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EDITORIAL

Supremo Amicus is an online peer reviewed international journal on law and science. The journal seeks to provide comprehensive information on different aspects of legal and scientific field. It focuses on the advancement in science and law and the various challenges which are before us in these fields.

The main purpose of the journal is to encourage original research in these fields and to publish outstanding articles. It aims at providing good quality readable material to its readers and to spread knowledge in the area of science and law. The journal welcomes students, research scholars, academicians, and practitioners to present their studies on various topics acknowledged by this journal and also provide them a platform for publication of their works.

With this thought, we bring forth this journal before you.
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UNIFORM CIVIL CODE.

By Abhaya Dubey & Aman Kataruka
From KIIT School of law, Odisha, India.

ABSTRACT

In India, there exists Hinduism, Islam, Jainism, Buddhism, Sikhism and other communities classified as per their religious beliefs. Indian Constitution, under article 44, states that the state shall follow a Uniform Civil Code for all citizens, it is a Directive principle of state policy, rights which cannot be enforced in the court of law. Uniform civil code takes into account the element of human right, Though Uniform civil code applies to citizens residing within the territory of India, and human rights are available for both citizens as well as non-citizens, there is a nexus between them as implementation of Uniform civil code facilitates safeguarding of human rights and prevention of practices contrary to philosophy of human rights.

Prevalence of personal laws over the uniform civil code is a highly controversial matter, especially with regard to India, where women under Hindu, Muslim and Christian laws continue to suffer inequalities in the matter of marriage, succession, divorce and inheritance. It is highly inequitable for any law whether Christian, Muslim or Hindu to trample over woman’s right in a progressive country like India. According to Christians, an unwed women cannot take guardianship of her own child without prior permission of the father of her child, the Joint Woman’s Program of the Christian church has been asking for reforms, but reforms are not the best possible solution for this never ending plight of Indian constitution, which aims to uphold its supremacy of equality without affecting the cultural pluralism. Every law or code comparatively looks down upon women and minor religious groups, for instance, Muslim personal law states that a daughter’s inheritance is One half of son’s inheritance right based on the fact that a woman’s worth is one half of a man. On the contrary India’s Succession act was not free from gender biasness before, but amendments were made and daughters were given equal rights to ancestral property. Interestingly, “polygamy”, is a provisonary law, a practice based on natural justice which contradicts the Quran itself which says, no Islamic law poses against doctrine of Equity. The infamous Shah Bano case witnessed an uproar which led to passing of much criticized Muslims women protection bill, under Rajiv Gandhi government, later in Sarla Mugdal case ,the judgment was highly criticized for the remarks made on minorities and invocation of Uniform Civil code, Similarly, a Christian women is not given guardianship of her child as she refused to disclose the name of the father, is not practiced in Muslim and Hindu law, where primacy is given to women in such cases ,be it legitimate or illegitimate child . On a broader perspective, there exists LGBTS and humans who do not fall under the male-female category, for the purpose of article 44 and 14 they fall within the definition of citizens of the country. Uniform civil code has a broader approach towards nation integration as it beneficial for all other elements, other than man and woman, of society who are still struggling to be recognized as humans to avail basic human rights.

Keyword: directive principle of state policy, inequalities, trample over woman’s rights, never ending plight, cultural pluralism,
doctrine of equity, natural justice, nation Integration.

1. UNIFORM LAWS OR UNIFORM CIVIL CODE:

Article 44 of Constitution of India states the Directive Principle of State Policy (hereinafter called “DPSP”) that “The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.”

However, in practice, it isn't so, the cultural pluralism with which our country is endowed, carries with it, a huge baggage of customs, which again carry the burden of belief and morality.

India is a democratic country, giving highest possible liberties in the form of fundamental rights and DPSP’s, fundamental rights being justiciable in nature, that is, can be enforced in the court of law whereas DPSP’s are non-justiciable, cannot be generally enforced in the court of law.

ART.25-28 of Constitution of India, talks about the Fundamental Rights of freedom of practicing any religion and ART.29 and 30 talk about freedoms relating to cultural practices and education rights.

These laws were enacted with the advent of the constitution, with only Right to Education being recognized as a fundamental right later in 2005.

Uniform civil code (herein after called “UCC”) is not a controversial matter which has erupted because of one or two landmark matters, but a series of events not evenly put forward for getting mass reaction, and the section being adversely affected by it, are women and minor religious communities but be it believers of any religion, all citizens suffer greatly and the same can be understood by the following instances.

1.1 INITIAL UPHEALS BETWEEN PEOPLE OF DIFFERENT RELIGIONS AFTER ADVENT OF UNIFORM CIVIL CODE:


This case was a landmark case in the field of UCC, wherein a Muslim women stood against religious orthodoxy in order to get her maintenance rights from her husband. Mohammad Khan had given irrevocable talaq (triple talaq) to Shah Bano Begum and was ready to dispense off only the maintenance as prescribed under Islamic Law and not as per the procedure prescribed in Criminal Procedure Code.

Subsequently the matter became a rage and witnessed the inspirational and progressive character of Muslim women in the society. Supreme Court’s Judgment was in Shan Bano Begum’s favor, which eventually got diluted by an act, namely, The Muslim Women (Protection of Rights on Divorce) Act, 1986 passed by the Parliament in 1986 but most important of all it raised a debate about the rights of women, application of

1 Constitution of India, 1950.

2 AIR 1985 SC 945.
principle of equality and precedence of political populism over rational principles of social justice and human rights

1.1.2 Sarla Mudgal v. Union of India

Another case, where a Hindu women was subjected to mental agony where her Hindu husband had converted his religion to Islam, thereby solemnizing his Second marriage, as Islamic laws recognizes Second marriage.

The Court held that a Hindu marriage solemnized under the Hindu law can only be dissolved on any of the grounds specified under the Hindu Marriage Act, 1955. Conversion to Islam and Marrying again would not, by itself, dissolve the Hindu marriage under the Act. And, thus, a second marriage solemnized after converting to Islam would be an offense under Section 494 of the Indian Penal Code.

The Judgment was justified and meritorious as, such law would act as a deterrent and precedent, so that no man can take shelter under the Umbrella of Personal laws to benefit unjustly or veil his mala fide intents.

1.1.3 John Vollamatta V Union of India

Minorities are also affected by the disparities in law, for instance, when a Christian priest approached the Court challenging the Constitutional validity of Section 118, which states that "No man having a nephew or a niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a Will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for safe custody of the Will of living persons." of the Indian Succession Act.

The priest from Kerala, John Vallamattton filed a writ petition in the year 1997 stating that Section 118 of the said Act was discriminatory against the Christians as it imposes unreasonable restrictions on their donation of property for religious or charitable purpose by will. The bench comprising of Chief Justice of India V.N. Khare, Justice S.B. Sinha and Justice A.R. Lakshmanan struck down the Section declaring it to be unconstitutional.

1.2 Secularism means state has no religion, state has a duty towards relation subsisting between man and man and not man and god. There is a ardent need to draw a line between customs as a usage and customs as laws. Belief and values need to be supported by rationality in order to be accepted as civil code which will be applicable to all.

2. PERSONAL LAWS

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2.1 Personal laws are laws, which are personal to a person, that is, the religion he follows has set of usages and customs regarding his behavior in the society, he is guided and governed by it and is supposed to abide by it, by the virtue of being born in that particular religion.

No doubt, he has the right of conversion, but he is subjected to the laws of the religion professed by him.

Presence of Hindu’s, Muslim’s, Christian’s, Sikh’s, Parsi’s and other small sects of religious groups, calls for different usages and practices for any given particular matter, for instance, maintenance laws are different for Muslims from that of the Hindus or Christians, similarly marriage dissolution laws are also different for different religious groups.

**DISTINCTION BETWEEN HINDU, MUSLIM, CHRISTIAN AND PARSI LAWS on specific matters.(major sects of religion in India)**

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<tr>
<th>BASIS</th>
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<th>MUSLIM LAW</th>
<th>CHRISTIAN LAW</th>
<th>PARSI’S LAW</th>
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<tr>
<td>MARRIAGE</td>
<td>A sacred relationship, Where the statutory requirement requires consent of both adults, 18 years for women and 21 for men, alive at the time of marriage, usually done by taking Saptapadi (7 rounds) around</td>
<td>Nikah, an Arabic term, means marriage. It means &quot;contrac t&quot;, The Qur an specifically refers Nikah, as a strong</td>
<td>It is governed by the Indian Christian Marriage Act, 1872, one of the person has to be a Christian in order to get married under the</td>
<td>The parties should not be related to each other in any of the degree s of consanguinity. They should be consen ting</td>
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| SEPARATION/DIVORCE | Nine grounds for separation are given for dissolution of marriage, namely, adultery, desertion, cruelty, conversion, Insanity, Leprosy, Venereal disease, remisso n, presumptio n of death. Granted in cases where marriage is beyond | Several modes of divorce in Musli m Law. One is, pronouncement of words to signify dismiss al, that is, talq. Other is, lla and Zihar. Initiall y women could not | There are 10 grounds for dissolution of marriage adultery, cruelty, mutual consent, etc, similar to the grounds mentioned in Hindu Marriage Act. The district court is competent to dissolve the marriage | Simil ar ground of Divorc e as in the case of Hindu Marriage Act, 19 55. |

The sacred fire.

Statutory require ment of competence to be fulfilled. Muslim marriage require s propos al ‘ijab’, from one party and acceptance ‘Qubul ’ from the other side at one meetin g.

above act. Statutory require ment of age and competence to be fulfilled. The marriage should take place between six, in the morning and 7, in the evening. Certifica te of marriage is issued after payment of fees.

Two witnesses to be present at time of issuance of certificate, with a fee of 2 rupees paid by the husband to the registrar of that place.
repair. divorce unless allowed under any agreement, though now they can file for divorce by talaqqi-tawfee z and lian, or if mutuall y then, Mubar at or Khula and the church has no role to play.

| MAINTENANCE | Both spouse can ask for Interim and Pendente lite maintenance. Wife can ask for permanent maintenance, she needs to be lawfully wedded and that she has to prove that she cannot maintain herself and such that if living separately she needs to prove that the husband is found to be guilty on certain grounds like, desertion, has treated her with cruelty, has any other wife living. There is no provision on maintenance Pendent lite and interim maintenance can only be claimed by the wife and not by the husband. In Christian law, only the divorced or judicially separate d or divorced wife can claim for maintenance Pendent lite and interim maintenance can only be claimed by the wife and not by the husband. Both the husband and the wife can claim for maintenance. The claimant keeps a concubine. maintenance is provided irrespective of the age of the claimant i.e. the factor of puberty is not considered. Wife loses the claim of maintenance if she is disobe dient and refuses to be accessible at all times. This is not so under the other personal laws. It has to prove that he/she is not able to maintain himself/he/ herself. There is also a provisi on for the payment of mainte nance to the trustee of the claimant (S.41) on which the Hindu law is silent. |

| CUSTODY OF CHILDREN | Children of tender years and older girls should be committed to the custody of the mother whereas, older boys should be in the custody of the father. But these are judicial statements of general nature & there is no established principle that the welfar e of the child is paramount that is, the most important | Mother has the right of custody as long as she is not disqualified. This right is known as right of hiznaat. Christia n does not have any provision for custody but the issues are solved by the Indian Divorce Act which is well-established principle that the welfare of the child is paramount. |

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8Payment of alimony to wife or to her trustee. — In all cases in which the Court shall make any decree or order for alimony it may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the Court 39 [or to a guardian appointed by the Court] and may impose any terms or restrictions which to the Court may seem expedient, and may from time to time appoint a new trustee.]
Above are just a few matters, on which the personal law differ. There are a gamut of issues and other minor religious groups, with their own set of laws. In such a situation providing timely Justice becomes a far-fetched dream.

3. PERSONAL LAWS V/S UNIFORM CIVIL CODE.

3.2.4. UCC PROVIDES EQUAL STATUS TO ALL CITIZENS

3.2.5. IT MAKES SURE THAT THERE IS GENDER PARITY.

3.2.6. IT WORKS TO ACCOMMODATE THE ASPIRATIONS OF THE YOUTH OF THE COUNTRY.

3.2.7. IT UPHOLDS THE AIM OF NATIONAL INTEGRATION.

3.2.8. IT HELPS TO BYPASS THE CONTENTIOUS ISSUE OF REFORM OF PERSONAL LAWS.

3.3. The above broad reasons are why UCC should be implemented in India.

Whereas, why Personal law should prevail in India, is justified by the following points mentioned below.

3.3.4. DIVERSITY IN CULTURE, RELIGION RESULTING IN PRACTICAL DIFFICULTIES OF DISPENSING TIMELY JUSTICE.

3.3.5. CITIZENS MIGHT FEEL AN ENCHROAMENT ON THEIR FUNDAMENTAL RIGHT OF RELIGIOUS FREEDOM.

3.3.6. APPREHENSION OF INTERFERENCE OF STATE IN PERSONAL MATTERS.

3.3.7. IMPLEMENTATION OF UNIFORM LAW TO BE WELCOMED WITH RESISTANCE IN THE COMING TIME.

4. CONCLUSIONS.
UCC can be of help, when the same is drafted in consonance with Heads of All Personal law makers. Active Participation by all religions groups and attitude to accept dynamic changes needs to be brought about in general public.

Everyone, in such case, has unhindered right of professing his/her religion, but not being civilly governed by it.

Main objective is that wrong or unjust behavior cannot be justified by camouflaging under Personal law.

A man converting his religion from Hinduism to Islam, to solemnize his second marriage to escape legal liability is wrong, even though a Muslim man is allowed to marry more than once.

Personal laws on the other hand provide power to religious groups who feel empowered to make, amend and follow their own customs, they feel that their culture is subsisting in society with an identity and the same should spread as well.

Disparity in terms of mostly all laws, are determinant to the position of women in the society and minor groups, even men suffer in certain laws of personal nature, as Under Islamic law, mother has the foremost right to get the custody of the child, similarly, In Islamic law, its is absurd to disallow maintenance of a woman on the ground of disobedience, a woman is not a chattel after all.

Progression demands speedy justice system, law governing the citizens should make this aim easier to achieve, be it a uniform civil code or personal law.

One Interesting aspect to this situation is, Atheists (people do not believe in god) and LGBTS. (Lesbians, Gays, Bisexual and Transgender).

Most communities shun out LGBTS, so what law should be most appropriate to govern them, as in order to be governed by their own personal law, they need to be accepted as a part of it first.

Similarly, Atheist’s should be governed by which personal law is a question of doubt, even though his family believes to belong from a religious group, its his choice to profess any religion or even not.

In such cases, when a large population needs to be managed, the Govt. Needs to find a balance to incorporate reforms in personal laws and suggest personal law heads who make such law, to either bring reforms within the personal law and the bridge the gap between all personal laws, thereby giving equal status to every citizen in the society or to codify such law which is an amalgamation of all personal laws with unanimous consent of all.

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WINDING UP OF A COMPANY UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016: A COMPARATIVE ANALYSIS

By Akrati Goswami & Sarika Rai
From School of Law, UPES, Dehradun

ABSTRACT
Winding up of a company is the process whereby the life of a company is ended and the property of a company is administered for the benefit of its creditors and the members. When the company presents its petition for winding up the Board of Directors of a company stops functioning and the powers of the BODs is vested with the ‘liquidator’ who takes the control of the company, collects its assets, pays its debts and finally distributes any surplus among the members in accordance with their respective rights. The Insolvency and bankruptcy code, 2016 (IBC) is a landmark development in the dynamic world of our country. The code is a revolutionary change brought to amend the existing provisions of the Companies Act, 2013 as it entirely removed the provisions of the voluntary winding up in the Companies Act, 2013.

The ICB, 2016 consolidate and amend the laws relating to insolvency of companies, partnership firms, limited liability partnership into a single legislation. It aims to provide time bound resolution and empowered the creditors to initiate the insolvency resolution process if default occurs. The authors in the present research would enlighten the comparison of the provisions of winding up of a Company between the Companies Act, 2013 and the provisions of winding up in the IBC, 2016. The research would be a doctrinal research and during the course of research the authors would be referring to existing literatures and various judicial pronouncements given by the tribunals and courts.

At the end of this research the author would be able to draw a clear distinction and comparison of the winding up provisions under the existing Company laws and the new code, i.e the IBC, 2016.

KEY WORDS: Insolvency and Bankruptcy Code, 2016, companies Act, 2013, Winding up, Liquidator.

INTRODUCTION
MEANING OF WINDING UP

The winding up of a company is the process by which the assets of the company are collected and sold in order to pay its debts. In the words of Pennington9 winding up or liquidation is the process by which the management of a company’s affairs is taken out of its director’s hands, its assets are realized by a liquidator, and its debts and liabilities are discharged out of the proceeds of realization and any surplus of assets remaining is returned to its members or shareholders. Generally, winding up is the last option available to a company in case the company is unable to pay its debts and liabilities to its members and shareholders through any alternative options. When the wind up of a company is completed, first the

9Pennington’s Company Law, 5th Edition, Page 839
company is dissolved and then it ceases to exist. Broadly a company can be dissolved by two ways, first is when the tribunal or court passes an order to compulsory wind up that company on the grounds of petition presented in the Tribunal or Court and Secondly, when a resolution is passed in the General meeting of members to wind up the company.

INTRODUCTION OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Before the introduction of the Insolvency and Bankruptcy Code, the winding up of a company was solely and exclusively governed by the Companies Act, 1956 and under the supervision of the Courts. After the introduction of the Companies Act, 2013 the provisions specified under the 1956 Act were carried forward with some minimal changes to the Companies Act, 2013. However, in the original form the provisions of the winding up under the Companies Act, 2013 were never notified and the winding up henceforth continued to be broadly governed by the provisions mentioned in the old 1956 Act. Both the Acts allowed a company to be wound up by two ways i.e, Compulsory winding up and Voluntary winding up. The grounds for winding up of a company were also specified in the provisions of the Companies Act. The introduction of the IBC, 2016 brought major and important changes in the provisions governing the winding up of a Company.

Some of the major and notable changes brought up by the introduction of the IBC, 2016 in the winding up of a company are as follows:

- The introduction of IBC, 2016 removed the inability to pay debts as a ground of compulsory winding up of a company.
- The introduction of the IBC, 2016 sweep out the part in the companies Act which dealt with the Voluntary winding up of a company.

MODES OF WINDING UP OF A COMPANY UNDER COMPANIES ACT, 2013

a) BEFORE THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Before the introduction of the IBC, 2016 a company can be wound up by two modes and the Companies Act provides provisions for the same. Section 270(1) of the Companies Act, 2013 provides for the modes of winding up of a company:-

- By the Tribunal, i.e, compulsory winding up or
- Voluntary i.e, by passing of an appropriate resolution for voluntary winding up at a general meeting of members.

b) AFTER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

After the introduction of the IBC, 2016 the Section 270 of the Companies Act, 2013 stands amended. Due to the notification of Section 255 of the IBC, 2016 the provisions of voluntary winding up of a company are omitted from the Companies Act, 2013. Section 255 of the IBC, 2016 provides that the Companies Act, 2013 shall be amended as in the manner provides in the Eleventh Schedule. The provisions of voluntary winding up of a company now fall under Section 59 of the IBC, 2016 which deals with the voluntary liquidation of the corporate
persons. Earlier this section under the IBC, 2016 was not notified therefore the question prevails that whether the Companies Act or the IBC, 2016 would govern the voluntary winding up. To this Section 468(3) of the Companies Act, 2013 provided that the rules framed by the hon’ble Supreme Court before the commencement of the companies act, 2013 shall continue to be in force till the time new rules are framed to that effect by the Central Government. Now on 31st March, 2017 IBBI has notified the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017. The same is published in the official Gazette of India. Hence, till now it is settled that the provisions of the Voluntary winding up of a company under the 2013 Act stands omitted after the IBC, 2016 and the voluntary winding up of a company would be governed by the IBC, 2016 only.

**COMPULSORY WINDING UP OF A COMPANY UNDER COMPANIES ACT, 2013**

**MEANING**

A compulsory winding up of a company is winding up of a company when it is ordered by the National Company Law Tribunal (NCLT). The tribunal makes a winding up order on an application presented by any persons who are entitled to present a petition under the provisions of the Companies Act, 2013.

**GROUNDs FOR COMPULSORY WINDING UP UNDER COMPANIES ACT, 2013**

**a) BEFORE THE INSOLVENCY & BANKRUPTCY CODE, 2016**

Before the IBC, 2016 under Section 271 of the Companies Act, 2013 total 7 grounds for the Compulsory winding up of a company were provided. Any person entitled under Section 272 of the Companies Act, 2013 can file a petition on these 7 grounds before the tribunal in order to seek a winding up of a company. The grounds are as follows:

i. if the company is unable to pay its debts;  
ii. if the company has, by special resolution, resolved that the company be wound up by the Tribunal;  
iii. if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;  
iv. if the Tribunal has ordered the winding up of the company under Chapter XIX;  
v. if on an application made by the Registrar or any other person authorized by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;  
vi. if the company has made a default in filing with the Registrar its financial statements.

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10 Omitted by the Insolvency & Bankruptcy Code, 2016  
11 Section 271(1)(a) of the Companies Act, 2013  
12 Section 271(1)(b) of the Companies Act, 2013  
13 Section 271(1)(c) of the Companies Act, 2013
or annual returns for immediately preceding five consecutive financial years\textsuperscript{14}; or

\textit{vii.} if the Tribunal is of the opinion that it is just and equitable that the company should be wound up\textsuperscript{15}.

\textbf{b) AFTER THE INSOLVENCY & BANKRUPTCY CODE, 2016.}

The introduction of the IBC, 2016 has a sweeping effect on the provisions of winding up of a company. After the introduction of IBC, 2016 the ground under which a company can seek winding up by presenting a petition when there is inability to pay debts [Section 271(1) (a)] in a tribunal under Section 272 of the Companies Act, 2013 stands omitted by the virtue of Section 255 of the IBC, 2016. However the same is dealt with Sections 7 to 9 of the IBC, 2016, being initiation of corporate insolvency resolution process by financial and operational creditors.

Presently only 5 grounds for winding up of a company are prevailing under Section 271 of the Companies Act, 2013, and the satisfaction of these grounds by the tribunal leads to the winding up of a company. However the tribunal as long as possible will try to figure out the ways such that a company could be saved from winding up and the last available option available for a tribunal is the dissolution of a company.

\textsuperscript{14} Section 271(1)(d) of the Companies Act, 2013

\textsuperscript{15} Section 271(1)(e) of the Companies Act, 2013

\textbf{MEANING OF VOLUNTARY WINDING UP}

Members' Voluntary Liquidation (MVL) is where the shareholders of a solvent company adopt a voluntary winding up resolution and appoint a liquidator to realize the assets of the business in order to distribute the proceeds to company members. Section 59 of the Code provides for the voluntary winding up of a company. Clause 1 of Section 59 A corporate person who intends to liquidate itself voluntarily and has not committed any default may initiate voluntary liquidation proceedings under the provisions of Chapter V of the code.
INITIATION OF VOLUNTARY WINDING UP OF A COMPANY

The Insolvency and Bankruptcy Board of India (Voluntary Liquidation) regulations, 2017 (hereinafter referred as IBBI) and the IBC, 2016 provides that the commencement of the voluntary winding up of a company starts when the corporate person satisfies all the conditions mentioned under Section 59 of the Code as provided by Section 59(2) of the Code and the procedural requirements shall be specified by the board as per the said section. Following are the conditions that a corporate person shall meet in order to initiate the voluntary liquidation:

1) DECLARATION OF INSOLVENCY

Section 59 of the Code provides that a declaration from majority of the directors of the company verified by an affidavit stating that—

(i) they have made a full inquiry into the affairs of the company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and

(ii) the company is not being liquidated to defraud any person;\(^\text{16}\)

The aforesaid declaration shall be accompanied with the following documents:

(i) audited financial statements and record of business operations of the company for the previous two years or for the period since its incorporation, whichever is later;

(ii) a report of the valuation of the assets of the company, if any prepared by a registered valuer;\(^\text{17}\)

2) GENERAL MEETING

Section 59 further provides for passing of a special resolution in a general meeting of shareholders in order to commence the voluntary winding up of the Company. Clause c of the Code provides for the same, it provides that

Within four weeks of a declaration under sub-clause (a) of Section 59 there shall be—

(i) a special resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as the liquidator; or

(ii) a resolution of the members of the company in a general meeting requiring the company to be liquidated voluntarily as a result of expiry of the period of its duration, if any, fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, as the case may be and appointing an insolvency professional to act as the liquidator:

\(^{16}\) Section 59(3)(a) of the Insolvency & Bankruptcy Code, 2016

\(^{17}\) Section 59(3)(b) of the Insolvency & Bankruptcy Code, 2016
The proviso to this Section provides that if the company owes any debt to any person, creditors representing two thirds in value of the debt of the company shall approve the resolution passed under sub-clause (c) within seven days of such resolution.

**APPOINTMENT OF THE LIQUIDATOR**

The regulations and the Code provides for the appointment of an insolvency professional to be appointed as a liquidator in order to collect the assets of the company and discharge its liabilities at the time of winding up and such professional shall be qualified as per the regulations of the Voluntary liquidation. A professional shall be eligible to be appointed as the company liquidator if he fulfills the following requirements:

(a) is eligible to be appointed as an independent director on the board of the corporate person under section 149 of the Companies Act, 2013 (18 of 2013), where the corporate person is a company;

(b) is not a related party of the corporate person; or

(c) has not been an employee or proprietor or a partner:

(i) of a firm of auditors or company secretaries or cost auditors of the corporate person; or

(ii) of a legal or a consulting firm, that has or had any transaction with the corporate person contributing ten per cent or more of the gross turnover of such firm, in the last three financial years.

(2) A liquidator shall disclose the existence of any pecuniary or personal relationship with the concerned corporate person or any of its stakeholders as soon as he becomes aware of it, to the Board and the Registrar.

(3) An insolvency professional shall not continue as a liquidator if the insolvency professional entity of which he is a director or partner, or any other partner or director of such insolvency professional entity represents any other stakeholder in the same liquidation.\(^{18}\)

**EFFECT OF VOLUNTARY WINDING UP ON STATUS OF A CORPORATE PERSON**

The corporate person shall from the voluntary liquidation commencement date cease to carry on its business except as far as required for the beneficial winding up of its business: Provided that the corporate state and corporate powers of the corporate person shall continue until it is dissolved.\(^{19}\)

**CONCLUSION**

The current provisions with regard to the winding up of a company may be summarized as that the compulsory winding up of a Company is governed by the Companies Act, 2013 and the grounds for the compulsory winding up are mentioned in Section 271 of the Companies Act, 2013 and due to the effect of Section 255 of the

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\(^{18}\) Regulation 7 of the Insolvency and bankruptcy Board of India (Voluntary liquidation) regulations, 2017.

\(^{19}\) Regulation 6 of the Insolvency and bankruptcy Board of India (Voluntary liquidation) regulations, 2017.
Insolvency and bankruptcy Code, 2016, Section 271(1) (a) of the old companies Act, 2013 is omitted which was winding up on the ground of inability to pay debts. Also, the whole part of the Companies act which dealt with the voluntary winding up of a company is omitted from the Act and it is now governed by the IBC, 2016. The tribunals and the liquidators play a major role in the winding up of a company. The main objective in shifting the proceedings of winding up from the courts to the tribunal is mainly to shift the burden from the courts. It is very interesting after the introduction of the code to see that how the tribunals will deal with the winding up proceedings applying both the 2013 Act and the Code.
REGULATION OF FORWARD TRADING: A CRITICAL ANALYSIS

By Akshay Jain & Sudhanshu Shekhar
From DIRD College (affiliated to GGSIPU), Holambi, Delhi

REGULATION OF FORWARD TRADING: A CRITICAL ANALYSIS

INTRODUCTION

In general the contracts and agreements are done to perform instantaneously. But quite often they are also done to perform in future. As far as the forward trading is concerned this is also a type of agreement or contract which is generally done at instantaneous time to perform the promises in future. There is some time-limit within which the promise made is required to be performed by the contracting parties.

In very simple words we can say that forward trading is a non-standardised contract between two parties to buy or to sell an asset at specified future time at a price agreed upon today. Now question arises that in how this trading takes place? What is the subject matter of this type of trade practice? Further the very relevant question need to be answered is about the existing position of forward trading.

In our definition part of this project we first define each and every term which is relevant in the context of forward trading. Renowned economists have mentioned that trade and exchange allow us to benefit from specialization and obtain welfare gains. Trade and exchange require the existence of markets. India, a commodity based economy where two-third of the one billion population depends on agricultural commodities, surprisingly has an underdeveloped commodity market. Unlike the physical market, future markets trades in commodity are largely used as risk management (hedging) mechanism on either physical commodity itself or open positions in commodity stock. It means that habit for using the future commodity market is not for the purpose of business in true sense but it is merely used for avoiding the risk of market.

Instead of having large nation-wide commodity market, India is generally characterised to have isolated regional commodity markets. In parallel with the underlying cash markets, Indian commodity futures markets too are dispersed and fragmented, with separate trading communities in different regions and with little contact with one another. While the exchanges have varying degrees of success, the industry is generally viewed as unsuccessful. The exchanges – with a few exceptions – have acknowledged that they need to embrace new technologies, and, above all, modern – and transparent – methods of doing business. But management often find it difficult to chart out a route into the future, and have had difficulties in convincing their membership. For the future trading we needed a strong chain of commodity market.

CONCEPTS, TERMINOLOGIES AND DEFINITIONS

20 Nishant Burte, Sagar Bijwe, Ajit Ratnaparkhi, Sanket Patle, Prasad Joshi, Study Of Forward Market

21 Commission of India, Indian Institute Of Technology Bombay

21 Id
COMMODITY:
A commodity may be defined as an article, a product or material that is bought and sold. It can be classified as every kind of movable property, except Actionable Claims, Money & Securities. Commodities actually offer immense potential to become a separate asset class for market-savvy investors, arbitrageurs and speculators. Retail investors, who claim to understand the equity markets, may find commodities an unfathomable market. But commodities are easy to understand as far as fundamentals of demand and supply are concerned. Retail investors should understand the risks and advantages of trading in commodities futures before taking a leap. Historically, pricing in commodities futures has been less volatile compared with equity and bonds, thus providing an efficient portfolio diversification option.  

COMMODITY MARKET:
Commodity market is an important constituent of the financial markets of any country. It is the market where a wide range of products, viz., precious metals, base metals, crude oil, energy and soft commodities like palm oil, coffee etc. are traded. It is important to develop a vibrant, active and liquid commodity market. This would help investors hedge their commodity risk, take speculative positions in commodities and exploit arbitrage opportunities in the market.  

THE COMMODITIES SUITABLE FOR FUTURES TRADING:
All the commodities are not suitable for futures trading and for conducting futures trading. For being suitable for futures trading the market for commodity should be competitive, i.e., there should be large demand for and supply of the commodity – no individual or group of persons acting in concert should be in a position to influence the demand or supply, and consequently the price substantially. There should be fluctuations in price. The market for the commodity should be free from substantial government control. The commodity should have long shelf-life and be capable of standardisation and gradation. Such commodities are; oil and oilseeds, spices, metals, ore, pulses, cereals, energy and others.  

DERIVATIVES AND DERIVATIVE CONTRACT:
Derivatives are financial instruments whose value is derived from the value of something else. The main types of derivative instruments are futures, forwards, options, and swaps. A derivative contract is an enforceable agreement whose value is derived from the value of an underlying asset; the underlying asset can be a commodity, precious metal, currency, bond, stock, or, indices of commodities, stocks etc. In simple words we can say that the value in future time for a contract is decided by the present assets such as metals, bullions etc.  

FORWARD CONTRACT:
A forward contract is an agreement between two parties to buy or sell an asset (which can be of any kind) at a pre-agreed
future point in time. Therefore, the trade date and delivery date are separated. It is used to control and hedge risk, for example currency exposure risk (e.g., forward contracts on USD or EUR) or commodity prices (e.g., forward contracts on oil).

One party agrees (obligated) to sell, the other to buy, for a forward price agreed in advance. In a forward transaction, no actual cash changes hands. If the transaction is collateralized, exchange of margin will take place according to a pre-agreed rule or schedule. Otherwise no asset of any kind actually changes hands, until the maturity of the contract. The forward price of such a contract is commonly contrasted with the spot price, which is the price at which the asset changes hands (on the spot date, usually two business days). The difference between the spot and the forward price is the forward premium or forward discount. Under Forward Contracts (Regulation) Act, 1952, all the contracts for delivery of goods, which are settled by payment of money difference or where delivery and payment is made after period of 11 days, are forward contracts.\footnote{26}{Supra note 1}

**FUTURE CONTRACT:**

Futures contracts are standardized. In other words, the parties to the contracts do not decide the terms of futures contracts; but they merely accept terms of contracts standardized by the Exchange.

**DIFFERENCE BETWEEN FORWARD CONTRACT AND FUTURE CONTRACT:**

Futures contracts are standardized. In other words, the parties to the contracts do not decide the terms of futures contracts; but they merely accept terms of contracts standardized by the exchange. On the other hand, forward contracts (other than futures) are customized. In other words, the terms of forward contracts are individually agreed between two counter-parties. Forwards transact only when purchased and on the settlement date. Futures, on the other hand, are rebalanced, or "marked to market," every day to the daily spot price of a forward with the same agreed upon delivery price and underlying asset. Futures are always traded on an exchange, whereas forwards always trade over-the-counter, or can simply be a signed contract between two parties.\footnote{27}{Supra note 6}

**WHAT ARE COMMODITY FUTURES?**

Commodity Futures are contracts to buy/sell specific quantity of a particular commodity at a future date. It is similar to the Index futures and Stock futures but the underlying happens to be commodities instead of Stocks and indices.

Commodity futures market has been in existence in India for centuries. The Government of India banned futures trading in certain commodities in 70s. However, trading in commodity futures has been permitted again by the government in order to help the Commodity producers, traders and investors. World-wide, the commodity exchanges originated before other financial exchanges. In fact most of the derivatives instruments had their birth in commodity exchanges.\footnote{28}{Supra note 6}

**Commodity Exchanges:**
The Government of India permitted establishment of National-level Multi-Commodity exchanges in the year 2002-03 and accordingly following exchanges have come into picture. In India currently total 24 commodity exchanges are working of which 3 are national level exchanges and remaining 21 are working on regional level. At international level there are major commodity exchanges in USA, Japan and UK. Commodity Exchange function from 10.00 AM to 11.30 PM/11.55 PM every-day. However, only metals, bullions and energy products are available for trading after 5.00 PM. On Saturdays, the exchanges are open from 10.00 AM to 2.00 PM.

**DETERMINATION OF FUTURE PRICE AND PREDICTION OF PRICE BY PROFESSIONALS IN FUTURE:**

Futures prices evolve from the interaction of bids and offers emanating from all over the country – which converge in the trading floor or the trading engine. The bid and offer prices are based on the expectations of prices on the maturity date. Two methods generally used for predicting futures prices are fundamental analysis and technical analysis. The fundamental analysis is concerned with basic supply and demand information, such as, weather patterns, carryover supplies, relevant policies of the Government and agricultural reports. Technical analysis includes analysis of movement of prices in the past. Many participants use fundamental analysis to determine the direction of the market, and technical analysis to time their entry and exist.

One doesn't need to have the physical commodity or own a contract for the commodity to enter into a sale contract in futures market. It is simply agreeing to sell the physical commodity at a later date or selling short. It is possible to repurchase the contract before the maturity, thereby dispensing with delivery of goods.

**SETTLEMENT PRICE:**

The settlement price is the price at which all the outstanding trades are settled, i.e., profits or losses, if any, are paid. The method of fixing Settlement price is prescribed in the Byelaws of the exchanges; normally it is a weighted average of prices of transactions both in spot and futures market during specified period.

**MARGINS ON THE COMMODITY FUTURE CONTRACTS:**

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29 *Id*

30 *Supra note 6*
Generally commodity futures require an initial margin between 5-10% of the contract value. The exchanges levy higher additional margin in case of excess volatility. The margin amount varies between exchanges and commodities. Therefore they provide great benefits of leverage in comparison to the stock and index futures trade on the stock exchanges. The exchange also requires the daily profits and losses to be paid in/out on open positions (Mark to Market or MTM) so that the buyers and sellers do not carry a risk of not more than one day.\[^{31}\]

CONSTITUENTS OF MARKETS:

Participants in forward/futures markets are hedgers, speculators, day-traders/scalpers, market makers, and, arbitrageurs.

What is Hedger?

Hedger is a user of the market, who enters into futures contract to manage the risk of adverse price fluctuation in respect of his existing or future asset.

What is arbitrage?

Arbitrage refers to the simultaneous purchase and sale in two markets so that the selling price is higher than the buying price by more than the transaction cost, so that the arbitrageur makes risk-less profit.

Who are day-traders?

Day traders are speculators who take positions in futures or options contracts and liquidate them prior to the close of the same trading day.

Who is floor-trader?

A floor trader is an Exchange member or employee, who executes trade by being personally present in the trading ring or pit floor trader has no place in electronic trading systems.

Who is speculator?

A trader, who trades or takes position without having exposure in the physical market, with the sole intention of earning profit is a speculator.

Who is market maker?

A market maker is a trader, who simultaneously quotes both bid and offer price for a same commodity throughout the trading session.\[^{32}\]

SPECULATION AND GAMBLING:

Participants in futures market include market intermediaries in the physical market, like producers, processors, manufacturers, exporters, importers, bulk consumers etc., besides speculators. There is difference between speculation and gambling. Therefore futures markets are not “satta markets”. Participants in physical markets use futures market for price discovery and price risk management. In fact, in the absence of futures market, they would be compelled to speculate on prices. Futures market helps them to avoid speculation by entering into hedge contracts. It is however extremely unlikely for every hedger to find a hedger counterparty with matching requirements. The hedgers intend to shift price risk, which they can only if there are participants willing to accept the risk. Speculators are such participants who are willing to take risk of hedgers in the expectation of making profit. Speculators provide liquidity to the market therefore; it is difficult to imagine a futures market functioning without speculators. Speculators are not gamblers, since they do

\[^{31}\] Id

\[^{32}\] Supra note 6
not create risk, but merely accept the risk, which already exists in the market. The speculators are the persons who try to assimilate all the possible price-sensitive information, on the basis of which they can expect to make profit. The speculators therefore contribute in improving the efficiency of price discovery function of the futures market.

OVER-SPECULATION:
Informed and speculation is good for the market. However over-speculation needs to be curbed. There is no unanimity about what constitutes over-speculation. In order to curb over-speculation, leading to distortion of price signals, limits are imposed on the open position held by speculators. The positions held by speculators are also subject to certain margins; many Exchanges exempt hedgers from this margins.

RISK IN FUTURE MARKET:
Commodity prices are generally less volatile than the stocks and this has been statistically proven. Therefore it's relatively safer to trade in commodities. Also the regulatory authorities ensure through continuous vigil that the commodity prices are market-driven and free from manipulations. However, all investments are subject to market risk and depend on the individual decision. There is risk of loss while trading in commodity futures like any other financial instruments.

WHAT ARE THE BENEFITS FROM COMMODITY FORWARD/FUTURES TRADING?
Forward/Futures trading performs two important functions, namely, price discovery and price risk management with reference to the given commodity. It is useful to all segments of the economy. It enables the ‘Consumer’ in getting an idea of the price at which the commodity would be available at a future point of time. He can do proper costing and also cover his purchases by making forward contracts. It is very useful to the ‘exporter’ as it provides an advance indication of the price likely to prevail and thereby helps him in quoting a realistic price and secure export contract in a competitive market. It ensures balance in supply and demand position throughout the year and leads to integrated price structure throughout the country. It also helps in removing risk of price uncertainty, encourages competition and acts as a price barometer to farmers and other functionaries in the economy.

Commodity futures are beneficial to a large section of the society, be it farmer, businessmen, industrialist, importer, exporter, consumer.

WHAT IS HEDGING?
Hedging is a mechanism by which the participants in the physical/cash markets can cover their price risk. Theoretically, the relationship between the futures and cash prices is determined by cost of carry. The two prices therefore move in tandem. This enables the participants in the physical/cash markets to cover the price risk by taking opposite position in the futures market. In other words the practice of offsetting the price risk inherent in any cash market position by taking an opposite position in the futures market. A long hedge involves buying
futures contracts to protect against possible increasing prices of commodities. A short hedge involves selling futures contracts to protect against possible declining prices of commodities.37

HOW DOES FUTURES MARKET BENEFIT FARMERS?

Over the world, farmers do not directly participate in the futures market. They take advantage of the price signals emanating from a futures market. Price-signalss given by long-duration new-season futures contract can help farmers to take decision about cropping pattern and the investment intensity of cultivation. Direct participation of farmers in futures market to manage price risk – either as members of an Exchange or as non-member clients of some member - can be cumbersome as it involves meeting various membership criteria and payment of daily margins etc. Options in goods would be relatively more farmer-friendly, as and when they are legally permitted.38

DELIVERY AND SETTLEMENT:

How would contracts settle? All open contracts not intended for delivery and non-deliverable positions at client level would be settled in cash. Are the trades/settlement guaranteed by the exchanges? Yes, the commodity exchanges have got some of the most high profile corporate as their promoters. Such a high profile shareholding provides these exchanges valuable experience, knowledge and also high standards of operations. Also the exchange guarantees the settlement of trades and so eliminates the counter-party risk in the transactions. The exchange for this purpose maintains a Settlement Guarantee fund akin to the stock exchanges. Are there physical deliveries in commodity futures exchanges? Yes, the exchanges, in order to maintain the futures prices in line with the spot market, have made available provisions of settlement of contracts by physical delivery. They also make sure that the price of futures and spot prices coincide during the settlement so that the arbitrage opportunities do not exist. Is delivery mandatory in futures contract trading? The provision for delivery is made in the Byelaws of the Associations so as to ensure that the futures prices in commodities are in conformity with the underlying. Delivery is generally at the option of the sellers. However, provisions vary from Exchange to Exchange. Byelaws of some Associations give both the buyer and seller the right to demand/give delivery. How the deliveries are made possible? The exchange has enlisted certain cities for specific commodities as the delivery centres. The seller of commodity futures, upon expiry of the contract may choose to deliver physical stock instead of settling the positions by cash, in which case he would be required to deliver the stocks to the specified warehouses. The buyer of the commodity futures, if he is interested in physical delivery would be matched with a seller and would be required to take delivery of the specified quantity of stock from the designated warehouse. World-wide commodity futures are generally used for hedging and speculation and hence physical deliveries are negligible. However, the possibility of physical delivery has made these markets more attractive in India. Both NCDEX and MCX have successfully
completed physical delivery in bullions and various agro-commodities. The delivery and settlement procedure differs for each exchange and commodity.\textsuperscript{39}

**REGULATIONS OF FORWARD MARKET:**

Having understood the concept of future contracts it is necessary to understand the need to regulate and sometimes put a ban on them. Former Finance Minister Palaniappan Chidambaram, once pointed out that, “If rightly or wrongly, people perceive that commodity futures trading is contributing to speculation-driven rise in prices, then in a democracy you will have to heed that voice”.\textsuperscript{40} Thus many times future contracts lead to the rise in price of the commodity due to speculation regarding that commodity. This explains the reason for regulation of the same. Forward contracts are regulated by Forward Contracts (Regulation) Act, 1952 and draft rules of 2014.

The major tools that are being employed in India in regards to this regulation are:

- **Maintaining Market Integrity:** it is necessary that the integrity in the market is maintained so that the trust of the customer remains strong. This can be done when there is proper and effective surveillance and monitoring done of the ways the market is functioning. Also when the exchanges are given the responsibility of facilitating the business done through these contracts thus time to time audit of their accounts is also called for.

- **Ensuring alignment of Future and Spot prices:** As forward contracts are made before the date on which actual delivery of goods is expected thus it becomes imperative to maintain a balance between the future and spot prices. Also there is always a threat of delivery that haunts such contracts. The exchanges are made to ensure that none of the parties are at loss and the final settlement that is reached at is based on correct spot prices.

- **Investor Protection:** The investor who is investing by way of such contracts also needs to be protected. The regulations also need to cater to the need that the investor is fairly and evenly handed at the hands of the exchange. The exchange must have an unbiased attitude towards all. None should suffer at the cost of the other.

- **Fairness and Transparency in Trading, Clearing and Settlement Process:** The exchanges that are made as the regulators or rather facilitators need to be kept within their domain as well. They have power to regulate but such power should not be misused. Also such methods should be adopted that the trading via exchanges becomes more user friendly. Thus methods like electronic trading should be made famous among the people.

Thus to meet the above requirements the main legislation available is the Forward Contacts (Regulation) Act, 1952.

\textsuperscript{39} Supra note 6
\textsuperscript{40} Sandhya Srinivasan, *Futures Trading in Agricultural Commodities. Is The Government Ban On Commodities Trading Logical?*, Centre for Civil Society, 5
FORWARD CONTRACTS (REGULATION) ACT, 1952

The preamble of the Act itself states the main purpose for which it was enacted. It reads as, an act to provide for the regulation of certain matters relating to forward contracts, the prohibition of options in goods and for matters connected therewith. The Act applies to goods that are defined as movable property under the Act under section 2(d) excluding actionable claims, money and securities. It also provides where forward trading has been prohibited. The Act has strictly provided that only certain associations that are registered under the Act are allowed to felicitate and organize forward contracts and none other. Under section 15 the Act provides for a list of goods that are ‘regulated commodities’ and section 17 provides the list of goods that are ‘prohibited commodities’. All the other goods are allowed for forward trading by this Act.

The Act envisages three-tier regulation:

(i) The Exchange which organizes forward trading in commodities can regulate trading on a day-to-day basis;

(ii) The Forward Markets Commission provides regulatory oversight under the powers delegated to it by the central Government, and

(iii) The Central Government - Department of Consumer Affairs, Ministry of Consumer Affairs, Food and Public Distribution - is the ultimate regulatory authority.

Thus this clarifies that a lot of efforts have been put to regulate the forward contracts which such vast layers of regulatory authorities at every level. From the very basic level to the highest level none of the tier is ready to compromise with the regulation of these contracts. In India there are at present 24 commodity exchanges working at the moment, 3 at national level and 21 at regional level. Forward trading has grown to be done in over 100 goods in India now and thus the level of business growth has increased the need for regulation in the area.

Central Government: The government has power to grant as well as withdraw recognition of the exchanges. Also the government has power to notify commodities under section 15, 17 and 18(3). It is the highest governing body in this area. It supersedes the governing body of a recognized Association / Exchange.

Forward market commission: This constitutes as the second tier of the regulating framework. It approves the rules and the bye laws of the exchange that they make for the proper functioning of their setup. Also the commission grants permission and supervises the trading methods of the exchanges. Such permission is subject to appropriate regulatory measures. It further is responsible for the monitoring and surveillance of the markets. Thus it is the domain of the commission to keep a check on the exchanges that are working in this field. To ensure this the commission keeps a close eye check on the exchanges by inspecting their members and accounts. It may even appoint the independent directors in the exchange to have

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41 Preamble, Forward Contracts (Regulation) Act, 1952

42 Supra note 1
transparency and unbiased working in the internal management of the exchanges. The commission even has power to register a police complaint in case of fraudulent practices in the working of the exchanges.

- **Exchanges:** The last and the most basic tier in this setup. They conduct the trading in forward contracts on the basis of the Articles, by-laws and other rules that have already been approved by the commission. They have been given the power to deal with and take action against the intermedaries.

**Forward market commission:**

Having studied the three tiers of the framework, it is important to study the commission in detail because even though central government has been given the superior most power yet the main supervisory work is carried on by this commission. The commission consists of not less than two but not more than four members appointed by the central government. The chairman too shall be appointed by the central government. Such members shall hold office for three years and shall be eligible for re-election.

The commission performs many important **functions** in its sphere:

- It assists the central government in granting and withdrawing recognition of the exchanges or associations.
- It keeps a close check on the forward market and takes all the necessary steps to regulate it under the powers given to it by the Act.
- It also collects information regarding the trading condition in respect of the goods such as the demand and supply as well as the prices. It publishes such vital information whenever it deems necessary.
- It also submits periodical reports to the central government keeping it well informed about the market condition and the working of the Act.
- It makes recommendations for changes wherever there is requirement of any improvement in the forward market.
- As already talked about, one of the most important functions of the commission is to regulate the exchanges. For the purpose it has been given power to inspect the accounts of the exchanges. It may even appoint the Independent directors in the exchanges so as to bring about a transparency in the working.
- To perform any other duties that it may under the Act.

To be able to perform these functions the commission has been given certain **powers**. They are:

- For the performance of its functions, the commission has been given all the powers that are available to a civil court under the Civil Procedure Code, 1908 (5of 1908). It can, while trying a suit,
  
  (i) **Summon parties enforcing attendance of any person examining him on oath.**
  
  (ii) **Requiring the discovery and production of any document.**
  
  (iii) **Receiving evidence on affidavits.**

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43 Supra Note 1  
44 Id
(iv) Requisitioning any public record or copy thereof from any office.\textsuperscript{45}
(v) Any other matters which may be prescribed.\textsuperscript{46}

- The Commission has power compel any person to produce the documents or such information before the commission which it deems as necessary. Such person shall be legally bound to produce such information.

- The commission shall be deemed to be a civil court and whenever any offence under sections 175, 178, 179, 180 or Sec. 228 of the Indian Penal Code, 1860 (45 of 1860) is committed in the view or presence of the Commission, the Commission may, after recording the facts constituting the offence and the statement of the accused as provided for in the Code of Criminal Procedure,1898 (5 of 1898)\textsuperscript{11} forward the case to a Magistrate having jurisdiction to try the same and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case had been forwarded to him under Section 482 of the said Code\textsuperscript{12}.\textsuperscript{47}

- The proceedings before the commission shall be deemed to judicial proceeding within the meaning of sections 193 and 228 of IPC, 1860.

Thus the powers given to the commission are vast as it has been given power under the civil code as well as the criminal code. The reason seems to be that the commission has to regulate a huge market and if it is not given any power as stipulated above it would become difficult to function. Also already the courts are overburdened and if these matters are also sent to them then a speedy disposal would become very difficult. These act as specialized agency of the forward market which is able to deal with problems more efficiently. Now having gotten an overview of the powers of the Commission, it becomes easier to comprehend what regulatory measures are resorted to by it.

As per the Act, illegal contracts are those which are made either between the unauthorized associations or through any such members or which are made in regards to any of the prohibited commodities under section 17 of the Act. Thus the work of the commission mainly revolves around the control of such contracts. The commission mainly resorts to two measures:

(i) First it communicates the fact that any such offence has happened to the police and assists them in the investigation by guiding them in search and seizure of relevant documents.

(ii) As the offence under the said Act are technical in nature thus the commission has taken up the job of conducting periodical seminars and training programmes for the investigating officers, magistrates, public prosecutors etc. so that the crimes under this can be effectively dealt with.
The liability under this Act has been made vast, covering a lot of people under its domain.

(i) The person who had a knowledge that the contract made is illegal and still made his place to carry on with the contract

(ii) A person who does have the permission of the Central Government and still organizes the contract

(iii) A person who misrepresents that he is a member of any recognized association, but he is not

(iv) A person being a member of a recognized association effects to make any contract in contravention to the provisions of the Act

All such persons shall be held liable under the act and will be liable to be prosecuted under the provisions of the Act. Thus the scope of the Act has been kept vast in order to strictly combat to the aim for which the Act was enacted. The Commission strictly exercises an effective control over the forward market.

Commodity market:

Commodity market has gained importance in the near future however has gained much importance as the business runs in the high numbers of 11 trillion per annum. The commodities that are allowed for future trading area mainly food grains, fibres, spices, metals etc. the business in these are regulated by the commodity exchanges. Some of them are:

- National Commodity and Derivatives Exchange of India, Mumbai (NCDEX). 48
- National Multi Commodity Exchange, Ahmadabad (NMCE). 49
- Indian Commodity Exchange (ICEX) 50
- ACE Derivatives & Commodity Exchange Ltd 51

The commodity exchanges work for long hours because the business is so huge. They are functional between 10 A.M. and 11:30 P.M. they are the regulators and the facilitators in this market. The trade and the settlement in this market are guaranteed by them. The exchanges have high profile promoters who have an experience of the market and who are well able to contemplate as to how the market is to work. Thus they guarantee the settlement in such market thus eliminating the possibility of counter-party transactions. Thus they have to even maintain a Guarantee fund akin to the stock exchanges.

Delivery in commodities:

One of the methods of regulation is asking for the delivery in the commodities at the exchange. This makes it easier for the exchange to make the spot price and the future price coincide with each other. Such delivery is not mandatory though because the provision for the same is made in the by-laws of the exchanges. Generally it is at the option of the seller to deliver the commodity. However it depends from exchange to exchange to make delivery mandatory. The delivery is made possible by making certain cities as destinations for such deliveries. On expiry of the contract if the seller chooses to deliver, he is required to
physically deliver at these warehouses and the buyer can collect from there. This acts as a regulation because the fear of delivery would scare away people who wish to artificially rigging up or depressing the futures prices.  

For instance a participant may wrongfully rig up the price and another participant may give his intention to deliver the commodity on being tempted to a high price. A participant can avoid delivery as the exchanges have given an option to avoid delivery by the option of liquidation. The participant can liquidate his contract before the delivery period commences. The by-laws of the exchange have been made strict to make most of the commodities to be compulsorily delivered. Thus the buyer as well as the seller is under the obligation to opt for delivery. While in the case of Seller’s option, i.e., if the seller gives his intention to give delivery, buyers have no choice, but to accept delivery or face selling on account and/or penalty.  

Both the parties are supposed to settle at the due date i.e., i.e. weighted average of both the spot price and the future price of the specified number of days. Another concern regarding the quality and description of commodities is also looked into by these exchanges. The contract as regulated by the exchange is to specify the description, the particular grade and variety of the commodity that is being offered for trade. The description shall deal with every detail of the commodity specifying varieties and ranges of quality that would be accepted in delivery shall also be mentioned in the contract under the supervision of the exchange. If the commodities differ from the quality stipulated then the exchange shall specify the premium or rebate payable. The rate at which such rebate shall be payable will be prior mentioned on the website of the exchange. The authorities who will ascertain whether the commodity is different from the benchmark specifications setup are: SGS India Pvt. Limited, Geo-Chem Laboratories, Dr. Amin Superintendents & Surveyors Pvt Ltd., Calib Brett and Stewart etc. Only certificates given by specified assayers by NCDEX will be accepted. All the certificates issued will have time validity.  

If any disputes arise in regards to the above issue, they shall be resolved by the Arbitration Committee which has been set up for the purpose.

CONCLUSION:

Here we end up with our Research paper with the conclusion related to concept of forward market commission and regulation mechanism of forward market. We have discussed about the commodity and the commodity market. Commodity underlying the transaction is the subject matter of contract whereas Commodity market is the venue where the agreement is made. The important thing is the suitability of the commodity being a transaction of contract. Further, we have made distinction between the forward contract and future contract. The distinction lies in the fact that in the forward contract the parties are free to determine the term of agreement but in future contract parties are not allowed to determine the term of agreement but they just accept the standardised form of contract for future. Another main thing is the management of risk in the commodity market. Investment is

52 Id  
53 Id  
54 Id
always accompanied with the risk to lose the said investment, so it is necessary to manage the risk of investment. This management is done through securing the interest of investment by the forward contract. As far as the regulation is concerned the main concern is regarding the autonomy of regulating authority in connection with the ultimate regulator.

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THE LEGAL ASPECTS OF NEW ERA OF SPACE TRAVEL

By Amrita Aryendra, Kurudi Shreya, & Qazi Salar Masood Aatif

"The Earth is the cradle of humanity, but mankind cannot stay in the cradle forever."55

Abstract

Since the launch of the first object in space in 1957, humankind has been obsessed with exploration and exploitation of space. Owing to the development of technology, transportation of a large number of persons into outer space has been made possible. Space will no longer be available only for scientific research and development. Habitation of other planets is well within the foreseeable future. The existing legal framework for activities concerning air and space is not sufficient to deal the legal issues arising out of the upcoming developments in space activities. The article, primarily, aims to examine issues associated with habitation of outer space such as jurisdiction, property, security and how the treaties fail to address them. Certain key developments in space industry are also discussed. It is argued that the solution to such issues is primarily based on certain analogous situations while the basic legal framework for space activities will remain firm.

INTRODUCTION

It has been over 47 years since man first set his foot on the moon and over the course of these years, the exploration of space has undergone a drastic change, while most of the laws and principles governing space travel and exploration have not developed much. The genesis of space law can be traced back to over 59 years back, when world’s first artificial satellite ‘Sputnik 1’ was launched by the Soviet Union in October 1957. This initiated the Space Race, between the Soviet Union and the United States of America for use and exploitation of space during the Cold War. Taking these aspects into consideration the United Nations established the Committee on the Peaceful Uses of Outer Space (hereinafter as COPUOS). The Legal Subcommittee’s main function was to provide a forum for discussion and negotiation on the use of outer space for peaceful purposes.

The General Assembly in its resolution of 196256 laid down the “Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space”, which was further expanded into five main essential treaties and other principles which govern international law related to space exploration and use. These treaties are Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies57 (hereinafter as the “Outer Space Treaty”), Agreement on the Rescue of Astronauts, the Return of Astronauts and Return of Objects Launched into Outer Space.


Space (hereinafter as the “Rescue Agreement”), Convention on International Liability for Damage Caused by Space Objects (hereinafter as the “Liability Convention”), Convention on Registration of Objects Launched into Outer Space (hereinafter as the “Registration Convention”), and Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (hereinafter as the “Moon Treaty”). So far these treaties have been sufficient to govern the peaceful use and exploration of space, but with the increase in privatisation of space sector in many space-faring States such as the United States, these treaties may become inadequate and obsolete to cater this new era of space travel and exploration which is inclined more towards commercialization of space-related resources in order to forward human space exploration and for private use.

While private companies have been trying to use space for commercial purposes since 1962, the recent development in commercial space exploration by providing sub-orbital flights and supplying cargo to the International Space Station (hereinafter as the “ISS”) is responsible for the new spark of space exploration, which has been approved by domestic laws. A new frontier of space is being explored by certain private agents such as SpaceX and Mars One, which aims at landing and establishing a human habitat on Mars and other Celestial Bodies in the next 15 years. This could be as revolutionary as the United States’ Apollo 11 mission. With the advancement of technology and interest in the use of space, such mission might become feasible according to NASA, by 2030s. This will give rise to whole different aspects of laws and liabilities, which are not covered under any of the international treaties governing space law as of now. It might also go against few of the underlying principles of these treaties to accomplish this mission.

While the present space law and aviation law does answer some of the questions which are raised in the case of interplanetary travel, such laws, in the long run, are more likely to create confusion and not provide adequate remedies for all the challenges. This is why we need to define these new aspects of space law and amend some previously held beliefs and laws to accommodate this new era. This paper aims to understand the issues which are likely to arise in this new era of space exploration and how the present international space law framework, while it can provide a basic foundation for the new framework, it is inadequate to address those issues, while it

58 Ibid., vol. 672, No. 9574.
59 Ibid., vol. 961, No. 13810.
60 Ibid., vol. 1023, No. 15020.
61 Ibid., vol. 1363, No. 23002.
can provide a basic foundation for the new framework.

**INTERPLANETARY TRAVEL AND RELATED ASPECTS**

While the concept of interplanetary travel has been one of the most discussed subject in science fiction, this dream of mankind as space-faring species might soon be a reality. This raises not only technical, economic and social questions about the feasibility of such travel but also legal and moral questions as to what will be the responsibility of such space-faring nations towards others and the future of mankind.

There is immense development in the Space sector. The huge vacuum of space is now becoming more and more plausible to discover and the existing laws are found to be inadequate to deal with the present and probable future situations to secure the safety of passengers and spacecraft among other things. Although the regime relating to space exploration has been developing for several decades, there is still no clearly articulated system of legal rights relating to exploration and economic exploitation of outer space.

Under this chapter, we try and understand the concept of interplanetary travel and the present developments under international space law framework which relate to interplanetary travel.

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**Differences between Interplanetary Travel and Space Tourism**

Space tourism is recreational space travel, either on established government-owned vehicles such as the Russian Soyuz and the International Space Station (ISS) or on a growing number of vehicles fielded by private companies. Since the flight of the world’s first space tourist, American businessman Dennis Tito, on April 28, 2001, space tourism has gained new prominence as more suborbital and orbital tourism opportunities have become available. 66 ‘Space Tourism’ has been defined as “any commercial activity offering customers direct or indirect experience with space travel”. A “Space Tourist” is someone who tours or travels into, through or to, or travels to a celestial body for the purpose of recreation. 68 By this definition, it is clear that space tourism can be of various types depending on whether the spaceflight traverses at an orbital speed or at a sub-orbital speed. In orbital spaceflight, the flight traverses at an orbital speed and reaches a particular destination, for example, the International Space Station, where the space tourists spend a certain number of days. In a sub-orbital spaceflight, the flight does not attain an orbital velocity, it reaches an altitude of 100-200 miles above the sea level and then stays there for 3-6 minutes after which it falls back to Earth. 69 Another hybrid that is possible is the launch of a spaceflight
through another vehicle from the airspace, so a part of the journey is in the air and a part in space. The prospects of space tourism, give rise to some interesting and conceptually difficult legal questions. For this purpose, it is pertinent to draw a distinction between “Space Tourism” and “Interplanetary Travel”. Interplanetary spaceflight or interplanetary travel is travel between planets, usually within a single planetary system. It is clear that the idea of “Space Tourism” in the present day is limited to the extent of reaching the Earth’s Orbit and the International Space Station. “Interplanetary travel”, inherently involves reaching another planet’s orbit or landing on its surface. An interplanetary spacecraft spends most of its flight time moving under the gravitational influence of a single body – the Sun. Only for brief periods, compared with the total mission duration, is its path shaped by the gravitational field of the departure or arrival planet. The definition of “Space Tourism” can be extended to interplanetary travel as it is defined as ‘any commercial activity offering an experience with space travel’. Therefore, there is a scope for extension of ‘Space Tourism’ to include interplanetary travel in the near future, considering the recent demand and developments in space tourism.

However, for the purpose of this paper, we are drawing a clear distinction between space tourism and interplanetary travel. The definition of interplanetary travel for the purpose of this paper is long-term stay on any celestial body other than the Earth or the ISS. The intention of interplanetary travel is not just for recreational purpose but with an intention of establishing a human habitat on other celestial bodies for a long-term.

Astrolaw and its application to future of Space Law

Astrolaw is the jurisprudence of living in space for prolonged periods. It focuses on relations between and among persons, both natural and legal, living, functioning and working in space for such prolonged periods. It is a revolutionary new field of law which is a new branch of space law. While Space Law analyses the various idiosyncrasies of the treaties that govern space activities of sovereign nations, twenty million dollars for a two-week flight to an orbital space station, with that figure rising to 16 percent if the price were reduced to a “mere” five million dollars. See Space Cowboys Ready to Pony Up, SPACE DAILY, (May. 20, 2002), http://www.spacedaily.com/news/tourism-02i.html (last visited Oct. 26, 2017)

Significant resources are being directed towards the continued advancement of Reusable Launch Vehicle (“RLV”) technology, a vital element in the development of the space tourism industry. See, Charity Trelease Ryabinkin, Let There Be Flight: It’s Time to Reform the Regulation of Commercial Space Travel, 69J Air L & Comm 101, 103 (2004).

A poll conducted in May 2002 indicated that 19 percent of affluent American adults would be willing to pay one hundred thousand dollars for a fifteen-minute suborbital flight, while 7 percent would be prepared to pay

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70 Steven Freeland, Up, Up and back- the Emergence of Space Tourism and its impact on International Law of Outer Space, Chicago International Journal of Law, 6, 1 at Art. 4
73 A poll conducted in May 2002 indicated that 19 percent of affluent American adults would be willing to pay one hundred thousand dollars for a fifteen-minute suborbital flight, while 7 percent would be prepared to pay
Astrolaw involves those aspects that apply to people living and working in space who represent the various nations, rather than being restricted to nations themselves. This term is used to designate the future creation and practice of law in orbit by space settlers themselves.

It is pertinent to understand the distinction between Astrolaw and Space Law. Astrolaw is distinguished from Space law by reason of the difference of the subjects and sources of law. Space law is primarily treaty-based and applicable to the Earthly political concerns of sovereign governments. It deals with outer space as a legal regime and is a branch of Public International Law. The subjects of Space law are sovereign governments and public international organizations. Astrolaw, on the other hand, is not treaty-based and focuses upon extraterritorial applications of municipal laws for or in outer space. Astrolaw deals with the rights and obligations of both natural and legal persons in space as a place. When compared to Earth-bound environments and experiences, space as a place is physically and legally unorthodox and unusual. Thus, irrespective of legislative intendment by terrestrial lawmakers, space as a place will compel some unforeseen departures from domestic laws applied there, whether in civil, criminal, military, or other traditional fields. Astrolaw is distinct from current concepts of Space law, a body of international treaty law seeking to govern and regulate relationships between nations during their exploration of space. Astrolaw is concerned with relationships between people as they live, work and grow in outer space.

In its ultimate development, Astrolaw is not perceived as a field or variant of some existing body of municipal or international law, but rather as a new and evolving distinctive system of jurisprudence originating from the uncharacteristic physical properties of outer space itself. Consequently, both the physical and psychological environments and the dangers inherent in the confines of large manned space objects and future lunar and planetary settlements dictate that any unreasoned extension into outer space of adversarial systems of law will prove to be revulsion to the well-being, safety, and even lives of all who constitute a discrete space-faring community.

From the standpoint of mission integrity and self-preservation, the dispute in space between two space-farers or factions of them becomes the legitimate concern of all in the space-faring community whose collective interests will require rapid resolution of disputes on behalf of the community at large. These perceptions compel the conclusion that law in space is destined to evolve into the craft of a helping profession rather than an adversarial one. This concept is the key player of Astrolaw jurisprudence.

Astrolaw does not focus upon "space as a legal regime," but instead upon "space as a place" accommodating diverse permanent industries, spacefarers on missions of long duration and domiciles. The jurisprudence of Astrolaw also comprehends that an entirely new class of persons, with no counterpart on Earth, will emerge in space where it may be difficult even to determine whether the

breach precipitating them trenches upon a public or private duty.77

THE NEED TO CHANGE OUR POSITION ON INTERPLANETARY TRAVEL

The present big five treaties which govern international space law were entered into after a time of war and conflict due to which these treaties were naturally more inclined towards maintaining peace and harmony at that time of exploration of space. Due to this influence of cold war era, these treaties fail to answer most of the new questions which are likely to arise in this new era of space travel and exploration. The legal framework for outer space law poses many obstacles for development and growth of privatized space travel and exploration. The circumstances and pace of development at that time was vastly different from the times now. They were mostly based on the principle of ‘res communis’78 and ‘res nullius’79 which are beneficial only in an idealistic world.80 Although this is a highly intellectual ideology, it is incongruent with the market conditions that will promote privatization of space-related activities.81 Also, there was no place for the issues and claims arising out of privatized space activities owing to the stunted pace of developments at that time. Therefore, there is a need to amend these laws in such a way that it catalyses the development in private space activities. With the increase in privatization and commercialization of space activities, there will be many more space objects which increase the susceptibility of accidents/mishaps. Some of these issues which are likely to arise are discussed here in this chapter.

Issue of Jurisdiction

Jurisdiction is the capacity of a State under International law to make and enforce the law.82 It can be defined as the power, recognised by international law, of a State ‘to perform the functions of a State’.83 A State’s jurisdiction is derived from State sovereignty and constitutes its vital and central feature. In Palmas Case,84 it has been laid down that each State enjoys exclusive competence to exercise governmental authority over all persons, objects, and activities within its territory. This jurisdiction power is not restricted to a territorial limit but States can also exercise such power over persons and things which have a State link. These are based upon principles by which States gets such power to assert its jurisdiction beyond

78 Res communis is a Latin term derived from Roman law that preceded today’s concepts of the commons and common heritage of mankind. See Kemal Baslar, The Concept of Common Heritage of Mankind in International Law (1997).
79 Res nullius is not yet the object of rights of any specific subject. Such items are considered ownerless property and are free to be acquired by means of occupation. See Randall Lesaffer, Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription, 16 EUR, J. INTL L. 25, (2005).
81 Thomas, J., Privatization of Space Ventures: Proposing a proven regulatory theory for Future Extra-terrestrial appropriation, Birmingham Law Review; (1), at A7
83 Island of Palmas (United States v. Netherlands), ICGJ 392, (Perm. Ct. Arb. 1928)
84 Id.
its territorial limits. There are essentially three types of Jurisdiction which are recognised under International law. (1) Territorial jurisdiction, which means that a State has jurisdiction over all events taking place in its territory regardless of the nationality of the person responsible. (2) Quasi-territorial jurisdiction, which means that a State has jurisdiction over its vehicles, vessel, or ship and overall events and persons in any territory (even in no man’s land, ‘resnullius’). (3) Personal jurisdiction, which means that a State has jurisdiction over all its individuals, corporate bodies, and business enterprises regardless of wherever they may be.

According to Bin Cheng, a State jurisdiction by its nature has two distinct elements: Jurisfaction, the normative element, which represents the power of a State to adopt valid and binding legal norms, and Jurisaction, the physical element which denotes the power of a State, at any given time or place to perform any governmental function. From this perspective, the validity of Jurisfaction presupposes Jurisfaction, but it is possible to have Jurisfaction without Jurisaction. According to principles of international law, territorial jurisdiction supersedes both quasi-territorial jurisdiction and personal jurisdiction. Quasi-territorial jurisdiction gives way to territorial jurisdiction but supersedes personal jurisdiction. However, personal jurisdiction gives way to both territorial jurisdiction and quasi-territorial jurisdiction.

It can be logically concluded that the State will not have any kind of territorial jurisdiction in space, as it has been clearly enumerated in the Outer Space Treaty that no State can claim sovereignty over Moon or any celestial bodies. However, according to the Registration Convention and Article VIII of OST, the State shall retain jurisdiction and control over the object, and over any personnel launched in space. This means that due to the absence of territorial jurisdiction in space, the quasi-territorial jurisdiction will take precedence in outer space.

While applying principles of the maritime law might seem like the obvious solution to the issue of jurisdiction, there are way more variables involved in the case of space travel which cannot be adequately addressed by the present maritime law without making some major modifications or implementing completely new principles for space travel.

Let’s consider an illustrative case to understand this hierarchy of jurisdiction and to point out the flaws in these principles. Company X, which has been registered in State A has established a colony on Mars. All the personnel will be under the jurisdiction of State A, as long as they are in the Spacecraft regardless of their own nationality. However, when they land on Mars and leave the Spacecraft the question that arises is: which form of jurisdiction will take precedence, whether State A will exercise jurisdiction even after leaving the spacecraft or will the personal jurisdiction take precedent in the absence of both territorial jurisdiction and quasi-territorial jurisdiction. Another issue which is likely to arise is whether the State will retain quasi-territorial jurisdiction over buildings or

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Id.
facilities established on the surface of Mars or whether such exercise of jurisdiction violates the very basic principles of international space law. Further, if such space colony or facilities are established by corporation of more than one State then issue of which State will exercise its quasi-territorial jurisdiction has to be determined before establishing such facilities as has been observed in the case of ISS.

Due to such conflict of jurisdiction, it is necessary to amend the treaties to establish which State will retain jurisdiction over personnel in outer space without national appropriation or without claiming sovereignty over any celestial bodies.

Issues of Property and Ownership of Space Resources

It is a well-established principle in international law that outer space and the celestial bodies are not subject to appropriation or sovereignty by any nation. It declares space as a ‘province of mankind’, based on the principle of ‘res communis’, free to be explored and used by all for benefit of all nations. This principle of non-appropriation is a backbone of international space law. Also, Articles I, IV and VIII of the OST confirm the open access to space and the general view that space or parts of it cannot be claimed by any country. Strict as it may be in this prohibition, it lacks in certain aspects such as defining what is outer space and celestial bodies. This principle of non-appropriation which extends only to State Parties stands as an issue when we talk about interplanetary travel and habitation. The principal leaves out non-signatory, private organisations and persons. Could this mean that private organisations and individuals who are the subjects of interplanetary travel may not be bound by this provision?

However, in order to own, a property needs a superior authority to enforce it. Therefore, without an authority, a person would be in ‘possession’ of the land, rather than ownership. Property cannot exist outside the sphere of state sovereignty. In this context, the problem that could arise in case of Martian habitation is the manner in which the occupation will be done. And when it is done, there is a need for an authority to govern such settlements. This may be considered as a far-fetched dream, but there is a need to develop a strong legal framework to address these problems that are likely to arise in future.

Another problem that is likely to arise is regarding the ownership and exploitation of natural resources. The moon, Mars, and other celestial bodies contain resources that are scarce or non-existent on Earth and which could have immense value. One example is helium-3, a substance common on the moon but exceedingly scarce on Earth. A Russian space corporation, announced that it

92 Sarah Coffey, Establishing a Legal Framework for Property Rights to Natural Resources in Outer Space, 41 Case W. Res. J. Int'l L. 119, 120 (2009), Available at:
intends to build a permanent base on the moon by 2025 and to begin industrial-scale delivery of helium-3 by 2030. There is no proper framework in the current international space law regarding usage and exploitation of natural resources and States, as well as, private companies are desperate to pursue exploitation of natural resources. Although Article I\(^9\) of OST implies that the resources and wealth gained from exploitation of all resources have to be redistributed, it does not provide a strict framework as to how this has to be done. It is argued that providing real property rights to private parties in celestial bodies would prevent wasteful use of such land and also allow exploitation of natural resources while preserving the environment. At this juncture, the analogy may be drawn from the existing situation of Antarctica. For this, reliance may be placed on the Convention for Regulation of Antarctic Mineral Resource Activities (CRAMRA), 1988, which was entered into after 7 years of negotiations which allowed nationally sponsored mineral exploitation and mining and provided for regulation and collection of fees while protecting the environment. A similar framework has to be entered into for exploitation of celestial natural resources in order to avoid issues arising out of the loopholes in such treaties. Another debatable issue is regarding the intellectual property rights in outer space. It is a well-established notion that intellectual property rights are territorial in nature and national laws are applicable to inventions and products of human creativity on earth. World Intellectual Property Organization (WIPO) was established to regulate intellectual property rights on an international level. However, it is unclear whether such rights extend to outer space as well. It is also unclear about the legal situation in case of infringement of intellectual property rights in outer space, i.e., what law will be applicable and who will have the jurisdiction to decide upon such matters as outer space is free from sovereignty. Let’s assume that an invention has been made by the inhabitants of such a body, now it is impossible to decide what law will be applicable to such intellectual property in such highly international environment where theseparation of the territory is difficult to achieve. The ISS model can be relied on with respect to this issue. The IGA and the NASA Directive on Space Station Intellectual Property contain regulations settling the matter among the Member States. The approach of the ISS IGA to industrial proprietary rights and other intellectual property is consistent with the situation that the space treaties create, i.e. it follows the territorial principle. As a result, the legal regime governing intellectual property on board the ISS corresponds with the rules relating to the ownership of space objects. The sovereignty of each launching State is extended to the parts of the ISS which are on its registry. As all components of ISS are distinct and identifiable it is possible for determining which laws will govern such intellectual property, such might not be the case where there is a collaboration between more than one State for establishing a space colony.

**Issues related to Safety and Security**

The OST in Article VII provides that the State Party which launches or procures the launching of an object into outer space,  

http://scholarlycommons.law.case.edu/jil/vol41/iss1/6
(last visited Oct. 26, 2017)

\(^9\)Supra note 33.
including the Moon and other celestial bodies, and from which State such launch is facilitated shall be internationally liable for damage caused to another State Party or any natural or judicial persons on the Earth, in air space or in outer space, including the Moon and other celestial bodies.

Privatisation of Space related activities is still a new and underdeveloped concept even in space-faring nations such as the USA, where alternatives to government-provided space launch services began in the 2000s. Wired magazine in 2012 declared it as “the year of private space,” because of the success of SpaceX in conducting two launches to the ISS using their Falcon 9 vehicle. The US law related to space was updated with the passage of the SPACE Act of 2015 in November 2015. This Act explicitly allows “US citizens to engage in the commercial exploration and exploitation of ‘space resources’ [including ... water and minerals].” The right does not extend to biological life, so anything that is alive may not be exploited commercially.

The SPACE Act includes the extension of indemnification of US launch providers for extraordinary catastrophic third-party losses of a failed launch through 2025, while the previous indemnification law was scheduled to expire in 2016. The Act also extends, through 2025, the "learning period" restrictions which limit the ability of the FAA to enact regulations regarding the safety of spaceflight participants. The Federal Aviation Administration (FAA) of the United States published “Safety Approval: Guide for Applicants” in 2009 which provides “procedures for identifying appropriate safety standards and obtaining a safety approval” for commercial launches in space. While FAA doesn’t provide for industrial standard safety requirements under those guidelines, it establishes that it will evaluate the safety standards for each vehicle on a case-by-case basis based on established federal launch range practices and other industry safety standards.

It is essential to draw parallels between the safety standards and regulations followed by most of the Nations under the Chicago Convention and ICAO, which can be used as the basis for establishing proper safety regime for the space age as these treaties under the guidance of ICAO has been beneficial to the civil aviation.

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95 Spurring Private Aerospace Competitiveness and Entrepreneurship Act of 2015, § 102 H.R.2262 § 117
96 Id.
100 Id. at Preface (iii)
101 Id. at 11
102 While it has been argued by few authors that amending the Chicago Convention to include commercial space activities under it should be sufficient, it is argued that such a method is only a temporary fix and as both the subjects are vastly different from each other both should be governed under separate international treaties. This however, doesn’t mean that Chicago convention and other
Article 3 of the Convention provides and recognises that every State must refrain from using weapons against civil aircraft in flight and that in the case of such an interception, the lives of the civilians on board and the safety of such aircraft must not be endangered. A similar provision can be adopted for commercial spacecraft’s which will prohibit other State Party from using any weapons which will compromise the safety of passengers on board and the spacecraft, in case any such spacecraft during its flight or landing stage breaches the sovereignty of any State. Further, every State can be required to publish its regulations in force regarding the interception of civil spacecraft’s similar to the requirement under Article 3 to publish such rules in case of interception of civil aircraft.

Further, the Convention provides for various issues faced in commercial civil aviation and provide appropriate solutions for the same. As it will be difficult and too tedious to adopt new Annexures to the present Convention, which could also lead to many difficulties, it is therefore suggested that a new treaty should be adopted for setting standards and regulating the conduct of civil commercial spacecraft by using the present Convention as the basis for the same.

Issues related to conduct of humans during interplanetary travel
The next issue which should be addressed is how to regulate the behaviour of persons travelling and what measures should be adopted to govern them. This regulation should not only be limited to outer space or on celestial bodies but should also lay down a code of conduct which shall govern travel time or time spent in spacecraft. It is essential to regulate and govern the socio-political behaviour of individuals coming from different nationalities to ensure cooperation and success of each mission. In the development of space law, it has been observed that such regulation is possible in neutral territory where no state exercises its sovereignty. The most prominent example of such international cooperation and volunteerism is the International Space Station. Understanding the framework of ISS will play a very important role in framing laws governing the future of interplanetary travel as it is the most prominent man-made object in space right now.

The ISS programme is a joint project among five participating space agencies: NASA, Roscosmos, Japan Aerospace Exploration Agency (JAXA), European Space Agency (ESA) and Canadian Space Agency (CSA). The working and functioning of the space station are established by intergovernmental treaties and

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103 Such as countries losing their status if they don’t amend their domestic laws to support those new changes.

104 GARY KITMACHER, REFERENCE GUIDE TO THE INTERNATIONAL SPACE STATION 71-80 (Apogee Books, 2006)
Various bilateral Implementing Arrangements between the space agencies have been established to implement the Memoranda of Understanding. These arrangements enumerate guidelines and tasks among the national agencies. The importance of Intergovernmental Agreement (IGA) and various arrangements is that they show the possibility of regulating human conduct in outer space if there is cooperation among individual States by their own consent and would further facilitate the objectives of international law of using space for peaceful purposes. Some of the essential concepts which have been developed under these agreements are discussed here briefly. Article 9 of IGA provides for ‘utilisation rights’, the philosophy behind this approach is that goods and services are exchanged by space agencies without exchange of funds. This bartering system has enabled the process of standardisation and commonality in the Space Station Programme.

The Crew Code of Conduct, (hereinafter ‘the Code’) agreed on by the Partners in September 2000, sets specific rules and a chain of command for the astronauts and cosmonauts. Further, the Code establishes the relationship between ground and on-orbit management, standards for work, responsibilities with respect to elements and equipment, disciplinary regulations, along with physical and information security guidelines. In order to develop a code of conduct for people going for interplanetary travel, it is necessary to ensure that such code is based on inter-cultural values and valuable contributions from spacefaring nations along with nations which are still in initial stages of space exploration. One of the necessary aspects provided under the Code that ISS crew member has a right to know about the different requirements under all the agreements and regulations applicable and that he or she will be educated as to the applicable rules.

The Multilateral Crew Operations Panel (MCOP), a cooperative body established through Article 11 of the MOUs will exercise a central role, such as the procedure required for submitting a statement asserting violation of a prescription of the Code by a crew member, examining and making determination on this statement, the manner in which a decision may be revised, and the type of disciplinary measures that could be imposed depending on whether the violation occurred on Earth or during flight, etc. A similar international body can be established under the new space law regime to determine the necessary actions to be taken in violation of any of the principles enumerated under international law or agreements among different space agencies. Section II of the

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107 Intergovernmental Agreement ISS of 1998, Art 9, (2006); (See also, other relevant parts of MoUs), available at: http://www.esa.int/About_Us/ECSL_European_Centre_for_Space_Law/ISS_IGA_English_French (last visited Oct. 26, 2017)
Code calls for the need to ‘maintain a harmonious and cohesive relationship among the crew and assure an appropriate level of mutual confidence and respect.’ In other terms, any interpersonal or group harassment would make the application of sanctions possible in a case where the MCOP determined that harassment had taken place. One of the issues which were determined after a lot of discussions was the issue of ‘use of force.’ The following interpretive statement was included in the Code, ‘In the case where necessary to ensure the immediate safety of the Crew Members of the ISS, reasonable and necessary means may include the use by the ISS Commander of proportional physical force or restraint’. It is necessary to understand that in case immediate safety is jeopardised and after exhaustion of other possibilities only the Commander of ISS can use proportional physical force and not the crew members of ISS. In case of long-term space missions, it will be necessary to regulate the use of force and to determine who can exercise force if required without violating any rules.

While the IGA and MOUs already govern such conduct these agreements are only binding on the partner states and for the purpose of ISS, there is a need for having a similar code of conduct on an international level to ensure maximum compliance with all the States. The fastest mission to Mars is projected to take 2022, but also during travel time. The United Nations Office for Outer Space Affairs can draft a model code of conduct to be followed during and after interplanetary missions and the parties to the same can implement the same principles in the internal legal systems to ensure a solid legal basis in order to persuade astronauts, crew, and passengers to abide by the rules outlined in the model code.

Other Issues
The new age of space exploration is like opening the Pandora’s box, it will not only raise legal issues which have been discussed above but will also raise a number of other social, cultural and economic questions, which must be discussed as well. One of the most essential social/ethical questions which must be answered before we start exploring heavenly bodies is what will be our responsibility towards any other organic life form found on other planets? Any consideration of such extra-terrestrial life has to include both vegetation and intelligent life. In any discussion about future of space law, it is essential that we discuss what would be our duty to protect such life forms or to use them for the benefit of humankind. The discussion about the same can be carried onward from the UNISPACE III Conference organised by United Nations, which yielded in the adoption of “The Space Millennium: Vienna Declaration on Space and Human Development”. This Declaration inter alia provides for protection of the space environment. There is no known principle of

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law which mentions “extra-terrestrial intelligence”. Therefore, there is no existing norm of international law which prohibits or regulates human interaction with such beings.

Another aspect which must be discussed is the impact of such breakthrough on human culture. The concept of culture is a unique and useful tool used by humans to understand their behaviour and relationship with their environment. On Earth, the human culture is incredibly diverse, so those who would operate in space perhaps with this multicultural society need to have skills for dealing effectively with cultural differences.

The environment of outer space is completely different from Earth’s, which will provide for further growth in human culture as we try out new things in outer space. Only a handful of people have experienced true outer space but as this number grows it is evident that population in space will be multicultural and heterogeneous. As we establish human colonies on Mars or any other celestial body, there will be a need for cultural synergy, to ensure the differences between people foster cooperation and collaboration with others.

Human culture is a product of harsh environments that people were exposed to, however, the case of interplanetary travel will be the first time that people will be able to consciously design the kind of culture we wish to create in this new frontier. A planned culture designed for outer space based on the data and insights of behavioural scientists will immensely benefit in cooperation.

Some of the other factors which have not been discussed in this paper but are nonetheless of equal importance for future of humans in outer space are physical (medical-health/wellness), psychological (emotional behaviour), sociological (human systems/institutions), financial (economic resources and costs), political (government and other support systems), educational (preparation and training), management (organising/administering/leading projects), and communication (use of information technology for governing interpersonal and group interactions).

CONCLUSION

While interplanetary travel has always been a fascinating subject of science fiction, with the recent developments in space industry it is essential to recognise that interplanetary travel/habitat might become a reality sooner than we realise. The history of space law has been tainted by the overwhelming fear of war and this has greatly influenced the basic framework of international space law.

As the scope of interplanetary travel is wide, it is essential to define the present uses, which will overlap with interplanetary travel laws. The most prominent of these overlapping concepts are perhaps the development of space tourism as a recreational activity which might become a subject of interplanetary travel in the larger picture but is different from the fundamental concepts of interplanetary travel in the long term. The development of Astrolaw is perhaps an essential recent development under international law, which is still at an infant stage but is likely to grow with the further development of space industry and with the exploration and colonisation of the outer space and celestial bodies.

With the new era of space exploration, a number of social, political and cultural issues are likely to arise, while the present international law provides a strong framework to govern these issues on our
planet, it might not be sufficient to cater to the needs of this complicated development of space law. The most prominent of all the issues is the issue related to jurisdiction, which forms the basis of a sovereign state to exercise its power over its resources and persons. The development of space law was based on idealistic principles of *res communis* and *res nullius*. While these principles have been regarded as the most idealistic, it will be difficult to give importance to these principles with the development of humankind as space-faring species. The second most important issue is with respect to property and ownership of space resources. The present treaties and international law are not developed enough to regulate and govern the issues related to not only geological resources but also intellectual property rights issues. The present framework which can form the basis for the development of this concept is the International Space Station and the Antarctica Treaty. With a high learning curve for space-related activities due to technical and other aspects, it is essential that safety and security procedures to be followed in such case are based on universally accepted industrial standards and proper framework is established to resolve any issues with respect to damages or liabilities arising out of such cases. Although the Chicago Convention and ICAO are responsible for setting industrial safety standards for civil aviation, it is not clear whether the crafts used for interplanetary travel will be governed under the same or newly adopted principles. Therefore, it is necessary to establish a new international organisation which will be responsible for setting safety standards and protocols with respect to outer space vehicles. The probability of failures at the initial stages is high, which makes it essential to amend the Liability Convention in order to provide a better mechanism to claim for any damages caused to any state or an individual due to such failure. Another important issue which must be addressed is regulating the conduct of crew and personnel on such crafts because of large travel time and other aspects of confining oneself to a limited space for a long period. The Crew Code of Conduct agreed by the Partners to the ISS project sets out well-established principles governing the conduct of astronauts during their stay in ISS. This Crew Code and the proposed Code of Conduct by the European Space Agency will provide a strong foundation for developing similar code governing not only the relationship between the crew and personnel on crafts but also during their stay on celestial bodies. There are many other ethical, moral and economic issues, which will arise with the increasing feasibility of interplanetary travel.

The first manned mission to Mars is projected to take place by 2022, therefore it is essential for the international community and the academic community to initiate discussions for addressing the issues which are likely to arise in case interplanetary travel becomes a reality in either the next 10 or 20 years.

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INTELLECTUAL PROPERTY MANAGEMENT AND MONETIZATION AND ITS RELEVANCE WITH RESPECT TO NEW INNOVATIONS

By Anany Upadhyay & S. Anjani Kumar
From Jamia Milia Islamia

Intellectual property is the creative work of the human intellect. A right to intellectual property is an invisible/intangible right to a product of a man’s brain such as a new invented product i.e. property of the mind as against a right for material things/tangibles i.e. goods such as a right to the invented goods. An intellectual property is at times described as ‘knowledge goods’.1 According to Article 2(viii) of the convention establishing the World Intellectual Property Organization (WIPO) 1967, intellectual property includes right relating to (i) literary, artistic and scientific works; (ii) performing artists performance, broadcast and phonograms; (iii) inventions in all fields of human endeavor; (iv) scientific discoveries; (v) industrial designs; (vi) trademarks, commercial names and designations; (vii) protection against unfair competition; and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

INTRODUCTION

With the advent of newer technology, processes and automation tools, businesses are becoming heavily dependent on technology and knowledge. These processes and innovation take a lot of effort to develop – once developed others can also benefit from them. It is quite crucial for innovators, technology or process creators and businesses to prevent others from deriving any benefits from unjust exploitation of these innovations and to be rewarded for this effort. In 2012 Samsung was required to pay USD 1 billion to Apple for patent infringement claims. Ericsson does not make cell phones anymore but it has a very profitable revenue stream merely from licensing of cellular technology patents to cell phone manufacturers. Zomato was initially started as Foodiebay but changed its name due to similarity with eBay.

Intellectual Property is acquired so that it can be exploited for commercial purposes. A business generally use intellectual property rights to generate revenues by itself (i.e. by manufacturing and selling products using its own patent and brand names)- this is the most obvious manner to exploit intellectual property rights. However, they miss out on one important thing that is monetising from the IP created. A business may sell IPRs permanently, or it may allow other entities to use its IPRs through licensing, franchising or technology transfer.

Before moving further, the authors would like to clarify from the outset that this paper is solely for the purpose of understanding the relevance of Monetising Intellectual Property and its growing importance with the advent of new technologies. There exist no intention of the author

1 Bayer Corporation v. Union of India, 2014 (60) PTC 277 (Bom).
to question the acts and provisions governing Intellectual Property Rights in India. The onset of this research paper is based on answering the following hypothesis given below:

i. What kinds of IPRs can be exploited through licensing and franchising?

ii. What is the role of Technology Transfer Agreement in the age of innovation and technological advancement?

1. WHAT KINDS OF IPRS CAN BE EXPLOITED THROUGH LICENSING AND FRANCHISING?

Intellectual property is acquired so that it can be exploited for commercial purposes. A business may either use intellectual property rights to generate revenues by itself (by manufacturing and selling products using its own patent and brand names) – this is the most obvious manner to exploit intellectual property rights. A business may also sell the IPRs permanently or it may allow other entities to use its IPRs through licensing, franchising or technology transfer. Some businesses have earned millions through licensing their technology, while others have expanded globally bases on franchising model.

LICENSING AND FRANCHISING

Licensing, franchising, assignment and technology transfer agreements are some of the most common kinds of agreements for commercializing IPRs – the IP creator typically gets a royalty or license fees for such arrangements. It’s critical for an entrepreneur to know the key concepts surrounding licensing and franchising agreements - these are often under negotiated. Lawyers and consultants also have the opportunity to add value at an earlier stage by handholding an uninitiated businessman through the concepts and helping him through the negotiation process. For example, Ericsson had earlier transferred its mobile handsets business to a joint venture which was owned by Sony and itself. However, the joint venture is presently, wholly owned by Sony. Although it does not manufacture handsets anymore, Ericsson owns 30,000 patents pertaining to mobile handset technology and derives a significant portion of its revenues from licensing this technology to other handset manufacturers. Recently, it even secured a temporary injunction against import of handsets by Micromax (such as Ninja series, Canvas 2 and Funbook talk) on the ground that these imports were violating its patent rights.

In another example, Nortel Networks Corporation, a US company which was being liquidated sold its patent portfolio for about US $4.5 billion to multiple technology giants such as Apple, Microsoft, Sony, and Research in Motion etc. Apple itself acquired over a thousand patents.

In such situations, there is always a risk that a particular company could acquire the entire patent portfolio of the seller and start suing its competitors for infringement across the globe, thus triggering a patent war. Therefore, companies have the objective of acquiring patents which are associated with the field they are operating in, to minimize risk of such litigation.

Now coming to the hypothesis, Licensing and Franchising can be used to commercially exploit all kinds of intellectual property – such as copyrights, trademarks, patents,
proprietary know-how, trade secrets and confidential information.

a) RECITALS

The Recitals do not discuss the legal obligations of the parties but explain the background and circumstances within parties which have decided to execute the agreement. Sometimes businessmen and parties ignore recitals but it is a good idea to describe them in some level of detail as this will help a court in understanding the agreement in its true light in the event of a dispute and it will also bring to light the commercial intent of the parties. Further, every agreement has a definitions clause so that the key terms used in it can have a specific and determinate meaning which is accepted by both parties. Important terms should also be defined depending on the circumstances and the nature of the contract.

b) SUBJECT MATTER OF THE LICENSE

The subject matter over which the license is granted must be clearly identified to prevent confusion later. It should also include the intellectual property that comprises the subject matter. There are various types of licenses, such as an exclusive license - prevents everyone from using the intellectual property including the licensor itself. A sole license – excludes the licensor from licensing the IPRs to any other entity. However the licensor itself can continue to use the IPRs in case of a sole licence. A non-exclusive license is the least restrictive and the licensor can issue as many non-exclusive licenses as required. It will always be in the licensee’s interest to negotiate an exclusive or sole licence. However, for the licensor, it limits his ability to receive royalties to one source. If the licensee has not previously demonstrated any capability to sell the product, an exclusive or sole license may be a losing proposition for the licensor, as the creator of the IPRs.

c) SCOPE OF THE LICENSE

The scope of the license, that is, whether the license is only for the use of the brand name, whether it includes the right to manufacture the licensed product, or the right to further develop and improvise the product, should be specified.

d) RESTRICTIONS ON THE LICENSOR/LICENSEE

The grant of the license is coupled with certain restrictions on the licensor and the licensee to protect their business interests. Similarly, the licensor may be prevented from providing the license to another licensee within a defined area. Non-compete restrictions should be limited and reasonable, as otherwise they may be violative of the Indian Contract Act, 1872 (prohibiting unreasonable restraints on trade or business) and hence unenforceable in a court. They may also require a competition act scrutiny if the restrictions are unfair or anti-competitive.

e) IMPROVEMENTS IN INTELLECTUAL PROPERTY
A licensed product may be improved by the licensee, either on its own or jointly with the licensor. The licensee may also create local variants of the product. Therefore the agreement must specify whether the licensee has the authority to introduce modifications/improvements, whether it is required to follow any procedure for initiating such improvements. It should specify who owns the IPRs pertaining to the modified product. More importantly, the procedure for the commercial management of the IPR must be clearly specified.

**f) RISK ALLOCATION MEASURES**

Risk allocation will depend on the nature of IPR and the kind of license that is granted in relation to them. If a trademark licensee receives product from the licensor which he is required to sell as per the license agreement, he may require an indemnity from the licensor. If, however, the licensor has also granted the right to manufacture the licensed product, the licensor may seek an indemnity from the licensee for any claims in respect to the product sold by the licensee. An indemnity only covers losses and does not permit the licensor to recover any profits or a rate of return.

Some risks can also be mitigated by obtaining insurance, e.g. product liability insurance is an efficient way to reduce risk from product liability claims. Sometimes, one of the parties may also require another party to obtain product liability insurance in its own name.

**g) ROYALTY PAYMENTS**

The agreement must specify the amount of royalty or a license that is payable, manner and time of payment. A variety of payment models are possible, and parties can use any system that enables them to reap commercial benefits fully from the arrangements. Royalty payments can also be made in kind-sometimes, parties mutually license the right to use specific proprietary technology to each other without any cash payment at all. The cross license agreement provides each party the non-exclusive right to the other parties technology at no charge (and no royalty). Cross-licensing may also feature consideration paid in cash or cash equivalents.

The cross-licensing agreement between Apple and Microsoft in 1997 required a US$150 million cash infusion by Microsoft into Apple (Microsoft acquired limited shares of apple in return). Similarly Hero Honda was a joint venture between Honda Motors Limited (controlled by Japanese interests) and the Hero group of India. Under the joint venture, Honda licensed technology to manufacture motor bikes to the Indian joint venture company. The joint venture entire relied on the marketing and distribution capabilities of domestic Hero group to sell the motor bikes.

**h) TIMELINES**

The date from which the agreement comes into force, the period for which it is valid, the process by which it can be terminated, the mode and time of payment, etc. must be clearly specified.

**i) ASSIGNMENT AND CHANGE IN CONTROL**

Sale of the assets of the licensee to the competitor in the entity which controls the
licensee may be against the commercial interest of the licensor - the licensor may want the opportunity to be intimidated (and if it chooses to terminate the license) in the event of such occurrences. Therefore, a clause that prohibits assignment without written permission of the licensor, or states that the assignment would be terminated in case of a change in control if permission of licensor is not obtained, is usually inserted in license agreements.

In the event of disputes, a defaulting party often tries to argue that there commercial understanding was different from what is contained in the written agreement, or that it was modified after entering into the agreement - this can pose obstacles to dispute resolution and it may prevent the innocent party from obtaining the desired relief. In order to prevent the defaulting party from taking the stand it must be mentioned that the written license/franchising agreements captures the “entire commercial understanding” of the parties, and that any subsequent variations can only be made if they are in writing and signed by both parties.

j) OVERVIEW OF RESPONSIBILITIES OF LICENSOR

In a franchising agreement, the franchisor will have additional responsibilities as compared to an ordinary license. He may be required to provide:

- Detailed product and design specifications,
- Support and assistance to the franchisee,
- An operations manual for the staff and officials of the franchisee,
- Training to the key sales representatives or staff of the franchisee,
- Assistance in obtaining regulatory or legal approvals for conducting the franchisee’s business,
- Information and updates about new product launches and
- Recommendations regarding advertising and promotional activities.

k) MINIMUM COMMITMENTS OF FRANCHISEES

- CAPITAL COMMITMENTS: Often in franchising businesses, the franchisor may consider stipulating that the franchisee to contribute a minimum pre-determined amount towards advertising, or in certain industries they require minimum purchase commitments from the franchisee. At the same time, the franchisee may incorporate a specific obligations of the franchisor to engage in regular promotion activities for the product (in the territory where the franchisee is responsible for marketing the product).

INFRASTRUCTURE AND CAPITAL COMMITMENTS: The franchisor usually specifies minimum size and infrastructure requirements of the premises and a minimum investment to be made by the franchisee. Franchisors in the restaurant industry also require a minimum upfront capital contribution. For e.g., Subway or McDonalds.

- MONITORING OBLIGATIONS: The franchisor insist on the right to oversee the operation of the franchisee or depute a manager or supervisor to look into activities of one or more franchisees, to monitor compliance with the franchising agreement.
2. WHAT IS THE ROLE OF TECHNOLOGY TRANSFER AGREEMENT IN THE AGE OF INNOVATION AND TECHNOLOGICAL ADVANCEMENT?

Technology transfer is a mode of transfer of technological knowledge from one company to another or within the same corporate group. It can be in the form of tangible knowledge—knowledge embodied in physical goods, services and codified in blueprints, designs etc. or intangible knowledge like skills, tactics which the people have gathered or learned over a period of time in a particular sector or field for operating the technology. Vertical technology transfer takes place when technology is developed in its natural life cycle within the organization from one unit to another, say from research and development unit to its implementation in the production unit. Horizontal transfer happens when technological knowledge flows from one organization to another. The authors would be focusing on the aspect of horizontal transfers in this paper.

For developing and underdeveloped countries, technology transfer is an important mean for gaining access to the latest technology for the developed countries. For big companies, transferring obsolete technologies can be a way to monetize underutilized IP. The authors, through this paper try to highlight certain important provisions in a technology transfer agreement.

• a) INTELLECTUAL PROPERTY

Intellectual property involved in a technology transfer contract includes, patents, trademarks, designs, know-how. Developing and creating technologies involves huge investment, but imitation of those technologies can be done very easily. Having a very strong IP protection mechanism might reduce the chance of IP spillover or leaks to competing firms. The nature of IP protection in a particular country determines the terms and conditions and fees to be paid. In the case of weak regimes the licensor might insist for strong confidentiality clauses and higher royalty to set off in case of IP leaks. However, impact of IP protection mechanism on technology transfer varies from product to product. While transfer involving complex technologies which require huge machinery and expensive inputs might be unaffected by the IP regime of a country, but in case of product which can be easily imitated without much effort, IP protection regime often dictates the nature of the terms and conditions.

In a technology transfer agreement, there is a possibility that a new IP is created, or it is improved, or the existing IP is used by the IP is used by the parties. In the case of a newly created IP, it is essential to identify who will have ownership of the IP and whether the licensee will have certain rights regarding its usage or will it be joint ownership. In case of joint ownership one should review the applicable laws of the country and its possible consequences. However, the most complex of the IP rights which might result in conflicts is the rights on the “improvements” on the existing IPs. First and foremost, the parties must explicitly mention what constitutes improvements. One should focus in the areas which might make the IP valuable, like functionality, reduction of cost, improvement of performance, added features which are making the product more useful. While negotiating on improvement
clause, its possible that the parties agreed to make the improvement rights reciprocal-granting each other licenses for the improvements, rights can include only the patented improvements (but that would limit the scope by not including know-how). The improvement license for the inventing party can be made exclusive for a limited period; this can be important where the market favors the early adopter of the improved technology in a significant manner. What the clause should also mention is the improvement can be sublicensed. Making the improvements non-sub licensable will reduce the threat from competitive companies. In case the parties agree to make the improvements sublicenseable, the provision might allow the inventing party a share in consideration received from the sub licensing.

GRANT BACK CLAUSE: Under a grant back clause, the licensee gives the licensor the rights to the improvement made by the licensee on the licensor’s technology. It’s essential that the agreement must provide that the scope of such improvement is defined in clear words.

• b) TERRITORY AND EXCLUSIVITY

Like any other contracts, a technology transfer contract must explicitly identify the territory of the license granted and also should mention whether the license is exclusive (sole licensee) or non-exclusive (license may be granted to another party as well). Generally, the licensee seeks for an exclusive license in a particular country and may also include neighboring countries or regions. In case of exclusive license granted in a particular territory, demarcating a proper territory may prevent competition from similar entities that have similar license in other territories. For the licensor if the fees is received in terms of per piece or volume sales, the licensor may put a limitation clause on the exclusivity, making the exclusive period to be of say 3 to 5 years, and in case the licensee fails to meet the target, the license becomes non-exclusive.

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INDEPENDENCE AND ACCOUNTABILITY OF JUDICIARY

By Anurag Chajlani
From USLLS, GGSIPU

Abstract
This research paper is an attempt to analyse the efficacy of the judicial system in the country and the need for a system of accountability, by drawing on the experiences of other countries which have a system in place for curtailing instances of corruption in judiciary. This becomes all the more necessary when one takes into account the historic press conference held by the four senior most judges of the apex court who expressed reservations as to the allotment of cases and constitution of rosters by the Chief Justice of India. Also, how a system of accountability could expedite efficient justice delivery and ensure that justice is actually delivered forms a point of focus in this research paper as we need to remember the fact that Judges are not “demigods”, incapable of flaws or inconsistencies but mere mortals subject to “judicial meanderings and tentativeness”\(^ {110}\).

Given the fact that there is no system in place for ensuring judicial accountability in India, the necessity of holding judges accountable for their decisions rendered is an essential corollary to the concept of independence of Judiciary as envisaged by the framers of our constitution. In a democracy no institution can enjoy unbridled power without any scope of accountability. Hence, an analysis of the rejected NJAC proposal has also been made in this research project, whether this proposal could have helped in ushering in a system of judicial accountability in the world’s largest democracy.

Independence of Judiciary
Every democratic country adopts various means to ensure freedom of the judiciary and thereby to ensure individual freedom. For instance, U.S.A. has adopted system of separation of powers to ensure independence of the judiciary. But in constitutional systems based on the concept of Parliamentary sovereignty, the adoption of separation of powers is ruled out. This is the case in England. This is also partly the case in India, for in India, the doctrines of Parliamentary and constitutional sovereignty are blended together.\(^ {111}\)

Independence of judiciary in India
Constitution of India provides for various provisions whereby independence of judiciary is ensured. Firstly, the judges of the Supreme Court and the High Courts have to take an oath before entering office that they will faithfully perform their duties without “fear, favour, affection, ill-will, and defend the constitution of India and the laws”. Recognition of the doctrine of constitutional sovereignty is quite implicit in this oath. Secondly, the process of appointment of judges also assures the independence of judiciary in India. The judges of the Supreme Court and the High Courts are appointed by the President\(^ {112}\). It is an obligation of the

\(^ {110}\) 5th edition IP MASSEY, ADMINISTRATIVE LAW 4-5
\(^ {112}\) INDIA CONST. art 124 cl.4.
president to make appointments of the Justices of the apex court as well as the High courts. Necessary qualifications have also been provided for appointment and the same should be adhered to while effecting appointments and they should not be vitiated by political considerations.

Security of tenure is guaranteed by the constitution as the judges of the Supreme Court and the High Court’s serve “during good behaviour” and not during the pleasure of the President, analogous to other high Government officials meaning thereby that arbitrary removals cannot be effected by the President. They may be removed from office only through impeachment. A Judge can be removed on the ground of proved misbehaviour or incapacity on a report by both Houses of Parliament supported by a special majority.

Fourthly, salaries and allowances of the Apex court and the High courts are drawn from the consolidated funds of India and that the same cannot be reduced except in the event of an emergency.\(^{113}\)

Fifthly, By forbidding the discussion of activities of the Judges, by the executive or the legislature in the parliament, except in case of removal of them.\(^{114}\)

Sixth, the retirement age is 65 years for Supreme Court judges and 62 years for High court judges. Such long tenures enable the judges to function impartially and independently.

Seventh, by laying down that after retirement, a judge of the Supreme Court shall not plead or act in any court or before any authority within the territory of India.\(^{115}\)

All of the aforesaid provisions ensure the independence of judiciary, which is now a part of the “basic structure” of the constitution that is an inviolable provision of the constitution which cannot be altered by any amendment to the constitution.

Why is Independence of Judiciary necessary?
It is quintessential for a vibrant democracy that Judiciary functions independently to ensure the faith and reliance of the common citizen towards the state of law and order in the society. Decisions rendered by courts of law should not be vitiated by any undue influence which may arise from improper pressure by the executive or the legislature, by individual litigants, particular pressure groups, the media, self-interest or other judges, in particular more senior judges.

Equally vital is the fact that judges should base their decisions solely on the evidence presented by the parties to the case, in accordance with the rule of law as the same is a pre-requisite for the judges to discharge their constitutional responsibility of providing fair and impartial justice.

Disputes between Citizens and the state have increased exponentially along with the responsibility of judges to provide remedies against unlawful acts of government. All of this has resulted in a need for judicial independence so as to protect the citizens from the excesses of the government.

Therefore, the existence of independent and impartial tribunals is at the heart of a judicial system that guarantees human rights in full consonance with international human rights.

\(^{113}\) INDIA CONST. art 146 cl.3.
\(^{114}\) INDIA CONST. art 121.
\(^{115}\) INDIA CONST. art 124 cl.7.

law. The constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the State. Within the justice system, judges, lawyers and prosecutors must be free to carry out their professional duties without political interference and must be protected, in law and in practice, from attack, harassment or persecution as they carry out their professional activities in the defence of human rights and dispense the role of active protectors of human rights.

International resolutions
The protection of judicial independence has been the focus of international resolutions, the most prominent of which are:

The ‘United Nations Basic Principles on the Independence of the Judiciary and the role of lawyers’\(^\text{117}\). These were endorsed by the UN General Assembly in 1985 and 1990. The ‘Bangalore Principles of Judicial Conduct’\(^\text{118}\) were endorsed in 2003 and set out a code of judicial conduct which are intended to complement the UN’s Basic Principles on the Independence of the Judiciary and the role of lawyers. The first of its principles states that Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects. Other bodies have endorsed judicial independence. For instance, in 1995, the group of Asian – Pacific Chief Justices adopted a common set of standards for the promotion and protection of their judicial institutions, which included judicial independence. These are known as the ‘Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region’\(^\text{119}\).

In 1998, a similar statement of principle (“the Latimer House Principles”)\(^\text{120}\) were also agreed by representatives from over 20 Commonwealth countries at a conference held at Latimer House, Buckinghamshire, UK.

An international conference was also held by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Milan from 26 August to 6 September 1985, which was further endorsed by the General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.\(^\text{121}\) Discussions were conducted to ensure a balance between judicial independence and ensuring accountability of the Judiciary.

Principle of Judicial Accountability
A natural corollary of Judicial Independence is “Judicial Accountability”, which can be defined as the costs that a judge expects to

\(^{117}\) https://www.un.org/ruleoflaw/blog/document/basic-principles-on-the-independence-of-the-judiciary/


incur in case his/her behavior and/or his/her decisions deviate too much from a generally recognized standard, in this case referring to the “letter of the law”.

Judicial independence was not intended to be a shield from public scrutiny. Judicial independence is not only a necessary condition for the impartiality of judges, it can also endanger it. Higher judiciary in our country is the only institution that is virtually not accountable and at the same time enjoys exceptional constitutional protection and formidable weaponry such as “contempt of court” to silence its critics. Although provisions for appeal, reversion and review have been provided for in the constitution for decisions violating rule of law, but there is no mechanism per se for accountability for serious judicial misconduct and disciplining errant judges.

Why is Judicial Accountability necessary?

“Power corrupts, and absolute power corrupts absolutely.” – John Emerich Edward Dalberg Acton

The aforementioned quote is quite relevant given the deplorable condition of the Indian judiciary, where the sanctity of the highest authority in the country for judicial decision making- the honourable Supreme court has taken a huge blow after the historic press conference held by the four senior most justices of the Supreme court, expressing reservations against the allotment of cases and formation of rosters by the Chief Justice. The judiciary has always held a high regard in the eyes of the common citizen- a system of authority respected by one and all and deemed as a defender against the arbitrary actions of Government and citizens alike.

When such an important responsibility has been placed on the judicial system and by extension, the Judges, then a system for ensuring the accountability of judges becomes imperative for ensuring effective justice delivery.

It is also a well settled principle of modern day governance that an authority deriving its existence from same source cannot claim to be absolute and unaccountable. It must be accountable either to the source of its origin, to the institution and more importantly to the people. When there is a system in place for ensuring the accountability of Legislature and Executive, then why should the Judiciary remain unaccountable? Ultimately, every institution should be held accountable to the people in every democratic polity like ours. Several countries in their constitutions have already provided for ensuring accountability of judiciary so as to prevent concentration of power in the hands of a single organ of the state, especially in countries where judicial activism interferes with and invades into the domain of other organs. But at the same time Judicial independence is a pre-requisite for every judge whose oath of office requires him to act without fear or favour, affection of ill-will and to uphold the constitution and laws of the country. Thus, here arises a tension between Judicial Independence and Judicial Accountability and a need to reconcile these two afflicting concepts.

Systems for ensuring Judicial Accountability in Other countries

122 (Mar. 17 2018)
From an international perspective, measures for ensuring judicial accountability have already been incorporated by various countries through passing legislations, orders, or making relevant amendments in their constitutions itself. An analysis of the same is given below:

**Canada**
In Canada the independence of the federally appointed judiciary is guaranteed by the Canadian Constitution (namely sections 96 to 100 of the Constitution Act, 1867) which provides for the appointment, security of tenure and financial security of superior court judges. An amendment in the Judges act, 1971 led to the creation of the Canadian Judicial council with a mandate to "promote efficiency, uniformity, and accountability, and to improve the quality of judicial service in the superior courts of Canada". Further, Under section 63(2) of the Judges Act, any member of the public (including a provincial attorney general or the federal Minister of Justice) may make a complaint about a federally appointed judge by writing to the Canadian Judicial Council.

**United States of America**
Judicial accountability in the United States of America is ensured by Code of Conduct for United States Judges- a set of ethical principles and guidelines adopted by the Judicial Conference of the United States. This Code provides guidance for judges on issues of judicial integrity and independence, on permissible extra-judicial activities and the avoidance of impropriety or even the appearance of impropriety. The Judicial Councils in each circuit are generally responsible for enforcing the Code. Sanctions for breach include private or public censure, temporarily suspending a judge’s caseload, and requesting voluntary retirement.

**Australia**
The federal judiciary enjoys constitutional protection in terms of appointment and removal of judges by virtue of section 72 of the Federal Court of Australia Act. Removal can occur on proved charges of misbehaviour and misconduct, effected by the Governor General on an address from both houses of parliament in the same sitting on either of the two grounds listed above. A more formal mechanism for considering complaints was established to address the Judicial Commission of New South Wales. The New South Wales statute requires the Commission to dismiss complaints in a number of specified circumstances: including where there is a right of appeal, where the complaint is frivolous or trivial, or where further consideration is unnecessary or unjustifiable. Apart from the aforementioned countries, efforts to establish a system of judicial accountability in developing countries has been on the rise. The most recent example being a consultation meeting Tunis on the topic of judicial accountability, seeking to hold judges accountable for violations of human rights judicial corruption or other instances of misconduct.

**Judicial accountability in India**
Many eminent jurists and reports from international and National institutions have stressed on the need for having a system of Judicial accountability in India. A number of

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124 Judges act, 1971
bills have been passed and legislations promulgated to ensure judicial accountability in India. These include the Judges (Inquiry) act, 1968, Judicial Standards and Accountability Bill, 2010 and the most recent being the National Judicial appointment Commission bill, 2014 which was rejected by a majority of 4:1 by the apex court, terming the 99th Amendment and NJAC Act unconstitutional.

National Judicial Appointments Commission

"An Act to regulate the procedure to be followed by the National Judicial Appointments Commission for recommending persons for appointment as the Chief Justice of India and other Judges of the Supreme Court and Chief Justices and other Judges of High Courts and for their transfers and for matters connected therewith or incidental thereto".126

National Judicial Appointments Commission (NJAC) was a proposed body which would have been responsible for the appointment and transfer of judges to the higher judiciary in India. The Commission was established by amending the Constitution of India through the ninety-ninth constitution amendment vide the Constitution (Ninety-Ninth Amendment) Act, 2014 passed by the Lok Sabha on 13 August 2014 and by the Rajya Sabha on 14 August 2014.127

The NJAC was deemed as a replacement of the collegium system for the appointment of judges as invoked by the Supreme Court via judicial fiat. Along with the Constitution Amendment Act, the National Judicial Appointments Commission Act, 2014, was also passed by the Parliament of India to regulate the functions of the National Judicial Appointments Commission. Ratified by 16 state legislatures, the proposal for NJAC was subsequently assented to by the President of India Pranab Mukherjee on 31 December 2014. The NJAC Act and the Constitutional Amendment Act came into force from 13 April 2015. However, this legislation did not go well with the legal fraternity with a plethora of petitions being filed against the purported legislation. Finally, on 16 October 2015, the Constitution Bench of Supreme Court by 4:1 Majority upheld the collegium system and struck down the NJAC as unconstitutional.128

Composition

As per the amended provisions of the constitution, the Commission would have consisted of the following six persons:

Chief Justice of India (Chairperson, ex officio)
Two other senior judges of the Supreme Court next to the Chief Justice of India - ex officio
The Union Minister of Law and Justice, ex-officio
Two eminent persons
These (two) eminent persons would have been nominated by a committee consisting of the

126 The Official Gazette of India[No. 48] NEW DELHI, WEDNESDAY, DECEMBER 31, 2014/ PAUSA 10, 1936 (SAKA)
127 The Constitutions (Ninety-ninth) Amendment) Bill, 2014” (PDF). Govt. of India.
128 Supreme Court Advocates-on-Record -Association Vs. Union of India(WRIT PETITION (CIVIL) NO. 13 OF 2015
Chief Justice of India, Prime Minister of India, and Leader of Opposition in the Lok Sabha (or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in Lok Sabha), provided that of the two eminent persons, one person would be from the Scheduled Castes or Scheduled Tribes or OBC or minority communities or a woman. The eminent persons shall be nominated for a period of three years and shall not be eligible for re-nomination.

Functions

As per the amended constitution, the functions of the Commission would have included the following:

- Recommending persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;
- Recommending transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court;
- Ensuring that the persons recommended satisfied the merit, ability and other related criteria as mandated under the act.

Efficacy of the NJAC act in ensuring Judicial Accountability

The debate centring around NJAC has drawn the response of a large number of people with the discourse ranging from senior lawyer Ram Jethmalani calling it an “evil absurdity” to attorney general Mukul Rohatgi pointing to judges who habitually turned up late in court as a reason to ditch the existing collegium system to select judges. In the midst of these discourses, one cannot discount the fact that ensuring Judicial Accountability is a prerogative of the all the stakeholders in the society so as to ensure efficient justice delivery as Justice must not only be done but it should be seen as done. Contrary to popular opinion that NJAC “would compromise the independence of the judiciary and give primacy to the Executive” in the appointment of judges, in my opinion, the system of NJAC wasn’t altogether flawed and could have contributed towards ensuring Judicial accountability and integrity.

Arguments against the validity of the NJAC act were raised by various legal stalwarts including Ram Jethmalani, Harish Salve, Fali Nariman, T.R. Andhyarujina, Anil B. Divan, K.K. Venugopal and Arvind P. Datar.

Their arguments against NJAC can be summarised in the following points:

Whether NJAC would endanger the independence of the judiciary as guaranteed under the existing collegium system?

Whether the appointment of two eminent persons from a non-judicial background would topple the pillar of independence of the judiciary?

129 Ibid.
130 CONST.OF IND. Art.(124A)
131 (Mar. 19 2018 9:40 PM) http://www.livemint.com/Politics/rcsu24yGQ0frdanyQ9fVVL/All-you-need-to-know-about-NJAC.html

Whether the power of voting to non-judicial members of NJAC would amount to bad appointments?

As has been pointed out in the aforesaid paragraphs about the need for having an independent and accountable judiciary, perhaps we need a system whereby judicial accountability is ensured. What the framers of our constitution envisaged was a system of “Checks and Balances” wherein no organ of the government would have an untrammeled and arbitrary scope of power, their functioning checked by the simultaneous operation of the other two organs.

It was rightly pointed out by Attorney General Mukul Rohatgi that “In addition to the independence of the judiciary and separation of powers, public confidence stemming from democratic nature of our country also has to be kept in mind while making appointments.” Time and again apprehensions have been raised against the erstwhile “collegium system”, which has been in operation for the past 20 years, operating as a mode of ensuring appointments to the Highest echelons of Judiciary.

This system hasn’t always ensured full accountability as the decisions for making appointments is vested in a body of senior most judges of the honourable apex court and their decisions pertaining to appointments cannot be questioned. This becomes all the more relevant when one takes into account the opinion of Justice Jasti Chelameshwar, who has been a staunch critic of the collegium system and was the only dissenting judge who upheld the validity of the NJAC act.

The most strongly attacked proposition of the NJAC act was the presence of “two eminent persons” in the panel as the same would dilute an otherwise purely judicial aspect of functioning. Scepticism regarding suitability of two non-judicial persons as members of the selection committee was expressed by the bench during the course of arguments.

This can be aptly summarized by the arguments raised by Mukul Rohatgi, “One way to look at it is that such a person may not possess legal acumen, but is bound to have a deeper understanding of life beyond the courtroom. We have to look beyond and cannot be oblivious to the world outside. It would not be wise to continue on a path completely insulated from the world.”

Hence, it was rightly argued that NJAC envisaged adopting a broad platform and looking beyond the perspective of the courtroom to serve the public, who were the ultimate seekers of justice. Moreover it is the common man who is affected by the course of functioning undertaken by the Judiciary, as the Judiciary is the only forum which acts as “a sentinel on the qui vive” to protect citizens against the excesses of the state.

Conclusion

Although the system of NJAC may have been wholly rejected, but efforts to evolve a system of ensuring Judicial Accountability should not be dropped. It is an undisputed fact that the judiciary has an important role to play in a functioning of a democracy and ensuring access to justice.

133 (Mar. 19 2018 9:41 PM) YkKvaJoXL/The-arguments-that-led-to-Supreme-Courts-NJAC-verdict.html
Judicial Independence and Judicial accountability are conflicting but not mutually exclusive concepts and in the present day scenario, both of these aspects form an important part of the justice delivery system. Any organ of the state cannot exercise its power arbitrarily, devoid of any checks imposed on their power and the same is true for the judiciary as well. The time has come when the judicial independence needs to be interfered with. Judicial independence must go hand in hand with judicial accountability. It is important to acknowledge the fact that the judiciary is not appointed by the people directly and therefore its accountability is questionable. The main task of judiciary is to provide fair trial and speedy justice and the organ that protects the society.

Representation of the members of the society should be ensured in the process of appointment of Justices to the High Courts and the Apex court, a suggestion put forth by the Law commission of India in its 80th and 121st reports, as high courts and the Supreme Court apart from entertaining Civil and Criminal cases also adjudicate cases which have a direct bearing on the fundamental rights of the common man and in this sense, ensuring accountability of judiciary is particularly important.

There is no doubt as to the importance of the independence of judiciary but we need to realize the fact that ensuring the independence of judiciary is not merely an end in itself rather the means to an end. The end is The end is to secure efficient, expeditious and impartial delivery of justice and the main intention being the fact that people get justice irrespective of their status. The aforesaid is pertinent to instill and maintain confidence in the general public as the Judiciary is one system which has always enjoyed the confidence of the masses until recently, when a press conference held by the four senior most judges of the apex court raised questions as to the credibility of the Highest court of Justice.

Therefore, any new step towards revamping the Judicial System should aim at balancing the best possible manner judicial independence and judicial accountability.
ABSTRACT:

It goes without saying that sport has an almost fascinating virtue of bringing together people from every corner of the world. Be it the young accountant in Manchester who was too sad to show up to work after Manchester United lost 3-1 to Barcelona in the 2011 Champions League final, or the 43-year-old Indian father of two who burst into tears when Pakistan dominated India with a 180 run win in the ICC champions trophy 2017. There are very few things in the world that can evoke as much emotion and passion in the people as sports.

Like all good things sports too has its own fair share of negative aspects. Practices such as Doping, Tampering and match fixing have plagued this noble component of our life. However, the largest and most detrimental shortcoming of this field lies in its repeated failure since time immemorial to escalate the platform of women’s sports to that of men’s.

This paper discusses and deliberates on the struggles and grievances that women in almost every sector of the sphere of sports are facing today. It takes an in-depth look into different sports, their respective bodies and federations which draft up the framework of rules to which all players and organizers much abide, sponsors who are in charge of the monetary support to different teams and franchises, the fans whose behavior and preferences can be studied to arrive to comprehensive conclusions about the game and isolated incidents or occasions which will further elucidate on the grim reality of gender-based discrimination and bias in the field of sports both in our country India and all over the world.

"Believe me, the reward is not so great without the struggle." - Wilma G. Rudolph

Inspirational words that are forever etched in the world of sports and our hearts. This quote by Wilma Glodeon Rudolph, an American sprinter from Tennessee who won 3 gold medals and a bronze medal during the 1956 and 1960 Olympics and was heralded as the fastest female sprinter in the world during that time, captures the very essence of this paper where we dwell on the vast inequalities and injustices faced by women in the sphere of sports. Their struggle is against a mindset, the mindset of the very institution they belong to. Their struggle is against the stigma and dogma that haunts them and waters down their accolades and drags them down from attaining parity in regard to respect and relevance with their male counterpart in the world of sports.

Sports, in my opinion can be regarded as one of the greatest boons to modern societal cooperation and time utilization spanning over different groups. It is the zenith of recreation on national, international and also local levels. It is also one of the highest forms of the manifestation of healthy competition and mutual motivation. Sports has always
existed in our society. The old age rulers and princes too competed in games between kingdoms and over the centuries we have only seen the evolution of this concept. Today sport is so amazingly intertwined in our lives that we often don’t even understand. Be it watching, participating or organizing, it has become an industry all together and has given rise to so many vivid concepts such as sports related businesses and vocations. It goes without saying that sport has an almost fascinating virtue of bringing together people from every corner of the world. Be it the young accountant in Manchester who was too sad to show up work after Manchester United lost 3-1 to Barcelona in the 2011 Champions League final, or the 43 year old Indian father of two who burst into tears when Pakistan dominated India with a 180 run win in the ICC champions trophy 2017 or even the little 13 year old kid in Kingston, Jamaica who went absolutely ecstatic as Usain Bolt crossed the finish line at the Beijing Olympics 100m sprint and simultaneously created a new world record. There are very few things in the world that can evoke as much emotion and passion in the people as sports.

Like all good things sports too has it’s own fair share of negative aspects. Practices such as Doping, Tampering and match fixing have plagued this noble component of our life. However the largest and most detrimental shortcoming of this field lies in it’s repeated failure since time immemorial to escalate the platform of women’s sports to that of men’s. It is unfortunate that all of us across the world are silent and almost seemingly willfully ignorant to the humongous gap between the significance associated with men’s sports and that of women’s.

Today, even though we can say that the situation of women’s sports has improved tremendously, it is unfortunate that women had to struggle so much just to bring themselves on the same platform as men in the world of sports but what is even more unfortunate and shameful is that even today that parity has still not been reached. In almost every sport in every country it is evident that men’s sports garner much higher viewership, planning and monetary funding.

This paper discusses and deliberates on the struggles and grievances that women in ALMOST every sector of the sphere of sports are facing today. It takes an in depth look into different sports, their respective bodies and federations which draft up the framework of rules to which all players and organizers much abide, sponsors who are in charge of the monetary support to different teams and franchises, the fans whose behavior and preferences can be studied to arrive to comprehensive conclusions about the game and isolated incidents or occasions which will further elucidate on the grim reality of gender based discrimination and bias in the field of sports both in our country India and all over the world.

AN IN DEPTH UNDERSTANDING OF THE PREDICAMEN

The reason the status quo when it comes to gender equality in the world of sports is so crippled is because for over centuries ever since the advent of sports there has been such a strong attempt to keep women away from sports that the concept of bias towards the male in sports has now become an institutionalized concept almost next to impossible to do away with. Countries like England and America are regarded the torch
bearers of sport in the modern world but however we find that even before sport was made a part of everyday life it was given a masculine connotation backed by religion. Over a century and half ago the Victorian Church and society viewed sport to be inseparable to the doctrine of muscular Christianity which was held as the polar opposite of femininity which connoted softness. In America too organizations like YMCA (Young Men Christian Association) attributed sport to the masculine young Christian male thus inhibiting the main principle this sport had set out to achieve: inclusion. It can be said without any doubt that the Olympics was the biggest revolution to ever grace the sporting world. Mass participation of young men from all over the world in a number of varied events, global recreational cooperation had reached its zenith. However unfortunately if we study the history of the Olympics we will find how the very enterprising Mr Baron De Coubertin, Founder and president of the Olympic committee that organizes the mega sporting event every four years had tried his level best to keep women away from the games. So sexist was he in his thinking that he came out and said that women indulging in sports was “the most unaesthetic sight human eyes could contemplate.” While these were the stories of the so called global powers who are seen as the champions of human rights and equality in other parts of the world the situation was even more grim. Most countries in South America, Asia and Africa were already struggling with civil violence and disorder on home ground so for them the introduction of sports itself into the country was such a herculean task let alone inclusion of women too. It was after the early 1900’s that women were slowly allowed to participate in some events. Over the years the numbers in regard to women’s participation have greatly increased and now in the 2016 Rio Olympics we saw a women athletes were 45 percent of the total number. However it is important that we do not confuse the struggle for equal participation with that of equal interest from the viewers. The journey in terms of bringing parity between men and women in sports is still not over and the world has still a long way to go in that regard despite the mammoth achievements that have been made to bridge the gap. But it is also integral that we understand that while we can push for more reform we cannot forcefully change the interest of the viewers and alter their preferences. In many sports, men who by virtue of their genetic makeup are biologically able to exert more physical force and thus exhibit greater strength and durability are preferred by viewers. Which is precisely why more sponsors and brands are flocking to male dominated sports. This should not happen ideally, yet it cannot be stopped as in a liberal economic and democratic country such as ours we cannot prohibit corporations from pursuing ventures where they know they can make large amounts of money. Finally, when it comes to an in depth understanding of this sport it would be catastrophic if after perceiving the current gap in sports instead of working on the parity we let destructive ideas like misogyny or misandry get the better of us. In this fight against age old mindsets that have prevented mass participation of women in sports we cannot allow a situation where the male athletes and female athletes believe that they are against each other. We cannot let there be any animosity between them because in this fight all our athletes, men and women unanimously are fighting on the same side,
the side of justice which has been denied to the women of our country and this world for ages.

**TITLE IX - A CRITICAL ANALYSIS**

Title IX is a federal law in the United States of America, which was created as part of the Education amendments of 1972. It is a legislation, which has evolved from the Title VII of the civil rights act of 1964. Title VII stated that no employer could discriminate against an employee based on religion, sex, race, colour or origin. Title IX broadens the horizons of that doctrine to educational programs that receive financial assistance from the federal government. Any individual who faces discrimination based on their gender in education programs that receive federal funding is protected under this law. Title IX states:

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

Education institutions (receiving federal resources for their programs) are required by law to acknowledge and take immediate countermeasure actions to repair any complaints of hostile gender related discriminative environments. Failure to do so would result in the college or high school being cut off from their federal funding.

Though Title IX is by nature a short statute, decisions from the Supreme court and aid from the United States Department of Education has given it an extensive scope that not only covers cases of discrimination, but also cases concerning sexual harassment and sexual violence.

One of the integral functions of Title IX is to ensure that funds are being fairly allocated between men’s and women’s programs. Naturally, The amount of funding and the allocation of resources depend on the number of students attending the particular high school or college. This is enforced by the Department of Education (DOE) and it’s Office of Civil rights (OCR).

The Office of Civil rights have created certain rules and regulations that define the way in which Title IX cases ought to be looked at.

According to the OCR, the following factors are required to be taken into account when comparing Men’s and women’s programs at an institution, while keeping Title IX guidelines in mind:

1. Equipment and supplies
2. Scheduling of games and practice time
3. Travel and per diem allowances

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(4) Tutoring
(5) Coaching
(6) Locker rooms, practice, and competitive facilities
(7) Medical and training facilities and services
(8) Housing and dining facilities and services
(9) Publicity
(10) Support services
(11) Recruitment of student-athletes

These regulations work towards ensuring that educational institutions provide equal opportunities to all their students. It is designed to prevent gender discrimination in every way possible. It has greatly improved female participation in sports in the U.S. The penalty of losing federal funding has almost guaranteed equality in sporting programs throughout the educational landscape. Though it is important to note that no such penalty has ever actually been handed out.

The biggest case involving Title IX was in October 2000, when a federal Jury ruled that Duke University had discriminated against female place kicker Heather Sue Mercer.

Mercer was an all-state kicker at Yorktown Heights High School in New York and tried out for the Duke University team upon enrolling in the fall of 1994.

She didn’t make the team in 1994 but was given a position as a manager instead.

In the spring of 1995 however, she participated in an annual spring intra squad scrimmage, called the Blue-White game. She was selected for this game after impressing seniors during her participation in conditioning drills with the football team. Mercer was undeniably the star of the match, as she kicked a 28-yard field goal to win the game for her side.

Thereafter, a number of events took place to confirm Mercer’s place on the team.

She was personally told of this news by assistant coach, Fred Chatham and this was further confirmed to the media by the Duke head coach, Fred Goldsmith.

Duke’s sports information director, Mike Cragg also asked Mercer to take part in interviews with various news outlets. Mercer attended regular first team practice and was officially listed as a member of the football team on the roster filed with the NCAA. She was also pictured in the varsity yearbook.

However, she did not play a single game in the 1995 season. On top of which, she was not allowed to dress for games or even sit on the sidelines. She participated in conditioning training the following year, but that was when Mercer complained about alleged discriminatory comments and treatment by the head coach, Fred Goldsmith.

In addition to not being allowed to sit on the sidelines. Mercer was not permitted to attend summer camp and was given fewer opportunities than other walk on kickers.

Goldsmith was alleged to have made discriminatory comments towards Mercer, where he stated that she would be better of participating in beauty pageants and implied that she should sit in the stands with her boyfriend and not on the touchline.
In 1997, Mercer filed suit against Duke, claiming that the coaches had cut her from the team solely based on her gender. This violated Title IX of the 1972 Education’s amendment. Under Title IX, Duke was not required to let Mercer try out for the team, but once she had tried out, they had to treat her the same as any other player in the squad. Duke tried to argue that Mercer was not given opportunities because she wasn’t good enough on a sporting level. This was quite evidently not the case though and in October 2000, Duke had to pay Heather Sue Mercer 2 million dollars in punitive damages.

Title IX has been a remarkable success and is providing women with so many more opportunities in the field of sports. It has paved the way for various fantastic careers and given fruition to many a dream. Equal participation in sports is slowly becoming a part of life and society in the United States. Before Title IX’s inception in 1972, only 1 in 27 girls played varsity sports. Today, that figure is 1 in 2.5. There are almost 2.8 million girls playing high school sports with hopes of obtaining scholarships for college. The number of women playing at collegiate level has increased from 32,000 to 150,000.

Athletic scholarships for woman were non-existent before 1972, but just 20 years later in 1992 there were close to 10,000 athletic scholarships given out to women. These scholarships have not simply aided women’s sports but also women’s education as a whole. Before 1972, women earned a meager 7% of all law degrees in the country. By 1997 however, the number had risen to 44%. Similarly, 41% of medical degrees were earned by women, a considerable increase from before Title IX took effect, when it was only 9%.

Due to Title IX, a system has been created whereby women have been given a much greater chance to flourish at a sporting level. The number and quality of female athletes in the United States has improved dramatically. However, gender discrimination is still a very real issue and continues to limit women to some extent even at an intercollegiate level. They are still not afforded the same amount of opportunities that men are. In his essay on Title IX laws and intercollegiate athletics, Michael Lancaster states “Although women in division I colleges are 53 percent of the student body, they receive only 41 percent of the opportunities to play sports, 36 percent of overall athletic operating budgets, and 32 percent of the dollars spent to recruit new athletes.”

In 2005, the National Coalition for Women and Girls in Education estimated that men receive $133 million more per year than women in athletic scholarships.

INTERNATIONAL PERSPECTIVE

The subject of inequality of opportunities, funding and wages stems from the developmental stage, but rises upwards and is just as abundant at a professional level. An example of this is the recent stand off between the United States Soccer Federation

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(The ruling body) and the Women’s national football team.

The US Women’s National Team (USWNT) has been the most successful football team in the female game, winning three Worldcup titles and four gold medals since they joined the Olympic games in 1996. Their 5-2 win over Japan in the 2015 worldcup final was the most viewed football match by an English-speaking audience ever. With close to 25 million people tuning in to watch captain Carli Lloyd score a hat trick and subsequently lift the famous trophy. That is a remarkable feat and is testament to the efforts and commitment to improve the quality and number of female athletes in the country.

It is also a stark contrast to the relative failure that the men’s team have had in international competitions. The team has appeared in the Worldcup 10 times, and their greatest success was to finish in 3rd place all the way back at the first worldcup finals in Uruguay in 1930.

However, the men earn a lot more than their female counterparts at a club level and the same goes for the international stage. It is argued that the comparisons between the two wages are more complicated than people think, as the payment processes are different. The men are paid through a bonus system, while the women are paid through a salary system. This essentially means that the men are paid purely on appearances for the national team. The women are paid regardless of whether the play or not, as they are earning a salary from their contract.

This may initially seem fair, however the compensations received by the two sets of players are very different. It is quite evident, with all their recent success that the women have significantly outperformed the men at every level. Thus, based on merit they must deserve to be compensated with a lot more than the men’s team.

According to the Guardian, Tim Howard (The men’s team goalkeeper) was paid slightly more than Hope Solo (Women’s team goalkeeper) for playing 8 games in a calendar year compared to Solo’s 23. These numbers are related to just the friendlies that are played by the two national teams every year. Though the women receive a high base salary of 72,000 US dollars, the only bonuses they receive are for winning friendlies. The women receive a bonus of 1,350 dollars for winning a friendly, but no bonuses are handed out for a loss or a draw.

On the other hand, the men receive high bonuses for appearances (Which essentially makes up their base salary) and much greater bonuses (17,625 dollars) for winning matches. They also receive a bonus of 5,000 dollars for a football match that they lose.
In International competitions, these discrepancies are even greater. Each player on the men’s team received almost 50,000 dollars for making the 2014 World cup squad, while the women only received 15,000 in 2015. When the standing of each team in the game is taken into consideration, the difference in these numbers are staggering.

accused the Federation of wage discrimination. Several members of the team also voiced their concerns about the fact that the federation did not give them the same treatment when aspects such as match venues, playing surfaces, travel and stay were taking into account.

There is evidence in this claim as can be seen in the following table. The women are paid a smaller daily allowance by the federation as compared to the men’s. They are paid 50$ as compared to the men’s 60$ at domestic venues and only 62.5$ dollars as compared to the 75$ paid to the men at international venues. This, out of all the other discrepancies is possibly the most infuriating. It is a trivial amount and is hard to comprehend why the allowance is not exactly the same for both teams.

“The numbers speak for themselves. We are the best in the world, have three World Cup championships, four Olympic championships. (The men) get paid more to just show up than we get paid to win major championships.”

-Hope Solo (NY TIMES)

After their success in the 2015 worldcup, the Women’s national team filed a suit with the Equal Employment Opportunity commission against the U.S Soccer Federation. This suit

While the discrepancy in wages is so obviously misguided, the United States soccer federation has tried to justify it through various claims.

They have claimed that the discrepancy in pay is not as large as made out to be in the complaint. Although as seen previously, no difference in pay, however small it may be, can possibly be justified on the basis of merit.

US Soccer also claims that the fundamental reason for any discrepancy is the fact that the men’s team brings in a lot more revenue than the women’s. According to the New York Times, the revenue brought in through ticket sales is almost double for the men. Additionally, a large amount of the US Soccer Federation’s funding comes from the international governing body FIFA (FédérationInternationale de Football Association). The monetary inconsistencies start from the top. In 2015, the US men’s team was given 9 million dollars for their round of 16 exit from the competition. The women’s team was only awarded 2 million for being crowned champions.

In their effort to force an improved agreement with the U.S Soccer federation, the women went public with their complaint. They felt the need for the fans to understand and support their cause. Initially though, as the debate was simply about equal pay, US Soccer sued the team union in early 2016. The lawsuit brought against the team union, was brought about in order to enforce the terms of the existing agreement between the federation and it’s star players. This agreement had expired in 2012, but was to be continued with certain modifications that had been agreed with the player’s representatives in 2013. The New York times reported at the time “U.S. Soccer said in the court filing that it ‘reluctantly’ brought the action against the union representing the women’s team after the executive director of the union, Richard Nichols, threatened to repudiate the agreement and its no-strike clause in a negotiating session in New York.”140

After a long drawn out process, months of negotiations came to and in 2017 when the players and federation finally agreed on a new contract that runs until 2021. The result of all those sleepless nights and determination of the players and their representatives was finally announced by the U.S Soccer federation on April 5th, 2017. The joint statement from U.S Soccer and the U.S Women’s National Team Players Association read:

"We are pleased to announce that U.S. Soccer and the U.S. Women’s National Team Players Association have ratified a new collective bargaining agreement which will continue to build the women's program in the U.S, grow

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the game of soccer worldwide, and improve
the professional lives of players on and off
the field. We are proud of the hard work and
commitment to thoughtful dialogue reflected
through this process, and look forward to
strengthening our partnership moving
forward. The agreement carries through the
2019 FIFA Women's World Cup and 2020
Olympics.”¹⁴¹

This new contract is seen as a massive victory
for women’s football and the larger world of
women’s sport. The efforts of star players
such as Carli Lloyd, Hope Solo and Alex
Morgan was supported by their growing fan
base and a large section of the public.

According to the New York Times, “The
agreement includes a sizable increase in base
pay for the players — more than 30 percent,
initially — and improved match bonuses that
could double some of their incomes, to
$200,000 to $300,000 in any given year, and
even more in a year that includes a World
Cup or Olympic campaign. Yet while the
women’s players can claim significant gains,
including on noneconomic issues like travel
and working conditions, the new deal does
not guarantee them equal pay with the men’s
national team, which the women had made
the cornerstone of their campaign for much
of the past year. For the union, that reality —
a consequence of the teams’ different pay
structures and an eight-figure gap in FIFA
bonus payouts to U.S. Soccer for the men’s
and women’s World Cup — was balanced by
progress elsewhere. It is those changes,
including control of some licensing and
marketing rights, which the union views as an
opening to test the team’s value on the open
market, that the players and their lawyers feel
could pay off in future negotiations.”¹⁴²

INDIAN PERSPECTIVE

Sonali Gite, a rower from Krita Prabhodini ,
one of the better sports academies in our
country , was asked about her practice regime
and coaching sessions. Her answer explains
the gender inequality and backwardness
prevailing all over the country in a nutshell.
She spoke about how they were made to
practice for two hours in the morning and two
hours in the evening, but they had no coach.
The river they rowed in, was not meant for
rowing and most of all the only coach they
had previously was the college principal, who
knew nothing about rowing. Later on , they
decided to bring on a proper coach who
besides being highly biased towards the male
athletes would also look down upon the
female rowers and behave aggressively with
them , which was a set back on their
confidence. When one of the girls was
selected for an International Camp , he did
not send her because her behaviour was not
according to his liking and her attitude was
not up to the mark. “Politics is a part and

¹⁴¹ US Soccer. “U.S. Soccer and U.S. WNT PA
Finalize CBA Through 2021.” U.S. Soccer,
US Soccer, 5 Apr. 2017

¹⁴² Das, Andrew. “Long Days, Google Docs and
Anonymous Surveys: How the U.S. Soccer Team
York Times, 5 Apr. 2017
parcel of sport” is all they are told and hence nobody stands up.

It is no wonder then that we ask ourselves – why do we have only one Sania Mirza, one Saina Nehwal, or one PT Usha? The answer lies in the deplorable condition of the women in the Sports Industry. It cannot be denied that the 21st century has seen an exponential growth in the female participation under various fields and in the most recent Olympics, it was the women from our country who really showed their vigour and proved that sport is not something that must be associated exclusively with men but deep down the condition is deplorable and will remain so until there is a change, a change so vast that the entire outlook of sport and women both are changed, because until this happens women will always be considered as the fragile beings who are to mend the man when he comes home and look after his needs.

It is essential to look at the grass root level and ponder about the various problems faced by the young women of this country who want to make a career in sports and cant make it. The primary problem faced where most women bow out is that they are not allowed to pursue their dream. Before participating in a 400m hurdles race a women has to jump and conquer so many social hurdles and while jumping these hurdles she is so burdened and tired that the battle ends even before it starts. The notion that men and women have different bodies and different purposes is an age old principle which is the basis of the argument that women are not meant to be seen in the field, but in the kitchen. In a country like India, where women are not given primary education and basic rights, opportunity in sport is highly far fetched.

Traditionally masculinity and manhood is synonymous to athleticism or sporty behaviour and that is the norm which must change. The few sports where women have made a mark is the ones where they have been given a chance due to their “flexibility” and “tenderness” like gymnastics. Hence an athlete would never be associated with a woman until recently but even then a lot of progress is required. Since childhood if a girl is subject to dolls and cooking like in our country and if by chance she takes to sports she is termed an ‘outcast’ or a ‘tomboy’, she would never continue with the sport. Social acceptance is of great significance and to fit in sport is sacrificed by a huge amount of women. India is a country where the norm is the only way that must be followed and due to this families put pressure on their daughters and sisters to give up their passion and get involved in household work or they would remain unmarried, especially if it is a lower income family, it becomes really difficult for them to even imagine such a situation. Again this is a mentality which must progress, the people must evolve and elevate the woman’s status. To curb these issues the discriminatory practices must be tackled as soon a they are witnessed with the help of professionals. There must also be a suitable and supportive work climate to make women feel comfortable if not privileged.

Education is primary when it comes to the

143July 13,2012. Leena Kundnani ,Naaree.com
social issues and only the educated will see how equality and justice function.

These were some of the psychological and social reasons for women to hesitate entering the field of sport but even the few that take up this end up struggling to make a living. After thorough research the authors have come up with numerous reasons for this disparity.

Coaching and Practice

“A good coach can change a game, a great coach can change a life”, but there is nobody who wrote about what no coach can do. That is exactly what the women on India face day in and day out. Without a coach there is no fitness regime, there are no practice sessions, there is no technical development and there is skill enhancement. How can a woman become a professional without a coach and without practice. Having the right guidance in any field is essential but for some reason the men receive this guidance whereas the women are required to imbibe it by themselves or by examining the men. In some facilities they do have coaches, but they are neither good nor great. They are usually sexist, homophobic and misogynists. The inexperienced coaches to gain a little time are given the women’s team which is again very unfair. Women feel a lot more comfortable having female coaches but unfortunately there are very few women in this field as well. Politics and favoritism plays a major part as well but the worst issue faced by them under their coaches is sexual harassment. During Asian Games 2014, gymnastics coach Manoj Rana and gymnast Chandan Pathak were booked for allegedly sexually harassing a female gymnast at the Indira Gandhi Indoor Stadium. The 29-year-old woman gymnast alleged that the duo made vulgar and indecent remarks about her clothes. While the SAI launched a probe, Manoj Rana and gymnast Chandan Pathak, flew to Incheon for the 17th Asian Games. No news reports appeared after this. This is just one of the many incidents reported with no action taken as the coaches ultimately use their power and clout to get away.

Travelling Arrangements

Travelling is something that cannot be helped because sports are played all over the world and it is their duty to make it to every competition no matter where in the world it is held but for some reason the budget allotted for the men is so much higher as compared to the women for no reason at all. Many teams have reported the male team getting first class tickets whereas their female counterparts flying in the economy class. At the semi professional level travelling arrangements must be made by the athletes themselves and thus families are not ready to spend the money required for the female child. They must travel to distant locations in trains without reservations as the various sports bodies are not ready to utilize funds on the ‘weaker sex’. Sport is an expensive hobby but as a career it is even more expensive.

Media & Representation

Women are made to face the barrels of buoyant sexism on a daily basis, be it at work

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144 http://www.huffingtonpost.in/2016/12/14/7-times-indian-sportswomen-reported-of-facing-sexual-harassment_a_21627488/

or even at home. This is especially the case when it comes to the sports industry. The media seems to cover only the juicy details about the personal lives of female athletes where as they should be criticized on their sporting abilities and talent. Jwala gutta, an International Badminton player has time and again spoken about how her professional success is based on how she looks on and off the field. “I love fashion and I don’t step out dressed shabbily. But why is that a basis for accusing me of not being focused on my game? I can’t train 24×7, can I?” said a distraught Jwala after being accused by the media on several occasions about her looks and personal life. Media coverage is extremely poor when it comes to women’s sports and no International women’s events are shown on television screens in India. Although times are improving and the women’s cricket world cup was covered at length, there is still a long way to go. To understand how media interprets female athletes, the perfect example is the Sports Illustrated magazine which has over time proved that women in sport can only be judged by their bodies or looks and their skill on the field is of no importance. So far, there have only been 10 Sports Illustrated covers featuring women, while there have been 75 men on the covers. Out of the 10 covers that have women on them, 10% feature a female that has no connection to athletics. The media makes the female athletes look weak and dependent on the male athletes. This is gross misrepresentation and should be stopped immediately because understanding the problem of gender inequality is the key as often, there is subtle sexism or inequality prevalent and journalists fail to realize it. Recently, Mithali Raj, captain of the Indian women’s cricket team was asked who her favourite men’s cricketer was in the Indian team. “Do you ask the same question to a male cricketer? Do you ask them who their favourite female cricketer is?” was her brilliant response. She had just played a game of cricket where in she brilliantly showcased her talent and won the game but the media seemed to be more interested in trivial gossip. Such a question had never been asked when it came to any Men’s cricketer which shows how women are represented in society and how their must always be inferior and sidelined.

### Sports Bureaucracy

Sports Awards are prestigious trophies not only tangibly but something that acts as a mental goal for many athletes to achieve and conquer in their careers. It is a great honour to receive the Khel Ratna or the Arjuna award for ones contribution to the country but unfortunately even Sports bureaucracy is not free of gender inequality and injustice. Just over one-fourth of Arjuna awards have gone to women. Dronacharya awards, which are meant to recognize quality coaches, are even more biased. Less than one in 25 of them have gone to a woman. The reason there is such an imbalance is not because of the talent

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www.supremoamicus.org
gap but because of sports administration and bureaucracy. There are very limited awards in the first place and even then they are all prejudiced and handed over to the men. It is the sports federations that recommend the winner of these awards and most sports federations are highly male dominated. Due to this domination, female athletes are not given opportunities in various sports and hence up getting fewer chances to win an award. women have suffered setbacks in the ranks of coaching and sport administration in women’s program. Of course, it is possible for men to do a good job in these positions, but unless girls and young women see women in positions of authority and power in their programs, they will be reluctant to define sports and sport participation as important in their own futures.\(^{149}\) The composition of the bureaucracy must change and only once that happens will this partiality vanish and awards as well as medals will be won.

**RECOMMENDATIONS**

The authors of this paper have dug deep and tackled every aspect of discrimination faced by the women in this country with regard to sport and their participation in it. After our study we found various issues that are hampering progress in this field and it is also our duty to find solutions to these obstacles and help implement them. First and foremost we must help implement more policies and draft a committee to look into more participation and growth in the women’s sports industry. The Sports Authority of India was set up with an intention to broad base sports and in this regard they should take up including womens sports in this policy. In 1975, the government had started a national festival which held women’s sports at the district and state levels and helped nurture a lot of talent, but this has subsequently decline and hence should be revived. Budget Allocation is desperately needed because all the problems have germinated due to shortage of funds. There are a high amount of funds to pay the male cricketers a handsome salary but there is no improvement in the condition of the female athletes. They are paid meagre salaries and given basic government jobs which are barely enough to maintain a normal lifestyle. At the same time sports facilities must be improved with the funds so that the talent can be developed in a systematic way.

We also need to focus on the grass root level so that in the future more women can participate and achieve gender equality, with relation to all sports. There has been progress which is evident in the Olympics, where now there are certain events like synchronized swimming that has only women participants and in the 2016 Olympics more women participated than in previous sporting event. Education is also another key area which should be looked into and sports should be a compulsory addition in the curriculum of every school. There should also be special attention paid to get more female coaches and official who could hold high positions and influence the way the sporting authorities work. At the same time athletes also feels

\(^{149}\)Gender issues in sports, http://ncw.nic.in/pdfreports/Gender%20Issue%20in%20Sports.pdf
comfortable and get inspired by imminent personalities.

Selection procedures and processes should be kept in check by all the sporting authorities. They must be made accountable and answerable for each decision made with regard to allocation of the funds because in the recent past there has been great mismanagement of funds. In fact a special body or cell should be introduced which would look into the development of women’s sport and check for gender injustice at every level. The media must play a vital role in promoting women’s sports by televising and telecasting at every point. There must be positive publicity and coverage given to sporting abilities and every achievement should be acclaimed highly so that there is a push for more women to enter this field.

Women should be made to train and practice not only with regard to their sport but also in their responsibility towards development of women’s participation in sport. Ex- players should take it up to improve the future and get involved as coaches or officials in the various sports bodies. Like the Title IX has worked wonders in America, India too must implement a law which would not only improve the condition of the women but elevate the sport to a whole new level. We need to applaud our sportswomen just the way we idolize our cricketers. Only then will we see many more Sania Mirzas and P.T Ushas.

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CHILD SEXUAL ABUSE IN INDIA: LAW WITH LACUNAE AND LOOPHOLES

By Aroma Raman Pices
From National Law University, Delhi

Introduction: Child Molestation in India
Sexual violence against children is the most horrendous crime which incorrigibly stigmatizes a naïve and brutally deracimates his innocence. It tailgates not only physical but also psychological aftermatts that affects the deteriorated victims’ existence life-long. Child sexual abuse may be defined as any sexual activity victimizing children, whether physical or non-physical, by a mature person or an adult conducive to satisfy sexual fervors and for sexual gratification. It includes penetration or intercourse(anal, vaginal or oral), contacting or caressing of private organs or genitals, denuding private parts or genitals or exhibition of naked child, naked photography, pornography or prostitution or other sexual attacks. In India, sexual offences against children are soaring at a distressing elevation with a total number of 8904 cases reported in 2014, following 14,913 cases reported in 2015 while more than double, there were 36022 cases reported in 2016 under the POCSO (Protection of Children from Sexual Offences) Act, 2012. Supplementary to the POCSO Act, 2012, certain punitive controls against CSA (child sexual abuse) are covered by the IPC (Indian Penal Code), 1860, subsuming engrossed penalty for kidnapping, child trafficking, voyeurism, sale of obscene objects, stalking and unnatural offences. Other sorts of child related sexual felonies, mostly being non-penetrative in nature are not expressly acknowledged as crimes under the IPC and hence, prior to the POCSO Act, 2012, these crimes were failed to be recorded, thus, which indubitably impelled the evolution and enactment of the afore-stated Act. However, the unceasing rampant escalation in the number of CSAs cases dictates the contributions provided by the lacunae and loopholes present in the Act as well as the intensifying grievous malaise prevalent in the country. This paper attempts to identify and construe the lacunas and vacuity in the POCSO Act and also to concomitantly highlight the current countenance of the victims, offenders and the aggravated crime itself with the contemporary concerns.

Law with Loopholes
The Protection of Children against Sexual Offences Act, 2012, was devised with a view to specifically criminalize sexual abuses against children as punishable offences and to fix the hiatuses against these crimes under the Indian Penal Code, 1860. The Act encompasses sexual offences including “sexual assault” , “aggravated sexual assault” , “penetrative sexual assault” .

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152 Section 7 of the POCSO Act
153 Section 9 of the POCSO Act
154 Section 3 of the POCSO Act
(PSA), “aggravated PSA”¹⁵⁵, “sexual harassment”¹⁵⁶, “online sexual abuse”¹⁵⁷ and “pornography”¹⁵⁸ along with the “procedures”¹⁵⁹ involved in reporting of the cases. The Act has also given due attention to the child care and friendly recording of the statements.¹⁶⁰ The special courts have been established under the Act in order to attend the offences committed under the Act with due care and special attention.¹⁶¹ Also, due diligence have been paid to the protection, treatment and prevention of the re-victimization of child. Agreeably, the Act educes as a comprehensive legislation against child sexual abuses. Nonetheless, it accommodates certain clear crevices which impede the efficient impact and implementation of the Act.

Men possess power over women therefore, they objectify them, similarly adults have power over children and likewise they also objectify them.¹⁶² Thus, children, having the least power, apparently become the most vulnerable falling victims against crimes, especially against sexual abuses. Also, though men have power over women, female offenders against children could not be guaranteed a conduit escape on the basis of the common vista of having female genders only as victims. This contested notion, at the first blush, endangers male children who are victimized and subjected to sexual abuses. Seemingly, the confidence in the afore-stated infected ideology is inflated by the POCSO Act through gender biasness in many of its provisions thus, guaranteeing a shield to the female criminals. The penetration of a penis of a child impelled by a female perpetrator into her vagina to gratify her lust has not been clearly expressed as a sexual abuse under the Act. Section 3(a) of the Act expressly states the penetration of the penis as a sexual assault¹⁶³, following section 3(b) which expressly includes insertion of penis¹⁶⁴ and then, section 3(d) mentioning the penetration through mouth¹⁶⁵. However, section 3(c)¹⁶⁶ provides manipulation of any body part of the child to penetrate the body part of the child or “making the child to do so with him” i.e. to make the child manipulate his own body part for penetration, thus, this penetration could be interpreted as referring into the body part of the child or into the perpetrator’s body. Hence, this ambiguity blurs the inclusion of penal-vaginal penetration induced by a female adult against a child in the Act.

Further, the deliberations upon the mental age of the victims have been avoided on the

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¹⁵⁵ Section 5 of the POCSO Act
¹⁵⁶ Section 11 of the POCSO Act
¹⁵⁷ Section 11 (iv) and (v) of the POCSO Act
¹⁵⁸ Section 13 of the POCSO Act
¹⁵⁹ Section 19 of the POCSO Act
¹⁶⁰ Section 24 of the POCSO Act
¹⁶¹ Chapter VII of the POCSO Act
¹⁶³ Section 3(a) of the POCSO Act, “...he penetrates his penis, to any extent, into the vagina, urethra or anus of a child or makes the child to do so with him or any other person;”...
¹⁶⁴ Section 3(b) of the POCSO Act, “...he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person;”...
¹⁶⁵ Section 3(d) of the POCSO Act, “...he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”
¹⁶⁶ Section 3(c) of the POCSO Act, “...he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person;”...
surface while the attention has been circumscribed only by the biological age to determine the persons referred under the Act.\textsuperscript{167} This creates dilemma concerned to those adult victims who are mentally retarded as children and therefore, could have similar mental agony and harm. Arguably, this manifests that the Act prioritizes the physical harm more than the mental agony, as being a child is determined according to the person’s physical characteristics and age rather than mental status. Affably, this could also throw light upon the revelation that the Act expects to dodge the mental trauma and agony of a victim because in case if it would have considered it, then the mentally ill adult victims would have been subsumed and considered it, then the mentally ill adult victims would have been subsumed and accordingly, the mental age would have been given due importance under the Act. Likewise, then the victims having enough maturity level to give consent would also have been treated separately giving regard to their mental status and thus, consented sexual activities would have been distinctly dealt under the Act. This indicates that the Act accentuates maximally on physical identity rather than hovering over mental level of a person. Also in a recent judgment, the Supreme Court has clearly refused to entertain mentally retarded people under the POCSO Act.\textsuperscript{168} Albeit the Act appears to have a proper structural framework through special courts and procedures, it fails to consider the issues revolving around the application of its provisions in the light of the prevailing conditions that impedes its efficient implementation and thus, hampers the connection between the law and its subjects.

Thus, the concern related to less number of female medical examiners\textsuperscript{169}, fewer courts with deficient ambiance pertinent to the children-victims\textsuperscript{170}, handling of victims reluctant to go through medical examination (the Act being silent upon this)\textsuperscript{171} or victims unwilling to disclose abuse before the court\textsuperscript{172} ostensibly thwarts the positive progress of the Act. The problem of

\textsuperscript{167} Section 2(d) of the Act defines a child as a person who is below the age of 18 years.

\textsuperscript{168} Rape Cases Of Mentally Challenged Victims Cannot Be Shifted To POCSO Courts: SC, Author: APOORVA MANDHANI JULY 21, 2017 10:05 PM, Read more at: http://www.livelaw.in/rape-cases-mentally-challenged-victims-cannot-shifted-pocono-courts-sc-read-judgment/


\textsuperscript{170} Lack of special courts under Protection of Children from Sexual Offences Act: A structural deficit, Journal of Family Medicine and Primary Care, Authors: Deepak Jyal, Ajay Setia, Ashutosh Sayana, Adarsh Kumar, Vyas Kumar Rathaur, and Benu Dhawan.

\textsuperscript{171} Section-41 of the POCSO Act: “Provisions of sections 3 to 13 not to apply in certain cases.—The provisions of sections 3 to 13 (both inclusive) shall not apply in case of medical examination or medical treatment of a child when such medical examination or medical treatment is undertaken with the consent of his parents or guardian.”; Consent of the victim for medical examination has not been deliberated under the said provision as well as under the Act.

\textsuperscript{172} Reviewing India’s Protection of Children from Sexual Offences Act three years on, Authors: SrishtiAgnihotri and Minakshi Das, http://blogs.lse.ac.uk/southasia/2015/12/18/reviewing-indias-protection-of-children-from-sexual-offences-act-three-years-on/
implementation also arises in relation to the police officers as there are known instances where the police has registered a case under IPC instead of the POCSO\textsuperscript{173} which thereby, reveals the improper training and non-influencing directions provided by the government to them.

Moreover, whether sexual abuse suffered by an adult during his childhood can be reported under the Act? It is evident that, prior to the POCSO Act, a proper law to deal with sexual offences against children was not available. After the enactment, the awareness proliferated gradually regarding the newly penalizing crimes under the law. Thus, whether an adult survivor could avail the umbrella of the POCSO Act against the sexual abuse which he suffered during his childhood is quite complex to be determined. The Act has not expressly dealt with this concern and therefore, seemingly, the person would have \textit{locus standi} before the court under section 19(1)\textsuperscript{174} which that mentions ‘any person’ having apprehension or knowledge can report the case. However, the obverse interpretation would again point out the digression of the Act from the mental sufferings of a victim by excluding adult survivors from the umbrella. Indeed, this would contest a concern complicating the already complex condition of the Act along with its administration and implementation procedures. Also, indubitably, this could lead to an increased risk of false complaints, blackmailing and mental harassment under the Act. Nevertheless, the risk factor cannot become an escape from providing remedy to the sufferers.

Agreeably, these leaves in the law render certain perpetrators to wander scot free and certain victims to have no avail and protection. Further, police activities usually revolve around “crime detection and investigation”.\textsuperscript{175} As per evidences, there is very little gain in the prevention sexual abuse crimes by elevating numbers of policemen and their focus on response and arrest policies.\textsuperscript{176} Rather, enhancing attention of the police authorities “by generating intelligence about and directing ‘problem-oriented policing’ methods”\textsuperscript{177} and pertinent “methods for the identification of sexually abused children”\textsuperscript{178} would ensure prevention of sexual abuse in a better manner. Lack of training skills among police officers, deficient preventive measures and accentuating more on punishments (such as recent consideration of death penalty as a

\begin{thebibliography}{99}
\bibitem{174} Section 19(1) of the POCSO Act: “Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to, .....”
\bibitem{175} Preventing Child Sexual Abuse: Evidence, Policy and Practice; Authors: Stephen Smallbone, William L. Marshall and Richard Wortley; Willian Publications, pg 111.
\bibitem{176} \textit{ibid}
\bibitem{177} \textit{ibid}
\end{thebibliography}
punishment for a rape of a child below 12 years by states including Haryana, Rajasthan and Madhya Pradesh\(^\text{179}\), along with the afore-mentioned gaps, indicate the contribution of the Act in the increased crime rate rather than the reduction. Indicatively, there is an apparent need of the establishment of local bodies focusing upon parenting education, facilitating home visiting programs, victim-focused prevention and other such community based approaches of prevention\(^\text{180}\) and thus, having a continuous and periodic check over these concerned issues, which could ameliorate the worsening situation. Therefore, along with providing cure, efforts should also be made for prevention and annihilation of these crimes. Indeed, the POCSO Act is an apt law. However, more attention towards prevention and deterrence of child sexual abuse could envisage a better future for “the future of the country” than the punitive measures that mostly fail to correct the irreparable wrongs committed against them.

**Preys and Predators**

According to the National Crime Record Bureau report, every quarter-hour a child is sexually abused.\(^\text{181}\) A study in 2007 also reveals that out of a total number of 53.22% children suffering from sexual violence, a substantial of 52.94% are male children.\(^\text{182}\) Accordingly, child sexual abuse should not be genderized\(^\text{183}\) and thus, victims could not be related to a particular gender only.\(^\text{184}\) A prey to sexual abuse could be any child falling under the rubric of male, female children, or children belonging to the third gender category\(^\text{185}\). Further, children who are younger as well as doubly oppressed, i.e. belonging to minorities, mentally or physically disabled, orphans, juvenile


\(^{180}\) Ibid 26


\(^{183}\) SEXUAL ABUSE AND EXPLOITATION OF BOYS IN SOUTH ASIA A REVIEW OF RESEARCH FINDINGS, LEGISLATION, POLICY AND PROGRAMME RESPONSES John Frederick IWP-2010-02; https://www.unicef-irc.org/publications/pdf/iwp_2010_02.pdf


\(^{186}\) Save the Children Sweden-Denmark (Slugget, C.), 2003., ‘Mapping of psychosocial support for girls and boys affected by child sexual abuse in four countries in South and Central Asia’, See from: https://resourcecentre.savethechildren.net/sites/default/files/documents/2973.pdf.
homes, refugees or conflict zone area, are more prone to be sexual abuse. However, this does not maintain that privileged children are not vulnerable and could not be subjected to abuse. Evidently, there have been substantial rise in the incest cases in India as per the NCRB report ‘ Crime in India, 2015’. A study by a NGO, named as RAHI maintained that the predators mostly involve family members and a person who is routinely involved in a child’s life. This exhibits a serious threat to children who are subjected to violence by the trusted people, thereby inhibiting their possibility of disclosing abuses and thwarted for the protection of family’s honor and to maintain secrecy. Thus, the predators have a proper shielded conduit which not only helps them to escape from their guilt but also to commit crimes repeatedly without any threat of disclosure. Likewise, sexual violence against mentally-retarded persons i.e. those having a mental status of children has also become a grave concern especially after the Supreme Court refusal of the inclusion of mentally ill children under the POCSO Act. This again reflects the primary concern accentuated under the law to be only physical violence, thus, wholly neglecting the mental trauma of a victim. Further, the perpetrators could be categorized under two rubrics: firstly, the pedophiles which refer to those people who have psychiatric-disorder of being specifically sexually attracted to children and secondly, those persons who commit offence under any stress or inciting factor commit such offences. Apparently, the former has higher crime commission rate than the latter. The juvenile offenders in these offences circumscribe again as a serious issue where the probability of commission of similar kind of offences in the juvenile homes by such offenders increases. This evinces the inactivity and difficulty to control and prevent sexual crimes against children in certain cases and also in unmasking the predators. Arguably, punishments do not act as a complete remedy against these grievous aggravated crimes and rather, mostly the satisfaction from committing sexual crimes becomes the main focus of the parents’, 1998; Author: ; PinkiVirani, Penguin Publications

187 Juvenile homes are hellholes, says report on child rape; NEW DELHI, APRIL 21, 2013 02:16 IST; http://www.thehindu.com/news/national/juvenil e-homes-are-hellholes-says-report-on-child-rape/article4637540.ece


191 “Voices from the Silent Zone”, by Recovering and Healing from Incest (RAHI).http://www.rahifoundation.org/

192ibid 19

193 Trends & issues in crime and criminal justice no. 429, Misperceptions about child sex offenders; Author: Kelly Richards, ISSN: 1836-2206; https://aic.gov.au/publications/tandi/tandi-429

194ibid

195ibid 37
perpetrators.\textsuperscript{196} What could be sought at the first instance is indubitably the prevention of these crimes that would remedy most of these problems, albeit requiring diligent efforts.\textsuperscript{197} Certainly, these concerns have to be addressed in order to extirpate sexual offences against children and provide them a secure future.

\textit{Conclusion}

Conclusively, the afore-stated concerns and complications indicate that the law possessing lacunae and loopholes attenuates its efficiency in alleviating the sufferings of victims and in inhibiting the increasing crimes. Indeed, the POCSO Act furnishes the major concerns pertinent to sexual abuses against children however, the hiatuses in the law, as afore-discoursed has somehow mitigated its progress and contributed in the increased crime rate. This discourse has attempted to throw light upon such vacancies in the law which requires exigent redress for its better implementation and cause it to transform into a perfect weapon for preys against the predators thus, effectively curbing child sexual abuses in India. Thus, in order to uproot and eliminate sexual offences against children, spotlight should be placed on the prevention measures and contested concerns that could contribute to the law its comprehensiveness.

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\textsuperscript{196}ibid 26\hspace{1cm}\textsuperscript{197}ibid 30
APPLICATION OF THE
ARBITRATION AND CONCILIATION
(AMENDMENT) ACT, 2015:
RETROSPECTIVE OR
PROSPECTIVE

By Harshit Goel
From Government Law College, Mumbai

The Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the “Amendment Act”) had a celebrated entry in the Indian Arbitration regime. In August 2014, the Law Commission of India had published its 246th Report reviewing the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “Act”). The key recommendations of the report has now become a reality in the form of the Amendment Act, which came into force on October 23, 2015.

Section 26 of the Amendment Act provides for the applicability of the Amendment Act. The section is divided into two parts. The first part provides that the Amendment Act would not apply to arbitral proceedings which commenced before the commencement of the Amendment Act in accordance to Section 21 of the Act. But if the parties to the arbitration agrees then the Amendment Act could be applied to arbitral proceedings which commenced before October 23, 2015. The second part of Section 26 provides that the Amendment Act would apply in relation to arbitral proceedings which commenced on or after the date of commencement of the Amendment Act.

This section gave birth to different opinions on the interpretation of the phrases “to arbitral proceedings” and “in relation to arbitral proceedings” used in the section.

This article will first analyse the jurisprudence on the prospective and retrospective application of any statute. It will then present the different views taken by the Supreme Court and the High Courts of Calcutta, Bombay and Delhi on the interpretation of Section 26. The article will conclude with the views of the author regarding the interpretation of Section 26 and Prospective application of the Amendment Act.

General Principle of the Applicability of a Statute

The cardinal principle of construction of law is that every statute is prospective unless it is expressly or by necessary implication made to have a retrospective operation. When

198Arbitration & Conciliation (Amendment) Act, 2015, No. 3 of 2016 (India)
200Act not to apply to pending arbitral proceedings.-Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the Principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this act.
20121. Commencement of arbitral proceedings—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.
the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations, it is deemed to be prospective only, unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights. However, when the statute deals with merely procedural matters, it is deemed to be retrospective, unless such a construction is textually inadmissible. 203 No person has vested right in any course of procedure. 204

In Thirumalai Chemicals Limited v. Union of India and Others205, Supreme Court held that though it may be true that amendments to procedural laws can be applied retrospectively, procedural statutes, which affect the rights of the parties, cannot be applied retrospectively.

The view of Calcutta High Court

In Sri Tufan Chatterjee v. Sri Rangan Dhar, 206 the issue before the Calcutta High Court was whether the Court has been deprived of power to grant interim relief under Section 9 of the Act from the date on which the Amendment Act came into force 207, if an Arbitral Tribunal has been constituted, and arbitral proceedings have commenced.

Section 9(3) of the amended Act provides that once the Arbitral Tribunal has been constituted, the court shall not entertain an application under Section 9(1), unless the court finds that circumstances exist, which may not render the remedy provided under Section 17 efficacious.

The High Court held that the arbitral proceedings can be said to have commenced, when a request for reference to arbitration made by the Claimant is received by the Respondent and/or the competent authority under the arbitration agreement. The arbitral proceedings, which so commence, terminate with a final award as provided in Section 32(1) or with an order under Section 32(2) of the Act. Proceedings in Court under the Act whether initiated before, during or after the termination of the arbitral proceedings, would not attract Section 26 of the Amendment Act.

Thus, the Court held that the Amendment Act has retrospective operation from October 23, 2015. After October 23, 2015, the Court cannot entertain an application for interim relief under Section 9(1) of the Act, where the arbitral tribunal has already been constituted, unless the Court is satisfied that circumstances exist under Section 9(3) of the Amended Act, which may not render the remedy provided under Section 17 efficacious.

203 Delhi Cloth and General Mills Co. Ltd. v. CIT, A.I.R. 1927 P.C. 242. See also: In Hitendra Vishnu Thakur and Others v. State of Maharashtra and others 1994 (4) S.C.C. 602, the Supreme Court held that a statute that affects substantive rights is presumed to be prospective in operation, unless made retrospective, either expressly or by necessary intendment. Furthermore, the law relating to forum and limitation is procedural in nature, whereas the law relating to action and right of appeal, even though remedial, is substantive in nature.
206 Sri Tufan Chatterjee v. Sri Rangan Dhar, Fmat No. 47 of 2016 (Calcutta High Court)
207 Amendment Act came into force on 23rd October, 2015
The View of Bombay High Court

In *M/s. Rendezvous Sports World v. The Board of Control for Cricket in India*\(^{208}\) the issue before the Bombay high Court was that when the application under Section 34 of the Act has been filed prior to the commencement of the Amendment Act, whether there would be an automatic stay on the enforcement of the award under Section 36 of the Act or whether the Award debtor has to make a separate application for stay under Section 36(2) of the amended Act.

The Court held that an application under Section 34 of the Act is not a continuation of the arbitral proceedings. As provided in the Act itself, the arbitral proceedings terminate on passing of the final award. The challenge to the arbitral award provided for in the Act is minimal. The only order that can be passed on the challenge under Section 34 is either of upholding the Award as it is or of setting it aside in its entirety, except where parts of the award are separable. Section 36, which pertains to the enforceability of an arbitral award cannot go along with the application for challenge to the arbitral award so as to form a package of rights.

The Court has given the plain literal meaning to the amended Section 36 and the use of verb “has been” was held to be in present perfect tense. Therefore, Section 36 of the Act would be applicable not only to cases where a petition under Section 34 of the Act is filed after October 23, 2015 but also to cases where a petition has been filed before October 23, 2015. In other words, all the applications under Section 34 pending in the court for consideration will attract section 36(2) of the Amended Act.

The Court also held that the remedy available to an aggrieved award-debtor under Section 34 was not taken away by the Amendment Act. A vested right is available to the award-debtor only in the matter of challenge to the arbitral award, a provision which has remained intact and not been affected by the amendment. Section 36 of the Act pertains only to the enforcement and execution of an award.

In conclusion, the Court held that the application of amended Section 36 to the existing matters i.e. the applications under Section 34 of the Act, that are pending as on October 23, 2015 give the amendment prospective effect and not retrospective effect.

The view of Delhi High Court

In *Ardee Infrastructure Pvt. Ltd. v. Ms. Anuradha Bhatia*\(^ {209}\), the issue before Delhi High Court was whether the phrase “to arbitral proceedings” used in first part of Section 26 of the Amendment Act includes court proceedings arising out of arbitration or not.

The court held that the pendency of any legal proceedings or otherwise would not come in the way of determining as to whether the right had accrued under the Act prior to amendment. The Court referred to *Thyssen*\(^ {210}\) case and observed that the right to

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\(^{208}\) *M/s. Rendezvous Sports World v. The Board of Control for Cricket in India*, Chamber Summons No. 1530 of 2015 with 1532 of 2015. (Bombay High Court)

\(^{209}\) *Ardee Infrastructure Pvt. Ltd. v. Ms. Anuradha Bhatia*, FAO(OS) No. 221/2016 (Delhi High Court)

\(^{210}\) *Thyssen Stahlunion Gmbh v. Steel Authority of India Limited: 1999 (9) S.C.C. 334.*
have the award enforced (which also comprises of the negative right of the award debtor to not have it enforced till his objections under Section 34 of the Act are heard and decided) is certainly an accrued right. Given the fact that the amended Section 36 takes away the right of an automatic stay of enforcement of an award, it is clear that the amended Section 36 would definitely impinge upon the accrued right of the party against whom the award is given after the arbitral proceedings have been held under the Act. Since an accrued right is affected, unless a contrary intention appears in the Amendment Act, the amendment would be treated as prospective in operation from the standpoint of commencement of the arbitral proceedings.

The Court observed that the Amendment Act has amended Section 9 as well as Section 17 of the Act. While Section 9 pertains to interim measures which may be directed by the court prior, during arbitral proceedings or after the making of the award, Section 17 deals with the interim measures which may be ordered by an arbitral tribunal. There would be serious anomaly related with these sections where the provisions of the Act would be saved only in respect of the proceedings before the arbitral tribunal and would not extend to court proceedings if arbitral proceeding commenced prior to October 23, 2015. If it is to be accepted, then, in respect of arbitral proceedings commenced prior to October 23, 2015, the amended provisions would apply to proceedings under Section 9 of the Act, but not to Section 17 thereof. This would result in a serious anomaly.

Therefore, the Court held that the words “to arbitral proceedings” must be interpreted as “in relation to arbitral proceedings” which includes all court proceedings.

**The view of Supreme Court**

The Supreme Court on March 15, 2018 in *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd* 211 considered the interpretation of Section 26 of the Amendment Act.

The Court made a distinction between the two parts of Section 26. It held that the first part of Section 26 applies to only arbitral proceedings before the arbitral tribunal because the word “to” have been used instead of “in relation to” and commencement is mentioned with reference to Section 21 of the Act. Further, it referred to the heading of the Chapter V of the Act. While it held that the second part of Section 26 deals with the court proceedings which relate to the arbitral proceedings. The Court concluded that the Amendment Act is prospective in nature.

The Supreme Court also made a distinction with reference to automatic stay to the enforcement of the award under Section 36 of the Act. Under the old Act, if the award was challenged under Section 34, there used to be an automatic stay on the enforcement of the award. This automatic stay has been taken away by substituting Section 36 by the Amendment Act. An application for staying enforcement of award has to be filed on

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211 Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd., Civil Appeal Nos.2879-2880 (Arising out of SLP (C) Nos. 19545-19546 of 2016).
which judge has the discretion to grant stay. The Court held that the execution of an award is a procedural matter and there is no substantive right of the judgment debtor to resist execution. The amended Section 36 would apply to all cases including the cases in which Section 34 application is pending on the date of commencement of the Amendment Act.

Prospective Application of the Amendment Act

The Supreme Court has affirmed the view of the Bombay High Court which stated that the Amendment Act is applicable prospectively. However, the judgment of the Supreme Court is silent on the question of what would prospective application mean. The only direction it has given is through a distinction with respect to the application of Section 34 and automatic stay on the enforcement of the award.

In the further paragraphs, the points on which the amended Act would apply prospectively are discussed with reference to different opinions of Courts. Also with all due respect to the Supreme Court, I differ on the point of distinction made by the Court with reference to automatic stay on enforcement of Award under Section 36 of the Act when the Award is challenged under Section 34 of the Act.

1. Amendment in Section 9 and Section 17

Section 9 and Section 17 of the Act deal with interim measures ordered by the court and arbitral tribunal respectively. Section 17(2) after amendment gives power to arbitral tribunal to make interim orders which are statutorily enforceable in same manner as orders of the court. This provision was not present in the Act. Also, Section 9(3) has been introduced by the Amendment Act which provides that the court shall not entertain an application under section 9(1) if the arbitral tribunal has already been constituted.

Since the Supreme Court has not laid down anything in relation to Section 9 and Section 17, and if the interpretation of Calcutta High Court in Sri Tufaan is to be accepted, it would result in serious contradiction between the enforcement of Section 9 and Section 17. For the cases in which arbitral proceedings have commenced before October 23, 2015 but are still pending, court proceedings would be conducted under amended Act and the arbitral proceedings would have to be conducted under the Act. Thus the person seeking interim relief would be denied

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212 Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd., Civil Appeal Nos.2879-2880 (Arising out of SLP (C) Nos. 19545-19546 of 2016).

213 17. Interim measures ordered by Arbitral Tribunal (1)... (2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.

214 Sundaram Finance Ltd v. NEPC India Ltd., (1999) 2 S.C.C. 479

215 9. Interim Measures etc. by court - (1)... (2)... (3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under subsection (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.

216 Sri Tufan Chatterjee v. Sri Rangan Dhar, Fmat No. 47 of 2016 (Calcutta High Court)
remedy since the court because of the restriction imposed by section 9(3) would not entertain his application. At the same time the person would also not be able to take recourse under Section 17 (under the Act), since there is no power conferred on the arbitral tribunal to enforce its order nor does it provide for judicial enforcement.

Therefore, because of this contradictory situation, the interpretation of Calcutta High Court should not be accepted. If we apply the Amendment Act prospectively as laid down by the Supreme Court and the Delhi High Court, there would be no such contradictions as the interim measure application will be governed by Section 9 of the Act in which the court has power to grant interim orders.

2. Amendment in Section 8 of the Act
   According to Section 8 of the Act, a non-signatory to the arbitration agreement could not be referred to a domestic arbitration by the court. However, Section 45 provides that in arbitrations with a foreign seat, some non-signatories can be subjected to arbitrations without consent.

   The amended Section 8(1) uses the expression “one of the parties or any parties” and “refer parties to arbitration”. The expression “any person” in the Section clearly refers to the legislative intent of enlarging the scope of the words beyond the parties who are signatories to the arbitration agreement.

   If the interpretation made by Calcutta High Court of Section 26 of the Amendment Act is to be accepted then in the case where an application under Section 8 is filed by a party to refer the dispute to arbitration involving a non-signatory, the court would have to adopt the Chloro Controls test, as required under the amended Section 8, and may refer the parties (including the non-signatory) to arbitration. However, the
consequent arbitration would still be subject to the old regime as the arbitration started before amendment. Forthis reason, the arbitral tribunal would have no jurisdiction since the arbitral proceeding would then involve not just the parties, but also any person claiming through or under a party. It certainly cannot be that the intention of the Legislature was to have the arbitral tribunal and the courts apply different standards in relation to the same proceedings.

There would not be any such anomaly in relation to Section 8 if the Amendment Act is applied prospectively.

3. **Amendment act is affecting accrued rights and therefore it would be prospective in operation**

   In *Thyssen*\(^{224}\) case, where after considering several earlier decisions, the Supreme Court observed that it is not necessary that for the right to accrue, legal proceedings must be pending when the Act comes into force. To have the award enforced when arbitral proceedings commenced under the Act, to get the award enforced was certainly an accrued right under the Act. In other words, all the aspects of enforceability of an award entail an accrued right both in the person in whose favour the award is made and against whom the award is pronounced. This exactly covers the situation where the arbitral proceedings were commenced prior to October 23, 2015 and the award was also made prior to October 23, 2015 but the petition under Section 34 had been filed after October 23, 2015. The right to have the award enforced (which also comprises of the negative right of the award debtor to not have it enforced till his objections under Section 34 are heard and decided) is certainly an accrued right.\(^{225}\)

   The amended Section 36 takes away the right of an automatic stay of enforcement of an award. The amendment introduced in Section 36 by the Amendment Act would definitely impinge upon the accrued right of the party against whom the award is given after the arbitral proceedings have been held under the provisions of the Act. Since an accrued right is affected, unless a contrary intention appears in the amending statute, the amendments would have to be treated as prospective in operation.\(^{226}\) The distinction made by the Supreme Court takes away the accrued right of the party against whom the award is given and hence must be rectified.

4. **Section 6 of General Clauses Act will apply**

   Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision.\(^{227}\) Substitution of Section 36 of the Act by the Amendment Act amounts to repeal of Section 36 and part repeal of the Act. And therefore the provision of Section 6 of the General Clauses Act will apply.

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\(^{224}\) Thyssen Stahlunion Gmbh v. Steel Authority of India Limited: 1999 (9) S.C.C. 334.

\(^{225}\) Ibid.


\(^{227}\) State of Rajasthan v Mangilal Pindwal, (1996) 5 S.C.C. 60
Clauses Act \(^{228}\) which operates in the situation of repeal of a Statute, becomes effective and applicable. First part of Section 26 of the Amendment Act, which is a saving provision, does not provide for the post-award proceedings. Therefore, the section is necessarily non-exhaustive. A saving provision is not exhaustive of the rights that are saved and just because a right is not expressly saved by the saving provision, it does not mean that such right stands extinguished. A non-exhaustive savings clause leaves it to Section 6 of the General Clauses Act to determine which additional rights are saved. \(^{229}\) Unless a repealing statute expressly extinguishes a vested right or expressly affects a pending legal proceedings under the repealed statute, the accrued vested right, or legal proceeding is not affected. Since part one of Section 26 of the Amendment Act does not expressly deals with post-award proceedings and appeals arising from the arbitration proceedings commenced prior to October 23, 2015, the general law in relation to repeal would be applicable. It would mean that the amended provisions of the Act will not apply to the court proceedings arising out of arbitral proceedings commenced prior to October 23, 2015.

**Conclusion**

The Report of High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India chaired by Justice B.N. Srikrishna (Retired) recommended that permitting the Amendment Act to apply to pending court proceedings related to arbitration commenced prior to October 23, 2015 would result in uncertainty and prejudice to parties, as they may have to be heard again. \(^{230}\) It may also not be advisable to make the Amendment Act applicable to fresh Court proceedings in relation to such arbitrations, as it may result in an inconsistent position. The committee recommended that the applicability of the Amendment Act be limited to arbitrations commenced on or after October 23, 2015 and related court proceedings.

The Union Cabinet has also approved the Arbitration and Conciliation (Amendment) Bill, 2018. \(^{231}\) The proposed bill incorporates and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.”

\(^{228}\) Section 6: Effect of Repeal- where this act, or any [central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not--

(a) …

(b) …

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) …

(e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;


\(^{231}\) Press Information Bureau, Government of India, Ministry of Law & Justice, *Cabinet approves the Arbitration and Conciliation (Amendment) Bill, 2018*, 7th March 2018 available at:
the recommendations of Justice Srikrishna’s Committee report. It provides that the Amendment Act would be prospectively applicable to all arbitral proceedings and court proceedings in relation to such arbitral proceedings. The Supreme Court in its judgment has asked the law ministry to take into consideration the judgment before passing any amendment.

In light of these policy considerations and the arguments stated, it is evident that the Amendment Act has to be applied prospectively as has been interpreted by the Supreme Court. However, distinction made by the Supreme Court is not tenable and must be rectified.

http://pib.nic.in/newsite/PrintRelease.aspx?relid=177128
TECHNOLOGIES DEVELOPMENT, CLIMATE CHANGE – HUMAN HEALTH AND WELFARE ISSUES

By Honey Verma
From Amity University, Jaipur

ABSTRACT

TECHNOLOGIES DEVELOPMENT, CLIMATE CHANGE – HUMAN HEALTH AND WELFARE ISSUES

I stand before you not as an expert but as a concerned human being one of the four-hundred thousand billion who march in the streets of their homeland who want to solve our climate crises. Let us compare ourselves with actors because mostly people of our generation sees that as a compliment. An actor plays a fictitious character often solving fictitious problems, I believe mankind has seen the problem of climate change in the same way, as if it was a fiction, as if pretending that climate change weren’t real but somehow make it go away, but I think we all know better than that now. Every week we see new and undeniable climate events, evidence that accelerate in climate change is here right now. Droughts are intensifying; our oceans are polluting, methane in fumes rising up from the ocean floor, we are seeing extreme weather events, West Antarctic and Greenland ice sheets melting in an unpresidential rate, decades ahead of scientific prediction. None of this is fictitious and none of these are hogwash, these are facts. The scientific community knows it, industries know it, and government knows it. The chief of the U.S. navy specific command admiral Samuel said that “climate change is our single greatest security threat”. My friends, this body, perhaps more than any other gathering in human history now faces this difficult but achievable task.

You can either make history or you will be vilified by it. To be clear this is not about telling people to change their light bulb or buy a hybrid car, this disaster has grown beyond the choices that individuals make, this is now about our industries and our governments around the world taking massive large scale action. This must be our moment for action. We need to put a price tag on carbon emissions and eliminate government subsidies on oil, coal and gas companies, we need to end the free right that industrial polluters are given in the name of free market economy, they do not deserve out taxes, they deserve our scrutiny, for the economy itself will die if our ecosystem collapse.

The good news is, renewable energy is not only achievable but it’s also a good economy policy. This is not a debate, it is a human want, clean air and livable climate are valuable human rights, and solving this problem is not a question of politics but the question of our own survival. This is the most urgent of times and the most urgent of messages. People, actors pretend for living, but you do not. The people make their voices heard on Sunday around the world and the momentum will not stop, but now it is our turn. The time to answer human kind’s greatest challenge is now. I beg of you to face it with courage and honesty.

Introduction

In the last decade, discussions of environmental economics and policy have become increasingly permeated by issues related to technological change. An
understanding of the process of technological change is important for two broad reasons. First, the environmental impact of social and economic activity is profoundly affected by the rate and direction of technological change. New technologies may create or facilitate increased pollution, or may mitigate or replace existing polluting activities. Further, because many environmental problems and policy responses thereto are evaluated over time horizons of decades or centuries, the cumulative impact of technological changes is likely to be large. Indeed, uncertainty about the future rate and direction of technological change is often an important sensitivity in “baseline” forecasts of the severity of environmental problems. In global climate change modeling, for example, different assumptions about autonomous improvements in energy efficiency are often the single largest source of difference among predictions of the cost of achieving given policy objectives (Weyant 1993; Energy Modeling Forum1996).

Second, environmental policy interventions themselves create new constraints and incentives that affect the process of technological change. These induced effects of environmental policy on technology may have substantial implications for the normative analysis of policy decisions. They may have quantitatively important consequences in the context of cost-benefit or cost-effectiveness analyses of such policies. They may also have implications for welfare analyses, because the process of technological change is characterized by externalities and market failures with important welfare consequences beyond those associated with environmental issues. Our goals in this are to summarize for environmental economists current thinking on technological change in the broader economics literature; to survey the growing literature on the interaction between technology and the environment; and to explore the normative implications of these analyses. This is a large task, inevitably requiring unfortunate but necessary omissions. In particular, we confine ourselves to the relationship between technology and problems of environmental pollution, leaving aside a large literature on technological change in agriculture and natural resources more broadly.1 Because of the significant environmental implications of fossil fuel combustion, we include in our review some of the relevant literature on technological change and energy use.

### Human impact on the environment

**Human impact on the environment**

Human impact on the environment or anthropogenic impact on the environment includes impacts on biophysical environments, biodiversity, and other resources. The term anthropogenic designates an effect or object resulting from human activity. The term was first used in the technical sense by Russian geologist Alexey Pavlov, and was first used in English by British ecologist Arthur Tansley in reference to human influences on climax plant communities. The atmospheric scientist Paul Crutzen introduced the term "Anthropocene" in the mid-1970s. The term is sometimes used in the context of pollution emissions that are produced as a result of human activities but applies broadly to all major human impacts on the environment.
Causes

Technology
The applications of technology often result in unavoidable and unexpected environmental impacts, which according to the \( \text{I = PAT} \) equation is measured as resource use or pollution generated per unit GDP. Environmental impacts caused by the application of technology are often perceived as unavoidable for several reasons. First, given that the purpose of many technologies is to exploit, control, or otherwise "improve" upon nature for the perceived benefit of humanity while at the same time the myriad of processes in nature have been optimized and are continually adjusted by evolution, any disturbance of these natural processes by technology is likely to result in negative environmental consequences. Second, the conservation of mass principle and the first law of thermodynamics (i.e., conservation of energy) dictate that whenever material resources or energy are moved around or manipulated by technology, environmental consequences are inescapable. Third, according to the second law of thermodynamics, order can be increased within a system (such as the human economy) only by increasing disorder or entropy outside the system (i.e., the environment). Thus, technologies can create "order" in the human economy (i.e., order as manifested in buildings, factories, transportation networks, communication systems, etc.) only at the expense of increasing "disorder" in the environment. According to a number of studies, increased entropy is likely to be correlated to negative environmental impacts.

Agriculture
The environmental impact of agriculture varies based on the wide variety of agricultural practices employed around the world. Ultimately, the environmental impact depends on the production practices of the system used by farmers. The connection between emissions into the environment and the farming system is indirect, as it also depends on other climate variables such as rainfall and temperature.

There are two types of indicators of environmental impact: "means-based", which is based on the farmer's production methods, and "effect-based", which is the impact that farming methods have on the farming system or on emissions to the environment. An example of a means-based indicator would be the quality of groundwater, that is effected by the amount of nitrogen applied to the soil. An indicator reflecting the loss of nitrate to groundwater would be effect-based.

The environmental impact of agriculture involves a variety of factors from the soil, to water, the air, animal and soil diversity, plants, and the food itself. Some of the environmental issues that are related to agriculture are climate change, deforestation, genetic engineering, irrigation problems, pollutants, soil degradation, and waste.

Fishing
The environmental impact of fishing can be divided into issues that involve the availability of fish to be caught, such as overfishing, sustainable fisheries, and fisheries management; and issues that involve the impact of fishing on other elements of the environment, such as by-
catch and destruction of habitat such as coral reefs. These conservation issues are part of marine conservation, and are addressed in science programs. There is a growing gap between how many fish are available to be caught and humanity’s desire to catch them, a problem that gets worse as the world population grows. Similar to other environmental issues, there can be conflict between the fishermen who depend on fishing for their livelihoods and fishery scientists who realize that if future fish populations are to be sustainable then some fisheries must reduce or even close. The journal Science published a four-year study in November 2006, which predicted that, at prevailing trends, the world would run out of wild-caught seafood in 2048. The scientists stated that the decline was a result of overfishing, pollution and other environmental factors that were reducing the population of fisheries at the same time as their ecosystems were being degraded. Yet, again the analysis has met criticism as being fundamentally flawed, and many fishery management officials, industry representatives and scientists challenge the findings, although the debate continues. Many countries, such as Tonga, the United States, Australia and New Zealand, and international management bodies have taken steps to appropriately manage marine resources.

Irrigation
The environmental impact of irrigation includes the changes in quantity and quality of soil and water as a result of irrigation and the ensuing effects on natural and social conditions at the tail-end and downstream of the irrigation scheme. The impacts stem from the changed hydrological conditions owing to the installation and operation of the scheme.

- a) the downstream river discharge is reduced
- b) the evaporation in the scheme is increased
- c) the groundwater recharge in the scheme is increased
- d) the level of the water table rises
- e) The drainage flow is increased.

These may be called direct effects. Effects on soil and water quality are indirect and complex, and subsequent impacts on natural, ecological and socio-economic conditions are intricate. In some, but not all instances, water logging and soil salinization can result. However, irrigation can also be used, together with soil drainage, to overcome soil salinization by leaching excess salts from the vicinity of the root zone. Irrigation can also be done extracting groundwater by (tube) wells. As a hydrological result it is found that the level of the water descends. The effects may be water mining, land/soil subsidence, and, along the coast, saltwater intrusion. Irrigation projects can have large benefits, but the negative side effects are often overlooked. Agricultural irrigation technologies such as high powered water pumps, dams, and pipelines are responsible for the large-scale depletion of fresh water resources such as aquifers, lakes, and rivers. As a result of this massive diversion of freshwater, lakes, rivers, and creeks are running dry, severely altering or stressing surrounding ecosystems, and contributing to the extinction of many aquatic species.
Agricultural land loss and soil erosion
Lal and Stewart estimated global loss of agricultural land by degradation and abandonment at 12 million hectares per year. In contrast, according to Scherr, GLASOD (Global Assessment of Human-Induced Soil Degradation, under the UN Environment Programme) estimated that 6 million hectares of agricultural land per year had been lost to soil degradation since the mid-1940s, and she noted that this magnitude is similar to earlier estimates by Dudal and by Rozanov et al. Such losses are attributable not only to soil erosion, but also to salinization, loss of nutrients and organic matter, acidification, compaction, water logging, and subsidence. Human-induced land degradation tends to be particularly serious in dry regions. Focusing on soil properties, Oldeman estimated that about 19 million square kilometers of global land area had been degraded; Dregne and Chou, who included degradation of vegetation cover as well as soil, estimated about 36 million square kilometers degraded in the world's dry regions. Despite estimated losses of agricultural land, the amount of arable land used in crop production globally increased by about 9% from 1961 to 2012, and is estimated to have been 1.396 billion hectares in 2012. Global average soil erosion rates are thought to be high, and erosion rates on conventional cropland generally exceed estimates of soil production rates, usually by more than an order of magnitude. In the US, sampling for erosion estimates by the US NRCS (Natural Resources Conservation Service) is statistically based, and estimation uses the Universal Soil Loss Equation and Wind Erosion Equation. For 2010, annual average soil loss by sheet, rill and wind erosion on non-federal US land was estimated to be 10.7 t/ha on cropland and 1.9 t/ha on pasture land; the average soil erosion rate on US cropland had been reduced by about 34% since 1982. No-till and low-till practices have become increasingly common on North American cropland used for production of grains such as wheat and barley. On uncultivated cropland, the recent average total soil loss has been 2.2 t/ha per year. In comparison with agriculture using conventional cultivation, it has been suggested that, because no-till agriculture produces erosion rates much closer to soil production rates, it could provide a foundation for sustainable agriculture.

Meat production
Environmental impacts associated with meat production include use of fossil energy, water and land resources, greenhouse gas emissions, and in some instances, rainforest clearing, water pollution and species endangerment, among other adverse effects. Steinfeld et al. of the FAO estimated that 18% of global anthropogenic GHG (greenhouse gas) emissions (estimated as 100-year carbon dioxide equivalents) are associated in some way with livestock production. A more recent FAO analysis estimated that all agriculture, including the livestock sector, in 2011 accounted for 12% of global anthropogenic GHG emissions expressed as 100-year carbon dioxide equivalents. Similarly, the Intergovernmental Panel on Climate Change has estimated that about 10 to 12% of global anthropogenic GHG emissions (expressed as 100-year carbon dioxide equivalents) were assignable to all of agriculture, including the livestock sector, in 2005 and again in 2010. The percentage assignable to livestock would be some fraction of the percentage for...
agriculture. The amount assignable to meat production would be some fraction of that assigned to livestock. FAO data indicate that meat accounted for 26% of global livestock product tonnage in 2011. However, many estimates use different sectoral assignment of some emissions.

Environmental specialists Jeff Anhang and Robert Goodland with the IFC and World Bank, have put the GHG associated with livestock at 51%, pointing out the FAO report failed to account for the 8,769 metric tons of respiratory CO$_2$ produced each year, undercounted methane production and land use associated with livestock, and failed to properly categorize emissions related to the slaughtering, processing, packaging, storing and transporting of animals and animal products.

Globally, enteric fermentation (mostly in ruminant livestock) accounts for about 27% of anthropogenic methane emissions. Despite methane’s 100-year global warming potential, recently estimated at 28 without and 34 with climate carbon feedbacks, methane emission is currently contributing relatively little to global warming. Over the decade 2000 through 2009, atmospheric methane content increased by an average of only 6 Tg per year (because nearly all natural and anthropogenic methane emission was offset by degradation), while atmospheric carbon dioxide increased by nearly 15,000 Tg per year. At the currently estimated rate of methane degradation, slight reduction of anthropogenic methane emissions, to about 98% of that decade’s average, would be expected to result in no further increase of atmospheric methane content. Although reduction of methane emissions would have a rapid effect on warming, the expected effect would be small.

Other anthropogenic GHG emissions associated with livestock production include carbon dioxide from fossil fuel consumption (mostly for production, harvesting and transport of feed), and nitrous oxide emissions associated with use of nitrogenous fertilizers, growing of nitrogen-fixing legume vegetation and manure management. Management practices that can mitigate GHG emissions from production of livestock and feed have been identified.

Livestock production, including feed production and grazing, uses about 30% of the earth’s ice-free terrestrial surface: about 26% for grazing and about 4% for other feed production. The intensity and duration of grazing can vary greatly and these, together with climate, vegetation and climate, influence the nature and importance of grazing’s environmental impact, which can range from severe to negligible, and in some cases (as noted below) beneficial. Excessive use of vegetation by grazing can be especially conducive to land degradation in dry areas.

Considerable water use is associated with meat production, mostly because of water used in production of vegetation that provides feed. There are several published estimates of water use associated with livestock and meat production, but the amount of water use assignable to such production is seldom estimated. For example, “green water” use is evapotranspirational use of soil water that has been provided directly by precipitation; and “green water” has been estimated to account for 94% of global beef cattle production’s “water footprint”, and on rangeland, as much as 99.5% of the water use associated with beef production is “green water”. However, it would be misleading simply to assign that associated rangeland green water use to beef production, partly
because that evapotranspirational use occurs even in the absence of cattle. Even when cattle are present, most of that associated water use can be considered assignable to production of terrestrial environmental values, because it produces root and residue biomass important for erosion control, stabilization of soil structure, nutrient cycling, carbon sequestration, support of numerous primary consumers, many of which support higher trophic levels, etc. Withdrawn water (from surface and groundwater sources) is used for livestock watering, and in some cases is also used for irrigation of forage and feed crops. Whereas all irrigation in the US (including loss in conveyance) is estimated to account for about 38% of US withdrawn freshwater use, irrigation water for production of livestock feed and forage has been estimated to account for about 9%; other withdrawn freshwater use for the livestock sector (for drinking, washdown of facilities, etc.) is estimated at about 0.7%. Because of the preponderance of non-meat products from the livestock sector, only some fraction of this water use is assignable to meat production.

Impairment of water quality by manure and other substances in runoff and infiltrating water is a concern, especially where intensive livestock production is carried out. In the US, in a comparison of 32 industries, the livestock industry was found to have a relatively good record of compliance with environmental regulations pursuant to the Clean Water Act and Clean Air Act, but pollution issues from large livestock operations can sometimes be serious where violations occur. Various measures have been suggested by the US Environmental Protection Agency, among others, which can help reduce livestock damage to stream water quality and riparian environments.

Data of a USDA study indicate that, in 2002, about 0.6% of non-solar energy use in the United States was accounted for by production of meat-producing livestock and poultry. This estimate included embodied energy used in production, such as energy used in manufacture and transport of fertilizer for feed production. (Non-solar energy is specified, because solar energy is used in such processes as photosynthesis and hay-drying.)

Changes in livestock production practices influence the environmental impact of meat production, as illustrated by some beef data. In the US beef production system, practices prevailing in 2007 are estimated to have involved 8.6% less fossil fuel use, 16.3% less greenhouse gas emissions (estimated as 100-year carbon dioxide equivalents), 12.1% less withdrawn water use and 33.0% less land use, per unit mass of beef produced, than in 1977. From 1980 to 2012 in the US, while population increased by 38%, the small ruminant inventory decreased by 42%, the cattle-and-calves inventory decreased by 17%, and methane emissions from livestock decreased by 18%; yet despite the reduction in cattle numbers, US beef production increased over that period.

Some impacts of meat-producing livestock may be considered environmentally beneficial. These include waste reduction by conversion of human-inedible crop residues to food, use of livestock as an alternative to herbicides for control of invasive and noxious weeds and other vegetation management, use of animal manure as fertilizer as a substitute for those synthetic fertilizers that require considerable fossil fuel use for manufacture, grazing use for wildlife.
habitat enhancement, and carbon sequestration in response to grazing practices, among others. Conversely, according to some studies appearing in peer-reviewed journals the growing demand for meat is contributing to significant biodiversity loss as it is a significant driver of deforestation and habitat destruction.

Current Environmental Issues
It is high time for human beings to take the ‘right’ action towards saving the earth from major environmental issues. If ignored today, these ill effects are sure to curb human existence in the near future.

Our planet earth has a natural environment, known as ‘Ecosystem’ which includes all humans, plant life, mountains, glaciers, atmosphere, rocks, galaxy, massive oceans and seas. It also includes natural resources such as water, electric charge, fire, magnetism, air and climate.

Many of the technologies we use every day consume a lot more resources and power than they need to, and using and manufacturing them can create a mess. Here are a few of the ways that technology can harm the environment:

Pollution - Air, water, heat and noise pollution can all be caused by producing and using technology

Consuming resources - Non-renewable resources, including precious metals like gold, are used to make technology. Many others, such as coal, are consumed to generate the electricity to use technology. Even some renewable resources, like trees and water, are becoming contaminated or are used up faster than they can renew themselves because of technology.

Waste - Manufacturing technology creates large amounts of waste, and used computers and electronics get thrown out when they break or become outdated. Called "technotrash," these electronics contain all sorts of hazardous materials that are very unsafe for the environment. They need to be disposed of using special methods.

Disrupting ecology - Clearing land where animals used to live to build factories and allowing pollution to contaminate the food chain can greatly affect the environment's natural cycles.

Health hazards - Using toxic materials that can harm our health can cause cancer, and technology addiction can lead to other health problems like obesity and carpal tunnel syndrome.

You can encourage manufacturers by choosing to buy more energy-efficient and less hazardous electronics and by supporting companies that make protecting the environment a priority. You can also do your own part to reduce environmental impact by not being wasteful and disposing of your electronics safely and properly.

Carbon Emissions

Carbon emissions, mostly carbon dioxide and carbon monoxide, are greenhouse gases that are produced by people. Greenhouse gases are gases in the atmosphere that trap and reflect heat and radiation back to the planet's surface. It is believed that over the last century, the amount of greenhouse gases in the atmosphere has increased due to carbon emissions and that they are contributing to global warming.

Carbon emissions get released into the atmosphere from things like cars, air planes, power plants and factories. They also get released by people like you, when you use a vehicle or electricity created from burning
fossil fuels. The computer you're using to read this is using electricity, and so is your mobile device and video game system. We're all guilty of enjoying things that aren't exactly eco-friendly, but if we're smarter about how we use technology, we can reduce our environmental impact.

**Toxic Technotrash**

*Technotrash* also called electronic waste or e-waste, is any broken or unwanted electrical or electronic device, and is currently the most rapidly-growing type of waste. If you just throw away technotrash with the regular trash, it usually ends up in a landfill. Most electronics contain non-biodegradable materials, and heavy metals and toxic materials like cadmium, lead and mercury. Over time, these toxic materials can leak into the ground, where they can contaminate the water we drink, the plants we eat and the animals that live around the area. Many European countries have even banned technotrash from landfills.

These toxic materials can cause all kinds of bad effects including nausea, diarrhea, vomiting and even cancer. If you keep eating and drinking contaminated food and water, these toxins can build up in your body. If you eat animals that have been contaminated, you're getting a double dose of toxins. What's even worse, your body can't properly process some of these metals and so they might take years to get out of your system. To help protect the environment, don't put technotrash in with the rest of your household's garbage. Check with your local recycling centers to see if they take technotrash, or enter the type of trash and your zip code at Earth911.org to look for other recycling places nearby. You can also ship it to a company that specializes in disposing of technotrash, like GreenDisk.

**Tips for Recycling Technotrash**

*Sanitize your Hard Drive*

Before donating a machine, be sure to remove all of your files and data from it. Most people will just try to drag everything to the trash can or recycle bin, but this only partially erases the information! Cyber criminals can find this “deleted” information and use it however they want. To really protect yourself, you need to run a program that “sanitizes” your hard drive. These programs, which can be found online, work by replacing all your data with a jumble of useless nonsense. That way, your information is safe, and your good deed goes unpunished!

*Consider Donating your Mobile Device*

There are actually a LOT of great things your old mobile devices can do for people. Whether that means helping soldier’s overseas talk to their families or helping victims of domestic violence, they can be a lot more than clutter for your junk drawer. Here is a list of several worthwhile charities.

*Raise Some Funds*

Because electronics contain precious metals including gold, silver and copper, technotrash can actually be worth a little money. Why not hold a community fundraiser to collect and dispose of everyone’s technotrash? You'll be helping both your community and the environment at the same time!

*Reuse Those Ink Cartridges*

Many locations that sell new printer ink cartridges will refill your old cartridge for a
fraction of the cost. Each cartridge you throw away takes anywhere between 400 and 1,000 years to decompose, and on average, there are 11 cartridges thrown out every minute across the globe! Not all cartridges can be refilled, and even cartridges that you've filled in the past will eventually break down after continual use. When this happens, take them to the store where you bought them and recycle them. Sometimes, the store will even give you a discount on your next ink cartridge.

Just a note to our international readers: using refilled ink cartridges can cancel your printer's warranty, so be careful. If you're in the US, don't worry about it. It's illegal for the manufacturer to cancel the warranty because of used ink cartridges.

While some of the impact of computers and the Internet has unfortunately been negative, much of it has also been positive. Here's just a few of the ways that technology is helping to improve the environment:

a) It helps us develop and produce new materials and technologies that are sustainable and do not harm the environment, so we can eventually stop using ones that do harm it

b) It allow us to monitor and study our environment to better understand how it works and the impact of our actions on it

c) It helps us create smarter technologies that respond to how we use them and adjust themselves to reduce their environmental impact, such as lights that can sense when no one is in the room and automatically turn off

d) It allows us to have a worldwide virtual laboratory, so that experts from all fields can share their research, experience and ideas to come up with better, smarter solutions. Not only does this allow people far away from each other to work together, but it also reduces the environmental impact people would normally cause from traveling to meet with each other

e) It allows for paperless communication like email and online bill paying to reduce the amount of trees cut down

f) It allows companies to reduce shipping and manufacturing impact and to reach a broader audience

Sometimes people can get so excited about using a new technology that they overlook the negative impact on the environment. But, it's very important that we use technology in the smartest and most responsible manner, so that we are solving problems, not creating more for the future

Technology has bad effects on environment

Industrialization coupled with technological advancement has continued to affect the environment in a negative way. Industrial benefits resulting from technological adaptation in major activities has indirectly contributed towards higher living standards though bad part on technology manifest more. This is evidenced by increasing international discussions and consultations through conferences and meetings. A major theme in such meetings is on environmental violations resulting from technology. Complaints and issues associated with effects of technology are arising globally (Ausubel & Sladovich, 1999).

Environmental degradation is a growing concern as continued industrialization is being witnessed mostly in developed countries. There are three major negative impacts of technology on environment discussed in this essay. First, environmental
pollution resulting from waste output is a resultant factor of technology. Contribution to global warming is the second effect of the growing technology. Lastly, depletion of natural resources and ecological imbalances experienced today result from technology. To start, environmental pollution occurs as a result of technology mismanagement and lack of control measures. Technological improvement in recent years has seen production of more machines, weapons and automobiles. Increased consumption of improved facilities triggers demand which in turn influences supply of required quality of products that are major effectors of industrialization using improved technology. Importance of technology in such cases is attributed to satisfaction of human wants. Though adverse pollution of environment due to increased production in the manufacturing and processing industries, weapons testing and high usage of automobiles such as cars. Air pollution, water and noise pollution are the key components of an environment that has been continually polluted as a result of technology. Emission of large quantity of gases such as CO2 in the air by large industries causes air pollution which in turn has degraded environment immensely. Again, disposal of waste into the rivers and water systems by industries and other institutions is an environmental hazard through water pollution. Similarly, a lot of noise pollution from weapons testing and usage, industries in their routine production processes and automobiles is causative of environmental dilapidation (Ausubel & Sladovich, 1999).

Furthermore, technology contributes towards depletion of resources. Development and usage of technology is contributing to increase industrial activity that requires raw material from natural resources such as coal, timber and wild animals. As well, extensive agricultural activities as experienced in Bangladesh is beneficial in terms of productivity but depletion of natural resources such as forest cover, water and soil fertility and its organisms composition is a likely event. Farming activities such as burning of bushes, deforestation and usage of chemicals to enhance soil fertility is an environmental exploitive. As well extensive mining of gold, diamond and other minerals is an activity that is contributing towards depletion of resources at an alarming rate. Overexploitation of fossil fuel and other resources ceases to be beneficial and becomes an environmental threat.

In addition, ecological systems imbalances and disruptions result from technological advancements in the modern world. Collapse of ecological life and extinction of organisms from their natural habitats is a direct probable result of technology. Wildlife extinction from their natural habitat to create more space for farming activities and home for increasing population is an evidence of how technology causes ecological imbalances. Availability of improved technology causes people to device convenient ways of satisfying their basic needs and increased productivity requirement. Human embark of activities such as deforestation, extensive farming activities, environmental pollution which lead to changes in the natural lifecycles that maintain ecosystem. Though ecosystems can rebound from these negative effects, continued of environmental degradation through destructive human activities affected by technology will eventually lead to collapse.

Lastly, current issues on global warming are negative effects of technology and...
environmental factors. Unchecked technology advancement and utilization specifically in areas causing air and water pollution leads to atmospheric gases imbalances (Ausbel & Sladovich, 1999). Emission of harmful gases such as CO2 in large amounts forms greenhouse effects that are the major components of global warming. Green house gases result from activities such poor farming methods, transport systems, manufacturing processes and renewable power generation activities especially using coal. Fossil fuel extraction through burning and clearing of farming lands through burning concentrates harmful gases hence affecting climate.

In conclusion, higher percentage of environmental problems is a direct result of technology mismanagement by innovators and users. A small portion of environmental issues relate to economic, social and natural changes resulting from human activities. Environmental pollution, ecological systems disturbances, depletion of natural resources and climatic changes resulting from global warming are technologically influenced. Technology is significant in development and increased productivity to satisfy human need, but uncontrolled technology impacts environment negatively.

Sustainable Development

Sustainable development, at present time is a most concern phenomena. Globally every country including most developing country like India and China thinks very much about it because they realize that their future generation must be suffer to lack of resources which is obviously most central to survive. This phenomenon comes after Second World War. The concept of sustainable development is not related only future generation but also with the present generation. Firstly it is important to know the conceptual meanings of sustainable development. It is a way of thinking by which we can secure our present and future generation. The right to development means the right to improvement and advancement of economic, social, cultural and political conditions that can be improved the global quality of life. Improvement of global quality of life means the implementation of changes that ensure every person’s life of dignity and at same time citizens realize their human rights. These changes must include the eradication and alleviation of widespread conditions of poverty, unemployment, and inequitable social conditions. In this context the statement of Mrs. Indira Gandhi would like to quote in which she was emphasized on environmental security for sustainable development. At the UN Conference on Human Environment at Stockholm in 1972 she said that, the removal of poverty is an integral part of the goal of an environmental strategy for the world.

The needs of Sustainable development:

In the 1970s the debate on development was safely mortizat between the issue of environment and development. This decade saw a major revision in the thought of development itself and that has presented a major challenge to the conventional consensus on economic development. New expressions such as ‘sustainable development’ have added new dimension to

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development debates. The problem today is not primarily one of absolute physical shortage but of economic and social mal-distribution and misuse.’ Thus United Nations Environment Programmed (UNEP) 1975 explains ‘environmental management implies sustainable development’. Since then the challenge as expressed in the Brundtland Report also as ‘the process of economic development (which) must be more soundly based on the stock of capital that sustains it.’

**Importance of Sustainable Development:**
Let me begin by quoting Terri Swearingen, recipient of the Goldman Environment Prize in 1997, for organizing the protests against Waste Technologies Industries toxic waste incinerator.

“O Earth, in the villages, forest, assemblies, committees and other places on Earth, may what we express always be in accord with you”.

We all are aware about the pace at which the world is developing. We have come a long way from the time when the society consisted of very small, closely-knit nomadic groups, where the respect for kin men, environment and individual brilliance was ingrained in the very societal structure by means of customs, traditions and usages developed over the period of time. We very well know the value of resources. But somewhere during this race to develop rapidly, we have become oblivious to the effect of this development on these resources.

During the Earth Summit of 1992, held at Rio De Janerio, Brazil, United Nations stated that any definition of development must include a notion of sustainability.

Now the important question is, what is ‘sustainable development’, and why it is central to any understanding of true development. Sustainable development is a pattern of resource use that aims to meet human needs while preserving the environment so that these needs can be met not only in the present but also for generations to come. The term was used by the Brundtland commission which coined what has become the most often-quoted definition of sustainable development as development that “meets the needs of the present without compromising the ability of future generations to meet their own needs.”

Sustainable development ties together concern for the carrying capacity of natural systems with the social challenges facing humanity. As early as the 1970s “sustainable” was employed to describe an economy “in equilibrium with basic ecological support systems.” Ecologists have pointed to the limits to growth, and presented the alternative of a “steady state economy” in order to address environment concerns conceptually, sustainable development can be conceived of as integrating three “pillars”

1. [International environment law](#)
2. [International human right law](#)
3. [International economic law](#)

The integrated structure of sustainable development is such that it requires support from each of the pillars.

**Sustainable Development Future Generation:**

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The term “sustainable development” is defined as development to achieve the needs of present generation without compromising future generation’s needs, while we are misusing the resources in a very vital manner, which is not good for the present generation and as well as to the future generation. ‘Future Generations’ is mainly related to the environmental problems of resource consumption and pollution and their distribution over long time horizons. In this paper we focus on strategies for sustainable development which are necessary for survival of and our present generation as well as coming generation. And also emphasize on how to improve the quality of life of both current and future generations, while safeguarding the earth’s capacity to support life in all its diversity.234

**Growing Awareness of Sustainable Development:**
The United Nations Conference on the Human Environment in 1972 recognized that the rapidly expanding human population survived off a finite pool of resources. Without careful management, resources such as food, energy and water could be exhausted, leading to obvious global crises. The conference also led to the establishment of many national environmental protection agencies and, most importantly, momentum behind the movement that included politicians, government agencies and international organizations. Eight years later, the International Union for the Conservation of Resources published the World Conservation Strategy, a document which stressed the inter-dependence of development and environmental protection strategies.

**Conclusion**
The term “sustainable development” is defined as development to achieve the needs of present generation without compromising future generation’s needs, while we are misusing the resources in a very vital manner, which is not good for the present generation and as well as to the future generation. ‘Future Generations’ is mainly related to the environmental problems of resource consumption and pollution and their distribution over long time horizons. In this paper we focus on strategies for sustainable development which are necessary for survival of and our present generation as well as coming generation. And also emphasize on how to improve the quality of life of both current and future generations, while safeguarding the earth’s capacity to support life in all its diversity.

Problems of sustainable development are rooted in issues of resource use and their pattern of distribution and ownership. Thus a policy towards sustainable development cannot be framed in isolation to politics and state regulations. The world community is confronted by a chicken and egg controversy; economic problems aggravate resources crisis and environmental despoliation and this leads to constrained economic revival due to which nations find it more difficult to solve problems of unsustainable use of environment. In a world where progress depends on a complex set of national and international economic ties, any step towards

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sustainable patterns of growth involves unresolved problems and challenges. In fact, local stakeholder consultation is a highly neglected subject in the Indian mining industry. Except for one-time public hearing in the environmental impact assessment process (prior to start of mining operation); there is no meaningful consultation between mining enterprises and communities living in mining project areas. The mining law also does not require or encourage such consultation. Transparency in communication, sharing of information with local communities and accountability are also major problems in most mining areas.

Governance failure in mineral administration is a major problem. Duality of state and federal control and multiplicity of state and central agencies with inadequate budget and staff appear to be the major reason for governance failure in India’s mining sector. Political interference and institutional graft further complicate the problem.

Though the mineral sector’s contribution to India’s GDP in 2011 was around 2.6%, its importance arises from the fact that it supplies basic and strategic raw materials for the country’s industrial and economic development. Due to the sharp rise in prices and demand of a number of mineral commodities, the production of many minerals has shown steady increase, both in quantity and value since 2004-05 and it has led to simultaneously greater exploitation of resources.

Two main pre-conditions for achieving sustainability are the existence of good governance and self-regulating mining enterprises which are economically viable, financially profitable and technically efficient.

A large number of small mines (including quarries for extracting minor minerals) operate in most mining states. These present difficult challenges for sustainable development as their financial, technical and managerial limitations restrict their ability to take effective corrective measures against negative consequences of mining.

‘Sustainable development’, an all-inclusive, somewhat ambiguous concept basically means economic and social development that endures over the long-term and its core ethic is intergenerational equity. Sustainability principles have application for all stages of mine life cycle – exploration, mine planning, construction, mineral extraction, mine closure and post-closure reclamation and rehabilitation. These principles include elements such as intra and inter-generational equity, the precautionary principle, scientific mining, management of environmental and socio-economic impacts, creation of substitute capital in the form of social and physical infrastructure and stakeholder engagement.

This is a critical moment in earth’s history, a time when humanity must choose its future. Our planet earth is perhaps the only human habitat in the vast universe and we owe it to posterity to preserve the divine heritage of our biosphere without pollution, degradation and destruction. While progress towards sustainable development has been made through meetings, agreements and changes in environmental governance, real change has been slow. The long term perspective for sustainable development requires the broad-based participation of various stakeholders in policy formulation, decision-making and implementation at all levels in particular of issues of biological diversity and this must be encouraged. To effectively address
environmental problems, policy-makers should design policies that tackle both pressures and the drivers behind them. Economic instruments such as market creation and charge systems may be used to help spur environmentally sustainable behavior.

It is true that in order to improve and protect the environment from pollution sustainability must be there between environment and development. The concept of sustainable development based on the notion that natural resources should be exploited for the benefit of both present and future generation. As we know that increased industrial activity worldwide requires the use of natural resources which are depleting day by day. It is also true that the need for resource conservation, efficient use of resources and environment friendly corporate policies and behavior has now been recognized worldwide. The country needs an Environmental policy and planning, while being globally sensitive must be based on local needs. Finally, if sustainable development has to move from mere wishful thinking and slogan-mongering into a reality, the world (developed and developing) as a whole has to move towards a new world order in which new economic and technological orders are dovetailed. Such an order has to be aimed at benefiting the poor because in the chain of sustainable development, the weakest links are poverty and inequality. Last but not least, if the principles of sustainable development are followed then definitely with the economic growth and industrial development of a country environment protection can be maintained.

Mining enterprises undertake socio-economic local development works in their respective mining projects areas as part of their corporate social responsibility (CSR) activity. The level of commitment and the nature and extent of activities differ from one enterprise to another. Major mining companies have set up ‘trusts’, ‘foundations’ and ‘societies’ to take up socio-economic development projects in their mining areas. Our objective with Marble Peaks Ranch is to be commendable stewards of our land. While we have legal ownership of the land, we view it as guardianship, with a responsibility to care for the land and its native inhabitants. We are committed to sustainable, low-impact agricultural practices.

Waste management is most important on marble and limestone industry. Waste that originates from processing activities, as mentioned earlier, includes scrap, chips and sludge. Scrap and chip particles of bad quality can be re-used the same way quarry wastes are used: the production of construction materials or aggregates. Good quality dry wastes can be alternatively exploited to give higher value products like floorings and coverings for exterior applications as mentioned previously. Sludge on the other hand is a special case since it contains water in an amount of 20 to 28 percent of its weight and when it comes from granite block cutting, iron in an 8-10 %. The options for re-using sludge are given below while the actual applications follow.

Recommendations:
The procedures for various approvals and monitoring including those for environmental and forest clearances should be streamlined in order to improve the efficiency and effectiveness of the system and to reduce the time taken to clear a proposal. Mineral development in a region should be carried out within its available social and
environmental ‘carrying capacity’ and infrastructural infrastructure facilities at a given point of time. Appropriate administrative and procedural arrangements should be made in order to ensure this outcome.

A separate legislation for mine closure should be formulated providing for, among other things, close and continuous community consultations, legal obligations of the mining lease holder for land reclamation and rehabilitation and strict implementation of the provisions.

Both the government and industry need to take a comprehensive view of sustainable development in mining that besides environment should cover other dimensions such as stakeholder engagement and consultations, local area socio-economic development and transparency in communication and accountability.

The new mining law (now under consideration) should provide for mining enterprises to engage in consultations with local community stakeholders at all the stages of mine life cycle.

The new law should also lay down a mandatory obligation on mining concessionaires to undertake socio-economic development projects in their mining project areas as a part of their corporate business obligation (CBO). This should replace CSR activity which is voluntary and optional in nature.

Preparation of a socio-economic assessment report for a mining project to be followed by the formulation and implementation of long-term and short-term development projects should be made a part of the permitting process for the grant and administration of mineral concession to a mining enterprise.

Local socio-economic development works should preferably be executed by mining enterprises rather than government and semi-government agencies (such as the District Mineral Fund proposed under the Draft MMDR Bill 2011) in order to avoid the problems of inadequate capacity, political manipulation and corruption. Also, simply doling out cash to affected persons is not a sustainable solution.

In order to alleviate the limitations of small mines in carrying out sustainable development activities, consortia of small mining enterprises in a region should be promoted. Technical advisory services should be made available to them in the relevant areas.

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BASIC ELEMENTS OF RIGHT TO INFORMATION LAW

By Kiffi Aggarwal
From BPS Women University, Sonipat, Haryana

INTRODUCTION

‘Democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed’ - Right to Information Act, 2005

India after independence has adopted democratic form of government and emerged as the largest democracy in the world. In a democracy, where people govern themselves, it is necessary to have more openness. Openness in the exercise of public power – be it Executive, Legislative or Judiciary – is backbone in democracy, which needs to be nurtured.

James Madison once said, “A people who mean to be their own governors must arm themselves with power that knowledge gives”.

Without openness and participation of citizens, democracy is ineffective. To enable citizens to actively participate in governance, they should be provided with information regarding governmental activities, about their elected representatives, about bureaucrats, about benefits which are conferred on citizens in various walks of life and information about governance itself.

Equitable, fair, transparent and justice ridden administration presupposes that persons be made aware of the Law, Rules, Regulations and Administrative guidelines by which their affairs will be governed.

In India, the Official Secrets Act 1923 was a major instrument to deny public access to information and promote secrecy. Public servants under the Official Secrets Act 1923 were duty bound to practice secrecy in their official functioning. All ministers, constitutional bodies and officials need to take oath for secrecy. Thus, public functioning has traditionally been shrouded in secrecy.

As our democracy kept on maturing, India continued moving towards openness in public dealings. In recognition to the need for transparency in public affairs, for fulfilment of international obligations, citizens’ demand and judicial decisions, the Indian Parliament has enacted the Right to Information Act in 2005 and made it fully effective with effect from 12th October 2005 with much fanfare. This Act has provided the machinery for the implementation of this all important “right” within a stipulated time-frame and for the redressal of the complaints when information is not provided.235

It is a major step in empowering people and promoting transparency. It enables citizens to participate fully in the decision-making process that affects their lives so profoundly and also has a dynamic role in constitutionally guaranteed democracy.

Right to know is the prerequisite of every welfare government and especially

democracies and any refusal or blockage in sharing such necessary information with the persons who want to know about it will be an utter feeling of disgrace and dissatisfaction to the citizens of any country which, in the long-term may prove fatal to the government.  

**HISTORICAL BACKGROUND OF RIGHT TO INFORMATION AT INTERNATIONAL LEVEL**

Citizen’s right for access to information held by government and public authority has, since last few decades, been voiced as an important human right globally. There has been a consistent demand in the countries across the world for transforming secretive administrative systems to open and transparent systems. There is an exciting global demand of recognition of Right to Information by nations, their intergovernmental organizations and the people. United Nations, the Commonwealth, the Organization of American States and the Council of Europe and other global organizations have been advocating for making Right to Information as a universal human right and for creating mechanism for its implementation and protection.

- Sweden is the first country in the world which has enacted laws promoting transparency laws in public affairs. On 02 Dec 1776, the increasing criticism of prevailing governmental secrecy in Sweden led to the adoption of the Freedom of the Press Act.
- In 1789, the France has declared its “French Declaration of the Rights of Man” which called for access to information about the budget to be made freely available.
- In the United States too, Patrick Henry one of the founding fathers of the United States of America protested against the secrecy of the Constitutional Congress, saying “The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them.”
- The ‘right to know’ gained prominence after the Second World War. The United Nations General Assembly had proclaimed in its 65th plenary meeting of 14th December 1946, that freedom of information is a fundamental human right and the cornerstone for all other freedoms recognised by the United Nations.
- On 10 Dec 1948, a declaration was made which is named as “Universal Declaration of Human Rights (UHDR). Article-19 of the Universal Declaration of Human Rights (UHDR), 1948 declares that “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinion without interference, and to seek, receive and impart information and ideas through any areas and regardless of frontiers.”
- The International Covenant on Civil and Political Rights (ICCPR), which India has also ratified, also provides a corresponding provision in its Article 19.
- According to Article 4 of the American Declaration, “Every person

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236 Ibid
has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.”


The development of the right to information as a part of the Constitutional Law of the country started with petitions of the press to the Supreme Court for enforcement of certain logistical implications of the right to freedom of speech and expression. The court has recognized the right to access information from government departments is fundamental to democracy.

Therefore, Justice K. K. Mathew of Supreme Court of India said that ‘in a government.... where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people.... have a right to know every public act, everything that is done in a public way, by their public functionaries.... The responsibility of officials to explain or to justify their acts is the chief safeguard against oppression and corruption’.  

The formal recognition of a legal Right to Information in India occurred was given by the Supreme Court of India in “State of U.P. v Rajnarain, AIR 1975 SC 865”, wherein the Supreme Court has ruled that the Right to Information is implicit in the right to freedom of speech and expression explicitly guaranteed in Article 19 of the Indian Constitution.

Subsequently, the Court has affirmed this decision in numerous cases like Association for Democratic Reforms v. Union of India, 2002(5) SCC 294 and People Union of Civil Liberties v. Union of India, 2003(4) SCC 399, and has even linked the Right to Information with the right to life enshrined in

CONSTITUTIONAL BACKGROUND OF RTI IN INDIA

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238 State of U.P. v Rajnarain, AIR 1975 SC 865
Article 21 of the Constitution. The Supreme Court of India emphasized importance of freedom of information and described it as a fundamental right under the facet of “freedom of speech and expression” as contained in Article Article-14, 19(1)(a) and Article-21 of the Constitution. But like all rights, right to information, is not at all times and always an absolute right. Being a penumbral right to freedom of speech, right to information is subject to States reasonable restriction on exercise of such right. Interests of sovereignty, integrity, security of India, foreign relations, public order, decency or morality are some of the factors which might encumber exercise of right to information.

If a public authority fails to comply with the specified time limit, the information to the concerned applicant would have to be provided free of charge.

**Duty to Publish**
The Act, in particular, requires every public authority to publish 16 categories of information. This includes the particulars of its organisation, functions and duties; powers and duties of its officers and employees; procedure followed in the decision making process; norms set for discharge of its functions; rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions; etc.\(^{239}\)

**Exceptions**
The Act enumerates the types of information(s) that are exempted from disclosure. However, these exempted information(s) or those exempted under the Official Secrets Act can be disclosed if public interest in disclosure overweighs the harm to the protected interest. Also the exempted information(s) would cease to be exempted if 20 years have lapsed after occurrence of the incident to which the information relates.

**Appeals**
If an applicant is not supplied information within the prescribed time of 30 days or 48 hours, as the case may be, or is not satisfied with the information furnished to him, he may prefer an appeal to the first appellate authority who is an officer senior in rank to the PIO. If still not satisfied the applicant may prefer a second appeal with the Central Information Commission (CIC)/State

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\(^{239}\) Short Commentary on “The Right to Information Act, 2005”, India Law House, 2010,
Information Commission (SIC) within 90 days from the date on which the decision should have been made by the first appellate authority or was actually received by the appellant.

Sanctions and Protections
Where the Information Commission at the time of deciding any complaint or appeal is of the opinion that the PIO has without any reasonable cause, refused to receive an application for information or not furnished within the time specified or denied the request for information or knowingly given incorrect, incomplete or misleading or distorted information it shall impose a penalty of R250 each day till application is received or information is furnished subject to the condition that the total amount of such penalty shall not exceed R25,000.

Protection of whistleblower
The issue of protection for whistleblowers caught the attention of the entire nation when National Highways Authority of India engineer Satyendra Dubey was killed for he wrote a letter to the office of the then Prime Minister detailing corruption in the construction of highways. Dubey’s murder led to a public outcry at the failure to protect him. As a result, in April 2004, the Supreme Court pressed the government into issuing an office order, the Public Interest Disclosures and Protection of Informers Resolution, 2004 designating Central Vigilance Commission (CVC) as the nodal agency to handle complaints on corruption. However, such unfortunate incidents kept increasing and brought renewed focus on the need for a law to protect whistleblowers. Thus, Public Interest Disclosure (Protection of Informers) Bill 2010 was introduced in the Lok Sabha on August 26, 2010. The Bill seeks to establish a mechanism to register complaints on any allegations of corruption, wilful misuse of power or discretion against any public servant. The Bill also provides safeguards against the victimisation of the person who makes the complaint.

DEVELOPMENT OF RTI IN INDIA
Government around the world is providing information about their official activities to their citizens for better understanding and transparency of their day-today administration. In the last two-three decades, many of the countries have enacted formal statutes guaranteeing their citizen’s right to access the Government information. The United States of America was the first country among the leading democracies to enact the freedom of information Act, 1966. Australia, New Zealand and Canada 1982, and England also enacted, Freedom of Information Act, 2002. In India, several states have also passed laws to provide for the right to information.

Tamil Nadu and Goa became the first two states to legislate on the subject in 1997. Madhya Pradesh in 2003 and Rajasthan enacted the right to Information Act, in the year 2000. Then one by one, Karnataka in 2000, Maharashtra in 2003, Delhi and Assam also enacted Right to Information Acts by 2002. The Parliament of India has enacted the Right to Information Act (Act 22 of 2005) which was notified in the official Gazette on 21st June, 2005. The Bill in its preamble

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240 Ibid
241 Available at, http://www.cuts-international.org/cart/pdf/Analysing_the_Right_to_In formation_Act_in_India.pdf (last accessed on 17 February 2017)
states that the Act is passed because ‘democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the Government’.

RIGHT TO KNOW AND RIGHT TO TELL

CASE LAWS

In Srinivas v State of Madras, it was decided that the “freedom of speech and expression includes liberty to propagate not one’s views only; it also includes the right to propagate or publish the views of other people.” Otherwise this freedom would not include the freedom of the press. Freedom of expression has four broad special purposes to serve;

(1) It helps an individual to attain self-fulfilment
(2) It assists in the discovery of truth;
(3) It strengthens the capacity of an individual in participating in decision making; and
(4) It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

All members of society should be able to form their own beliefs and communicate them freely to others. The fundamental principle involved here is the right to know. In the case between Indian Express Newspaper v Union of India, the Apex Court was of the opinion that freedom of speech and expression believe in the participation of people in the administration and the approach of the Government should be more cautious while levying taxes on matters of concerning newspaper industry than while levying taxes on other matters. Freedom of speech includes liberty and protection of law to both the speaker and also the audience. One has the right to speak, the other has to receive that what is spoken. It is this right which is guarded by law. Prior to Right to Information Act, 2005, Nine (9) states in India have already enacted identical laws. These states were; Goa, Tamil Nadu, Delhi, Karnataka, Madhya Pradesh, Rajasthan, Assam, Jammu & Kashmir and Maharashtra. State of U.P. v Raj Narain, is authority for the proposition that Article 19(1) (a) includes not only right to communicate, it includes right to receive the information communicated. Right to know is the basic right of the citizens of any free country and is guaranteed and protected by Article 19(1) (a).

Without adequate information, a person cannot form an informed opinion and democracy is mockery without informed citizenry. The Supreme Court was of the view that in a system like India, where Government is responsible to Parliament and to people, there is nothing like secrecy in public officer’s conduct. The people have the right to know every public act, everything that is done in public way by their public functionaries. They are entitled to know particulars of every public transaction in all its bearings.

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243 Srinivas v State of Madras, Air 1931 Mad 70
244 Indian Express Newspaper v Union of India, (1985) 1 SCC 641
245 State of U.P. v Raj Narain, AIR 1976 SC
CONCLUSION

The Right to Information Act, 2005 is a unique and revolutionary piece of legislation. It is unique and revolutionary because it is the first legislation arising out of public campaign and public outcry. That is why it is said to be a beginning of a new era in the democratic history of our country and to most significant reform in public administration in India. It is expected to expand the democratic space available and empowers the ordinary citizen to exercise a far greater control over the corrupt and arbitrary exercise of State power, as it gives right to the citizen to ask question, examine audit, review and assess Government acts, decisions and to ensure that every act is consistent with the principle of public interest. In this new era the Right to information, the readers or viewers require all kinds of primary information.

They can identify the truth on the basis of their analysis and commonsense. The press being the fourth estate has to make the government accountable by publishing information about matters of public interest even if such information reveals abuses or crimes perpetrated by those in authority. The Supreme Court of India has long back recognised a citizen’s access to government information as a fundamental right under article 19, but it has only been with the passage of the RTI Act in 2005 that Indians have had a way to exercise that right and force transparency and fairness onto a notoriously corrupt bureaucracy. Evaluation of public authorities and governance is impossible without factual, current/updated and primary information. The noble intention of the legislators to enact the law can be fruitful if public authorities became responsible, accountable to the need of citizenry.

All the State Government and Central Government should also earmark adequate budget provision for organising short duration training programmes for Public Information Officers, all over the country every year. Financial support must be given to all the Public Information Officers since expenses are incurred and facilities are needed (e.g. photocopies etc) to make information available on time. Thus the commissions can organize more public awareness programme and education on RTI Act.

It is also suggested for the introduction of RTI in the core curriculum of school education and more awareness campaigns, workshops and seminars should be conducted particularly in the rural areas. The people should therefore make ample use of this right to help proper and honest functioning of public authorities. The purpose of the Act can be achieved only if the public has proper guidance as how to use the Right to Information. A nationwide movement is initiated to guide and motivate the public.

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 Available at, http://www.cuts-international.org/cart/pdf/Analysing_the_Right_to_Information_Act_in_India.pdf (last accessed on 17 February 2017)
REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016: A CRITICAL ANALYSIS

By Mahima Shah
From Thakur Ramnarayan College of Law, Mumbai

Real estate is a highly recognized and regulated sector globally. In the last few decades, this sector has proliferated largely in India, making it the second-largest player in the world economy. Until 2016, apart from the general consumer and property laws in the country, there was no specific statute to regulate and govern this sector. Therefore, this year the Parliament passed The Real Estate (Regulation and Development) Act, 2016. This Act intends to bring transparency, safety and a regulatory mechanism in this field. It pursues to prevent ‘distortion’ and ‘structural abuse of powers’ in this sector. In this article, an attempt has been made to analyze the inception, the needs, the objectives and the provisions of this Act. Lastly, the various details that the legislature failed to address along with different loopholes in this legislation will be discussed.

Introduction

Geographically, India is the seventh largest country in the world with around 3,287,240 km² area. But surprisingly until the year 2016, there was no specific central legislation to govern the real estate sector. Therefore, the Parliament in order to regulate this one of the fastest-growing sectors passed The Real Estate (Regulation and Development) Act, 2016 which came into effect on 1st May 2016. The journey of the Act commenced in the year 2009 when the National Conference of Ministers of Housing, Urban Development and Municipal Affairs of States and UTs made a proposition of making a law on real estate sector, endorsed on further consultations by the central government, approvals by the Competition Commission of India, Tariff Commission, and Ministry of Consumer Affairs. Subsequently, in July 2011, the Ministry of Law & Justice also suggested a central legislation in the real estate relying on the power of the Parliament given in the Concurrent List. On getting the Union Cabinet approval, the Real Estate Bill was introduced in Rajya Sabha on 4th August 2013. Finally, it came into force in the year 2016, when both Rajya Sabha and Lok Sabha passed it on 10th and 15th March respectively.

Further, the President gave his assent to the Bill, thus making it an enforceable law.

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246 Henceforth referred to as ‘the Act’.
248 The Parliament has enacted this statute on the basis of Entry No. 6 (Transfer of property other than agricultural land; registration of deeds and documents.) and Entry No.7 (Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land) of Seventh Schedule of Indian Constitution.
What is real estate?

Black’s Law Dictionary (2nd Ed.) defines real estate as – “Real estate includes the land and anything fixed, immovable, or permanently attached to it such as buildings, walls, fixtures, improvements, roads, trees, shrubs, fences, roads, sewers, structures, and utility systems.” In simple words real estate can be depicted as anything related to lands, improvements, and buildings thereon, which are commercial, residential or industrial in nature. It also encompasses sale, purchase, development and construction of such improvements and buildings on these lands. Examples are housing unit, commercial office space, schools, health centres, shopping complex, etc. Real estate is always associated with immovable properties. On perusal to the General Clauses Act, 18974 and the Transfer of Property Act, 18825 - immovable property is something which is not movable and shall include land, benefits to arise out of the land, and things attached to the earth or permanently fastened to anything attached to the earth except standing timber, growing crops or grass. This widens the horizon of real estate and thus invites the application of multiple statutes in this sector.

What was the need to bring this statute?

As per the report of Standing Committee on Urban Development (2013-14), despite multiple schemes, the government was unable to cope with the increasing demands of housing and infrastructure in the country. This raised multiple concerns like, firstly, the private players in the market profited immensely through their arbitrary practices and consumer exploitation, therefore, became the undisputed kings of this sector. Secondly, notwithstanding the easy loans from public and private banks, the high-interest rates and high EMI’s caused an additional affliction on people in this unregulated sector. And lastly, in the absence of an effective mechanism, neither any accountability could be enforced against the builders and developers249 nor any information could be procured from them by the consumers250.

What are the objectives of the Act?

Thus, this Act is passed to curb the above-mentioned malpractices, abuses, and impediment. It intends to a.) regulate and promote real estate sector; b.) protect the interest of consumers; c.) bring a smooth flow of even information between both the promoter and the purchaser; d.) bring accountability of the promoters towards the purchasers; e.) ensure a transparent and efficient sale in this sector f.) bring a balance of responsibility between both the parties; g.) bring uniformity, professionalism, and standardization in different business transactions and practices in this sector; and h.) lastly, to establish a mechanism for fast-track dispute resolution.

Salient features of the act-

The Act has created a benchmark in the field of real estate with the ambit of the Act being broad and covers the maximum factors of real estate-

Applicability-
The Act is applicable to all the real estate projects where the area of the land proposed

249 Henceforth referred to as ‘the promoters’.

250 Henceforth referred to as ‘the purchasers’ or ‘the allottees’.
to be developed exceeds 500 sq. meters or where the number of apartments proposed to be developed exceeds 8, inclusive all the phases\(^{21}\). Such projects be either residential or commercial purpose\(^{251}\). A power is conferred upon the Appropriate Government\(^{252}\) to reduce this limit as per the requirement. It's noteworthy that this power doesn’t extend to increase this threshold\(^{253}\).

**Bodies to be established**

Further, the Act proposes to establish three agencies. They are:

- **Real Estate Appellant Tribunal\(^{259}\):**

  The benches of the Real Estate Appellant Tribunal\(^{260}\) have to be established like RERA with the similar composition. The bench shall have at least one judicial and one administrative member.

  Both the Tribunal as well as the Authority shall have all the powers of a civil court mentioned in the code of Civil Procedure, 1908.

  REAT shall hear appeals from the decisions, directions or orders of the Authority within 60 days from the date of receipt of said order or decision. Also, when an appeal is filed by a promoter, he has to first deposit an amount to the

  Act also provides for a comprehensive list of the function of RERA\(^{257}\).

  For the purpose of adjudging: a.) complaints of violation of the provisions of the Act; b.) compensation and; c.) holding an inquiry under the Act, the Authority shall appoint one or more judicial officer, who is or has been a District Judge\(^{258}\). Aggrieved person may either approach the Authority or the Adjudicating Officer in grievance as the case may be.

- **Real Estate Regulatory Authority\(^{254}\):**

  The Appropriate Government has to establish one or more RERA in each State or Union territory or one or more RERA for one State or Union Territory within one year\(^{255}\). It shall consist of a Chairperson and at least two whole-time members\(^{256}\).

  RERA will act as a nodal agency for enforcing the provisions of the Act, regulating and promoting the real estate sector, protecting the interest of consumers in the real estate sector and advising the Appropriate Government for the enhancement of this sector. The

251 Section 2 (e) and Section 2 (j) defines ‘apartment’ and ‘building’ respectively. As per the definition, the apartments and buildings used for both residential and commercial purpose are covered under the ambit of the Act.

252 Section 2 (f) of the Act: Appropriate Government include State Government, Union Territory Government and Central Government.

253 Proviso to Section 3 (2) (a) of the Act.

254 Henceforth referred to as ‘RERA’ or ‘the Authority’.

255 Section 20 (1) of the Act.

256 Section 21 of ‘the Act’.

257 Section 34 of the Act.

258 Section 71 of the Act.

259 Section 43 of the Act.

260 Henceforth referred to as ‘the Tribunal’ or the ‘REAT’. 32 Section 41 of the Act.
REAT which is to be decided by the tribunal itself.

- **Central Advisory Council**\(^{32}\): The Act provides a discretionary power to the Central Government to establish a council. The major work of this council would revolve around advising and recommending the Central Government on the growth and development of the sector and implementation of the provisions of the Act. Home Minister would be the ex officio chairperson of this Council.

Therefore, to bring uniformity, professionalism, and standardization in the real estate sector, the Act has made the registration of the following mandatory with the RERA -

- **Real estate project**: All the promoters before advertising, marketing, booking, selling or offering for sale whole or any part of their real estate project have to get it registered with the Authority\(^{33}\). This registration is mandatory when the project exceeds the limit\(^{34}\). This provision will curb the practice of pre-launch sale.

- **Real estate agent**: All the real estate agents have to get themselves registered with the Authority before facilitating or acting on behalf of any person to facilitate the sale or purchase of any real estate. This registration is not permanent and requires a periodical renewal\(^{36}\). A registration number shall be granted to the agent at the time of registration which has to be quoted by him in every sale he facilitates as per the provisions of the Act.

**Registration**

To bring uniformity, professionalism, and standardization in the real estate sector, the Act has made the registration of the following mandatory with the RERA - Real estate project: All the promoters before advertising, marketing, booking, selling or offering for sale whole or any part of their real estate project have to get it registered with the Authority\(^{33}\). This registration is mandatory when the project exceeds the limit\(^{34}\). This provision will curb the practice of pre-launch sale. Real estate agent: All the real estate agents have to get themselves registered with the Authority before facilitating or acting on behalf of any person to facilitate the sale or purchase of any real estate. This registration is not permanent and requires a periodical renewal\(^{36}\). A registration number shall be granted to the agent at the time of registration which has to be quoted by him in every sale he facilitates as per the provisions of the Act.

**Carpet Area**

Further, the Act imposed a peculiar limitation on the promoters to end the confusion and the manipulation of the area available for use and area sold in a real estate project. They can now only sell the projects on the criterion i.e. ‘the carpet area’. In simple words carpet area is the net usable space in an apartment. This area excludes the

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\(^{261}\) Section 3 of the Act.

\(^{262}\) Henceforth referred to as ‘REAT’.

\(^{263}\) Section 9 (1) of the Act.

\(^{264}\) Section 9 (6) of the Act.

\(^{265}\) Section 9 (5) of the Act.
area covered by the external walls and services shafts. The area covered by the internal partition walls of the apartment is included but the balcony or verandah area along with the open terrace area is excluded.\footnote{266 Section 2 (k) of the Act.}

While applying for registration of the project, the carpet area has to be also disclosed to the RERA\footnote{267 Section 4 (2) (h) of the Act.}.

**Limitations and Obligations on the Promoters**

Another major reason for enacting the Act was to curb the unprecedented power of the builders and promoters. Consequently, the following mandatory provisions of the Act are brought into force to bring accountability, confidence, and transparency against the sellers.

Since the registration of all the real estate projects whose size exceeds the limit has been made compulsory with the Authority. The promoters after making an application to the Authority receives a registration number within thirty days of applying. Further, the applicant is provided a Login Id and password to access the website of the Authority and to create his web page and to fill the details of the proposed project. These details include details of the promoters, layout plan, plan of development work, land status, the status of statutory approvals, the disclosure of proforma agreement and details of real estate agent, architect, structural, engineer, etc. Therefore, all the details of a proposed real estate project which is approved by the Authority are made available for on public portal for public access.

Firstly, the promoter has to timely deposit around seventy percent of the money realized for the project from the purchasers in a separate account of a scheduled bank. This money could only be used for the cost of construction or cost of land. Such withdrawal from the separate account has to be in proportion to the percentage of completion of the project. Also, a prior certification by an engineer, an architect, and a chartered accountant is required, stating that the withdrawal is in proportion to the percentage of completion of the project. These accounts have to be audited every financial year by a practicing chartered accountant. Lastly, the promoter is obliged to produce such statement of accounts duly certified and signed, during the audit to verify that the amount realized from the allottees has been proportionately used for the completion that particular project.

**Compensation and Refund**

Generally, the purchasers are inexperienced about the market conditions and the technicalities of the real estate. This places them in a vulnerable position and makes them more prone to the manipulation and exploitation by the builders. Therefore, to empower the purchasers the Act provides the provisions which mandate the compensation and refund along with the interest on such capital invested in the cases when the purchaser is dissatisfied with the services and the property transferred. They are:
a. To sell the real estate projects, the promoters usually advertise through the prospectus. Such prospectus contains the models of the proposed projects. Subsequently, the buyers make an advance or a deposit after relying on such information. If the buyer sustains any loss or damage by reason of any improper and deceitful statement included therein, he shall be compensated by the promoter as per the provisions this Act\textsuperscript{41}.

When the affected buyer intends to withdraw his advance or deposit from such project, the principle amount invested along with interest at such rate as may be prescribed shall be returned to him. He is also entitled to the compensation as per the provisions of the Act.

b. There might be the instances where the promoter fails to complete or to give possession of the real estate as per the terms of the agreement for sale on the promised date; or due to revocation of the registration of the project or for any other reason. Then there will be either of two repercussions: Firstly, if the allottee wishes to withdraw his money from the project, the promoter is liable to return the principle amount received by him in respect of that project, along with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act\textsuperscript{268}. Secondly, if allottee does not intend to withdraw from the project, the promoter shall pay him, interest for every month of delay, until the possession is handed over\textsuperscript{269}.

The promoter is also liable to compensate the allottees when any loss is caused to the allottee due to the defective title of the land, on which the project is being developed or has been developed\textsuperscript{270}.

**Restraint on deposit or advance payment**-

Secondly, the promoters cannot accept any deposit or advance from the purchasers. However, when the parties have entered into a written agreement for sale and have registered such agreement, the promoter is allowed to accept the deposit but the sum shall not exceed ten percent of the cost\textsuperscript{271}. The said agreement for sale along with other particulars shall mainly specify

\[\begin{align*}
\text{a.} & \quad \text{The particulars of the development of the project, along with specifications and internal development works and external development works;} \\
\text{b.} & \quad \text{the dates and the mode of payments by the allottees and the date on which the possession is to be handed over and;} \\
\text{c.} & \quad \text{the rates of interest payable by the promoter to the allottee and the allottee to the promoter in the case of default.}
\end{align*}\]

Thirdly, the promoter shall develop and complete the proposed project in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities. Any additions or alterations in the sanctioned plans\textsuperscript{47} and the project specifications (after they are disclosed and

\textsuperscript{268} Section 18 (1) of the Act.  
\textsuperscript{269} Proviso to Section 18 (1) of the Act.  
\textsuperscript{270} Section 18 (2) of the Act.  
\textsuperscript{271} Section 13 (1) of the Act.
furnished to the allottee) are allowed only in these three circumstances:

i. When any changes are to be made in some specific part of the project, the prior consent of the purchaser of that part is required.

ii. When any changes are to be made in the building or common area of a real estate project, the previous written consent of at least two-third allottees is required.

iii. When some minor additions or alterations are to be made which may be necessary due to architectural and structural reasons. They may be duly recommended and verified by an authorized architect or engineer after proper declaration and intimation to the allottees. Here no consent of the allottees is needed.

Also, the promoter is obliged to furnish the sanctioned plans, layout plans, provisions of civic infrastructure, time schedule of completion of the project and various specifications approved by the competent authority. Similarly, the promoter is also obliged to adhere to these project specifications and sanctions. Unfortunately, Parliament didn’t include the various safety approvals (like Fire Safety Certificate, Structural design safety approval etc.) which the promoter should furnish to the allottee as well as adhere while construction.

Lastly, no rights and liabilities in respect of a real estate project shall be transferred or assigned to a third party by the promoter without obtaining prior and written consent from two-third allottees excluding the promoter.

Therefore, to protect the interest of the consumer, the Act provides that: (i) nothing shall affect the allotment or sale of the project made by the erstwhile promoter even after the completion of said transfer and assignments of rights and liability as per the Act and; (ii) Irrespective of the number of apartments or plots an allottee has booked or purchased, for the purpose of said consent it/he/she shall be considered as only one allottee.

Further, there are two new obligations imposed upon the transferee or assignee. Firstly, it has to independently comply with all the pending obligations under the provisions and the rules and regulations of the Act, and the pending obligations as per the agreement for sale entered into by the erstwhile promoter with the allottees. Secondly, no extra time period will be given to complete the project to the transferee or assignee.

The Act creates another obligation to enhance the quality of service and the provisions provided by the promoter. As per Section 14 (3) of the Act, the promoter has to rectify any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development occurring within five years from the date of handing over possession to the allottee. Such rectification has to be made within thirty days without any further charge else the aggrieved allottees shall be entitled to receive an appropriate compensation as per the Act.
Bar on Jurisdiction-

The Authority and the REAT shall have the sole jurisdiction to entertain any suit or proceeding in respect of any matter which they are empowered by or under the provisions of the Act. Also, no civil court shall grant any injunction in respect of any action taken or to be taken by Authority or the REAT in pursuance of any power conferred by or under this Act.

Critical Appraisal

The Real Estate (Regulation and Development) Act, 2016 has excellently dealt with a large number of issues in the real estate sector. Still, some aspects are inadequately addressed and some provisions are incompletely framed to deal with the problems efficiently. Further amendments are required in future to rectify the existing loopholes. Some of the suggested improvements in the Act are:

- **Chairman:** Section 2 (l) of the Act defines ‘chairman’ as Chairperson of the RERA. It fails to include the Chairperson of the Tribunal. Therefore, it is necessary to include the Chairperson of the Tribunal under Section 2 (l) else the use of the same nomenclature in both the clauses would create confusion and scope of manipulation of the law.

- **Net usable area:** The carpet area is defined under Section 2 (k) of the Act. But, for better understanding and clarity, the net usable area should also have been defined. Such definition of the net usable area shall include the area sold to the allottee for his individual use, which includes living room, bedroom, kitchen area, lavatory(s), bathroom(s), any area of the residence allotted to the domestic help and the covered parking area.

- **Parking area:** Generally, in any residential complex or building, there is always a controversy regarding the parking area. Residents are uncertain about the parking space allotted to them in the parking area. Hence, parking space should be properly defined and earmarked to the allottee.

Real estate agent-

A real estate agent is defined as ‘any person, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, as the case may be, in a real estate project, by way of sale, with another person or transfer of plot, apartment or building, as the case may be….’

Therefore, as per the definition the scope of real estate agent doesn’t extend to secondary market properties. Hence the phrase ‘in a real estate project’ shall be deleted so as to regulate the sale of secondary market properties by any registered real estate agent. Registration of the real estate agent only focuses on the new property sale, therefore leaves out other areas of business like resale of property out of the purview. The real estate agents all across the country should be registered irrespective of the type of the property, hey are selling. This includes property from agriculture and industrial sector.

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272 Section 2 (zm) of the Act.
The Act provides neither any minimum eligibility criteria which a person has to fulfill for registration under the Act nor any model code of training of these agents. Such eligibility criteria and model code would bring a uniformity in the conduct and the qualification of these agents throughout the country.

Anti-Discrimination Clause-

Many cases reported every year where the individual purchasers of real estate property have been subjected to discrimination by the promoters. There is a widespread distress among many minority groups due to the refusals of builders to sell them the flats of the apartment on the basis of their background and status. Therefore, an anti-discrimination clause should have been added in ‘Functions and duties of promoter’ i.e. the promoter shall not discriminate on the basis of caste, creed, ethnicity, food, language, marital status, nationality, preferences, age, religion, sexual preferences, and region of origin, when transacting with a potential buyer.

Development, Standard, and Quality of real estate projects-

The Real Estate (Regulation and Development) Act, 2016 is constructed narrowly and restricted to disclosure and transparency in real estate transactions/sale. Nevertheless, the scope of this Act should have been extended to regulate the development of real estate projects. Although there are multiple compensatory provisions to handle situations like delay in completion of the project or any structural defects, there is no provision to compensate the allottee if the quality of the construction is below the promised standards. A provision to mandatorily follow the National Disaster Management Authority standards in construction could have been enshrined in the Act. The Act provides for three certificates: (a) Commencement Certificate (b) Completion Certificate (c) Occupancy Certificate. The promoters have to get them issued from the competent local authorities in different stages of a real estate project. Standing Committee on Urban Development (2013-14) suggested that if the project management has been taken by a project management consultancy company or in-house project managers of the promoter then the Project Manager shall issue a Construction Execution Certificate. This certificate shall state that all construction has been executed fully complaint to the good for construction drawing issued by various design consultants and the construction practices followed are given in the relevant Indian Standards issued by the Indian Bureau of Standards.

Others-

Apart from the above-mentioned lacunae, there are some intricacies which the legislature didn’t mention. They are:

- **Black money**: Real estate is a sector of Indian economy which is prone to black money. Since a large number of transactions relating to the transfer of real estate property are unreported, investment in this sector becomes the most convenient way of camouflaging

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273 Section 11 of the Act.

274 Section 2 (zf) of the Act.
the black money. However, to curb this practice, an amendment in Section 269SS of Income Tax Act was made in 2015. Now, while transacting Immovable Property, 100 percent penalty will be levied if the seller has accepted an amount of Rs. 20,000 or more in cash from the buyer. Therefore, a similar and a parallel provision to eliminate underground economy should have been made in this Act too.

Impact of RERA on various stakeholders of the society-

The Act is expected to bring about a remarkable change in how the various stakeholders are accustomed to operating – be it developers, contractors, regulatory authorities or the buyers. The need of the hour is to revamp their organizational capabilities which will come from investing in themselves. The strict rules will likely eliminate small and dubious players and ensure that only large and trusted players sustain in the market. The Act can also be a sentiment reviver for the sector which has been reeling under pressure due to slowing sales.

- Developers: Developers will have to change their traditional mode of managing funds. Developers often launch new projects to accumulate funds required to complete an old project. The escrow account, as proposed by the Act, will mean that developers cannot circulate money across projects. The bill requires new projects to be launched only after the developer has all approvals in place from the approving authorities. What this will lead to is that the concept of “pre-launch” – which developers did soon after land acquisition -- of a project will cease to exist.

Developers will have to buy land either through internal accruals, or investment platforms or through joint development agreement with landowners and not through buyer’s money. The developers are also likely to face penalties if they do

Withdrawal permission: As mentioned above, the promoter requires prior a certification by an engineer, an architect, and a chartered accountant before withdrawing any amount from the escrow account. However, any permission from them will be futile since they all are paid by the promoter himself. Thus, it is very unlikely that they will make any report or decision against the promoter.

Delay by the Government Authority: The Act provides for no timeframe for the approvals from the local authorities. There is no accountability on the part of various local authorities/agencies when the work gets delayed/ stopped due to their fault. In many cases, the builders face difficulties from getting clearances from the competent authority on their projects. They run from pillar to post to get different approvals from such authorities. Still, this Act penalizes only the promoter even though when he is also a victim.
not adhere to the delivery date committed to the buyers and regulators while registering the project. Developers will now have to pay more attention and energy on reducing the turnaround time of the project development cycle -- from land acquisition to giving possession to the buyer. Developers will need to significantly upgrade their organizational capabilities (people, process and technology) to deliver the end product in a defined budget / time / IRR by managing all the relevant stakeholders (contractors, consultants, approval authorities).

The Act will also require developers to notably invest more energy in managing the customer experience. The slowdown in the industry over the last few years has led to developers spending effort in customer acquisition – which manifests itself in online advertisements, schemes such as 20:80 and celebrity endorsements. However, there is limited focus in managing the customer experience after the buyer has paid the first installment. This often leads to customer dissonance – a feeling of being trapped with the developer till the project is finally complete. The Act significantly empowers the customer. The agreements will have to be registered with the regulator. This means the agreements are likely to become less one sided (in favor of the developer). The buyer is also entitled to penalties in case of delivery delays or quality issues with the end product. The regulator will also become a forum for the customer to register his grievances.

Since developers will be under pressure to shorten the development cycle time, they will demand faster approvals from authorities such as municipal corporations OR environment ministry. These authorities will have to streamline their internal processes to be responsive to this expectation from the developers.

A developer who is able to manage an efficient development cycle and a strong customer experience will have created a solid differentiator in the market place. This differentiator will attract more customers as well as prospective partners for new projects (landowners, investors)

- **Contractors:** Since the developers would now have to deliver a good quality product within a defined time period, they will also demand a higher standard of performance from contractors in terms of time, cost and quality. The contractors will have to invest in project management, site productivity, workmen training, automation or mechanization of some tasks, better construction technologies to improve schedule adherence, and most importantly, quality of construction. Both developers and contractors will need to strengthen their Contracts and Claims Management processes for proper and timely resolution of claims and performance issues. Contractors who deliver results will be able to charge a higher premium over their competition. This premium, in fact, already exists and can increase if the contractor has a proven track record of performance.
● **Regulatory authorities:** Regulatory authorities have an uphill task of revamping a sector which is known for issues like poor delivery performance, political interests, black money. Institutions like EC / SEBI took a long time to clean up their jurisdiction. The authorities will have to work hard to establish its credibility in minds of consumers as well as developers.

For starters, this regulatory institution will have to be built by appointment of a chairperson who has experience of building such institutions. At an operating level, the regulator will have to be manned with professionals with a background in real estate development, law, and banking. The regulator will have to set up mechanisms for dissemination of project information to customers, timely approval of new projects, disposal of arbitration and complaints.

● **Customers:** A number of already launched projects will have defaulted on the guidelines set forth by the Act, leading to customers activating the new regulatory platform to register their grievances / complaints with the developer.

Customers can expect a more transparent sector where their bargaining power with the developers will have significantly improved. This could be in form of agreements being less one-sided, the regulator providing a forum to register grievances and demand penalties from errant developers, and easier access to information on the developer’s past performance - which is currently gleaned through informal market research. What customers can also expect is a small cess on the property value in case the regulator’s expenses are not funded through the general budget of the Central or state governments.

**Conclusion**

The Act intends to increase transparency and accountability in the real estate sector. It provides various machineries to facilitate and regulate the transactions in commercial as well as residential projects and ensures timely project completion by the promoters. However, this would happen only if there is an efficient implementation by the State Government. Therefore, the most important challenge is to successfully establish the Real Estate Regulatory Authority in all the states within the time span of one year. Apart from the above-mentioned loopholes still there is a huge scope for the amendment. Example: the interest of other stakeholders (apart from the allottees) in the real estate sector are not addressed.

In the end, the enactment of this Act is a landmark development in the real estate sector. It will promote well-planned urban real estate development and simultaneously protect the interest of innocent consumers who invest their hard-earned money.

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PLEA BARGAINING: POSITION IN INDIA

By Manas Ranjan Panda
From KIIT School Of Law

ABSTRACT

Plea bargaining is a novel concept in India. In the modern era of criminal justice system in India, Plea bargaining can be used as an important and substitute tool to reduce the huge number of criminal cases pending in the courts. It is a process in which the accused and the victim in a criminal case work out together for a mutual satisfactory disposal of the case subject to the court’s approval.

In India, position of plea bargaining is different from that of US. In US, plea bargaining is widely prevalent practice which accelerate the legal process. Plea bargaining as a concept was introduced in Indian criminal justice system by the Criminal Laws(Amendment) Act, 2005, on the recommendation of Malimath Committee and 142nd and 154th Law commission report. Ever since its introduction, the concept has been a subject of debate. While some criticize it on the ground that it violates fundamental rights of the accused, others hail it as an instrument in ensuring speedy disposal of cases. In this light, this paper is an attempt to discuss relevant provisions and various aspects relating to Plea Bargaining in Indian criminal law system including judicial attitude towards this concept.

Introduction:

‘Plea Bargaining’ can be defined as pre-trial negotiations or an agreement between the accused and the prosecution in which the accused agrees to plead guilty in barter for certain compromise by the prosecution i.e lenient amount of punishment.

Plea bargaining as a concept has been present in the Indian legal system for a considerable amount of time. It is generally understood as negotiations that take place between the prosecution and defendant prior to the trial, which often lead to alteration in the defendant’s sentence. There are several types of plea bargaining namely, charge bargaining, sentence bargaining and concessions based on testimony in another case. In charge bargaining, the defendant agrees to plead guilty to a specific charge and in return the plaintiff promises to drop the other charges while in sentence bargaining, the sentence is reduced to a pre-decided term. In the third category, concession in charge or sentence is offered to the accused, in exchange of evidence of the accused in another matter. This paper collectively refers to all the categories as plea bargaining.

“The process whereby the accused and the prosecutor in a criminal trial workout a mutually satisfactory disposition of the case subject the court approval. It usually involves the defendants pleading guilty to lesser offense as to only one of some of the courts of a multi-count indictment in return for a lighter sentence that possible for the graver charge.” - Black Law Dictionary

The features of plea-bargaining:-

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276https://www.thelawdictionary.org/plea-bargaining/
1. It is applicable only in respect of those offenses for which punishment of imprisonment is less than 7 years.

2. It does not apply where such offense affects the social-economic condition of the country or has been committed against a woman or a child below the age of 14 year.

3. The application should be filed by the accused voluntarily.

4. An accused must file an application for Plea-bargaining in the court in which such of offense is pending for trial.

5. The accused and prosecution both are given time to work out a mutually satisfactory disposal of the case, which may include giving compensation to the victim by the accused and other legal expenses incurred during of the case.

6. Where a satisfactory disposal of the case has been done, the Court shall dispose the case by sentencing the accused to one-fourth of the punishment provided or extendable, as the case may be for such offense.

7. The statement or facts specified by an accused in an appeal for plea-bargaining shall not be used for any other cause other than for plea-bargaining.

8. The judgment delivered by the Court in the case of plea-bargaining shall be final and no appeal shall lie in any court against such judgment.

9. Three essentials work at the time of filing an application of plea-bargaining, are:-
   - Accused’s voluntariness to plead guilty.
   - The statements or facts specified by an accused in an application for plea-bargaining should not be used for any other cause except plea-bargaining.
   - It is a contractual agreement between the prosecution and the defendant regarding the disposal of criminal charge. However, it is not enforceable until a judge approves it.

10. It reduces the charge.

11. It drops multiple counts and press only one charge.

12. It recommends the courts about punishment and sentences.

Position of Plea Bargaining under US law and Indian Law:

This concept has not emerged recently but have life even in 19th century. In the United States, plea-bargaining plays a significant part of the criminal justice system. Majority of criminal cases are settled by plea-bargaining rather than by a trial by jury. But it is a subject to the approval of the court. The rules pertaining to Plea-bargaining in all states of US are different. More than 90% of
the cases are settled through Plea-bargaining in US. It has become a notable feature of American Judiciary that the disposing rate of cases is very rapid therefore, backlog is under control. Prosecutor commence about the plea-bargaining proceedings. One of the main arguments advanced in the favour of plea-bargaining is that it helps in speedy disposal of mass cases and will accelerate delivery of criminal justice.

In India, position is very different from US. As it came in the amendment Act of 2005 in Code of Criminal Procedure, there are not many cases regarding it but even though, position under Indian Judiciary is very clear. There were immense debates on this point before it was inserted in the Cr.P.C. in 2005, it was not accepted by the Indian Judiciary. Every time it was opposed by court of law by saying that it is not recognized under Indian law and other reasons. The concept is not widely accepted as it came recently and because there are cases, in which it was not applied properly. The commencement of plea-bargaining has to be by accused which is different from US Law. Our law provides for number of negotiations between the accused and the prosecutor or with the court itself which is a primary difference from US. Unlike in US, where plea-bargaining is for all sort of offenses but in India, it is not for social economic offenses or the offenses against women and children. Court has to take great care at the time of appeal of plea-bargaining, therefore, there is no recent case in which plea-bargaining has accepted. Speedy trial is the soul of criminal justice and there is no doubt that if there is delay in trial by itself then it initiates denial of justice.

Law Commission of India in its 142nd and 154th report recommended the concept of Plea-bargaining in India. They observed that this tool will be a substitute to be explored to deal with huge number of criminal cases. Malimath Committee was also considerable in agreement with the perspective and recommendation of the Law Commission report. According to them it will help in acquiring speedy trial with benefits such as end of uncertainty, saving of cost of litigation, avoiding lengthened trial and legal expense of the parties. They advised where the offenses are not of a serious character and the effect is mainly on the victim and not on the society, it is wise to promote settlement without trial.

**Plea Bargaining In Indian Context:-**

To reduce the delay in disposing criminal cases, the 154th Report of the law commission first suggestion was the introduction of Plea Bargaining as an substitute method to deal with huge number of criminal cases. This recommendation of the Law Committee finally found support of “Malimath Committee Report” . The NDA government had formed a committee, headed by the former Chief Justice of the Karnataka and Kerala High Court, Justice V.S. Malimath to come up with some suggestions

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279 Malimath Committee Report on Reform of the Criminal Justice System, 2003
to tackle the growing number of criminal cases. In its Report, the Malimath Committee proposed that a system of Plea Bargaining should be introduced in the Indian Criminal Justice System to facilitate the earlier disposal of criminal cases and to lessen the burden of the courts. To strengthen its case, the Malimath Committee also pointed out the positive results of Plea Bargaining system in U.S.A.

The concept of Plea Bargaining attracted extensive public debate. Critics said it is not recognized and against public policy under our criminal justice system. The Supreme Court also time and again confounded the concept of Plea Bargaining saying that subject to discussion in criminal cases is not acceptable.

Judicial Attitude toward Plea Bargaining:-

In India, the judicial attitude was not in favour of the practice of plea bargaining. The Supreme Court of India in a number of cases raised concern about the moral base of the concept.

In Murlidhar Meghraj Loya v. State of Maharashtra\textsuperscript{280}, it was observed by the Hon’ble Supreme Court that:

“In civil cases we find compromises actually encouraged as amore adequate method of setting disputes between individuals than an actual trial. However, if the dispute discover itself in the field of criminal law, “Law Enforcement” deserted the idea of negotiation as unethical, or at best an unnecessary evil. The “State” can never negotiate. It must "enforce the law." Therefore open methods of negotiations are impossible.”

The implementation of plea bargaining was again strongly criticized by the apex court in Kachhia Patel Shantilal Koderlal v. State of Gujarat and Anr\textsuperscript{281}. It was observed by the Hon’ble Supreme Court that:

“... it is to our mind contrary to public policy to allow a conviction to be recorded against an accused by persuading him to confess to a plea of guilty of a crime being held out to him that if enters a plea of guilty he will be let off.”

In State of Uttar Pradesh Vs Chandrika\textsuperscript{282}, the Hon’ble Supreme Court held that:

“...It is a settled principle that on the basis of Plea Bargaining, the court cannot do away with a criminal case. The court has to decide it on its merits. If the accused confesses its guilt then suitable sentence is required to be applied. The court further held in the same case that, mere acceptance or confession of the guilt should not be a ground for reduction of sentence, nor the accused can struck a deal with with the court that as he has pleaded guilty the sentence has to be reduced.”

\textsuperscript{280}Murlidhar Meghraj Loya v. State of Maharashtra, 1976 AIR 1929, 1977 SCR (1) 1
\textsuperscript{281}K.K. Patel And Anr vs State Of Gujarat And Anr on 12 May, 2000
\textsuperscript{282}State Of Uttar Pradesh vs Chandrika on 29 October, 1999
While commenting on this aspect, the division bench of the Gujarat High Court observed in *State of Gujarat Vs. Natwar Harchanji Thakor*\(^{283}\) that:

“The very motive of law is to provide easy, cheap and speedy justice by resolution of disputes, including the trial of criminal cases and considering the present realistic profile of the case and delay in disposal in the administration of law and justice, fundamental reforms are inevitable. There should not be anything static. It can thus be said that it is really a measure that shall add a new dimension in the sphere of judicial reforms.”

In another case of *Vijay Moses Das Vs. CBI*\(^{284}\), Uttrakhand *High Court* in March 2010 allowed the concept of plea-bargaining, wherein accused was charged under section 420, 468 and 471 of IPC. In the said case, Accused supplied inferior material to ONGC and that too at a wrong Port, which caused immense losses to ONGC, then investigation was done through CBI by lodging a criminal case against the accused. Notwithstanding the fact that ONGC (Victim) and CBI (Prosecution) had no objection to the Plea-bargaining Application, the trial court rejected the application on the ground that the Affidavit u/s (265-B) was not filed by the accused and also the compensation was not fixed. The Hon’ble *High Court* allowed the Misc. Application by directing the trial court to accept the plea-bargaining application.

**Plea Bargaining Can Happen In The Following Ways :-**

1. Removal of one or more charges against an accused in return for a plea of guilty

2. Reduction of a charge from a more serious charge to a lesser charge in return of a plea of guilty

3. Recommendations by prosecutor to sentencing judges for lesser sentence in lieu of plea of guilty.

It may happen in many cases that the accused entering into plea bargaining may not do so

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\(^{283}\) State of Gujarat Vs. Natwar Harchanji Thakor, 2005 CriLJ 2957, (2005) 1 GLR 709

\(^{284}\) Vijay Moses Das Vs. CBI on 29 March, 2010
voluntarily. Therefore, to ensure that the plea bargaining has happened in a proper and fair way and justice has been delivered, the Court must adhere to the following minimum requirements.

1. The hearing must take place in Court

2. The Court must satisfy itself that the accused is voluntarily pleading guilty and there is no existence of coercive bargaining to the prejudice of the accused

3. Any Court declining a plea bargaining application must be kept confidential to prevent prejudice to the accused.

Relevant Provisions & Procedure of Plea Bargaining in C.R.P.C

- **Section 265-A**, the plea bargaining shall be accessible to the accused who is charged of any offence other than offenses punishable with death or imprisonment for life or of an imprisonment for a term exceeding to seven years. Section 265 A (2) of the Code gives power to notify the offenses to the Central Government. The Central Government issued Notification No. SO1042 (II) dated 11-7/2006 specifying the offenses affecting the social economic condition of the country.

- **Section 265-B** scrutinize an appeal for plea bargaining to be filed by the accused which shall include brief details about the case relating to which such application is filed, including the offenses to which the case relates and shall be accompanied by an affidavit sworn by the accused stating therein that he has voluntarily filed the application, the plea bargaining the nature and extent of the punishment mentioned under the law for the offence, the plea bargaining in his case that he has not previously been convicted by a court in a case in which he had been charged with the same offence. The court will subsequently issue notice to the public prosecutor concerned, investigating officer of the case, the victim of the case and the accused for the date fixed for the plea bargaining. When the parties appear, the court shall examine the accused in-camera wherein the other parties in the case shall not be present, with the motive to satisfy itself that the accused has filed the application voluntarily.

- **Section 265-C** speaks about the procedure to be followed by the court in working out a plea bargaining disposal. In a case initiated on a police report, the court shall issue notice to the public prosecutor, investigating officer of the case, and the victim of the case and the accused to participate in the meeting to work out a mutual satisfactory disposition of the case. In a complaint case, the Court shall issue notice to the accused and the victim of the case.

- **Section 265-D** deals with the preparation of the report by the court as to the arrival of a mutual satisfactory disposition or failure of the same. If in a meeting under section 265-C, a satisfactory disposition of the case has been worked out, the Court shall prepare a report of such disposition which

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285 Code Of Criminal Procedure, 1973, Chapter 21A Plea Bargaining, Section 265A to Section 265L

286 http://www.mondaq.com
shall be signed by the presiding judge of the Court and all other persons who participated in the meeting. However, if no such disposition has been worked out, the Court shall record such observation and proceed further in accordance with the provisions of this Code from the stage the appeal under sub-section (1) of section 265-B has been filed in such case.

- **Section 265-E** talks about the procedure to be followed in disposing the cases when a satisfactory disposition of the case is worked out. After completion of proceedings under S. 265 D, by preparing a report signed by the presiding judge of the Court and parties in the meeting, the Court has to hear the parties on the quantum of the punishment or accused entitlement of release on probation of good conduct or after admonition. Court can either release the accused on probation under the provisions of S. 360 of the Code or under the Probation of Offenders Act, 1958 or under any other legal provisions in force, or punish the accused, passing the sentence. While punishing the accused, the Court, as its discretion, can pass sentence of minimum punishment, if the law provides such minimum punishment for the offenses committed by the accused or if such minimum punishment is not provided, can pass a sentence of one fourth of the punishment provided for such offence.

- **Section 265-F** deals with the pronouncement of judgment in terms of mutually satisfactory disposal.

- **Section 265-G** says that no appeal lies against judgment of cases relating to plea bargaining.

- **Section 265-H** deals with the powers of the courts in plea bargaining. A court for the purposes of discharging its functions under Chapter XXI-A, shall have all the powers vested in respect of trial of offenses and other matters relating to the disposal of a case in such Court under the Criminal Procedure Code.

- **Section 265-I** specifies that Section 428 is applicable to the sentence awarded on plea bargaining.

- **Section 265-J** talks about the provisions of the chapter which shall have effect notwithstanding anything inconsistent therewith contained in any other provisions of the Code and nothing in such other provisions shall be construed to contain the meaning of any provision of chapter XXI-A.

- **Section 265-K** specifies that the statements or facts stated by the accused in an application for plea bargaining shall not be used for any other purpose except for the purpose as mentioned in the chapter.

- **Section 265-L** says that plea bargaining will not be applicable in cases in which there is any involvement of any juvenile or child as defined in Section 2(k) of Juvenile Justice (Care and Protection of Children) Act, 2000.

The judgment of plea-bargaining cases are final and no appeal lies on such judgment. However, a writ petition to the State *High Court* under *Articles* 226 and 227 of the *Constitution* or a Special leave petition to the Supreme Court under *Article* 136 of the *Constitution* can be filed by the accused. This acts as a check on illegal and unethical Bargains.

The provisions also authorize the court to give accused the benefit of Probation of
Offenders Act where so ever it is possible. Section 12 of the Probation of Offenders Act, 1958 provides that a person found guilty of an offence and dealt with under section 3 or 4 of the said Act, shall not suffer any disqualification attached to the conviction. Thus, the Government employees who are released on probation under the Probation of offenders Act are saved from the disqualification, attached to this. There is one case decided on this point Sh. Charan Singh Vs. M.C.D.287

The litigant should be encouraged to avail the remedy of plea-bargaining to settle the pending cases. For the successful implementation of plea-bargaining, its application should be necessarily intelligible. With the changing world scenario where all the countries are shifting to ADR mechanism from the traditional litigation process which is very lengthy and time consuming, the plea-bargaining may be one of the best substitute as an ADR mechanism to meet the challenges of disposal of pending cases.

There are other reasons also for backlog of cases. Even if everything is in order there are simply not enough mechanisms available to try a person. For example, in India, there are not enough courts to deal with the number of cases pending. There are also shortages of public prosecutors due to backlog in appointments.

Major Drawbacks of Plea Bargaining in India:-

Some of the major drawbacks of the concept of Plea Bargaining is recognized in India are as under;

1. Threat to right of fair trial.

2. Involving the Police in Plea Bargaining process would give rise coercion.

3. By involving the court in Plea Bargaining process the court impartially is challenged.

4. Involving the victim in Plea Bargaining process would give rise to corruption.

5. If the plead guilty application of the accused in rejected then the accused would face great hardship to prove himself innocent.

Conclusive Analysis:-

It has become a debated concept because there are many views regarding the stated point. Some people stress that initiation of pleabargaining in India is exceptionally good as it will reduce heavy accumulation of criminal case prevailing in Indian Judiciary as well as it will reduce over crowding in jails and other reasons; whereas some people contradict about it on the basis that the social economic conditions existed in US and India are very different. Law Commission in its report recommended it with the justification

287 Sh. Charan Singh vs M.C.D. on 5 October, 2006
and reasons for accepting it. They stressed mainly on the points stated above. On the other hand, adversary opinion of this concept thinks that:

1. It is showing too much softness towards defendants.

2. The process is unfair with the innocent victims. It is like legalizing a crime to an extent, we already have provisions under probation of offenders Act, executive pardon.

3. According to one study of the US, one-third of the people who plead guilty would be acquitted if they went to trial.

Conclusion:

The plea bargaining concept no doubt will erode the public’s confidence in the criminal justice system and as result of this it will lead to the conviction of innocent, inconsistent penalties from similar crimes and lighter penalties for the rich.

According to the view of a Judge of Delhi High Court over three crore cases are pending in Indian courts. Plea-bargaining will help to resolve cases involving petty offences and the courts can concentrate on more serious offenses. Indian jails have capacity of 2.56 lakh prisoners but there are more than five lakh prisoners behind bars. The State governments spend more than rupee 55 per day on each prisoner and annual expenditure comes up to Rs 361 crore. This huge amount is spending by our Indian government to maintain these prisoners just because of delayed criminal justice system. Plea-bargaining will help in reducing the accumulation of case under Indian Judiciary and number of prisoners in jails and also the Constitution obligation to provide speedy trial is also being fulfilled.

To draw to a close, plea bargaining is undoubtedly, a debated concept. Few judicial officers have welcomed it while others have abandoned it. It is true that plea bargaining speeds up caseload disposal, but it does that in an unconstitutional manner. But perhaps we have no other choice but to adopt this technique. The criminal courts are very much over burdened to allow each and every case to go on trial. Only time will tell if the introduction of this new concept is justified or not.
RIGHT TO EDUCATION

By Mitr Rao
From GD Goenka University

“THE QUALITY OF EDUCATION DETERMINES THE QUALITY OF LIFE IN NATION “

The education is the most important technology for the advancement of the human being. It improves the individual identity for the future. Education is the most powerful tool which can shape the destiny of an individual as well as the whole nation. It plays a very vital role in each of the life. It is considered that man without education is no more than the animal. The education emancipates the human being. If we look at the reasons responsible for demarcating the boundaries between developed and under-developed nations, education emerges as the single most vital factor spinning the wheel of progress in the developed nations. It has been established that an educated citizen not only improve the economic and social status of the nation but political scenario also. It is the process of continuous development of the individual. The term education has been explained very nicely in the case BROWN V. BOARD 288 OF EDUCATION “It is the foundation of good citizenship”.

In earlier time the people of country are very backward, as they were not able to understand what is good for them. The term backward means that lack of adequate opportunity to individual or group of people especially in economic life and in matters of health, housing and education. It is measured in terms of low level of income, no proper living standard. To overcome with all this problem the government of India has inserted Article 21-A in the India constitution provide free and compulsory education of all children in the age group of six to fourteen years as a Fundamental Right in such a manner as the State may, by law, the education is basically the human right. This right should be provided to every citizenship as there should be no discrimination it should be legally provided to all. The individual should know about their right so that if there is any violation they can raise their voice.

Indian civilization recognises education as one of the pious obligation of the human society. To establish and administer educational institution is considered a religious and charitable object. Education in India has never been a commodity for sale. Looking at the economic condition, even after six decade of achieving independence, thirty percent of population is living below the poverty line and the bulk of the remaining population is struggling for existence under poverty conditions. The fundamental right cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity 289

Free and compulsory education to all children of the age of six to fourteen years has to be provided by the state so that the right to education included in art. 21(A) could become a reality. The right determined in light of Art 41, 45, 46 also means free education up to 14 years of age to every

288. 347 U.S. 483 (1954)
289. Miss Mohini Jain v. State of Karnataka and others
AIR 1993 SC 2178
child. After 14 years of age limits of economic capacity of state circumscribe the right. The citizens have a fundamental right to education.

The right to education further means that a citizen has a right to call upon the state to provide educational facilities to him within the limits of its economic capacity and development. The state have a duty to impart education and particularly the primary education. A three judge bench of supreme court held that Art -21A would cover primary as well as secondary education and the petitioner could claim benefit of art III OF THE constitution.

The right to education further means that a citizen has a right to call upon the state to provide educational facilities to him within the limits of its economic capacity and development. The state have a duty to impart education and particularly education having regard to the fact that the same is the fundamental right within the meaning of art 21 A as the govt has neither resources nor ability to provide for the same, it appears that the legislature has permitted the societies to institute educational. The education under the India constitution comes under the concurrent list, both center and state can legislate on the issue. Article 21-A and the RTE Act came into effect on 1 April 2010. The title of the RTE Act incorporates the words ‘free and compulsory’. ‘Free education’ means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education.

History of the act


December 2002

86th Amendment Act (2002) via Article 21A (Part III) seeks to make free and compulsory education a Fundamental Right for all children in the age group 6-14 years.

June 2005

The CABE (Central Advisory Board of Education) committee drafted the ‘Right to Education’ Bill and submitted to the Ministry of HRD. MHRD sent it to NAC where Mrs. Sonia Gandhi is the Chairperson. NAC sent the Bill to PM for his observation.

14th July 2006

The finance committee and planning commission rejected the Bill citing the lack of funds and a Model bill was sent to states for making the necessary arrangements. (Post-86th amendment, States had already cited lack of funds at the State level) Right of Children to Free and Compulsory Education Bill, 2008, passed in both Houses of Parliament in 2009. The law received President’s assent in August 2009. Article 21-A and the RTE Act came into effect. In 2009, the Right of Children to Free and Compulsory Education (RTE) Act was passed as enabling legislation to implement the recently added fundamental right. Both the constitutional amendment and the Act came into force on April 1, 2010. The Act

290 Unni krishan , J.P and others v. State of A.P and others , AIR 1993 SC 2178
requires that every child between the ages of six and fourteen years, including disadvantaged and low-income children, “have the right to free and compulsory education in a neighbourhood school till the completion of his or her elementary education. The Act also has provisions for non admitted children to be admitted to an age-appropriate class, and “specifies the duties and responsibilities of appropriate Governments, local authority and parents in providing free and compulsory education, and sharing of financial and other responsibilities between the Central and State Governments. Moreover, under section 12(c) of the Act unaided private schools are required to reserve 25% of their seats for children belonging to scheduled castes, scheduled tribes, and low-income or other disadvantaged or weaker groups (and provide free and compulsory elementary education for them).

**Cause and background of RTE Act 2009.**

Over past few years, opinion or approach to education underwent change because of Universal Declaration of Human Rights. It announces ‘Everyone has right to education’, wherein elementary and fundamental education shall be ‘free’ and compulsory’. World Conference on Education for all implemented ‘Every person – child, youth and adult – shall be able to profit from educational opportunity designed to meet their basic learning needs’. Twin notion of ‘elementary and fundamental education’ are surpassed by notion of ‘basic education’. At the same time a swing in emphasis from ‘education’ to ‘learning’ exemplifies people vis-à-vis society demands education to be ‘free’ and ‘compulsory’ (‘educational opportunity to meet basic learning needs of people’).

At a widely held discourse, learning begins at birth. Early childhood care and initial education are conveyed through involvement of community, family or institutional programme. Commencement of basic education of children outside family usually starts with primary school. Therefore a primary education must be universal and fundamental safeguarding basic education is essential for children and further taking into account socio-cultural specificity of community. Likewise supplementary substitute programme may help children, who have restricted or no access to formal schooling to meet their basic learning need; provided they share parallel learning process applied to a school that is adequately supported.

On conflicting basic learning needs of youth and adult are diverse and may be met through a diversity of delivery system. Literacy programmes are crucial because literacy is a essential skill in itself and foundation of other life skills. Literacy in mother-tongue supports identity and legacy of community and its people. Other needs of learning and education may be helped by skill drill, apprenticeship, formal and non-formal education programmes in health, nutrition, population, agricultural technique, environment, science, technology, family life including productiveness awareness and other societal issues. Accordingly accessible instrument and channel of information, communication and social action could be used to help transfer indispensable knowledge to educate people on social issues. In addition to traditional methods, library, television, radio and other audio-visual methods can be organised to meet their
simple educational need of people. All these components should constitute an combined system – complementary, mutually reinforcing and of comparable standard, and they should donate to creating and developing possibility for lifelong learning1

World Declaration on Education for All, Article 5, New York, Inter-Agency Commission (UNDP, UNESCO, UNICEF, World Bank) for World Conference on Education for All, 1990). Scope of ‘basic education’ has been extensively understood across community and society to comprise, among other things, ‘early childhood care and initial education’, i.e. activity intended to meet ‘basic learning need’ of children before they reach school-going age. In this context prevalent concern exists among nations across globes to remove mock barrier within basic education, particularly for addition of children with special educational need in consistent schools.

This act provides the free and compulsory education. The term compulsory education means that it is an obligation of the appropriate government to provide the free elementary education. According to Article 51 K of the Indian constitution it say’s that it the fundamental duty of the parents to provide free and compulsory education to the children between the age of six to fourteen years. There are many leading cases related to the right to education Mohini Jain v. State of Karnataka, a 1989 Supreme Court of India case, occurred when the Government of Karnataka issued a notification that permitted the private medical colleges in the State of Karnataka to charge exorbitant tuition fees from the students admitted other than the 'Government seat quota'. Miss Mohini Jain, a medical aspirant student filed a petition in Supreme Court challenging this notification. The Supreme Court of India observed that mention of 'life and personal liberty' in Article 21 of the Constitution automatically implies some other rights, those are necessary for the full development of the personality, though they are not enumerated in Part III of the Constitution. Education is one such factor responsible for overall development of an individual and therefore, right to education is integrated in Article 21 of the Constitution.

A landmark 2012 decision by the Supreme Court of India upheld the constitutionality of the Act, excluding section 12(c), but held that the RTE Act could not require private, minority schools to fulfill the 25% quota, as this would violate the right of minority groups to establish private schools under article 30 of the Indian Constitution. In defining the scope of article 21-A the Court held that it provides that the State shall provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may, by law, determine. Thus, under the said Article, the obligation is on the State to provide free and compulsory education to all children of specified age. However, under the said Article, the manner in which the said obligation will be discharged by the State has been left to the State to determine by law. Thus, the State may decide to provide free and compulsory education to all children of the specified age through its own schools or through government aided schools or through unaided private schools. The Court also held that unlike other fundamental rights, the right to education places a burden not only on the State, but also on the parent/guardian of every child.
Article 51 K of the Indian constitution says that it is the fundamental duty of the parents to provide free and compulsory education to the children between the age of six to fourteen years. The Constitution directs both burdens to achieve one end: the compulsory education of children free from the barriers of cost, parental obstruction or State inaction.

In Mohini Jain's case, this Court had held, inter alia; that every citizen has a right to education under the Constitution; the State was under an obligation to establish educational institutions to enable the citizens to enjoy the said right; the State may discharge its obligation through State owned or State-recognised educational institutions; that when the State Government granted recognition to the private educational institutions, it created an agency to fulfil its obligation under the Constitution, that charging capitation fee in consideration of admission to educational institutions, was a patent denial of a citizen's right to education under the Constitution and that the State action in permitting capitation fee to be charged by Staterecognised educational institutions was wholly arbitrary and, as such, violative of Article 14 of the Constitution; that the capitation fee brought to the fore a clear class bias; and that when the State Government permitted a private medical college to be set up and recognised its curriculum and degrees, then the said college was performing a function which under the Constitution had been assigned to the State Government and If the State permitted such institution to charge higher fee from the students, such a fee was not tuition fee, but in fact a capitation fee. The aforesaid decision was followed by the Full Bench of the A.P. High Court in Kranti Parishad v. N.J. Reddy, [1992] 3 ALT “ while allowing the writ petitions filed before it challenging the permission granted by the State Government for the establishment of private Medical and Dental Colleges in the State and also the constitutional validity of section 3-A of the Andhra Pradesh Educational Institution (Prohibition of Capitation Fee) Act, 1983. The respondents before the High Court, including the State, riled Special Leave Petitions against the High Court's judgment. Besides several writ petitions questioning the correctness of the decision of this Court in Mohini Jain's case also were filed.

In BandhuaMuktiMorcha v. Union of India, the Supreme Court held that while exploitation of the child must be gradually banned; other substitutes to the child should be developed including providing education, health care, nutrient food, shelter and other means of livelihood with self respect and dignity of person.

The question of right to free and compulsory education was elevated in the case of Mohini Jain, in 1992, popularly known as “capitation fee case”. The division bench of the Supreme Court held that the ‘right to life’ is the compendious phrase for all those rights which the Courts must implement as they are indispensable to the dignified enjoyment of life. Court stated: “The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual are not being assured unless it is accompanied by the right to education. The state is under an obligation

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291[1992] 3 ALT
292 (1997) 10 SCC 549
to make endeavour to provide educational facilities at all levels to its citizens”. T.M.A Pai Foundation v. State of Karnataka\(^{293}\) held that the state governments and universities cannot regulate the admission policy of unaided educational institutions run by linguistic and religious minorities, but state governments and universities can identify educational qualifications for students and make rules and regulations to maintain academic principles. In the case of AvinashMehrotra v. Union of India and Others\(^{294}\), is whether right to education comprises right to study in quality school which does not pose threat to child safety? The court held that Articles 21 and 21-A of the Constitution obliges that India’s school children obtain education in safe schools. The court had again stepped into the shoes of legislature by giving the aforementioned directions. The right to education has to move towards growth as merely primary education is made compulsory and free, the secondary, education and other higher levels still lag behind. The problem of drop outs even at primary level needs to be solved. It could be considered that the court will always remain the guarantor of fundamental rights such as right to education and will direct the legislature and the executive when such questions are brought before it.

67 years of independence, the private schools have filled in a gap of merely a little over 10 per cent, so far as the overall number of primary schools are concerned, there can be no guarantee that they will be able to contribute considerably to providing free and compulsory education to children in the age-group 6-14 and to universalising secondary education. At the current rate of their contribution, and if the state does not step in to shelter the gap, we may have to wait till the end of the era for universalising school education in India and even then it may not come about. It may take even longer to universalise secondary education, because the number of supplementary schools to be built and additional teachers to be recruited at this level, is colossal. Besides, school education is a common good the provision of which is the accountability of the state. The provision of free and compulsory education is now a fundamental right accessible to children in the 6-14 age-group. It is obligatory upon the state to ensure this right with instant effect. It is legally and morally indefensible for it to make the fulfilment of this right conditional upon the contribution of the private sector.

**DRAWBACK OF THE ACT**

This is the biggest drawback which RTE act is facing that it provide free and compulsory education only for students who falls in the category of class I to class VII, what about the students who wishes to appear for higher education. Let’s forget about higher education, a child who cannot afford to educate himself he’ll be struck till 8th standard and we fail to understand what good he’ll be able to do for himself in that case. Also it is an established fact that a child learns more frequently when he is young that is from3-4 years of age, now if RTE does not extend it boundaries to pre-primary level which is nursery (LKG, UKG) then there is a serious problem in this act.

**CONCLUSION**

\(^{294}\) April 13, 2009
Therefore, in the concluding remarks it is expected that that mare passing an act is not sufficient. The need of hour is to keep a proper check on the functioning of the act. The constant monitoring and strong political will is a must to make it effective.

As per the UNESCO’s „Education for All Global Monitoring Report 2010”, about 135 countries have constitutional provisions for free and non-discriminatory education for all. The much awaited Right to Education (RTE) Act which has been passed by the parliament of India should play a significant role in attaining universal elementary education in India. The victory and defeat of RTE would largely depend on consistent political care. Financial allocation of funds should be adequate in this respect. The youth in India should come forward and spread the utility of education to illiterate parents who are unable to appreciate the significance of education in limiting the social evils. Social differences and monopolization by any group should not be accepted at any cost. Education which is free of cost up to a certain age must be accessible to each and every one. Right to education for all and free education for certain age group of people is a brilliant policy by the government and we appreciate that, as key to a developed nation is that its citizens are literate enough to earn their bread and to contribute in the economy. Every coin has to faces

Similarly RTE faces both criticism and appreciation at the same time. The right to education is a fundamental right and UNESCO purposes education for all by 2015. India along with other countries of the world should also put genuine and honest efforts to make this goal a real achievement.
RULE OF LAW IN INDIA: THE FOUNDATION OF OUR DEMOCRACY

By Moksh Ranawat
From Symbiosis Law School, Pune

1. Abstract
Rule of Law is one of the basic features of the Constitution and is the bedrock of our democracy. It enshrines the idea that all men should be governed by law which is just, equal and supreme. It’s an essential feature which has evolved with time and is the soul of Article 14, which provides equality before law and equal protection of the laws. It is also the forefather of all fundamental rights, government policies and directive principles of state policy as it upholds the supremacy and spirit of the law. In the 71 years of independence which our country has witnessed, it has seen many governments rise and fall. There were many attempts to bend, break & even destroy the concept of the rule of law but it was the collective magnanimity & consonance of the judiciary which stopped this from happening. Hence, this paper aims to provide a historical overview of the evolution of the Rule of Law in India through various legislations, cases and ideas propagated over time and its significant contributions to protecting the liberties of citizens of India while highlighting the role of the judiciary in upholding the Rule of Law.

2. Introduction:
From time immemorial, mankind has always vested the power of its administration into some system, ideology or person for maintaining the order of society. We as a society have been witness to a variety of systems staring from ‘survival of the fittest’ in the ancient times; rise of monarchy & despotism in the medieval times; to the creation of ideologies of capitalism and socialism and to the birth of democracies, communists and republics in the modern times. This makes one wonder, why should our systems today outlast the ones before? What have we learned from countless years of history which can actually make a difference? How can we govern ourselves better?

The answer we came up with was that mankind could not be trusted to govern itself. As long as there stood a monarch or a group of people who were above others, there could always be misuse of power. So now, another question arose. What could be brought about to prevent this misuse of power? What could replace the ‘Rule of Men’ which was prevalent from thousands of years? What was the ultimate remedy?

And here it was that the theory of ‘Rule of Law’ came into existence. In its simplest version, it means the supremacy of the law above all individuals, wherein every action is governed according to the law of the land treating all individuals as equal while having frameworks maintaining the spirit of this law. No one was superior to the law, but only a subordinate. The concept of Rule of Law was that the state was governed, not by the ruler or the nominated representatives of the people but by the law at large. A country that enshrined the rule of law would be one

where there would be a basic and core law from which all other laws would derive their authority and be administered by the state. The monarch or the representatives of the republic would also be governed by the laws derived out of this supreme law which was established and their powers would also be limited by this law.  

3. Background:

The concept of the rule of law has its origins dating back to ancient times, wherein philosophers like Plato & Aristotle had first talked about such an idea. Over the years, the idea developed in the kingdoms of man wherein even kings agreed to also be bound by the law they laid down, one major example being the Magna Carta of 1215 signed by King John, the first declaration of rule of law. These ideas were propagated through medieval thinkers like Hobbs, Locke & Rousseau further ahead. Even Indian philosopher Chanakya had mentioned about the rule of law, in reference to king imposing the same in his reign. The term rule of law was coined by Sir Edward Coke and was derived from the French phrase ‘la principes de legalite’ which meant the principle of legality. Though, the real credit for this theory actually goes to A.V Dicey, who in his book Introduction to the Study of the Law of the Constitution (1885) took the idea ahead and remains to be one of the most popular works on the subject.

3.1. A.V. Dicey’s Theory:

The theory propounded by A.V. Dicey was based on three fundamental principles which were basically made for differentiating England’s governance at that time from all other republics in Europe, especially criticizing French & Dutch governance by giving a contrast between them and English governance. In the process, Dicey justified England’s excellence on three grounds, which are now recognized as the three basic fundamentals for the rule of law.

3.1.1. Supremacy of Law

The law is supreme. All individuals must obey it. This also includes those who are making laws; hence they are answerable to the public at large and the judiciary in specific for the laws they create.

3.1.2. Equality before the Law

All individuals are equals before the law. Nobody is above it. This concept of equality is based on equity between individuals and hence aims to bring about equal standing keeping into mind the lower sections of the society as well. Also, the

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298 Ivan Sage, *Democracy, Constitutionalism & Rule of Law*, VICTORIA UNIVERSITY OF WELLINGTON JOURNAL, Pg. 25.

299 Note 1.


301 Note 4.
laws must be non-discriminatory and should be enforced in a just manner.\textsuperscript{302}

3.1.3. Predominance of Legal Spirit
There must be a mechanism to enforce these laws and make sure these laws are not arbitrary to the interest of the public. This basically referred to the independence of judiciary.\textsuperscript{303}

The concept of the 'Rule of Law’ was fused within the Indian Constitution while it was in the process of creation. The preamble of the constitution itself talks about equality, liberty, justice and fraternity to be guaranteed to all. The Constitution was made as the instrument which defined the law of the nation and hence different laws were required to be in consistency with it. By this process, the constitution became the supreme law from which the all organs like the legislative, executive & judiciary derived their authority and therefore is considered the edifice of the ‘rule of law’ in India.\textsuperscript{304}

The concept of equality before law & equal protection of law is enshrined within Article 14 of the Constitution, while the right to personal life & liberty within Article 21 of the Constitution. These rights are those basic rights which A.V. Dicey had promulgated. Since the notion of rule of law was the basis on which the Constitution was made, the impact of its ideology could be seen inexplicably from Article 13–Article 32 (Part III) which guaranteed fundamental rights to the citizens of the country. Out of these, there were several important articles which were introduced in the modern concept and are pillars of the rule of law like: Article 21, which provides protection against self-incrimination, double-jeopardy & rights on detention; Article 32 & Article 226, which provide remedies through writs to the aggrieved & Article 19, which provides several important rights like freedom of speech & expression, freedom of movement etc.\textsuperscript{305}

The basic structure of the constitution itself is made to uphold the rule of law. Hence, in the words of Justice R.S. Pathak of the Hon’ble Supreme Court, “It must be remembered that our entire constitutional system is founded on the rule of law, and in any system so designed it is impossible to conceive of legitimate power which is arbitrary in character and travels beyond the bounds of reason.”\textsuperscript{306}

5. Evolution of the Rule of Law in India: Important Cases & Principles Evolved
Even though the original provisions for the rule of law were laid down in the Constitution of India, their validity and perpetuity was evolved through several landmark cases which decided the separation of powers.

\textsuperscript{302} Uma Pal, Right to Equality- A Fundamental Right, LEGAL SERVICES INDIA, (Jan 13, 2018, 12:12AM) http://www.legalservicesindia.com/article/print.php?article_id=1688
\textsuperscript{303} Ibid.
\textsuperscript{306} Note 10.
between the three pillars of democracy and laid the bedrock for continuous developments of the principles of the rule of law.

The first development took place in Shankari Prasad v Union of India\textsuperscript{307}, where the issue which was raised before the courts was whether the fundamental rights could be amended by the Parliament through Article 368 of the Constitution wherein the Supreme Court held that the Parliament had unlimited power to amend the fundamental rights of the Constitution which were guaranteed under Article 368 because according to Article 13 of the Constitution, the term ‘law’ had meant any legislative action and not a constitutional amendment. Therefore, a constitutional amendment would have been valid even if it abridged any of the fundamental rights. This was further upheld in Sajjan Singh v Union of India\textsuperscript{308} by the Supreme Court and now gave absolute power to the parliament to take away the basic liberties guaranteed by the makers of the constitution. The balance of power had tilted in favour of the parliament and the Ninth Schedule had become an instrument of misuse.

As the saying goes, ‘power corrupts, and absolute power corrupts absolutely.’ it was not long before court doors were knocked once again for the sake of justice. This lead to the historic case of IC Golak Nath v State of Punjab\textsuperscript{309}, wherein the Supreme Court took away the absolute power of the parliament to amend the fundamental rights and again restored equilibrium to the separation of powers in particular and the rule of law in general\textsuperscript{310}.

But yet again, the Rule of law was struck another blow with the 24\textsuperscript{th} Amendment by the Parliament which restored the amending power of the Parliament and also increased the scope of its own powers. This was challenged in Keshavananda Bharti v. State of Kerala\textsuperscript{311}, wherein the basic structure doctrine was laid by the Supreme Court. The courts held that the Parliament had wide powers in regard to amending the Constitution but this power was limited and could have not included the power to abrogate the basic feature of the Constitution. There were implied limitations which were put within which the parliament could amend the Constitution. Thus, the rule of law was preserved.

After the Keshavananda Bharti case, the concept was expanded and was applied upon a variety of cases which presented themselves. In the case of Indira Gandhi v. Raj Narain\textsuperscript{312}, the Supreme Court had invalidated the Indira Government’s attempt to immunise the election dispute by removing power of the courts to have the trial of a Prime Minister. In Raman Dayaram Shetty v. International Airport Authority of India\textsuperscript{313}, the Supreme Court held that the great purpose of rule of law was the protection of individual against arbitrary exercise of power, wherever it is found.

\textsuperscript{307} Shankari Prasad v Union of India, AIR 1951 SC 458;[1952] 1 SCR 89
\textsuperscript{308} Sajjan Singh v Union of India, AIR 1965 SC 845; [1965] 1 SCR 933
\textsuperscript{309} IC Golak Nath v State of Punjab, AIR 1967 SC 1643; [1967] 2 SCR 762
\textsuperscript{310} SOLI J. SORABJEE & ARVIND P. DATAR, NANI PALKHIVALA THE COURTROOM GENIUS, Pg. 41-56 (9\textsuperscript{th} Edition, LexisNexis 2017)
\textsuperscript{311} Keshavananda Bharti v. State of Kerala, AIR 1973 SC 1461; (1973) 4 SCC 225
\textsuperscript{312} Indira Gandhi v. Raj Narain, AIR 1975 SC 2299
\textsuperscript{313} Raman Dayaram Shetty v. International Airport Authority of India, 1979 AIR 1628 : 1979 SCR (3)1014
But there was one case which shall always remain as a stain on the magnificent history of the judiciary of India, which is **A.D.M. Jabalpur v Shivakant Shukla**[^314^], famously known as the habeas corpus case. According to the Shah Commission Report, around 1,08,010 detentus were imprisoned in courts and denied their right to be presented in the court of law. In this case the judges upheld the autocracy of the government and hence erred in conferring justice. It was the lone dissenter, Justice H R Khanna, who went against such oppression, for which his name shall always be remembered in the walls of righteousness & justice.

In **National Legal Services Authority v. Union of India**[^315^], the courts enumerated upon the importance of the rule of law and exclaimed that “The rule of law is not merely public order. The rule of law is social justice based on public order. The law exists to ensure proper social life. This is the rule of law that strikes a balance between society's need for political independence, social equality, economic development and internal order, on the one hand and the needs of the individual, his personal liberty and his human dignity on the other. It is the duty of the Court to protect this rich concept of the rule of law.”

6. **Research Methodology**

The quality and value of research depends upon the proper and particular methodology adopted for the completion of research work. Taking into mind the enormity of the topic, historical doctrinal and empirical legal research methodology has been adopted. To make an authenticated study of the research topic ‘Rule of Law in India: The Foundation of our Democracy ’enormous amount of study material was referred. The relevant information and data necessary for its completion has been gathered by secondary data sources available in the books, journals, research articles and bare acts of the Constitution of India. Keeping in view the need of present research, various cases filed in the Supreme Court which moulded the concept of Rule of law and their judgments have also been used as a source of information.

7. **Conclusion**

In the 71 years of independence which our country has witnessed, it has seen many governments rise and fall. There were many attempts to bend, break & even destroy the concept of the rule of law but it was the collective magnanimity & consonance of the judiciary which stopped this from happening. There may have been some mistakes down the road, but they were corrected while there was still time. What the rule of law envisaged were the basic liberties of its citizens, which have been upheld by our Constitution.

Rule of law has become the foundation of our democracy and only its survival guarantees the balance of powers. It is like the Himalayas which protects us from the cold winds of Siberia, while at the same time ensuring that the monsoon winds do not fly away. Through the provision laid down & the precedents evolved, we have achieved our solemn aim of keeping law supreme and stopping dictatorial & authoritarian regimes of the rule of man from arising back into our country.

[^314^]: ADM Jabalpur v Shivakant Shukla, AIR 1976 SC 1207 : (1976) 2 SCC 521; The initials A.D.M refer to Additional District Magistrate

[^315^]: National Legal Services Authority v. Union of India, WP (Civil) No 604 of 2013
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PUBLIC PROVISIONING AND SOCIAL PROTECTION IN THE NATIONAL AND INTERNATIONAL FORUM- A STUDY ON ISSUES RELATED TO WOMEN

By Monika T
From Alliance School of Law, Alliance University, Bengaluru

INTRODUCTION:
Public provisioning and Social protection are two terms not easily definable. Merriam Webster dictionary defines ‘provisioning’ as ‘an act or process of providing’. Thus, public provisioning means an act of providing support for an issue, raising voice and standing together.

When the public raises voice against an issue or a crime, immediately a change is seen (passing of legislation, amendment of existing laws, execution of ordinances, etc.) This is known as ‘Social Protection’ or ‘Social Safety’. This paper will explain about the relation between public provisioning and social protection, through issues relating to women (Example: Rape, Sexual offences and other abuses against women).

Protecting women from social, economic, political, caste and gender-biased discrimination is a great task. And, we are trying from centuries ago. “We cannot all succeed when half of us are held back” said Swami Vivekanand. Fear of violence is an important factor in lives of most of the women across the world. It causes women’s lack of participation in activities beyond home, as well as inside it. Sometimes the violence begins even before their birth, sometimes in their adulthood or during other phases of life. Though we talk about increase in the women’s safety and empowerment, the scenario hasn’t changed much. The reason for a few changes is due to the focus light on those issues. Thus, as a quest to know their relationship, the project focusses on two major incidents:

1) At national level- Nirbhaya case resulting in ‘The Criminal Amendment Act, 2013.'
2) At international forum- 9/11 Attack and the focus on violence against Afghan women.

1. IMPACT OF NIRBHAYA:

A. Background:

While a 23 years old Physiotherapy intern took a bus to return home with her friend, on the night of 16th December 2012, was gang raped by six people including the driver of the bus and a juvenile The victim and her friend were beaten up when received suspicion about the route to the destination. The women was raped brutally, she suffered serious injuries to her abdomen, intestines, genitals due to the sexual assault and a blunt object being used for the penetration. Later, both were thrown out of the moving bus.

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316 Malala Yousafzai, Youth Takeover of the United Nations (July 12, 2013), New York.
She was taken to a hospital in Singapore from Delhi as she required organ transplantation, but all the treatments ended up in futile. Two blood-stained metal rods were retrieved by the Police officers from the bus, despite the offenders cleaning to avoid the evidence. The medical staff confirmed the objects as being used for penetration. Within 24 hours the police arrested the accused.

B. Public’s outrage:

This incident led an outrage in the whole of India and even in some parts of the world. Many students started protesting and seeking justice for Nirbhaya. The protest included places like India Gate and Raisina Hills. The people who joined for the protest were forced to leave by water cannon and tear gas shells. Even a few were arrested. In order to avoid some violent eruptions curfew was imposed with Sec 144 of CrPc. Even politicians were demanding the rapists to be hanged.

C. Justice Verma Committee and its objective:

After six days of the incident, the Government of India appointed a three-member committee. It was headed by Justice J.S.Verma, 27th Chief Justice of India. Along with him Justice Leila Seth, first women Judge on the Delhi High Court and Gopal Subramanium, Solicitor General during the period 2009-2011 were appointed. The main objective of the Commission was to review for possible amendments to the criminal law. Also, the committee was proposed to suggest measures for speedy trails and harsher penalties for offences against women.

The committee on receiving 80,000 suggestions from eminent jurists, legal professionals, NGOs, women’s groups and many citizens, submitted its report after 29 days. The changes were demanded on the following Statutes.

(i) Indian Penal Code, 1860.
(iii) Indian Evidence Act, 1872

D. The changes the act demanded:

Punishment for Rape:

The commission recommended Rigorous Imprisonment for life or seven years depending on the case. Also, it recommended RI for not less than 20 years when the accused’s actions has led victim to the “persistent vegetative state”, sometimes RI for life also. Gang –rape shall also be punished with rigorous imprisonment for not less than 20 years, and may extend to life. In case of gang-rape leading to death of the victim, he shall be punished with life imprisonment. An armed personnel would be imprisoned for 7 to 10
years if they knew that his subordinate is indulging in sexual offences.

Note: The committee did not recommend for the death sentence.

(ii) **Punishment for sexual assault:**

The committee recommended to include even non-penetrative forms of sexual contact also under sexual assault. The offence should be punishable with 5 years of imprisonment, or fine, or both and when force is used, then punishable with 3 to 7 years of imprisonment. Repeal of Sec 509 of IPC and to treat ‘use of words, acts or gestures that create an unwelcome threat to sexual nature’ also under sexual assault punishable with 1 year of imprisonment. Even demanding of sexual favour is punishable with 1 year of imprisonment.

(v) **Medico-Legal Examination of the victim:**

The victim has to be taken to the nearest hospital and then, medical examination report has to be prepared, immediately after the examination or on the same date as of the examination. And if a public servant fails to record information to any sexual offence shall also be penalised.

(iii) **Age of consent:**

Age of consent has to be reduced from 18 to 16 years.

(iv) **Punishment for sexual offences:**

The commission recommended for the removal of the clubbing of this offence with the grievous hurt and to make a separate provision. And the punishment it demanded was rigorous imprisonment not less than 5 years and may extend to 7 years, additionally the accused has to pay the medical expenses incurred by the victim as compensation.

Inclusion of certain acts as crimes under separate heads, such as ‘Voyeurism’ (watching a woman when she is engaging in private act including sexual acts, use of lavatory, or when private parts are exposed), ‘Stalking’ (following a woman, attempting to foster personal interaction despite indication of victim’s disinterest, spying, monitoring electronic communications). These both offences shall be punishable with imprisonment for 1 to 3 years and shall also be liable for fine.

(vi) **Police Reforms:**

The committee recommended to form a National Security Commission headed by Union Home Minister and State Security Commission headed by Chief Minister or Home Minister as a chairman. The main aim of the State Security Commission is to control the unwanted pressure the State government is imposing on the State police. The Director General of Police (DGP) and Inspector General of Police (IG) shall have two years of tenure. The committee also recommended for separation between investigating police and law and order police.

Also, there shall be a Police Establishment Board for deciding all matters relating to transfers, postings and promotion of officers and Police Complaints Authority to
look into complaints against Police authorities.

(vii) **Electoral Reforms:**

The committee’s opinion was to disqualify a candidate from voting, if a charge sheet is filed against him/her and on cognizance by the Court. Thus, recommended to amend the Representation of People Act, 1951. Also, the committee recommends amendment to the provisions of the Comptroller and Auditor General’s (Duties, Powers and Conditions of Service) Act, 1971 to permit deeper investigation of assets/liabilities declared at the time of filing a nomination paper for election or, as soon as possible practically.

(viii) **Educational and Perception Reforms:**

The first recommendation put forth by the committee was to prevent stereotyping, and also to prevent from imputing false morality to children. Secondly, it suggests to make the children recognise discrimination and to control the asymmetrical powers held by the school. Thirdly, the committee pointed out the loopholes in the Indian Educational system and suggested to include life skills development at the school level itself. Lastly but strongly the committee has recommended to introduce sex education in a clinical manner, which is necessary during the transition into adulthood.

E. **The Criminal Law (Amendment) Act, 2013**

The Criminal Law (Amendment) Bill, 2013, was passed in the Parliament (Lok Sabha and Rajya Sabha respectively on 19th and 21st March 2013) but officially on 2nd April 2013. The Criminal Law (Amendment) Act, 2013 is the replacement of The Criminal (Amendment) Ordinance, 2013. Some sections are modified and new sections are inserted.

I. **Indian Penal Code, 1860 - Amendments**

1. Duty of Public servant and hospitals
   - Sec 116A: Punishes a public servant who disobeys directions under law with imprisonment for 6 months extending up to 2 years and fine.
   - Sec 116B: If a hospital refuses to treat a victim, it shall be punishable by 1 year of imprisonment or fine or both.

2. Acid attacks
   - Sec 326A: A person shall be punishable with imprisonment not less than 10 years and may extend for life and fine to be paid for the treatment, in case of voluntarily causing grievous hurt by use of acid.
   - Sec 326B: A person who voluntarily throws or attempts to throw acid shall be imprisoned for 5 years and extended up to 7 years and with fine.

3. Sexual offences
   - Sec 354A: A person who indulges in

• Physical conduct and advances involving unwelcome and explicit sexual overtures; or
• A demand or request for sexual favours; or
• Forcibly showing pornography shall be punishable with imprisonment which may extend to 3 years or with fine or with both.
• In case of making sexual coloured marks shall be punishable with imprisonment extending to 1 year or with fine or with both.

(vi) Sec 354B- A person is punishable with 3 years of Imprisonment which may extend to 7 years and with fine for assaulting a woman with intent to disrobe.

(vii) Sec 354C- Voyeurism
- In case of first conviction, the accused shall be punishable not less than 1 year which may extend to 3 years and with fine
- In case of second conviction, the accused shall be punishable not less than 3 years which may extend to 7 years and with fine (In case of second conviction)

(viii) Sec 354D- Stalking
- In case of first conviction, the accused shall be punishable up to 3 years and with fine.
- In case of second conviction, the accused shall be punishable up to 5 years and with fine

4. Rape

(ix) Sec 376A- Rape injuries resulting in a woman’s death or persistent vegetative state.
Punishment: Rigorous imprisonment not less than 20 years and may extend to imprisonment for life.

(x) Sec 376B- Sexual intercourse between wife and husband during their separation
Punishment: Imprisonment not less than 2 years but may extend to 7 years with fine.

(xi) Sec 376C- Sexual intercourse by persons in authority.
Punishment: Rigorous imprisonment for not less than 5 years but may extend to 10 years and with fine.

(xii) Sec 376D- Gang Rape
Punishment: Similar punishment under Sec 376A, but with fine to be paid to the victim.

(xiii) Sec 376E- Repeat offenders
Punishment: Imprisonment for life.

II. Amendments made in other Criminal law statutes:

1. The Code of Criminal Procedure, 1973
   Amendments of sections include Sec 54A, Sec 154, Sec 160, Sec 161, Sec 164, Sec 173, Sec 197, Sec 273, Sec 309 and Sec 327.
   - Insertion of Sec 198B, Sec 357B and Sec 357C.

2. The Indian Evidence Act, 1872.
   - Insertion of Sec 53A which states that evidence of character or previous sexual experience not relevant in certain cases.
   - Substitution of new section for Sec 114A which states that in case sexual intercourse has been proved and if a woman confesses that she did not give consent, it is presumed that she did not.
   - Substitution of new section for Sec 119- if a witness is unable to communicate verbally, the court can also permit any mode of communication which he is comfortable with or take help of an interpreter or a special educator, which shall be video graphed also.

- Substitution of new section for Sec 42 which states that any person who has committed an offence under the Sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or Sec 509 of The Indian Penal Code, 1860, shall be punishable either under this Act or IPC, which ever provides greater decree of punishment. And, In case of any inconsistency with other Acts, this Act will have overriding effect.

2. IMPACT OF 9/11 ATTACK

A. The focus on Taliban:

On September 11, 2001 people of the United States woke up to the attacks by the terrorist group ‘Al-Qaeda’ on the ‘twin towers’ of US. The hijackers took control over two aircrafts which were flown into the towers and a third aircraft hitting the Pentagon in Virginia. The suspicion on Al-Qaeda was proved and US said that “it was at war with a new and different kind of enemy”. The relation between this attack and the shift of focus on Taliban is believed to be due to the refusal of Taliban to turn Bin Laden over to US authorities and non-acceptance of the Taliban to create friendly relationship with United States and create government of “National Unity”\(^\text{320}\).

B. Background:

The Soviet attacks Afghanistan on December 27, 1979. Before the war, Afghans have requested Soviet to help them stabilize their economy. Soviet were ready for it, and planned to spread communism. A group called Guerrillas (mujahidin) was formed in order to fight communism, who were helped by USA, Saudi Arabia and Pakistan.

Taliban emerged as a powerful movement in 1994 and its main supporters being Pakistan who provided weapons, military training, and financial support. Most of the Taliban’s leaders were educated in refugee camps in Pakistan, who had escaped the Soviet invasion. In Afghan there were several ethnicities and tribes, Pashtuns being the majority, they considered duty of the men is to uphold the respectability of their women. Purdah, however a key element of family’s honour was not compulsory in all the tribes. When Kabul imposed restrictions and reforms, it was opposed by these tribes. The period 1920’s to 1950’s was considered to be glorified period of women, as they were allowed to vote, seclusion was abolished, and got much independence. But, in 1950’s to 1960’s there was the emergence of violence between those who opposed the reforms and the representatives of Kabul who were to implement them. That’s when the Soviet interfered in 1979. After the destruction of Soviet and the violence still prevalent, the talib Mujahedeen, regrouped to form the Taliban movement and they called themselves to be the cleansers of the Afghan society. By 1996, even Kabul was in the hands of Taliban. The impacts of which were, the schools were closed for girls. Strict interpretation of Shariat law

and chadari (a head to toe cover) was made mandatory. Mahram (a male family member) was to accompany a woman in all aspects which was not seen before. Women were banned from working, from showing their skin in public, banned from accessing healthcare services delivered by men, and being involved in speaking publicly and in politics. The main aim of invasion was to make Afghanistan an Islamic state. Taliban rule in Afghanistan from 1996 to 2001, changed the whole scenario.

C. The eternal mark of Taliban:
The mark of Taliban in Afghanistan can be divided into two periods 1996 to 2001 and from 2001 to the present. In 1989, 1 million Afghans had died and 7 million had been dispatched. 1996 was when the Taliban made their foot firm in the country. As already stated Mujahedeen were considered to be the purifiers of the broken Afghan society, in 1990’s regrouped to form Taliban movement. The solutions for the violence and the war were felt to be these strict rules. In 1996, they seized Kabul after which women faced the consequences as to removal from government jobs and to stay only inside their houses. As, some people believed that their strict rules protected and helped them as solution against the violence and war. The growth of Taliban was enormous. The main reason for their emergence was the state failure and the civil war. The Taliban rule was deeply ingrained in Pashtun society. The main vision of Taliban was to create an Islamic state. There was no emphasis nor the international community concentrated on this issue until 1990s. But, after the 9/11 attack in 2001, there was so much focus on the Taliban’s.

D. Changes in the lives of Afghan women:
Until September 11, 2001, there was no focus on this issue, neither Clinton nor Bush concentrated on the violence against women by the Taliban. There were so many resistance from the part of Taliban, however they ended in futile. The importance of social protection will be dealt herein under. Until this attack on September 2001, there was no recognition by international communities, but after this there was the defeat of Taliban and the regime of empowerment.

- A provision for gender equality was made under the Constitution in 2004, “ The citizens of Afghanistan - whether woman or man – have equal rights and duties before the law.”
- 25 percent and 17 percent seats reserved in the lower house and upper house, respectively.
- The right to vote in elections
- Creation of MOWA, Ministry of Women’s Affairs and gender units and focal points in other ministries; and of Afghan Independent Human Rights Commission and its women’s rights unit.
- Adoption of National Action plan for women of Afghanistan.
- Signing the convention on the Elimination of All forms of Discrimination against women.
- In 2009, EVAW, Elimination of Violence against women law was passed. It was drawn up by UNIFEM (UN Development


Fund for Women) and MOWA, the law provides greater punishment for violence against women.

- National Solidarity program sort to improve women’s economic and social rights providing funds and their involvement in decision making.
- There has been some increase in enrolment of students in the school, training of teachers, young women joining the military and the rehabilitation and construction of school buildings.

Before the intervention of the westerners and the international community, the Afghan women were under turmoil, only after the recognition there is a shift in their lives. The public provisioning plays an important role in social protection. If not noticed, the women of Afghan would have been under the constant fear even now and even a few percentage of improvement in their lives would not have taken place.

Before the intervention of the westerners and the international community, the Afghan women were under turmoil, only after the recognition there is a shift in their lives. This is a perfect example of public provisioning playing an important role in social protection. If not noticed, the women of Afghan would have been under the constant fear even without these improvements in their lives. But, the question of impact is still debatable. The Social protection has been attained but the implementation part is lacking. Even in this case, ironically the president Karzai signed the Shiite Personal Status Law, on the same day he signed the Elimination of Violence against Women. Even after the resistance only a few amendments were made, also the women who protested were called to “anti-Islamic, Western agents and prostitutes”. MOWA, has faced a lots of criticism, and it was considered to be an alien western discourse. DOWA, is the MOWA’s Department of Women’s Affairs in rural areas, but there in underfunded and provides only limited assistance. As we already seen in the above context, there is an uprising in the violence by 2005, the women’s participation has reduced especially in elections be it in voting and also in candidate’s nomination from 44 percent in previous elections to 38 percent\(^3\). In 2010, parliamentary elections mainly targeted women. The Free and Fair Election Foundation of Afghanistan found that Taliban secretly sent letters to the women candidates as a warning.

In 2002, Afghanistan’s health system was described by public health experts as in a state of “near total despair”. The abduction and killing of the health workers leads to closure of the health facilities. There is raising violence and civilian injuries despite the surge of US troops\(^4\). The women have reported that they faced violence by the foreign forces, insurgents, police chiefs, and criminal gangs.

**CONCLUSION:**

From both these cases, it is evident that public provisioning and social protection are intertwined. Even before the case of Nirbhaya, there were many cases which demanded change in the age old Criminal law. But, due to Public’s outrage, necessity for speedy justice, and for the protection of

\(^3\) David Cortright and Kristen Wall, “Afghan women Speak (Enhancing Security and Human Rights in Afghanistan)”, August 2012.

\(^4\) UNAMA (UN Assistance Mission in Afghanistan) report, 2011.
the women in the society, the Criminal Law Amendment Act was passed without delay.
In the second case, the Afghan women have undergone turmoil due to the Taliban’s intervention. In fact, some of the women were passive supporters of Taliban and they checked if the other Afghan women are following the rules of the Taliban. All these were known to other countries of the world, but nobody reacted to it. The incident of 9/11, brought the focus and thereafter helped in women empowerment in the country.
But, the fact that these social protections have to be obtained only through public’s outrage and provisioning is saddening. Even, then the implementation part is a debatable issue. The changes the public provisioning has brought is commendable. Not just these two issues, there are so many issues around the world, which due to public provisioning has achieved social protection. Some examples could be- The case
- Vishaka and Ors. vs. State of Rajasthan\(^{325}\)
- Jallikattu issue\(^{326}\); etc.
In all these cases, we can see the role of public in some or the other way.
Thus,
1. It is a three stage process-  a) Happening of an event which becomes a social issue; b) Public provisioning; c) Social Protection.
2. Recognition leads to focus. Focus on an issue brings in lots of suggestions, policies, legislations and ending up giving a solution.
3. Public provisioning has an important effect in bringing up social protection. Only, when the public recognizes it, there is a focus on that issue and it leads to the concept of social protection. When the former fails, the latter also does. Thus, they are co-related.

\(^{325}\) AIR 1997 SC 3011
\(^{326}\) Animal Welfare Board of India vs. A. Nagaraja & Ors., SLP (Civil) No. 11686 of 2007

www.supremoamicus.org
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PROTECTION OF CHILD RIGHTS IN INDIA

By Namita Chandwani
From Indore Institute of Law/Devi Ahilya VishwaVidhyalaya

“I strongly feel that this is a big honor to hundreds of millions of the children who have been deprived of their childhood and freedom and education.” – Mr. Kailash Satyarthi.

❖ INTRODUCTION
A child means every human being below the age of eighteen years unless, under the law applicable to the child, the age of majority is attained earlier. A nation’s children are a “supremely important national asset”, and the future well-being of a nation depends upon how its children grow and develop. It is the duty of the state to look after a child to ensuring full development of its personality. To achieve this goal, a state must grant certain rights to the children. In India, rights of citizens including that of children have been directly or indirectly provided for by the Constitution of India.327

A large number of children around the world are exploited, mishandled and oppressed. These children include child labourers, children sexually misused, children in struggle with the law or being taken care of by the state and as well as children living on the streets, adapting to handicaps or experiencing separation because of their religious or ethnic-minority status. They are deserted. They don't get an opportunity to venture in a school. They are left to fight for themselves in the city. They suffer violence silently in the society. They don't approach even essential human services. They suffer cruel and ill treatment every day. They are kids – honest, youthful and wonderful, innocent – who are denied of their rights.

In human rights history the rights of children are the most approved. The United Nations Convention on the Rights of the Child (UNCRC) characterizes Child Rights as the base qualifications and freedoms that ought to be afforded to every citizen below the age of 18 paying little heed to race, national source, colour, sexual orientation, language, religion, sentiments, origin, wealth, birth status, incapacity, or different attributes. These rights encompass chance of children and their social equality, family condition, fundamental medicinal services and welfare, instruction, unwinding and cultural activities and unique security measures. Children were beneficiaries of welfare measures. It was just amid the 20th century the idea of children’s rights emerged. The rights approach is principally concerned about issues of social justice, equity, non-discrimination and empowerment.

Nature has provided some inherent rights to every human being including children. These fundamental rights bestowed in human being from the very inception. Human being is

327Rebecca Furtado, All you need to know about child rights in India, IPEADERS (Apr. 1, 2018, 3:35 P.M.), https://blog.ipleaders.in/child-rights-in-india/
endowed with rights since the stage of foetus. Foetus in the mother womb is the starting point since then human being is guaranteed certain basic rights. These rights are intrinsic in every one. State cannot give or nullify these rights, which are inherent. State has to recognize and guarantee these rights, Human Right Instrument specific to the rights of the child: The Declaration of the Rights of the child 1924, adopted by the fifth assembly of the League of Nations, can be seen as the first international instrument dealing with children’s rights.  

WHO IS A CHILD??
In India, the Census of India and the Constitution of India defines persons below the age of fourteen as children. The Children Act defines child as a person who has not attained the age of 16years if it is a boy or 18years if it is a girl.

According to UNCRC- A child means every human being below the age of 18 yrs, unless under the law applicable to the child majority is attained earlier.

NEED FOR PROTECTION OF CHILD RIGHTS
Children are innocent, trusting and full of hope. Their childhood should be joyful and loving. Their lives should mature gradually, as they gain new experiences. But for many children, the reality of childhood is altogether different. Right through history, children have been abused and exploited. They suffer from hunger and homelessness; work in harmful conditions, high infant mortality, and deficient health care and limited opportunities for basic education. A child need not live such a life. Childhood can and must be preserved; children have the right to survive, develop, be protected and participate in decisions that impact their lives.

They are the future of our nation and they only are our future lawyers, doctors, engineers, teachers etc. The rights of children are also needed because even many children who are orphans have to spend a lot in their life. Such as sexual abuse, child trafficking, begging etc.

The need to have separate rights for children was felt after the Second World War when many children were orphaned or disabled due to the war and were in need of special protection. Those working with children felt that the existing system was not sufficient to deal comprehensively with the needs of the children. Thus, the UN Convention on the Rights of the Child brought all the rights of the children within one document for the very first time in history. The single most important principle, on which the rights of the children are based, is the ‘best interest principle’, which means any action taken with regard to a child must be in his/ her best


Child Right’s Importance, CHILD RIGHTS AND YOU (Apr. 1, 2018, 9:00 A.M.) http://uk.cry.org/knowus/importanceofchildrights.html
interest. The Convention on the Rights of the Child defines basic rights of children covering multiple needs and issues, which India endorsed on December 11, 1992.\textsuperscript{332} The need to secure a few children is absolutely more prominent than others because of their particular financial and political conditions and geological area. These are the children who are more helpless in term of the damage/threat/hazard on their right side to survival/improvement/interest.

1. Destitute children (asphalt inhabitants, uprooted/expelled, and so forth.)
2. Refugee children
3. Orphaned children
4. Children whose guardians can't or are not ready to deal with them
5. Street vendors as children
6. Children who are beggars
7. Trafficked children
8. Child prostitutes
9. Offspring of detainees
10. Children affected by struggle/common strife
11. Children affected by disaster, both characteristic and synthetic
12. Children influenced by substance mishandle, HIV/AIDS and other fatal infections
13. Handicapped children
14. Children having a place with ethnic, religious minorities and other underestimated gatherings
15. The girl child
16. The unborn child
17. Children in conflict with law

\textbullet\ The UNCRC traces the principal human rights that ought to be afforded to children in four wide groupings that appropriately cover all civil, political, social, economic and social privileges of every child.\textsuperscript{333}

\textbullet\ Right to Survival:
- Right to be born
- Right to minimum standards of food, cloth and shelter.
- Right to live with dignity
- Right to health and care, to safe drinking water, nutritious food, a clean and safe environment, and information to help them stay healthy.

\textbullet\ Right to Protection:
- Right to be protected from all sorts of violence
- Right to be protected from neglect
- Right to be protected from physical and sexual abuse
- Right to be protected from dangerous drugs

\textbullet\ Right to Participation:
- Right to freedom of opinion
- Right to freedom of expression
- Right to freedom of association
- Right to information
- Right to participate in any decision making that involves him/her directly or indirectly

\textbullet\ Right to Development:
- Right to education
- Right to learn
- Right to relax and play
- Right to emotional, mental and physical development.

\textsuperscript{332} Dr. Preeti Bhardwaj & Dr. Rajwanti Sandhu, \textit{Human Rights of Children in India}, Volume 1, UNICEF 34,35(2016)

\textsuperscript{333} Child Rights, SMILE FOUNDATION(Mar. 31, 2018, 7:50 P.M.), http://www.smilefoundationindia.org/child_rights.html
Summary of UNCRC

- Article 1: Everyone under 18 years of age has all the rights in this Convention.
- Article 2: The Convention applies to everyone whatever their race, religion, abilities, whatever they think or say, and whatever type of family they come from.
- Article 3: All organizations concerned with children should work towards what is best for each child.
- Article 4: Governments should make these rights available to children.
- Article 5: Governments should respect the rights and responsibilities of families to direct and guide their children so that, as they grow, they learn to use their rights properly.
- Article 6: All children have the right to life. Governments should ensure that children survive and develop healthily.
- Article 7: All children have the right to a legally registered name, and nationality. They have the right to know and, as far as possible, to be cared for, by their parents.
- Article 8: Governments should respect children's right to a name, a nationality and family ties.
- Article 9: Children should not be separated from their parents unless it is for their own good (for example if a parent is mistreating or neglecting a child.) Children whose parents have separated have the right to stay in contact with both parents, unless this might harm the child.
- Article 10: Families who live in different countries should be allowed to move between those countries so that parents and children can stay in contact, or get back together as a family.
- Article 11: Governments should take steps to stop children being taken out of their own country illegally.
- Article 12: Children have the right to say what they think should happen, when adults are making decisions that affect them, and to have their opinions taken into account.
- Article 13: Children have the right to get and to share information, as long as the information is not damaging to them or to others.
- Article 14: Children have the right to think and believe what they want, and to practice their religion, as long as they are not stopping other people from enjoying their rights. Parents should guide their children on these matters.
- Article 15: Children have the right to meet together and to join groups and organizations, as long as this does not stop other people from enjoying their rights.
- Article 16: Children have a right to privacy. The law should protect them from attacks against their way of life, their good name, their families and their homes.
- Article 17: Children have the right to reliable information from the mass media. Television, radio, and newspapers should provide information that children can understand, and should not promote materials that could harm children.
- Article 18: Both parents share responsibility for bringing up their children, and should always consider what is best for each child. Governments should help parents by providing services to support them, especially if both parents work outside the home.
- Article 19: Governments should ensure that children are properly cared for, and protect

them from violence, abuse and neglect by their parents, or anyone else who looks after them.

- Article 20- Children who cannot be looked after by their own family must be looked after properly, by people who respect their religion, culture and language.
- Article 21- When children are adopted the first concern must be what is best for them. The same rules should apply whether the children are adopted in the country where they were born, or if they are taken to live in another country.
- Article 22- Children who come into a country as refugees should have the same rights as children born in that country.
- Article 23- Children who have any kind of disability should have special care and support, so that they can lead full and independent lives.
- Article 24- Children have the right to good quality health care, to clean water, nutritious food, and a clean environment, so that they will stay healthy. Rich countries should help poorer countries achieve this.
- Article 25- Children who are looked after by their local authority, rather than by their parents, should have someone review the situation regularly.
- Article 26- The Government should provide extra money for the children of families in need.
- Article 27- Children have a right to a standard of living that is good enough to meet their physical and mental needs. The Government should help families who cannot afford to provide this.
- Article 28- Children have a right to an education. Discipline in schools should respect children’s human dignity. Primary education should be free. Wealthy countries should help poorer countries achieve this.
- Article 29- Education should develop each child's personality and talents to the full. It should encourage children to respect their parents, and their own and other cultures.
- Article 30- Children have a right to learn and use the language and customs of their families, whether these are shared by the majority of people in the country or not.
- Article 31- All children have a right to relax and play, and to join in a wide range of activities.
- Article 32- The Government should protect children from work that is dangerous, or that might harm their health or their education.
- Article 33- The Government should provide ways of protecting children from dangerous drugs.
- Article 34- The Government should protect children from sexual abuse.
- Article 35- The Government should make sure that children are not abducted or sold.
- Article 36- Children should be protected from any activities that could harm their development.
- Article 37- Children who break the law should not be treated cruelly. They should not be put in prison with adults and should be able to keep in contact with their families.
- Article 38- Governments should not allow children under 15 to join the army. Children in war zones should receive special protection.
- Article 39- Children who have been neglected or abused should receive special help to restore their self-respect.
- Article 40- Children who are accused of breaking the law should receive legal help.
Prison sentences for children should only be used for the most serious offences.

- Article 41- If the laws of a particular country protect children better than the articles of the Convention, then those laws should stay.
- Article 42- The Government should make the Convention known to all parents and children

INDIAN CONSTITUTION AND CHILDREN RIGHTS

The Constitution of India is the essential law of the country that incorporates the fundamental rights and directive principles for every citizen. The fundamental rights in the Constitution of India impose on the state an essential duty of guaranteeing that every one of the requirements of children is met and that their fundamental human rights are completely secured.

Fundamental rights if abused can be brought under the steady gaze of the courts.335 Directive Principles set out the rules the Government need to take after. On the off chance that they are violated they can’t be taken under the watchful eye of the courts but since of judicial interpretation, many of the directive principles have now turned out to be enforceable through lawful activities brought under the watchful eye of courts.

- Fundamental Rights in the Constitution that directly relates to children are: 335
  - Article 14- Shall not deny to any person equality before the law and equal protection of the law.
  - Article 15(3)- Nothing in this article shall prevent the state from making any special provisions for women and children.
  - Article 17- “Untouchability” is abolished and its practice in any form is forbidden.
  - Article 19- (1) All citizens shall have the right – (a) to freedom of speech and expression; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India.
  - Article 21- No person shall be deprived of his life or personal liberty except according to procedure established by law.
  - Article 21 A- State shall provide free and compulsory education to all children of the age of six to fourteen years.
  - Article 23- Traffic in human beings and beggar and other similar forms of forced labour are prohibited.
  - Article 24- No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

- Directive Principles of state policy that directly relates to children are: 336
  - Article 39 (e) - The tender age of children and to ensure that they are not forced by economic necessity to enter avocations unsuited to their age or strength; (f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.
  - Article 45- Provision for early childhood care and education to children below the age of six years.

335 DR. SAVITHA BHAKHRY, CHILDREN IN INDIA AND THEIR RIGHTS, 19-20 (National Human Rights Commission 2006)

Article 46- Shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes.

Article 47- Rising of the level of nutrition and the standard of living of its people and the improvement of public health.

Article 51- The State shall Endeavour to-(c) foster respect for international law and treaty obligations.

Article 51A- (k) parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

Eighty-sixth Amendment Act, 2002- The amendment added a new Article 21-A after Art. 21 which made the right to education of children of the age of 6 to 14 years a fundamental right. It also sustained Article 45 as follows: “The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.”

The Right to Education
Education is a fundamental human right, essential for the empowerment and development of an individual and the society as a whole. According to the UNESCO's 'Education for All Global Monitoring Report 2010', about 135 countries have constitutional provision for free and non-discriminatory education for all. In 1950, India made a Constitutional commitment to provide free and compulsory education to all children up to the age of 14, by adding this provision in article 45 of the directive principles of state policy. With the 86th Constitutional amendment on 12th December 2002, Article 21 was amended by the Constitution in order to introduce Right to Education as a fundamental right. The Right of Children to Free and Compulsory Education Act finally came into force on 1st April 2010. The Act provides for free and compulsory education to all children from the age of six to fourteen years. It is now a legally enforceable duty of the Centre and the states, to provide free and compulsory education. The act has the following major provisions:

- Every child between the ages of six to thirteen years might have the privilege to free and compulsory education in an area school, till completion of his/her basic education.
- For this reason, no child should be obligated to pay any kind of expense or charges which may keep him or her from seeking and completing education.
- Where a child is over six years old or has not been admitted to any school or however conceded, couldn't finish his or her elementary education, at that point, he or she might be admitted in a class suitable to his or her age.
- For completing the arrangements of this Act, the appropriate government and nearby specialist should set up a school, on the off chance that it isn't established, inside the given area, within a term of three years, from the commencement of this Act.

337 DR. J.N. PANDEY, CONSTITUTIONAL LAW OF INDIA 822 (Central Law Agency 2017)
338 Right to Education Act, INDIA.GOV.T.IN, (Apr. 2, 2018, 3:00 P.M.)
The Central and the State Governments should have simultaneous obligation regarding giving assets to completing the provisions of this Act. This Act is a fundamental step towards enhancing every child's openness to secondary and higher education. The Act likewise contains particular arrangements for disadvantaged groups, for example, child labourers, migrant children, children with special needs, or those who have a disadvantage owing to social, cultural, economic, geographical, linguistic, gender or any such factor. With the execution of this Act, it is likewise expected that issues of school dropouts, out-of-school kids, nature of education and accessibility of trained teachers would be addressed in the short to medium term plans.

The implementation of the Right to Education Act conveys the nation nearness in accomplishing the targets and mission of the Millennium Development Goals (MDGs) and Education for All (EFA) and consequently is a remarkable step taken by the Government of India.

® RIGHT TO CONSTITUTIONAL REMEDIES AVAILABLE TO CHILDREN

If the fundamental rights mentioned above are infringed, the appropriate courts may be approached. The constitution has provisions for constitutional remedies in article 32 and article 226.

- Article 32: A man has ideal to move to the Supreme Court to ensure his basic rights. It is additionally a basic right.
- Article 226: A man may approach High Court by righteousness of this article to get his rights ensured, not really basic rights.

The courts, to protect the rights they are approved to, may issue writs:

- **Habeas Corpus:** Truly meaning "you may have the body", a person, regardless of whether a tyke, who is kept, whether in jail or secretly, is directed to be produced before the court. On the off chance that found that such detainment was illegal, he is discharged.
- **Mandamus:** Signifying 'we command', mandamus issued by Supreme Court or High Court orders the lower courts/councils/open experts to play out an open or statutory obligation which they are obliged to perform yet have neglected to do as such.
- **Prohibition:** It is issued by the Supreme Court or the High Courts, to restrict interior courts under them from transgressing the cut-off points or powers vested in them.
- **Certiorari:** It empowers a superior court than subdue a request as of now go by the inferior court/council/quasi-judicial expert.
- **Quo warranto:** It truly implies by what right. It is issued to limit a man from holding a public office he isn't qualified for hold.

The writs might be stretched out to the lower courts by the parliament. Since children are unable to access the legal system by themselves, a Public Interest Litigation may be filed in the Supreme Court or the High Courts by a public spirited individual or a non-governmental organization against the Central Government or State Government or any of their
respective agencies by the virtue of A.32 and A.226 for protection of the rights of the Children.\textsuperscript{339}

**RIGHTS AVAILABLE UNDER INDIAN PENAL CODE (IPC)**

**Indian Penal Code, 1860**: Under IPC by its various sections it protects children and their rights:

- **S.83**: Nothing is an offense which is done by a child over seven years old and under twelve, who has not achieved adequate development of comprehension to judge of the nature and outcomes of his direct on that event.

- **S.292 and 293**: Selling, conveyance, distributing, open show or flow of indecent material, for example, books, magazines, illustrations, compositions, and so forth is denied under Section 292. Whoever sells, hire, distributes, shows or flows to any individual younger than twenty years any such obscene object as is referred to in Section 292, or offers or endeavours so to do, shall be punished more severely.

- **S.305**: Abetment of the commission of suicide of a person beneath the age of 18 years is culpable under this section.

- **S.317**: Abandonment or presentation of a child with the purpose of relinquishment by any of the guardians or a man having the care of such child is a punishable offense.

- **S.361**: This section deals with punishment of kidnapping (male if underneath 16 years old and female if beneath 18 years old).

- **S.363A**: Kidnapping or mutilating children to beg has been expressed to be a punishable offense under this section.

- **S.366A**: Inducing of a minor girl younger than 18 years to do any demonstration that may constrain or lure her to unlawful intercourse with someone else is punishable under S.366A.

- **S.366B**: It is a punishable offense to import a girl under 21 years old into India from a nation outside India or from Jammu and Kashmir proposing that she might be constrained or seduced to illegal intercourse with someone else.

- **S.369**: Kidnapping a child younger than 10 years with the expectation to steal from such child is an offense.

- **S.372 and 373**: Selling, purchasing or contracting a person under 18 years old with the end goal of prostitution or illegal intercourse with any individual or for any unlawful or corrupt intention is a punishable offense.

- **S.375**: A man is said to commit "rape" if has sexual intercourse with a lady with or without her assent when she is younger than 16 years.

- **S.376**: The section accommodates stringent punishment if: rape is committed by administration or staff

\textsuperscript{339}Rebecca Furtado, *All you need to know about child rights in India*, IPEADERS (Apr. 1, 2018, 3:35 P.M.), https://blog.ipleaders.in/child-rights-in-india/
of Remand Home or some other place of care set up by law or kids' foundation, rape is conferred upon a girl lady under 12 years old, gang rape is committed.

- **S.376C**: When the Superintendent or supervisor of a remand home or some other place of authority set up under the law of children's foundation prompts or tempts a lady into sexual intercourse by exploiting his official position, he is entitled to stringent punishment under this section.

These areas particularly secure the rights of children. Different sections relevant to punish offenders for a crime can likewise are conjured to secure the children against such guilty parties.

**OTHER LEGISLATIONS POLICIES IN INDIA**

- Guardians and wards Act, 1890
- Child Marriage Restraint Act, 1929 (Amended in 1979)
- Inimmoral Traffic (Prevention) Act (Amended in 1986), 1956
- The Women’s and Children’s (Licensing) Act, 1956
- Probation of Offenders Act, 1958
- National policy for children, 1974
- Bonded Labour System (Abolition) Act, 1976
- Child Labour (Prohibition and Regulation) Act, 1986
- National Policy on Education, 1986
- National Policy on Child Labour, 1987
- Juvenile Justice (Care and Protection of Children) Act, 2000
- The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2000
- National Health Policy, 2002
- Protection of Children from Sexual Offences Act, 2012
- Hindu Adoption and Maintenance Act, 1956
- Orphanages and Other Charitable Homes (Supervision and Control) Act, 1960

**CHILDREN IN NEED OF CARE AND PROTECTION**

A child in need of care and protection is to be produced before the Child Welfare Committee within 24 hours. The Act provides for mandatory reporting of a child found separated from his/her guardian. Non-reporting has been treated as a punishable offence. The Child Welfare Committee is to send the child in need of care and protection to the appropriate Child Care Institution and direct a Social Worker, Case Worker or the Child Welfare Officer to conduct the social investigation within 15 days. The Child Welfare Committees shall meet at least 20 days in a month and the District Magistrate shall conduct a quarterly review of the functioning of the Child Welfare Committee. A child in need of care and protection will be placed in a Children’s Home for care, treatment, education, training, development and rehabilitation. The Act provides for Open Shelters for Children in need of community support on short term basis for protecting them from abuse or keeping them away from a life on the streets.
The Child Welfare Committee could recognize a facility to be a FitFacility to temporarily take the responsibility of a child. The Specialized Adoption Agency is to take care of the rehabilitation of orphans, abandoned or surrendered children.\(^{340}\)

**Impact of the Convention of the Child Rights**

A breakthrough in the universal human rights enactment, the 'Convention on the Rights of the Child' has been instrumental in putting every one of the issues relating to children issues on the worldwide and additionally on national agenda. Moreover, it has widely prepared activities for the acknowledgment of the rights and development of children around the world.

It was not an overnight activity that brought about the adoption of the Child Rights. It took quite a long while of developments and activism on forming ideal, positive and productive states of mind toward children, and furthermore prompting activities to enhance their prosperity. The colossal endeavours required toward the usage of the Convention, the critical measure of assets focused on this reason, and the general adequacy of the frameworks set up for the execution procedure have an orientation on the achievement of child well-being outcome.

Throughout the last 20 or so years, execution of the Convention and its impact on children well-being changed from nation to nation and from one area of the world to the next. In light of investigation, there has been extraordinary advancement at a worldwide level in tending to the issues identified with youngsters. These incorporate advance in access to administrations, achieving their fullest potential through training, institution of laws that maintains the rule of the best advantages of children, and child survival.

\[\spadesuit\] **CONCLUSION**

Children, owing to their developing mind are vulnerable to the environment they are in. It is of utmost importance that such environment is made suitable for their growth and development, regardless of whether such child is in conflict with law or not and be given adequate care and protection of the law. No nation can flourish if children of such nation suffer;therefore India with the help of various international, national and state mechanisms tries to secure the rights of the children as has been discussed above.\(^{341}\)

In spite of the fact that an imperative advancement has been accomplished, yet in developing countries, especially in India, there is as yet far tooin understand the rights of kids. In spite of the fact that all the important tenets and strategies are set up, there is a need in requirement activities. As boundaries, there are a few factors that restrict compelling usage of the laws. Because of moderately low achievement in accomplishing concrete child development results in India, the state of underprivileged children and underprivileged youth is brutal and needs critical consideration. There is a need to escalate endeavours for children.

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\(^{340}\) Juvenile Justice (Care and Protection of Children) Act, 2015, VIKASPEDIA (Apr.2, 2018, 5:05)

\(^{341}\) Rebecca Furtado, All you need to know about child rights in India, IPEADERS (Apr. 1, 2018, 3:35 P.M.),
https://blog.ipleaders.in/child-rights-in-india/
welfare at all levels to execute the guidelines and arrangements of the Convention and add to make a world suitable for children.
THE PRESENT SCOPE OF JUDICIAL REVIEW OVER ADMINISTRATIVE TRIBUNALS

By Navia Suzanne Ninan
From The Tamil Nadu Dr. Ambedkar Law University, Chennai

ABSTRACT
The aim of this study is to analyse the scope of judicial review by High Courts and the Supreme Court over Administrative Tribunals in India. This paper also highlights the changes in the administration of justice. Tribunals are a “Judgment seat; a court of justice; board or committee appointed to adjudicate on claims of a particular kind.” The essence of the meaning of the word tribunal which can be culled out from the various Supreme Court authorities is that they are adjudicatory bodies (except ordinary courts of law) constituted by the State and invested with judicial and quasi-judicial functions as distinguished from administrative or executive functions. This study analyses the Constitutional mechanism for control of Administrative Tribunals. Then, the Administrative Tribunals Act 1985 and the interpretation of the ‘ouster clause’ is looked into. Finally, the Judiciary’s triumph over the Legislature in retaining Judicial Review and the existing grounds for Judicial Review are discussed.

INTRODUCTION
As the concept of welfare state changed radically and many allied welfare measures were introduced, the disputes arising on such matters raised not only legal matters but also matters which affect the society at large. The inherent procedural limitations made it difficult for the courts to dispose these cases promptly thus leading to a huge backlog of cases in all levels of the judiciary. In many quarters, the members of the judiciary were neither adequately trained nor equipped to deal with the complex socio-economic and technical matters at hand. Thus, specialised adjudicatory bodies such as tribunals needed to be created to resolve such disputes fairly and effectively. Irrespective of such Administrative Tribunals having their own procedures, the decisions of Administrative Tribunals are not free from Judicial Scrutiny.
Control over Tribunals and Constitutional Mechanism.

The objects behind such judicial supervision over the tribunals are to, (i) prevent them from emerging as tiny despots; (ii) maintain rule of law; (iii) protect and redress the private interests against unwarranted administrative action; and (iv) keep them within their legal bounds. In pursuance of these objects administrative laws of different countries have developed some kind of control mechanism over the administrative adjudication.

However, this mechanism has different contours ranging from the establishment of an independent institution like Conseil d’Etat as in the French system or by judicial institutions by way of prerogative writs or judicial review of their decisions as in English public law. In common law countries judicial review of decisions of administrative agencies is also allowed on a few legal grounds such as denial of principles of natural justice, failure to observe prescribed procedure, want or abuse of jurisdiction, error of law, ultra vires decision, etc. Indian administrative law, more or less, has adopted the second control mechanism namely judicial review of administrative agencies.

A reading of Indian statutes constituting the tribunals reveals the following control mechanism over them. However, there is no consistent pattern. The broad patterns are, (i) reference to the High Court on a question of law; (ii) power with the tribunal to refer such question to that court in a proceeding pending before it and also a right of appeal to it in cases involving substantial question of law; (iii) appeal to a higher administrative tribunal; (iv) appeal on a question of law to the High Court, first appeal to a higher administrative tribunal and a further appeal to the High Court on substantial question of law; and (v) direct appeal to the Supreme Court in some cases. Beside this statutory control mechanism operating on the respective tribunals, the Constitution, by virtue of Articles 32, 136, 226 and 227, guarantees a comprehensive judicial review and judicial supervision by the Supreme Court and High Courts over tribunals. These constitutional provisions are so broadly framed that it is left to the courts themselves to work out the limit on their jurisdiction as a matter of judicial policy and it remains unaffected by an Act of Parliament.

The Constitution (Forty-Second Amendment) Act 1976 has inserted Part XIVA, comprising Arts. 323A and 323B, in the Constitution to empower Parliament to constitute administrative tribunals in the areas of, (i) civil service; (ii) levy, assessment, collection and enforcement of any tax; (iii) foreign exchange, import and export across custom frontiers; (iv) industrial and labour disputes; (v) land reforms; (vi) ceiling on urban property; (vii) elections to the legislature; (viii) production, procurement, supply and distribution of foodstuffs and offences relating thereto. The amendment provides for exclusion of jurisdiction, powers and authority of all courts, except the Supreme Court under Art. 136, with respect to all or any of the matters falling within the jurisdiction of the proposed tribunals.


343 Arts. 323A(2)(d) and 323B(3)(d).
Art. 323A(1) provides for adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to the Public Service and posts in connection with the affairs of the Union or of any state, local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the government and for matters connected therewith or incidental thereto.

The Indian Parliament in pursuance of Art. 323A(1) enacted the Administrative Tribunals Act 1985 (hereinafter referred to as the Act) to provide for the adjudication or trial of disputes and complaints’ regarding service matters of Central and state government employees.

In pursuance of the provisions of the Act, the Central Government has established CAT with five branches, in November 1985. Prior to its establishment, writ petitions were filed in the High Courts and the Supreme Court challenging the constitutional validity of Art. 323A and various provisions of the Act. The main contention was that the writ jurisdiction of the Supreme Court, under Art. 32, and the High Courts under Art. 226, cannot be taken away by an amendment to the Constitution. The wide wording of Art. 226, enables the High Courts ‘to reach injustice wherever it is found’ and ‘to mould the relief to meet the peculiar and complicated requirements’. 344

The Supreme Court, admitting the writ petitions, did not stay the operation of the Act. However, by an interim order, it stayed the transfer of writ petitions filed under Art. 32 to the CAT and ruled that it is entitled to deal with writ petitions under Art. 32 and pass orders. But it refused to issue an order to stay their transfer under Art. 226 to the tribunals subject to a few suggestions, which were incorporated by Parliament in the Act by the Administrative Tribunals (Amendment) Act 1986.

The petitioners including Mr. Sampath Kumar relied on Minerva Mills Ltd. v. Union of India, 347 where P.N. Bhagwati CJ enumerated that: “The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view that if there is one feature of our constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review, and it is unquestionably, to my mind, part of the Basic Structure of the Constitution. Of course, when I say that I should not be taken to suggest that effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament.”

Ranganath Misra J. and Bhagwati C. J., relying on the view taken Bhagwati J. in Minerva Mills that though basic and essential feature

345 Powers of the Supreme Court under article 32 is restored by the Administrative Tribunals (Amendment) Act 1986 w.e.f. 22 January 1986.
346 S.P. Sampath Kumar v. Union of India, (1985) 4 SCC 458. (The order was passed on 31 October 1985)
of judicial review cannot be dispensed with, it is within the competence of Parliament to create alternative effective institutional mechanisms or arrangements for judicial review, opined that exclusion of jurisdiction of the High Courts in the specified service matters and vesting them in the administrative tribunals does not go against the Basic Structure Doctrine provided the tribunal is equally efficacious and effective as the High Court, and it substitutes, not only in form and de jure but in content and de facto, the High Court so far as the power of judicial review over service matters is concerned.

Interpreting the ouster clause.
Now, the Act by virtue of Secs. 14(1), 15(1) and 16, vests in the administrative tribunals all the powers of the ordinary civil courts and the High Courts pertaining to service matters. The legislative intent for conferment of such wide powers becomes crystal clear from Secs. 28 and 29 of the Act also. The latter section provides for automatic transfer of pending suits and proceedings before any court to such tribunals, while the former precludes any court, except the Supreme Court, industrial tribunal and labour court, from exercising ‘any jurisdiction, powers or authority’ pertaining to specified service matters.

Sec. 28 of the Act dealing with the exclusion of jurisdiction of courts, reads: On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matters concerning recruitment to any Service or post or service matters concerning members of any Service or persons appointed to any service or post, no Court except a) the Supreme Court; or b) any Industrial Tribunal, Labour Court or other authority constituted under the Industrial Disputes Act, 1947 or any other corresponding law for the time being in force shall have, or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment of such service matters.

The term ‘all courts’ except the Supreme Court used in Secs. 14(1), 15(1) and 16 read with the above-mentioned ouster clause, prima facie, reveals the legislative intent to bar the High Courts, along with ordinary civil courts, from exercising ‘any jurisdiction, power or authority to adjudicate disputes or entertain any complaints’ in specified service matters. It is further reflected in Sec. 27 of the Act dealing with the execution of orders of a tribunal. It is particularly clear from the Administrative Tribunals (Amendment) Act 1986, that an order of a tribunal is final and cannot be challenged in any court including a High Court.

High Courts’ power of Judicial Review over Administrative Tribunals.

Constitutionality of the ouster clause.
The comprehensive scheme of the Act regarding, (i) vesting of wide jurisdiction in the tribunals, 348(ii) exclusion of jurisdiction, power and authority of all courts, except the Supreme Court, labour court and industrial tribunals349 in the matters falling under their jurisdiction350 coupled with the transfer of pending suits or proceedings to the

348 Sections 14, 15 & 16.
349 Section 28.

350 Section 29.
tribunals and finality given to their orders and protecting them from challenges in any court including a High Court, as stated earlier, reflects Parliament’s intention to exclude all the jurisdiction, powers and authority of a High Court including its power to issue appropriate writ, order or direction under Art. 226 of the Constitution in the specified service matters.

Not only does it give finality to the orders of the tribunal but also keeps them free from challenge in any court including a High Court. The only exception made therein is approach to the Supreme Court under Arts. 32 and 136. Then, it does not make any reservation with respect to jurisdiction, power and authority of the High Court in service matters. It is important to note at this juncture that Art. 32 can be invoked if there is violation of a fundamental right and Art. 136 does not entitle a person to appeal to the Supreme Court as a matter of right as it is within the court's discretion to grant or refuse special leave to appeal. It is, generally, not invoked unless there are sufficient extraordinary exceptional circumstances which warrant invocation of this power. Thus, the mechanism for judicial review provided in the Act is ineffective and inadequate.

Ordinarily such a provision is unconstitutional as Parliament’s power to enact laws is subject to provisions of the Constitution. However, it is important to note that the object of the Act was to give effect to Art. 323A which among other things, provides for exclusion of jurisdiction, power and authority of all courts except the Supreme Court under article 136. The privative clause is almost verbatim what is laid down in clause 2(d) of Art. 323A. And Sec. 29, dealing with the transfer of pending cases, reproduces, in essence, clause (2)(e) of Art. 323A. And the provisions of Art. 323A are given overriding effect by virtue of Art. 323A (3). The validity of Art. 323A(2)(d) and the Act was upheld by the Supreme Court in Sampath Kumar.

It is important to note that the scheme of the Act, as pointed out earlier, makes it amply clear that it only precludes the High Courts from exercising its jurisdiction, power and authority to adjudicate disputes involving consideration of merits of the case in specified service matters and confers these powers (only) on the tribunals constituted under it. The Act debars the High Courts from adjudicating a dispute or entertaining a complaint as it always involves consideration of the merits of the cases thereby leaving its power untouched/unaltered in those cases not involving such consideration. Thus, it makes a distinction between the power and authority of the High Court to issue writs in specified service matters under Secs. 14(1), 51(1) and 16 and against the administrative tribunals. The former involves consideration of the case on merits while the latter does not. Therefore, the jurisdiction of the High Court to issue writs under Art. 226 against the tribunal is not

351 Section 27.
352 P.R. Shenoy and CM. Stephen, while taking part in the debate on the relevant provision of the Forty-Second Amendment Constitution Bill, had expressed the view that the jurisdiction of the High Courts under article 226 should be mentioned specifically and in its absence, they apprehended, it would not be possible to exclude jurisdiction of the High Courts. (1976) LXV L.S.D. (5th Lok Sabha) col. 83, 92 (1-11-1976).
barred by the Act as it does not involve any consideration of the merits of the case.

**Change from S.P. Sampath Kumar to L. Chandrakumar.**

In the case of *J.B. Chopra v. Union of India*\(^{355}\), it was held that since the Administrative tribunals are meant to be substitutes of High Courts (as held in *Sampath Kumar*), their power of judicial review extended to power as to decide on the constitutionality of service rules. However, soon there was a reversal of trend leading to a lot of confusion. In *M.B. Majumdar v. Union of India*\(^{356}\), the Supreme Court refused to extend the service conditions and other benefits enjoyed by ordinary High Court judges to the members of these Tribunals.

Three years later, in *R.K. Jain v. Union of India*\(^{357}\), the Supreme Court opined that these Tribunals could not be effective substitutes of High Courts under Arts. 226 and 227. A very clear expression of dissatisfaction of the apex court regarding the functioning and effectiveness of Administrative Tribunals especially with regard to their power of judicial review was also seen through the judgment of this case.

**Sakinala Harinath v. State of Andhra Pradesh**\(^{358}\): In this case, the Andhra Pradesh High Court dropped a bomb shell by expressing serious doubts about the wisdom of the learned Judges in Sampath Kumar’s case. The Full Bench ruled that the ruling in the above case equating Administrative Tribunals to the High courts with respect to their jurisdiction under Arts. 226 and 227 was inconsistent with the Apex Court’s ruling in cases like *Kesavanda Bharati v. State of Kerala*\(^{359}\) and *Indira Gandhi v. Raj Narain*\(^{360}\). It was pointed out that the constitutional courts could only exercise the power of judicial review. Since the logic of alternative institutional mechanism propounded in Sampath Kumar’s case does not fit in to this scheme, it is constitutionally impermissible. As a result, both Articles 323A(d) and Sec. 28 of the Act were struck down as unconstitutional. The judicial green signal given for tribunalisation given in Sampath Kumar can be seen to be slowly fading because of the subsequent decisions. The confusion created by these conflicting decisions ushered in the need for taking a second look at S.P. Sampath Kumar’s case.

This opportunity arrived when a three-judge bench of the Supreme Court in *L. Chandrakumar v. Union of India* decided to refer the matter to a larger bench. This eventually led to the famous ruling of the Seven Judge Bench of the Supreme Court on *L. Chandrakumar v. Union of India*, which is now the law of the land.

**L. Chandrakumar’s Case**\(^{361}\): The important issues considered by the Apex Court were as follows: (1) Whether Art. 323A (2) (d) and Art.323B (3) (d) of the constitution which give the power to the Union and State Legislatures to exclude the jurisdiction of all constitutional courts could only exercise the power of judicial review. Since the logic of alternative institutional mechanism propounded in Sampath Kumar’s case does not fit in to this scheme, it is constitutionally impermissible. As a result, both Articles 323A(d) and Sec. 28 of the Act were struck down as unconstitutional. The judicial green signal given for tribunalisation given in Sampath Kumar can be seen to be slowly fading because of the subsequent decisions. The confusion created by these conflicting decisions ushered in the need for taking a second look at S.P. Sampath Kumar’s case.

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\(^{355}\) *J.B. Chopra v. Union of India*, (1987) 1 SCC 422.


\(^{361}\) *L. Chandrakumar v. Union of India*, AIR 1995 SC 1151.
courts except that of the Supreme Court under Art.136, is in accordance with the power of judicial review embodied in Art.32 and 226. (2) Whether the power of High Courts to exercise the powers of superintendence over the subordinate judiciary under Articles 226 and 227 form part of Basic Structure. (3) The competence of the aforesaid tribunals to determine the constitutionality of any law. (4) Whether the aforesaid tribunals are acting as affective substitutes to High Courts in terms of efficiency.

It was held that the power of judicial review over legislative and administrative action is expressly vested with the High Courts and the Supreme Court under Arts. 226 and 32 respectively. The contention that the constitutional safeguards which ensure the independence of the higher judiciary is not available to the lower judiciary and bodies such as Tribunals was upheld and the Apex Court consequently held that the lower judiciary would not be able to serve as effective substitutes to the higher judiciary in matters of constitutional interpretation and judicial review. Hence the power of judicial review is vested in the higher judiciary and the power of High Courts and the Supreme Court to test the constitutional validity of legislative and administrative action cannot ordinarily be ousted. However, it was held that these tribunals and the lower judiciary could exercise the role of judicial review as supplement to the superior judiciary. The court applied the provisions of Art. 32(3) to uphold the same.

**PRESENT SCOPE OF JUDICIAL REVIEW.**
Generally, judicial review of any administrative tribunal can be exercised on four grounds viz,

- Jurisdictional Error
- Irrationality
- Procedural impropriety
- Proportionality
- Legitimate Expectation

These grounds of judicial review were developed by Lord Diplock in *Council of Civil Service Union v. Minster of Civil Service*[^362]. Though these grounds of judicial review are not exhaustive and cannot be put in watertight compartments yet these provide sufficient base for the courts to exercise their review jurisdiction over administrative action in the interest of efficiency, fairness and accountability.

**Jurisdictional Error.**
The term “jurisdiction” means “power to decide”. The jurisdiction of the tribunal depends upon facts the existence of which is necessary to the initiation of proceedings and without which the act of the Tribunal is a nullity. These are called “jurisdictional facts”. This ground of judicial review is based on the principle that administrative authorities must correctly understand the law and it limits before any action is taken. Court may quash an administrative action on the ground of ultra vires in following situations.

**Lack of Jurisdiction:**
It would be a case of “lack of jurisdiction” where the tribunal has no jurisdiction at all to pass an order. Court may review an administrative action on the ground that the authority exercised jurisdiction which did not

belong to it. This review power may be exercised inter alia on following grounds:

- That the law under which administrative authority is constituted and exercising jurisdiction is itself unconstitutional.
- That the authority is not properly constituted as required by law.
- That the authority has wrongly decided a jurisdictional fact and thereby assumed jurisdiction which did not belong to it.

**Excess of Jurisdiction:**
This covers a situation wherein though the tribunal initially had the jurisdiction but exceeded it and hence its actions become illegal. This may happen under following situations:

- Continue to exercise jurisdiction despite occurrence of an event ousting jurisdiction.
- Entertaining matters outside its jurisdiction.

**Abuse of Jurisdiction:**
All administrative and statutory powers must be exercised fairly, in good faith for the purpose it is given, therefore, if powers are abused it will be a ground of judicial review. In the following situations abuse of power may arise:

- **Improper purpose:** Administrative power cannot be used for the purpose it was not given.
- **Error apparent on the face of the record:** An error is said to be apparent on the face of the record if it can be ascertained merely by examining the record & without having to have recourse to other evidence. In *Syed Yakoob vs. K.S. Radhakrishnan*[vi], the Supreme Court explained, there would be a case of error of law apparent on the face of the record where the conclusion of law recorded by an inferior tribunal is:
  - Based on an obvious misinterpretation of the relevant statutory provision,
  - In ignorance of it,
  - In disregard of it,
  - Expressly founded on reasons which are wrong in law.

- **Non-consideration of relevant material:** In exercising discretion, a decision-maker must have regard to relevant matters & disregard irrelevant matters
- **In bad faith:** Where the tribunal has acted dishonestly by claiming to have acted for a particular motive when in reality the decision was taken with another motive in mind, it may be said to have acted in bad faith.
- **Fettering discretion:** An authority may act ultra vires if, in the exercise of its powers, it adopts a policy which effectively means that it is not truly exercising its discretion at all.

**Irrationality (Wednesbury Test).**
A general principle which has remained unchanged is that discretionary power conferred on the administrative tribunal is required to be exercised reasonably. A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A decision of the Tribunal shall be considered as irrational if it is so outrageous in its defiance to logic or accepted norms of moral standard that no sensible person, on the given facts and circumstances, could arrive at such a decision. Irrationality as a ground of judicial review was developed by the Court in *Associated Provincial Picture House v.*
**Procedural Impropriety.**

Failure to comply with procedures laid down by the Act may invalidate a decision. Procedural Impropriety is to encompass two areas:

- failure to observe rules laid down in Act; and
- a failure to observe the basic common law rule of natural justice.

It is a fundamental requirement of justice that, when a person’s interests are affected by a judicial or administrative decision, he or she has the opportunity both to know and to understand any allegations made, and to make representations to the decision maker to meet the allegations. The principles of natural justice which are imposed by the courts comprise two elements:

- Audi alteram partem (hear both sides)
- Nemo judex in causa sua (there should be an absence of bias with no person being a judge in their own cause).

The essence of justice lies in a fair hearing. The rule against bias is strict: it is not necessary to show that actual bias existed; the merest appearance or possibility of bias will suffice. The suspicion of bias must, however, be a reasonable one.

**Proportionality.**

Courts in India have been following this doctrine for a long time but English Courts have started using this doctrine in administrative law after the passing of the Human Rights Act, 1998. Thus, if an action taken by the tribunal is grossly disproportionate, the said decision is not immune from judicial scrutiny. The sentence has to suit the offence & the offender. It should not be vindictive or unduly harsh.

**Legitimate Expectations**

A legitimate expectation will arise in the mind of the complainant wherever he or she has been led to understand by the words or actions of the decision maker that certain procedures will be followed in reaching a decision. A Legitimate Expectation amounts to an expectation of receiving some benefit or privilege to which the individual has no right. Legitimate Expectation means expectation having some reasonable basis.

**CONCLUSION.**

In conclusion, administrative adjudication is a dynamic system of administration, which serves more adequately than any other method, the varied and complex needs of the modern society. However, we should not be blind to the defects from which it suffers or the dangers it poses to a democratic polity. It is in order to make up for such defects that Judicial Review over decisions of administrative tribunals is an inevitable requirement.

**Findings of the Study.**

It is thus clear that:

- The power of Judicial Review cannot be removed by way of a statute or an amendment to the Constitution.

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363 Associated Provincial Picture House v. Wednesbury, (1948) 1 KB 223.

364 Hind Construction Co. vs. Workmen, AIR 1965 SC 917.
No Tribunal can be a substitute for High Courts.

Judicial Review is the most important form of control over Administrative Tribunals.

Administrative Tribunals cannot function on their own whims and fancies as their decisions are subjected to judicial review by the High Courts and the Supreme Court.

Suggestions.

It is suggested that the Courts should exercise their power of Judicial Review only in matters that demand the serious attention of Courts. To do so otherwise would strike at the very objective of creating Administrative Tribunals. In order to achieve this, members of the tribunal have to be equipped with adequate judicial acumen and expertise. These judicial officers need to be balanced with experts in the particular field. Only a judicious blend of the two will be able to provide an effective and result oriented tribunal system.

Another important measure which needs to be taken are steps to maintain the independence of the members of these tribunals from political or executive interference.

The overall picture regarding tribunalisation of justice in the country is far from satisfactory. A fresh look at the system of tribunals in India is required so as to ensure speedy justice and quick disposal of disputes arising out of administrative disputes which are essential for the development of the nation.

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H.L.A HART AND THE CONCEPT OF LAW: A JURISPRUDENTIAL INSIGHT

By Pavithra. V
From School of Excellence in Law, The Tamil Nadu Dr. Ambedkar Law University, Chennai

ABSTRACT
Herbert Lionel Adolphus Hart, is a British legal philosopher who is well known for his famous work, *The Concept of Law* which was published in 1961. This book developed and concentrated on Hart’s theory of Legal positivism and the relationship between law, coercion and morality. However, Hart says that there is no such interconnection as laws are rules of law made by humans, within the framework of analytical philosophy. According to him, the idea of obligation are merely nothing but rules of law maintained in a society as they are vital for the maintenance of a good society. These rules are classified into two, namely Primary rules and Secondary rules.

Hart became a barrister and practiced successfully at the Chancery Bar from 1932 to 1940. Later, he preferred to accept the offer of a teaching fellowship at the New college, Oxford. In 1952, he was elected Professor of Jurisprudence at the Oxford University. It was during that summer, he wrote his most famous book, *The Concept of Law*, though it was not published until late 1961. In the view of analytical jurisprudence, His works remains to be one of the most successful one to appear in the common law world. Hart’s shadow floats over these disagreements and his theory remains by far the most interesting and internally consistent version of legal positivism. This is why we need to go back at Hart’s writings and discover his intuitions about law, legal theory and the concept of justice.

INTRODUCTION
The Concept of Law provides an enlightenment to a number of traditional jurisprudential questions such as “what is law?”, “must law be rules?”, and “what is the relation between law and morality?”. Hart answers these questions by placing law into a social context while at the same time leaving the capability for rough analysis of legal terms, which in effect “awakened English jurisprudence from its comfortable slumbers”. This book is considered to be one of the most famous one in the view of Analytical jurisprudence.

HART DEFENDING THE THEORY OF LEGAL POSITIVISM

The theory of Analytical positivism, commonly called as Legal positivism was proposed by John Austin in the book named *The province of the Jurisprudence determined* (1832). According to Austin, Law is the command of the sovereign, backed by sanctions. The three crucial components of his concept are the words ‘command,
sanction and sovereign. Austin believed that law is a species of command. He further defined a command as nothing but an intimation or expression of a wish to do or forbear from doing something, backed up by the power to do harm to the actor in case he disobeys. Furthermore, the person to whom the command is given is under a "duty" to obey it, and that is what creates a sanction.

However, this command theory propounded by Austin is subject to a number of complications when presented as a complete description of the operation of positive law. The legal theory of H.L.A Hart was founded upon a critique by the form of the classical command model which led to a revised ‘positive analysis’ founded not upon a combination of command and force but the combination and operation of rules in a legal system.

Hart commences from the basic proposition that, “The most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in some sense obligatory”. Hart denies that the classical positivist model of law, as an implicitly coercive expression of political power, and it sufficiently accounts for the character of law as obliging social character. He also argues that an equation of the obligatory character of positive law with moral obligation is equally inadequate and thus rejects naturalist theory on the ground that it insufficiently distinguishes the particular character of legal obligation.

This theory given by Hart was called as the theory of modified positivism. However, Hart himself expressed the goal of this theory that it is “an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion and morality, as types of social phenomena”.

The Concept of Law mainly explains us Hart’s dissatisfaction towards Austin’s theory. According to Hart, the idea that law consists merely of orders backed by threats is insufficient to explain the modern legal systems. Austin believes that all laws are simply coercive orders imposing duties on individuals. Hart is of the view that laws may differ from the commands of a sovereign, because they only apply to those individuals who enact them and not to other subjects.

**CRITICISM**

The 5th chapter in the Concept of Law begins with the four main critics given by Hart to Austin’s theory.

a) Firstly, Law, even a criminal statute, is unlike the coercive demands of a gunman, spoken generally rather than to a particular person and applies even to those enacting it.

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366 Gautam Bhatia, Jurisprudence and the Philosophy of Law- A blog to discuss jurisprudence, legal theory, the philosophy of law and moral philosophy (May 11, 2008), http://legaltheoryandjurisprudence.blogspot.in/2008/05/.


368 H.MCCOURBREY & N.D.WHYTE , TEXTBOOK ON JURISPRUDENCE, 32(ed.1996).

b) Secondly, Some laws do not impose duties but rather create powers, whether public or private.

c) Thirdly, there are legal rules which differ from orders in their mode of origin, because they are not brought into being by anything analogous to explicit prescription.\textsuperscript{370}

d) Fourthly, the idea of unlimited sovereignty which is free of all legal constraint fails to take account the continuity of law which is a crucial factor of a modern legal system, without reference, again, to a distorted explanation of tacit command.

Legal positivism – both soft and hard – may be contrasted with the natural law theory propounded by Finnis as he bases his concept of law on the requirements of practical reasonableness. There are certain grounds where natural law and legal positivist theory share a common ground. They are:

1. Firstly, as Finnissays that his approach is based on the tradition of analytical jurisprudence.
2. Secondly, they help to examine and justify the authority of law.
3. Thirdly, they both pledge to the view that there is no prima facie moral obligation to obey an unjust law.
4. Fourthly, they both accept the significance of the rule of law.

Hart emphasizes that these failures are, in his opinion, not incidental but fundamental, where the basic components of command theory are not capable of any combination which will give an idea of what he argues which is to be the essential element of law. Thus he states that, “What is most needed as a corrective to the model of coercive orders or rules, is a fresh conception of legislation as the introduction or modification of general standards of behavior to be followed by the society generally”.\textsuperscript{371}

This involved a fundamental remolding of positivist concerns as the building block of legal theory. In the view of above, Hart feels that these theories have failed as they failed to take into account the rules of law and that is what constitutes the element of law.

\textbf{NATURAL LAW v. POSITIVISM}

\textsuperscript{370}Id. at 79.
\textsuperscript{371}Id. at 44.
reason (and this may have a number of practical consequences).  

**MINIMUM CONTENT OF NATURAL LAW**

Hart’s formulation of the minimum content of natural law is the thought that in order to exist in a society, there must be rules. He was influenced by David Hume and further laid down the following fundamental characteristics:

- **Human Vulnerability**: We are all prone to physical attacks.
- **Approximate equality**: Even the strongest must sleep at times.
- **Limited altruism**: selfishness of people.
- **Limited resources**: We need food, clothes, and shelter and they are limited.
- **Limited understanding and strength of will**: We cannot be relied upon to live with our fellow men.

Because of these limitations there is seen a necessity for rules which protect the lives of people and property, and which ensure that promises are kept. But, despite this view, Hart is not saying that law is derived from morals or that there is a necessary conceptual relationship between the two. Nor is he suggesting that if we accept his ‘minimum content’ of natural law this will guarantee a fair or just society.

**OBLIGATION AND INTERNAL ASPECTS OF RULES**

The existence and interaction of rules are fundamental to Hart’s legal theory, and appear to be obviously the substance of law. All societies have social rules which include rules of morals, games etc., as well as relating to obligation rules which imposes duties or obligations on people. The latter may be further divided to moral rules and legal rules. Due to the result of our human limitations is why there is a need for obligation rules in all societies: the ‘minimum content of natural law’. Legal rules are further classified into primary rules and secondary rules. Hart says, Law is a union of primary and secondary rules that is the key to the science of jurisprudence.

Hart feels that Austin’s theory, though flawed, began from the standpoint of view that law makes human conduct obligatory and not optional to any. He is concerned to demonstrate that far more significant than commands, sovereignty, and sanctions, is the social source of legal rules: they are a manifestation of our actual behavior, our words and our thoughts.

There is a difference, yet to be explained, between the assertion that someone was obliged to do something and the assertion that he had an obligation to do it. The former is often a statement about the beliefs and motives on which an act is performed. But the

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statement that someone had an obligation to do something is of a very different type. The Austanian model cannot explain why if you are threatened by a gunman who orders you to hand over your money or he will shoot you, that though you may be obliged to comply, you have no obligation to do so - because there is no rule imposing an obligation on you.\textsuperscript{378}

He also says, in order to understand the general idea of an obligation, one must turn to the existence of social rules which create that obligation. Being under an obligation implies the existence of a rule, however, it is noteworthy that rules can also exist without obligating anyone.\textsuperscript{379}

Hart says that to determine whether rules give rise to obligations is the social pressure behind them. Rules supported by sufficient social pressure are important because they are consistent for a good societal balance and life.

Now, let us move on to the explanation of Primary rules and Secondary rules given by Hart. Under rules of one type, which may well be considered the basic or primary type, human beings are required to do or abstain from performing few acts, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations.\textsuperscript{380}

\begin{itemize}
  \item[i.] Firstly, rules of the first type impose duties, while rules of the second type confer powers, public or private.
  \item[ii.] Secondly, rules of the first type infer actions involving physical movement or changes while the latter provide for operations which lead not merely to physical movement or change, but to the creation of duties or obligations on individuals.
\end{itemize}

The secondary rules are further classified into three types namely, Rule of recognition, Rule of change and Rule of adjudication.

**ELEMENTS OF LAW**

Hart says that a society can exist without courts at all, in the case of primitive communities and in some parts of the world till date in villages. To explain this viewpoint, Hart presumes a society where there are only primary rules of obligation where people have to conform with one another if they have to live in proximity with another. The second condition which makes it crucial for this type of society to function is that the people who accept the rules must be in majority. But however, the above conditions can only be applied to a small community where the bonds of kinship, mutual sentiments, and belief are present in abundance to survive a system of unofficial rules.

There would be three defects in such type of society that is persistent only by primary rules.

\begin{itemize}
  \item[a.] The primary rules may be ‘uncertain’ in application, that is to say that no procedures would exist for their interpretation and the determination
\end{itemize}

\textsuperscript{378}Id. at 83.

\textsuperscript{379}JiaSajjal, H.L.A Hart Notes: Concept of Law; Chapters 2,3,4,5,6(Nov. 10, 2016).


http://www.academia.edu/6705968/H_L_A_Hart_Notes_Concept_of_Law_Chapters_2_3_4_5_6.
of their scope where this was not intrinsically clear.\textsuperscript{381}

b) The rules would be ‘static’ with the only method where there is a slow development of customary practice. .

c) The maintenance of such rules will be ‘inefficient’ as it granted the lack of mechanisms for determination of disputes about their application.

The remedy for each of these defects in this simplest form comprises supplementing the primary rules of obligation with secondary rules which are rules of a different kind. Thus they may all be said to be on a different level from the primary rules, and while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are merely concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.\textsuperscript{382} In order to remedy these defects, Hart feels the importance to merge the primary rules of obligation with secondary rules. It is this combination that will change the society from being pre-legal to legal.

**REMEDIES**

- **REMEDY FOR UNCERTAINTY**: In order to cure the defect of uncertainty, Hart introduces master rule, ‘Rule of recognition’. It is essential for the existence of a legal system. Unlike the other two rules, it appears, to be duty-imposing; it requires those who exercise public power (particularly the power to adjudicate) to follow certain rules. This gives rise to an element of circularity\textsuperscript{383} for the criteria of recognizing the validity of certain rules necessarily include- as a criterion of validity-- the valid enactment of rules by the legislature in exercising its power conferred by the rule of change.

- **REMEDY FOR STATICITY**: In order to remedy the static nature of rules, Hart feels that it is necessary to introduce the ‘Rules of change’. These rules are required to overcome legislative or judicial changes to both the primary rules and certain secondary rules. This process of change is regulated by secondary rules which confers power on individuals or groups to enact a legislation in accordance with certain procedures. These rules of change are also ‘lower-order’ secondary rules which confer power on ordinary individuals to modify their legal position. Thus, power-conferring secondary rules of change appear to have two meanings in Hart’s model.\textsuperscript{384}

- **REMEDY FOR INEFFICIENCY**: In order to cure this defect, it is important to introduce what Hart refers to as ‘Rule of adjudication’. Certain rules confer an authority on individuals to pass judgment mainly in cases of violation of primary rules. This power is normally associated with a further power to punish the wrongdoer or compel the wrongdoer to pay damages.

**INTERNAL AND EXTERNAL ASPECT OF RULES**

\textsuperscript{381} H.MC COUBREY&N.D.WHITE, TEXTBOOK ON JURISPRUDENCE 38(ed.1996).
\textsuperscript{383} Id. at 108.
\textsuperscript{384} RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE: AN INTRODUCTION TO LEGAL THEORY 102(ed.2009).
Hart argues against Austins model that the predictive theory concentrates only on the external aspects of behavior. However, there exists a second aspect of rules, namely, the internal aspect. Hart feels that there exists another concept of rules, concentrating on the attitude. Using the internal viewpoint, people within the legal system judge, evaluate and criticize their conduct and that of their peers. While the external viewpoint is purely descriptive, made by an observer outside the system (“In England, they recognize as law...”), the internal viewpoint is evaluative (“It is the law that...”) 385. The external observer may be able to evaluate the extent to which the rules of the legal system produce a pattern of conduct on the part of individuals to whom the rules apply. The ‘external’ aspect of rules may in some cases enable us to predict the conduct of individuals, but we may have to consider the ‘internal’ aspect of rules in order to interpret or explain the conduct of individuals 386.

Hart also relates these two aspects of rules with the primary and secondary rules. He says:

1. Hart explains internal aspect of rules in a legal system arguing that it is a necessary condition that the citizens to the primary rules, only take an external viewpoint towards primary rules. They may not view the rules as standards or even take a chance to obey them. But this seems unnecessary, all that is needed is the existence of the external viewpoint, so that the detached observer can look upon the behaviour of the citizenry, and on that basis alone, find the law to be in good, practical working order.

2. It is at the level of secondary rules that the internal aspect comes in. Hart argues that it is crucial for the working of the legal system that the officials are to identify and apply the primary rules through the means of secondary rules, and take the internal viewpoint towards those. This is so because it is the only way in which reasons or justifications of enforcing, creating or changing obligations can arise.

**FOUNDATIONS OF A LEGAL SYSTEM AND ITS OFFICIALS**

It has already been seen that it is Hart’s view that a legal system may be said to ‘exist’ only if primary rules are obeyed and officials accept the rules of change and adjudication.

In Hart’s words, ‘The assertion that a legal system exists is therefore a Janus-faced statement looking both to obedience by ordinary citizens and to the acceptance by officials of secondary rules as critical common standards of official behaviour’. 387

It is not clear whether these conditions are seen by Hart as a historical or developmental theory or whether it is a purely hypothetical model that enumerates the function of these rules or as a heuristic device to recognize the existence of a legal system—as J.W Harris puts it,

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385 Gautam Bhatia, Jurisprudence and the Philosophy of Law- A blog to discuss jurisprudence, legal theory, the philosophy of law and moral philosophy (May 11, 2008).


If a country is in a state of turmoil and the political scientist is trying to assess whether it has that social grace commonly known as ‘law’, wheel in the patient and apply this two-pronged stethoscope—‘Are your primary rules generally observed?’ ‘Do your officials accept your secondary rules?’

Hart is not suggesting that members of society need to ‘accept’ the primary rules or the rule of recognition; it is only the officials who need to adopt an ‘internal point of view’. He says that if a rule is not widely accepted, it become rejected morally and politically but that is not constitutes a legal system. The rule is validated not by its efficacy but just its emanation from the rule of recognition.

MINIMUM CONDITIONS FOR THE EXISTENCE OF A LEGAL SYSTEM

Hart feels that efficacy and validity of a rule are part of one another. The criteria for the existence of a legal system is that:

- The officials of the legal system must have an internal attitude towards the rule of recognition of the system, and what is crucial is that there should be a unified acceptance of the rule of recognition to validate it.
- The valid legal rules of the system must be generally obeyed by both officials and private citizens. He thus contends essentially that whereas ‘primary rules’ are addressed to all citizens, including officials in their personal capacities, ‘secondary rules’ are contrived for official rather than ‘private consumption’.

Hart states that a legal system exists when both the official sector (officials) and private sector (citizens) similar in their view of law, and when such coincidence happens, we find the validity.

Where unity among officials partly breaks down due to disagreement over certain constitutional issues, this could lead to the breakdown of the system of law.

DEBATE BETWEEN H.L.A. HART AND RONALD DWORKIN

A valuable starting point of Hart is from ‘Positivism and the Separation of Law and Morals’ where he states five points of legal positivism:

1. Laws are commands of Human Beings.
2. There exists no necessary connection between law and morals.
3. That a legal system is a closed logical system where decisions deduce from logical rules.
4. That the analysis of legal concepts is worth pursuing, rather than from sociological and historical enquiries and critical evaluation.
5. That moral judgments cannot be established as statements of fact.

Hart maintains that a legal system, is a combination of primary and secondary rules of which the most important he believes is the ‘rule of recognition’. He argues the most important feature of the secondary rules is the ‘rule of recognition’, as through this rule, conduct can be regulated even during moral disagreements. Wherever such a rule of

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389 RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE: AN INTRODUCTION TO LEGAL THEORY 107(ed.2009).
recognition is accepted, both private individuals and officials are provided with power for identifying primary rules of obligation. Thus Hart believes that the basis of any legal system is where the primary rules are identified by the secondary rules of recognition.

Dworkin’s opinion is demonstrated by the use of his interpretive theory and claims that once law is identified (pre-interpretive stage), it should also be justified (interpretive stage). Dworkin says that law consists not merely of rules, but a court when it has to decide on a hard case will rely upon moral or political standards, principles and policies in order to reach to a conclusion.

Dworkin criticized Hart’s theory in many ways:

1. Dworkin argues that the continually changing nature of law needs that it should be analyzed in terms of justice, legal principles and morals, not just plain facts.

2. Hart says, where the law is incomplete not providing an answer for a question, judge has discretionary power to fill the gap creating a new law. But Dworkin criticized, saying the law never runs out and it always contains the matter where the judge has to apply his mind to find the answer.

3. Dworkin criticizes the ‘Rule of recognition’ given by Hart. Dworkin’s argument is that Hart’s rule of recognition is based on content, because of its source and linguistic merits, rather than what it actually aims to achieve. He states there is no rule of recognition which distinguishes between legal and moral principles and a judge in a hard case must therefore appeal to principles which include his own conception of what is the best interpretation of the network of political structures and decisions within his community.

4. Dworkin describes principles as a standard to principles, which include his own concept interpretation of the network of political structures and decisions within his community be observed, as it would help to bring about fairness in law. He says, laws relate to rules, but also to principles. These principles, unlike rules, are important when two principles lead to different conclusions, the judge must take into account the relative weight of each. But when a conflict arises, one can be valid based on another given by a higher court.

5. Dworkin criticizes Hart’s descriptive theory of law saying it is misguided because it cannot precisely take into view the insiders view point of law, which he believes is essential in understanding the legal system. Hart states that there is no inherent connection between law and morality, and there can be legal rights and duties, with no moral justification. Whereas, Dworkin criticizes this in favour of the view that there must be some form of prima-facie moral grounds for the existence of legal rights and duties. So for him legal rights must be understood as a species of moral rights, and that constituted as a crucial element in his legal theory.

7. Dworkin criticizes by saying, Hart is telling us what any legal system is, but his defect lies in his assertion that all legal systems, at all times, hard cases are decided by judges

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having the discretion that he ascribes to them. While Hart’s theory is probably the dominant view among analytically prevailing philosophers of law, it is also subject to competing interpretations persistent criticisms and misunderstandings. Many others have argued on both sides including Joseph Raz, Jules Coleman, Harold Granville, John Finnis, Hans Kelsen, Lon Fuller and Kenneth Himma to name but a few. Due to the number of other jurists that have argued on both sides of the debate, it seems that this argument will continue and in future evolve in better arguments.

CONCLUSION

Professor Hart was one of the most important legal and political philosophers of the twentieth century, and his theory of modified positivism is still gaining a lot of appreciation and importance in the present day. Hart’s analysis of primary and secondary rules enunciates a very useful framework for understanding the sources of law and how one can distinguish valid laws from invalid ones without entering into subjective moral territory. Hart’s system creates a way to overcome some of the inconsistences in Austin’s theory, while also incorporating some of the more normative shades of the law without accounting for any moral claims. Hart observes that people feel an obligation to follow primary laws, even where they are under the verge of being caught. Since Austin defines laws as demands issued by a sovereign under threat of sanctions, this observation cannot be explained by Austin’s theory. Hart argues that this obligation does not come from the moral content of the law, but from its validity, which is why we need secondary laws to determine the validity of the primary laws. Because people who take the internal perspective to the law, they accept to be bound by laws that are valid according to the conditions set forth in the rule of recognition and in the secondary laws derived from this rule. I do feel, however, that Hart’s theory on judicial decisions fails to address the reality of how judges see their role in the legal system, as creators of new law. This article derives its conclusion about the opinion of Hart, that sometimes legal system leaves in compensatory injustice, and in such cases where injustice is arbitrarily served for the common good, all persons must be treated alike just by equal considerations, and that’s how his theory can be made effective in our present day.

REFERENCE

Books:


**Net source:**


INTRODUCTION
A debenture is an instrument of obligation executed by the organization recognizing its commitment to reimburse the whole at a predefined rate and furthermore conveying an intrigue. It is just a single of the strategies for raising the credit capital of the organization. A debenture is consequently similar to an endorsement of credit or an advance security confirming the way that the organization is at risk to pay a predefined sum with premium and despite the fact that the cash raised by the debentures turns into a piece of the organization's capital structure, it doesn't move toward becoming offer capital.

“Section 2 (30) of the Companies Act, 2013 define inclusively debenture as "debenture includes debenture stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not.”

In summary a "debenture" has the following characteristics:

The repayment of all moneys is secured by a charge in favour of the trustee over the whole or any part of the tangible property of the borrower or of any of the guarantors and

The tangible property that constitutes the security for the charge is sufficient to meet the liability for the repayment of all such money and all other liabilities that have been incurred and rank in priority to or equally with that liability.

ISSUE OF DEBENTURES
Issue of debentures is governed by the Companies Act, 2013, SEBI regulations and RBI regulations.

The Companies Act, 2013 allows both private and public companies to issue any type of debentures as long as they do not carry any voting rights. Debentures (taking any form) may be issued by two methods: public offer (where the offer is being made to more than 200 persons) or private placement (where the offer is being made to a select group of persons). While public companies can issue debentures using either method, private companies may only issue debentures using the private placement route.

In addition to the specific sections of the Companies Act, 2013, companies also need to refer to the Companies (Share Capital and Debentures) Rules, 2014 and the Companies (Prospectus and Allotment of Securities) Rules, 2014 when issuing debentures.

Secured debentures
If a company is proposing to issue secured debentures, then the additional requirements of the Companies (Share Capital and Debentures) Rules, 2014, r 18 need to be met. In particular, the date of redemption of such debentures cannot exceed 10 years from the date of issue, except in the case of companies engaged in infrastructure projects in which case such period cannot exceed 30 years.


393 Section 2 (30), Companies Act, 2013.
Fully or partly convertible debentures
In the case of fully or partly convertible debentures, the additional requirements of the Companies (Share Capital and Debentures) Rules, 2014, r 13 relating to issue of securities on a preferential basis need to be complied with. If the fully or partly convertible debentures are being issued by an unlisted public company on a public basis or by a listed company, then the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 will also apply.

Non-convertible / redeemable debentures
Both listed and unlisted public companies issuing non-convertible/ redeemable debentures on a public basis need to also comply with the SEBI (Issue and Listing of Debt Securities) Regulations, 2008.

For more information on types of debentures, an overview of the regulatory framework and process for issuance of debentures.

**GOVERNING LAWS**
1. Companies Act, 2013
2. Companies (Share Capital and Debentures) Rules, 2014
5. SEBI (Debenture Trustees) Regulations, 1993 and

**PROVISIONS REGULATING ISSUE OF DEBENTURES**

The ability to issue debentures can be practiced for the benefit of the organization at a gathering of the Board of Directors. An open organization may, in any case, require the endorsement of investors to get cash in abundance of the total of its paid up capital and free reserves. Assent of the investors would likewise be required for offering, renting or discarding the entire or generously the entire of the endeavour of the organization under segment 293 (1) (a). Debentures have been characterized under Section 2 (12) of the Act to incorporate debenture stocks, securities and some other securities of the organization in the case of constituting a charge on the organization's advantages or not.

The qualities of a debenture are:

a. A movable property.
b. Issued by the organization as an authentication of obligation.
c. It by and large indicates the date of recovery, reimbursement of foremost and enthusiasm on determined dates.
d. Could conceivably make a charge on the advantages of the organization.

Section 372 An of the Companies Act additionally controls between corporate credit and speculations and stipulates as far as possible on ventures and the measure of advance that can be obtained by an organization. The clarification condition of this segment expresses that the advance might incorporate debentures.

Section 117 to Sections 123 of the Companies Act, 1956 manage the
arrangements identifying with debentures, arrangement of debenture trustees, their obligations, formation of Debenture Redemption Reserve Account, risk of trustees and so forth.

The debentures issued under the Act should not convey any voting rights. On account of open issue of debentures, there would be countless holders on the enroll of the organization. All things considered it might not be possible to make charge for every one of the debenture holder. A typical strategy for the most part embraced is to make Trust Deed passing on the property of the organization. A Trust deed is a game plan empowering the property to be held by a man or people for the advantage of some other individual known as recipient. The Trustees pronounce the Trust for the debenture holders. The Trust Deed may give the Trustees settled charge over the freehold and leasehold property while a skimming charge might be made over different resources. The Company might permit review of the Trust Deed and furthermore give duplicate of the same to any part or debenture holder of the organization on installment of such total as might be endorsed. Inability to give the same would welcome punishments by method for fine under the Act. Any arrangement contained in the Trust Deed, which exempts a Trustee from risk for rupture of Trust, is void.

According to Section 125 (4) of the Companies Act, enlistment of a charge for motivation behind issue of debentures is obligatory. Area 128 stipulates that where an organization issues arrangement of debentures which is secured by charge, advantage of which will be accessible to all debenture holders paripassu, the organization might document the recommended particulars in Form 10 and 13 with the Registrar of Companies for enlistment of charge. These structures should be recorded inside 30 days after the execution of the deed.

**CONTRADICTIONS BETWEEN THE COMPANIES ACT AND THE SEBI REGULATIONS**

There are logical inconsistencies between the Companies Act and the SEBI directions on issues identifying with:

a. Utilisation of Debenture Redemption Reserves. The Act gives that the Debenture Redemption Reserve will be utilized towards recovery of debentures just while the SEBI control expresses that these will be a piece of the General Reserves, which can be used with the end goal of extra issues.

b. Any debentures issued with a development time of year and a half or less is exempted from the production of Debenture Redemption Reserve Account, while no such exception is given under the Companies Act.

c. No Public Issue/Rights Issue of Debentures might be made by an organization unless it has named at least one Debenture Trustees for such debentures though under SEBI rules, arrangement of Debenture Trustees is mandatory just if there should be an occurrence of debentures with development of year and a half or more.

A recorded organization however subjected to SEBI directions must conform to stringent standards between the two enactments/controls made there under.
The Indian legal has talked about this inquiry at different events and some of their discoveries have been set out beneath.

i. CIT v Motor Industries Co. Ltd.398: It was held that the debentures were bought in to recognize the obligation owed to monetary organizations from which credits were acquired and the sums were used for making of capital resources in India.

ii. Deputy Commissioner of Income Tax v Modern Syntex (India) Ltd. also, Modern Syntex (India) Ltd v Dy. CIT399: Similarly, the council had held that the consumption acquired was on 'issue of debentures as it were, for raising of credit' and the debentures were 'issued by the organization and it is as sure obligation'. This was regardless of the way that these debentures were convertible into value shares.

iii. Kirloskar Pneumatic Co. Ltd v Commissioner of Surtax400 and Ganesh Banzoplast Limited v Assistant Commissioner of Income Tax401: The courts have held that debentures, either convertible or non-convertible, are an affirmation of obligation.

iv. However, the Supreme Court of India in Sahara India Real Estate Corporation Limited v SEBI402, had broke down the qualities of a half and half instrument in detail and took an opposite view that a cross breed instrument, for example, alternatively convertible debentures are securities for the reasons for the Act and the SCRA. The Supreme Court held that 'it is clear, that "half breeds" are incorporated inside the expression "securities" for the motivations behind Companies Act, as well as, under the SEBI Act'.

**CONCLUSION**

Several companies decide to issue debentures to raise capital, along with the other sources of long-term finance. The companies need to follow the regulations and the procedure associated with the issuance of debentures. Further, they also need to account debentures issued at a par, premium or discount accordingly.

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398 CIT v Motor Industries Co. Ltd. ILR 1992 Karnataka 345.
399 Modern Syntex (India) Ltd v Dy. CIT (2005)95TIT(JP)161.
402 Sahara India Real Estate Corporation Limited v SEBI (2013) 1 SCC (Civ) 1.
CRITICAL ANALYSIS OF SEXUAL HARASSMENT OF WOMEN AT WORK PLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013.

By Radhika Agarwala
From Vikash Degree College, Orissa

“A WOMEN IS LIKE A TEA BAG, YOU NEVER KNOW HOW STRONG IT IS UNTIL IT’S IN HOT WATER”.

Swami Vivekananda said that “There is no chance for the welfare of the world until the condition of women is changed. It is not possible for a bird to fly on only one wing”.

THE SEXUAL HARASSMENT ACT: A CRITICAL ANALYSIS*

BRIEF BACKGROUND
The entire purpose of this research paper stems back to the landmark judgement by the Supreme Court of India in Vishaka v. State of Rajasthan1. It was in fact in this case for the very first time, that sexual harassment at the workplace was acknowledged to be a human rights violation, and elaborate guidelines were put into place. Sexual harassment at workplace was becoming an intolerable and uncontrollable menace2. Amidst various other developments, controversies and delays, the Indian legislature finally enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Act No. 14 of 2013)3, with an objective to protect women against sexual harassment at workplace and to put in place a redressal mechanism to handle complaints4.

The Act has effectively adopted and revised the guidelines laid down in the Vishaka judgement with added provisions of rigour and compliance. It is important to note certain loopholes in the provisions of the said legislation.

Various sections of society have raised their own concerns and objections towards the Act, which may or may not be justified from a particular point of view. Accordingly, some of the major concerns are as follows.

This research paper has been jointly co-authored by Divanshu Gupta, Nivedita Raju, Shyama Nair, Isha Dave, Dhruv Malhotra, Disha Mehta and Vishakha Choudhary, students of Gujarat National Law University, Gandhinagar.

1. AIR 1997 SC 3011 (AIR is All India Reporter).
3. Hereinafter referred to as “the Act” or “the Sexual Harassment Act”.

CONCERNS RAISED BY VARIOUS SECTORS OF THE SOCIETY
WOMEN RIGHTS’ ACTIVISTS

The Act is being highly criticized by women rights’ activists. Unfortunately, it leaves it up to the internal committee to decide a monetary fine to be paid by the perpetrator, depending on their income and financial status. Accordingly, a lower level executive has to pay a lower fine for harassment than a senior executive. This unjustified and unexplained discriminatory scheme leaves scope for inequality among different sections of society for an act equally heinous in nature, be it committed by anyone.

The Act does not cover in its scope and ambit a very important community, that are agricultural workers. The exclusion of armed forces too is an inexplicable gap. Women working in the armed forces suffer highly from sexual harassment which calls for their inclusion within the purview of the Act. What needs to be noted is that the Armed Forces sector is heavily male dominated and that the chain of command is in the lair of the males. Enquiries are held behind closed doors putting women in the Armed forces at a disadvantage to begin with. There is no need to exclude such women from the purview of the Act as no strategic or other interests are affected by protecting them against sexual harassment at the workplace.

DISCRIMINATION IN SCOPE AND AMBIT

In an era, where the force of the law thrives for creating equal opportunity and focuses on eliminating discrimination of every kind possible, this particular Act is not at all gender neutral. The Act provides protection against acts of sexual harassment only for women and not men. On the other hand, interestingly, various recent studies and surveys over the last years or so have shown that very often, workplaces also involve women initiating and engaging in acts of sexual harassment. The research concluded that with respect to this crime, cities in India are gender neutral and women are often on the dominating end just like men. There were 527 people queried in the survey across seven cities in the country. It was found that:

- **Bangalore**: The respondents said they had been harassed. Moreover, only 32% said that they were harassed by male colleagues.
- **Hyderabad**: 29% of the respondents said they have been sexually harassed by their female bosses while 48% accused their male bosses.
- **Delhi**: Numbers are even, with 43% pointing a finger at their female colleagues and an equal number accusing their male colleagues of sexual harassment. 38% of the respondents agreed that in today’s workplaces, even men are as vulnerable to sexual harassment as women.

The numbers give us enough evidence to conclude that in practicality, circumstances are not totally so as they were envisaged by the legislators. On the other hand, the Act provides no mechanism to deal with the same. Although, this Act is a great step forward in protection for women, it however leaves a wide scope for false allegations. Individuals

not involved in law making but who would rather be governed by this law feel, that its effect must be viewed not just on the individual in question but in totality including his family. This not only becomes a source of nuisance to the man so falsely accused and his family, it also tarnishes their reputation. This in turn becomes a great threat that a household may face.

EMPLOYER’S AND EMPLOYEE’S PERSPECTIVE

Another question that has been raised on numerous occasions is with regard to the definition of the word „employee”. The ambit of this definition is very wide. It can roughly be interpreted to include almost any male worker. This is evident by use of words like, „any work”, „regular”, „ad hoc”, „temporary”, „with contract”, „through agent”, „without agent”, „voluntary basis” etc. Therefore, this raises a greater possibility of untrue allegations for malafide reasons and gives a lot of scope for frivolous and unnecessary litigation.

The employer’s perspective holds equal importance as well. It has been pointed out, that in light of the increased number of complaints since the passing of this Act, the employers feel discouraged from hiring women all together. More and more employers shall not prefer the unnecessary risk of any such allegations and would in fact hire a male employee. This could result a great step backward in providing equal opportunity to women, ultimately hurting them in a perverse manner.

The employer is further burdened by the fact that the definition of workplace includes terms like, „anyplace”, „transportation”, „arising out of”, „due course” etc. This adds to the burden of responsibility on the employer to protect their female employees. It is also quite unreasonable in essence. The employer cannot be humanly expected to prevent any sort of harassment at any give place at any point of time. This is coupled with the fact that in majority of the cases, the employer shall not be responsible and will not govern circumstances for the act to take place even remotely and thus, places extraordinary burden on him.

The increased burden of employers has also raised questions, such as, whether employers have a positive obligation to report even minor acts of sexual harassment to the police, as it is an offence now punishable under the Indian Penal Code. Additionally, should a situation arise where a victim is unwilling to complain and an employer is aware of the situation. In such cases, is there an obligation under this Act to report against the victim’s wishes? The aforementioned problematic provisions and unanswered questions present a conundrum for application of the Act, and remain to be clarified.

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406 The Indian Penal Code, 1872 (Act No. 45 of 1860), Section 354A.
FREEDOM AT WORKPLACE
The existence of free and unmonitored work environment along with coexistence of liberties to be frank and humorous with each other at workplace is in fact the need of the hour. This when exercised in limits, leads to improved understandings and work efficiency. Few examples can be mild sexual humour, unhindered personal level interactions. All these help in building up ambient relations and allow the opposite sexes to break the ice and come to terms and understandings which they need to do, both as matured individuals and professionals.

With the reducing trend of gender exclusiveness at various workplaces, more and more men and women are interacting with each other at workplaces. This trend has led to an indispensable need to create a freer and friendly environment for both genders to freely interact and communcate. Humour within limits, can sometimes be stress reliever. However with the strict provisions of the new law, it appears as though this easy interaction will get curbed. With employees being much more careful with their jokes, it will ultimately create a hostile environment at workplace.

But the Act takes away this free environment. Circumstances where casual relations are encouraged between men and women will be curbed due to fear of it being misconceived.

The research now focuses on a provision based analysis of the Act whereby most of the provisions which have raised questions are:

CHARACTER OF LEGISLATION - ABSENCE OF GENDER NEUTRALITY
The first and most glaring flaw of this legislation is the complete absence of gender neutrality. The Act is all about sexual harassment of women and does not cater to the opposite gender. While efforts to protect women in the workplace are commendable, there appears to be no such recourse to legislative action for sexually harassed men. According to the law in place, no complaint may be filed by a male employee. There is a rising phenomenon of sexual harassment of males, which, though considerably lower than females, cannot be ignored.

SECTION 2(n) - “SEXUAL HARASSMENT”
The provision narrows the scope of what may be construed as sexual harassment for application of this Act. Acknowledgement of technological advancements could have also been noted, so as to include all possible electronic means of sexual harassment. Interpretation concerns are enhanced with the use of the phrase “unwelcome” in clause (v). Legislators have failed to note that the definition of “unwelcome” will be construed in a vastly different manner from each woman’s perspective. The subjective perception of different women ought to have been included in determination of whether the act is “unwelcome” or not. The definition of “sexual harassment” has also neglected to grant protection against potential victimization of the complainant by an employer. The timeline between making of complaint till a decision is made can be effectively misused by the employer to exert undue pressure on the employee of any nature whatsoever. Alternatively, the definition of “aggrieved woman” may have included the same.
SECTION 2(o)-“WORKPLACE”
The definition includes “any place which arises within the course of employment”, thereby including clients” offices, taxis, hotels, etc. Hence for the purpose of this Act, the areas over which the employer has no access or control are deemed to be a workplace, and the liability of occurrence of any untoward incident of sexual harassment is directly attributed to the employer. This provision seems to be extending the scope of the Act more than required, i.e. the “workplace” is being used to incorporate exceedingly unnecessary venues thus putting the employer in a position where his liability continues irrespective of his presence or control over the situation.

This law is framed mainly keeping in mind workplaces like offices, organisation, other institutions and enterprises, where complaints can be referred to committees. But the problem arises as a majority of Indian women do not work in institutions or enterprises, or in developed cities. They work in the informal sector such as fields, on the roads, or as self-employed producers or vendors. Their workplaces are everywhere, and there is no mechanism to prevent the everyday forms of sexual harassment that they may undergo.

SECTION 3–PREVENTION OF SEXUAL HARASSMENT
The provision deals with threats and detriments given by the employer to the employee and their co-relation with acts of sexual harassment. The phrases, such as “implied or explicit threat about her present or future employment status” and “interferes with her work or creating an intimidating or offensive or hostile work environment for her” will not be conducive for speedy redressal of complaints, because in a professional work environment the employees including female employees are bound to receive certain remarks or feedback with regard to quality of work and the improvements required thereof which might not always be positive. Such genuine and honest feedback, if not well received will become a reason of misusing this provision, i.e. owing to the phraseology of this provision women might file frivolous complaints on the ground that such feedback was creating an unhealthy work environment.

SECTION 4–CONSTITUTION OF INTERNAL COMPLAINTS COMMITTEE
The criticism of the constitution of this committee has been dealt with in a three-pronged manner. Primarily, it should be noted that in-house management of complaints may act as a deterrent to victims. It is therefore suggested that the complainant need not forcibly file a complaint with the Internal Complaints Committee. A more adequate forum would be an independent employment tribunal to handle complaints in


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a more efficient manner, which would simultaneously be preferable to a victim.\textsuperscript{409} Secondly, the composition of the committee members should have compulsorily been an odd number to enable the committee to reach a majority-based decision. Thirdly, \textit{Section 3(c)} mandates the appointment of a member from a non-governmental organization (NGO) or association “committed to the cause of women”. There is no threshold for this qualification and it has been left open to interpretation. Further, including third-parties such as NGOs as members of the committee will also raise concerns of confidentiality due to the sensitive nature of such internal matters.

The Act ambitiously creates an obligation for the employer to establish a complaints committee for each of its branches (which employs 10 or more people), even if the branches are in the same city. This provision must be rectified.

Apprehension has been expressed with respect to the disposition of the committee as a whole. The reason for it is the feminist biasness of the committee itself as it comprises of stakeholders strongly prejudiced in favour of the female sex. The most conspicuous shortcoming, however, is that the internal committee is composed of persons without any legal qualifications. This absence of training specifications for the internal complaints committee will result in an ill-equipped team and obstruct justice.

Another important point to be noted is that while under this Act the power to discharge the functions including that of constitution of Local Complaints Committee are to be conferred on a District Officer who can be the District Magistrate or Additional District Magistrate or the Collector or Deputy Collector as notified by the appropriate Government.\textsuperscript{410} But, no where it is clarified as to who is going to be “second in line” i.e. in absence of the District Officer who shall be authorized to exercise the functions under this Act. In such a scenario, it is possible that LCC would not be constituted in various districts, just because the presiding authority is unavailable or absent.\textsuperscript{411}

\section*{SECTION 10(1)–CONCILIATION}

This provides for the Committee to make an attempt to resolve the complaint through conciliation proceedings undertaken at the victim’s request and proceed to make inquiry only if a settlement is not reached. However, this provision misleads attempts to achieve justice, in eroding the dignity of women by compromising on women’s harassment. It is inconceivable and illogical why a sexually

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\textsuperscript{410} The Sexual Harassment Act, Section 5.

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A harassed woman would like to reconcile with her offender.

**SECTION 11(3)–INQUIRY INTO COMPLAINT; POWERS OF CIVIL COURT**

This provision vests the Committees with powers of a civil court hence making it a quasi-judicial entity. It is to be noted that the members to be appointed as a part of the Committee are not required to have any legal background nor is it necessary for them to belong to the legal fraternity. Hence, vesting the powers of a civil court in authorities having no legal knowledge seems inappropriate. Also, this may be interpreted as an instance of colourable legislation, as powers of courts cannot arbitrarily be conferred on domestic committees.

**SECTION 12–ACTION DURING THE PENDENCY OF A COMPLAINT**

On request of the complainant and recommendation of the Internal/Local Committee, the employer must grant paid leave (On completion of the said leave, she can be granted privilege leave by the organization. or transfer of workplace to the complainant). It is to be noted that the mere pendency of complaint is sufficient reason for the woman to avail the above reliefs. Once the complaint has been made, this provision might be misused to leave the workplace even if it is ensured that the workplace remains safe.

**SECTION 13(3)–INQUIRY REPORT; POWER TO DEDUCT SUMS FROM SALARY/WAGES**

The committee has been awarded vast discretionary powers. If the alleged sexual harassment is proved, the committee is empowered to take action against sexual harassment in accordance with the prescribed service rules, or to deduct adequate compensation from the salary of the employee, or to recover the compensation from the accused employee as land revenue.

Sexual harassment is considered to be a violation of basic human rights. Hence, instead of taking drastic action, such as dismissing the accused from employment or suspending him for a considerable time period without any pay, penalizing such an act by compelling payment of compensation seems to undermine the gravity of the offence and equates it to offences wherein the harm or damage can be undone by monetary means. Also, in order to carry out the deductions from the salary of the accused employee, corresponding changes need to be made in the Payment of Wages Act, 1936 which provides for certain restrictions when it comes to deductions in the salary of an employee.

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412 Section 12 provides for granting leave to the aggrieved female employee up to a period of three months in addition to the regular leave which she is allowed to avail on the basis of the employment contract.


414 Act No. 4 of 1936.
SECTION 14–PUNISHMENT FOR FALSE OR MALICIOUS COMPLAINTS AND FALSE EVIDENCE

It states that if there is a false complaint duly backed by forged documents submitted by the complainant or if it is proven that the complaint has been made with malicious intent, then strict action will be taken in accordance with the service rules of the concerned establishment. However, it categorically mentions that if the complaint cannot be substantiated, then it will not attract any repercussions under this provision.

This red-rag provision goes against the very purpose of this legislation by penalizing women for false or malicious complaints. The criteria of falsity here is evidence of forged documents or proof of malicious intent. It has not been able to consider that there may be a case wherein the complaint is filed and later not sufficiently proved, would possibly be a frivolous complaint.

Further, specific penalty is not prescribed by the provision for such complaints; it is merely stated that action has to be taken according to the service rules.

SECTION 15(d)–DETERMINATION OF COMPENSATION, INCOME AND FINANCIAL

STATUS OF RESPONDENT

The committee also has the power to prescribe monetary penalties payable to the complainant based on the income and financial status of the perpetrator. Aside from the discretion bestowed upon the committee, this provision itself is irrational, as it implies that sexual harassment by a lower executive, for example, would not warrant as high a penalty as a high-level manager. While undermining the entire concept of sexual harassment itself, this provision could possibly give more incentive to female employees to only report unwelcome acts of senior-level employees.

SECTION 16–PROHIBITION OF PUBLICATION OR MAKING KNOWN CONTENTS OF COMPLAINT AND INQUIRY PROCEEDINGS

While it is laudable that this provision endeavours to contain such delicate matters within the purview of the organizations in which they occur, the same information should also be made available on demand to an interested party. Express exclusion from the Right to Information (RTI) Act, 2005, will impede the interest of the public at large. This doesn’t seem to be just and fair as such an exclusion from the purview of RTI would mean that information on false/fabricated cases would not be available to a person with vested interest.

415 LAW TO TACKLE SEXUAL HARASSMENT OF WOMEN AT THE WORKPLACE BROUGHT INTO FORCE available at, http://almtlegal.com/articlespdf/ALMT%20Newsflas

416 Act No. 22 of 2005.
SECTION 26—PENALTIES FOR NON-COMPLIANCE

Chapter VI lays down the duties of employers. Section 26 prescribes penalties for non-compliance with the provisions of the Act, which includes a monetary fine upto Rs. 50,000, and on repetition of the same offence, could result in punishment being doubled and/or cancellation of registration of the entity or revocation of any statutory business licenses. Herein, a fine should be prescribed, as revocation of license will inflict injury on unrelated and innocent parties associated with the business of the employer as well.

CONCLUSION
It is certain that many victims will shy away from the publicity, the procedures, the delay and the harshness in the criminal justice system, this alternative structure and process is welcome, but needs much alteration. Helping the victims to make informed choices about the different resolution avenues, providing trained conciliators, settlement options by way of monetary compensation, an inquisitorial approach by the Committee, naming the victim by use of words like complainant etc. and not using her actual name and in-camera trials are some areas of improvement. Apart from this, we need something else which the legislation cannot provide- the mindset to understand the fears, compulsions, and pressures on women victims. The legal concept and test of a “reasonable man” should give right of gender to that of a “reasonable woman” as well.417

The critical analysis made in this research paper presents the quandaries posed by the Sexual Harassment Act, such as various sections of the community will be grossly affected by the over-imposing nature of the Act, primarily the vast increase in the burden of employers, as outlined. The legislation appears to be further excessive in the redressal mechanisms which it has established by leaving short-comings in the powers and functions of these non-judicially equipped bodies. Moreover, some provisions could have been more leaning to the female victim, such as the provisions for conciliation and punishment for false or malicious complaints.

The loopholes in the particular provisions may be already identified in this research paper along with suggestions as to what could have been done more properly. The overall impression provided by the Act is that it is not well drafted, with sufficient reasonable foresight of the harsh effects of its implementation. These problematic provisions and unanswered questions present a conundrum for application of the Act, and remains to be clarified.

EXTRADITION – A STUDY OF THE INDIAN PRACTICE

By Ruchira Baruah
From National Law University and Judicial Academy, Assam

Abstract
Based on the term autdedereautpuniare which means “either extradite or prosecute”, extradition is adopted as a practice by the nations as a weapon to be used in the international battle against crime. Most nations take forward the procedures of extradition in accordance with bilateral treaties. In general, offences of a political character have been excluded but this would not cover terrorist activities. India has also been extraditing criminals to foreign nations as well as making requests for its nationals to be sent back. The extradition laws in India are in accordance with the Indian Extradition Act of 1962. The extradition of Abu Salem was a landmark event in regards to extradition in India.

Keywords: extradition, fugitive criminals, foreign nations, treaty, arrangement

Introduction
Extradition is the surrender by one State to another of a person desired to be dealt with for crimes for which he has been accused or convicted and which are justifiable in the courts of the other States. Surrender of a person within the State to another State whether a citizen or an alien is a political act done in pursuance of a treaty or an arrangement ad hoc. Extradition plays an important role in the international battle against crime. Most nations take forward the procedures of extradition in accordance with bilateral treaties. In the absence of a treaty between countries, there are no defined guidelines for the law to be applied and procedure to be followed. Much is dependent on the relations between countries, including cooperation and coordination between different authorities of the two countries. One option is to resort to a Mutual Legal Assistance Treaty wherein both countries agree to exchange information in order to enforce criminal laws. However, in certain cases extradition is barred in India.

The researcher in this paper has discussed the concept of extradition under International law. The provisions of the Indian Extradition Act have also been dealt with. The treaties of India with Nepal and Bangladesh are also discussed. The treaties and the extradition of Abu Salem have highlighted the practice of extradition in India in consonance with the Act of 1962.

Extradition
The practice of extradition enables one state to hand over to another state, suspected or convicted criminals who have fled to the territory of the former. The law of extradition was designed to make the systems of reciprocal surrender orderly and principled, and to make abduction, military incursions and fraudulent deportations unnecessary as well as illegal. Extradition plays an important role in the international battle against crime. It owes its existence to

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the so-called principle of territoriality of criminal law, according to which a State will not apply its penal statutes to acts committed outside its own boundaries except where the protection of special national interests is at stake. In view of the solidarity of nations in the repression of criminality, however, a State, though refusing to impose direct penal sanctions to offences committed abroad, is usually willing to cooperate otherwise in bringing the perpetrator to justice lest he goes unpunished.  

The term “extradition” comes from the combination of the Latin terms ex and traditum which means the surrender of fugitives. Oppenheim defines ‘extradition’ as “the delivery of an accused or a convicted individual to the state where he is accused or has been convicted of a crime by the state on whose territory he happens for the time, to be”. In extradition, two states are involved: the state where the person is currently stationed, called the ‘territorial state’ and the state which is requesting, called the requesting state.

ICPO-Interpol has been a forerunner in international efforts to improve and accelerate existing procedure of extradition. Apart from attempts by academic bodies such as the Harvard Research Draft Convention on Extradition, the ICPO-Interpol was the first international organization to recommend to member countries a Draft General Agreement for the Extradition of Offenders, which unfortunately has remained a dead letter since it was adopted by the General Assembly of the Organization (then known as the International Criminal Police Commission) in 1948.  

The process of extradition is regulated by treaties between the two countries. Extradition is important because it helps to maintain the sanctity of the penal code of one country or territory. It is usual to derive from existing treaties on the subject certain general principles, for example, double criminality, i.e. that the crime involved should be a crime in both states concerned. But in the case of United States Government v. McCaffery it was held that extradition shall be granted if the offence is punishable under the laws of both parties by imprisonment or other form of detention for more than one year or by the death penalty and the offence constitutes a felony under the law of the United States of America. Although the general rule is that for extradition a treaty has to be there between the states but there are exceptions to it. If a country wants a person accused or convicted, and the other country is also willing to send the person, then there may not be a treaty and yet extradition can take place. This is based on the principle of reciprocity. Generally, people are sent back to trial where the jurisdiction lies because there are better chances of getting resources or collecting evidences. It is based on the term autdedereautpuniare which means “either extradite or prosecute”. The prosecution must be in accordance with the laws of that country. Scholars like Hugo Grotius considered it to be a legal duty of states to either prosecute or extradite. But modern day scholars do not consider it to be legal duty. Only if there exists a treaty between the states, there arises a legal obligation.


420 “Extradition”, http://cbi.nic.in/interpol/extradition.php#pos

421 Note-1, p.688

422 [1984] 2 All ER 570
Otherwise, it is only a moral obligation. The American Supreme Court has held that apart from a treaty, international law does not recognise extradition as a legal duty.\(^{423}\)

In general, offences of a political character have been excluded but this would not cover terrorist activities. Asylum is sought in the case of political offences. It is said that “where extradition ends, asylum begins”. It means that in such cases extradition will not take place. Before the French Revolution, political offences were not to be considered as exceptions to extradition. After the revolution, France gave asylum to all political offenders who committed offences in pursuance of his/her liberty. Today, the ambit of political offences has been narrowed down. Serious crimes of murder, manslaughter, assassination of crowns etc., are not be considered as political offences. Under International law there is no specific definition of political offences. This has led to many discrepancies. In the modern practice, a list of offences is made under the treaties as to which offences amount to political offences. In the case of Re Castioni\(^{424}\) where Mr. Castioni, a Swiss national had gone on to join a revolutionary party and killed Mr. Rossi, an official of the Government. Subsequently, he fled to England. Switzerland sought the extradition of Mr. Castioni so that he could be tried for the murder of Mr. Rossi. The English Court did not extradite him and held that though it looked like murder, the act was political in nature. This was followed for a long time till 1955. In 1955 in the case of Kolczynski\(^{425}\) categorization of political offences was made as a) absolute and b) relative. It was held that the words "offence of a political character" must always be considered according to the circumstances existing at the time when they have to be considered.\(^{426}\) In the case of Regina v Governor of Pentonville Prison, Ex Parte Cheng\(^{427}\) it was held that ‘for politics are about government’. 'Political' as descriptive of an object to be achieved must, in my view, be confined to the object of overthrowing or changing the government of a state or inducing it to change its policy or escaping from its territory the better to do so. Similarly the House of Lords has held that view that “the motive and purpose of the accused in committing the offense must be relevant and may be decisive. It is one thing to commit an offense for the purpose of promoting a political cause and quite a different thing to commit the same offense for an ordinary criminal purpose.”\(^{428}\) Apart from political offences, certain offences are barred in India. As per the guidelines of the Ministry of External Affairs, the nodal authority in case of extradition in India, an alleged offender may not be extradited to the requesting state in the following cases:

- No treaty – In absence of a treaty, States are not obligated to extradite aliens/nationals
- No treaty crime – Extradition is generally limited to crimes identified in the treaty which may vary in relation to one State from another, as provided by the treaty.

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\(^{423}\) 290 U.S. 276 (54 S.Ct. 191, 78 L.Ed. 315)  
\(^{424}\) [1891] 1 QB 149  
\(^{425}\) Regina v. Governor of Brixton Prison, Ex parte Kolczynski and Others, [1955] 1 QB  
\(^{426}\) http://www.uniset.ca/other/cs4/19551QB540.html  
\(^{427}\) [1973] AC 931  
\(^{428}\) R v Governor of Brixton Prison, Ex Parte Schtraks [1964] AC 556
Military and Political Offences – Extradition may be denied for purely military and political offences. Terrorist offences and violent crimes are excluded from the definition of political offences for the purposes of extradition treaties.

Want of Dual Criminality – Dual criminality exists when conduct constituting the offence amounts to a criminal offence in both India and the foreign country.

Procedural considerations – Extradition may be denied when due procedure as required by the Extradition Act of 1962 is not followed.

The Indian Practice of Extradition

Evolution
In India the extradition of a fugitive from India to a foreign country or vice-versa is governed by the provisions of Indian Extradition Act, 1962. The basis of extradition could be a treaty between India and a foreign country.

The first Indian statute on extradition is the Indian Extradition Act of 1903. The Indian Extraction Act, 1903 was passed before the attainment of independence of India when India was still under the British rule. The effect of the new constitutional situation on the extradition arrangements between Indian and the native state, namely, State of Tonk was considered by the Supreme Court in Dr. Ram Babu Saksenav. The State. The question was how far the extradition treaty (of 1869) between the Government of India and Tonk State was affected by the merger of the State into India. It was held that the treaty must be deemed to be ineffective. The Supreme Court of India through its judgment in the State of Madras v. C.G. Menon, held inapplicable in India the Fugitive Offenders Act, 1881, which was a part of the extradition law of India, regulating the extradition of fugitive criminals inter se the commonwealth countries. Thus, it is apparent that necessity is felt by the independent India for passing a new legislation to deal with Extradition, first, because Menon’s case created a vacuum in the law of extradition from India to Commonwealth countries, and, secondly, because the legal position relating to the surrender of fugitive criminals to foreign countries and Commonwealth countries from the former Part B States was somewhat doubtful.

The Extradition Act, 34 of 1962 duly enacted by Parliament, received the assent of the President on September 15, 1962 and came into force on January 5, 1963. The Extradition Act, 1962 consolidated the law relating to the extradition of criminal fugitive from India to foreign states.

Indian Extradition Act, 1962
It is an Act to govern extradition, the most sought after tool in the administration of criminal justice across the world. It provides legal mechanism to facilitate extradition of fugitive criminals from India to the requesting foreign countries. It also contains the procedure for making requests for the extradition of fugitive criminal who fled from

429 http://www.mea.gov.in/extradition-faq.htm
430 “Evolution of Extradition in India”, p.100, shodhganga.inflibnet.ac.in/bitstream/10603/8652/11/11_chapter%203.pdf
431 AIR 1950 SC 155
432 AIR 1954 SC 517
433 Note-9, p.102

www.supremoamicus.org 209
India to other countries. Indian extradition law is primarily modeled on the established principles and practices of extradition as evolved and generally approved by the international community. The Act consists of five chapters and two Schedules. The Extradition Act primarily seeks to meet two requirements that arise in the administration of criminal justice in India or in any other foreign state. These two requirements are:

1. Extradition of fugitive criminal from India to foreign states outside India
2. Extradition of fugitive criminals from foreign countries to India

Under the procedure prescribed in the Act, the Magistrate is not required to investigate whether the act of the fugitive is an offence under the penal law of the country requesting extradition. Thus, the principle of double criminality has not been given due recognition in the Act.

The term ‘fugitive criminal’ has been defined as follows:

Fugitive criminal means “a person who is accused or convicted of an extradition offence within the jurisdiction of a foreign State and includes a person who, while in India conspires, attempts to commit or incites or participates as an accomplice in the commission of an extradition offence in a foreign state”

Section 2(c) and (d) read together gives the picture that determination of ‘extradition offence’ depends basically upon the terms of extradition treaty or arrangements made with foreign states (referred to as treaty states) or the minimum quantum of punishment (which is set at one year) for the given offence (either under Indian law or foreign state) in the case of non-treaty foreign states.

**Procedure for Extradition of Fugitive Criminals to Foreign States**

Chapter II and Chapter III of the Act provide the procedure for extradition of fugitive criminals to foreign states. Whereas Chapter III applies to extradition to those countries with which India has extradition treaty or

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434 “Indian Practice”, p.130, shodhganga.inflibnet.ac.in/bitstream/10603/8652/12/12_chapter%204.pdf

435 Section 2 (f), Indian Extradition Act 1962

436 Section 2(e), Indian Extradition Act 1962

437 Section 2(e) of Indian Extradition Act, 1962
arrangement, Chapter II comes into operation with regard to extradition of fugitive criminals to foreign countries with which India has no extradition arrangements.

The process of extradition is activated with the request of foreign state for surrender of a fugitive. This is so as to enable each state to bring offenders to trial swiftly as possible in the state where the alleged offence was committed, and to preclude any state from becoming a sanctuary for fugitives from justice of another state.

The Act provides that the process of extradition is started on a formal request for the surrender of a fugitive criminal belonging to a foreign state by a diplomatic representative of the foreign state at Delhi to the Central Government. Alternatively, the government of the foreign state seeking surrender of the fugitive criminal may communicate with the Central Government through its diplomatic representative in that state or country. If these modes are not suitable then the request for surrender of the fugitive can also be made by any other mode as agreed between the government of the foreign state and the Central Government of India.

Chapter III of the Act deals with the return of fugitive criminals to foreign states with extradition arrangements. Under Section 13, where a fugitive criminal of any foreign state to which the Chapter applies is found in India, he shall be liable to be apprehended and returned in the manner provided by this Chapter to that foreign state. Under Section 16 the power has been given to a magistrate to issue provisional warrants for the arrest of such fugitive criminal. A fugitive criminal apprehended on a provisional warrant may, from time to time, be remanded for such reasonable time, not exceeding seven days at any one time, as under the circumstances seems requisite for the production of an endorsed warrant. Section 17 deals with the procedure to be followed while dealing with fugitive criminal when apprehended. The process is as follows:

1. If the magistrate, before whom a person apprehended under this Chapter is brought, is satisfied on inquiry that the endorsed warrant for the apprehension of the fugitive criminal is duly authenticated and that the offence of which the person is accused or has been convicted in an extradition offence, the magistrate shall commit the fugitive criminal to prison to await his return and shall forthwith send to the Central Government a certificate of the committal.
2. If not satisfied the magistrate may, pending the receipt of the orders of the Central Government, detain such person in custody or release him on bail.
3. The magistrate shall report the result of his inquiry to the Central Government and shall forward together with such report any written statement which the fugitive criminal may desire to submit for the consideration of that Government. Under Section 18, the Central Government can issue a warrant for the custody and removal to the country of the concerned

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438 V.K. Bansal, LAW OF EXTRADITION IN INDIA, 2008, p.45.
439 Ibid
440 Section 16(3), The Indian Extradition Act, 1962
441 Section 17(1), The Indian Extradition Act, 1962
442 Section 17(3), The Indian Extradition Act, 1962
fugitive criminal and for his delivery at a place and to a person to be named in the warrant.

Surrender or Return of Accused or Convicted Persons from Foreign States
Chapter IV and Section 19 of the Act deal with the return of a fugitive criminal from a foreign state to India. A requisition for the surrender of a person accused or convicted of an extradition offence committed in India and who is, or is suspected to be, in any foreign State or a commonwealth country to which Chapter III does not apply, may be made by the Central Government:

(a) to a diplomatic representative of that State or country at Delhi or
(b) to the Government of that State or country through the diplomatic representative of India in that State or country.

If neither of these modes is convenient, the requisition shall be made in such other mode as is settled by arrangement made by the Government of India with that State or country. Whenever any person accused or convicted of an offence, which, if committed in India would be an extradition offence, is surrendered or returned by a foreign State, such person shall not, until he has been restored or has had an opportunity of returning to that State, be tried in India for an offence other than:

(a) an extradition offence in relation to which he was surrendered or returned or
(b) any lesser offence disclosed by the facts proved for the purposes of securing his surrender or return other than an offence in relation to which an order for his surrender or return could not be lawfully made or
(c) an offence in respect of which the foreign state has given its consent.443

Guidelines of Ministry of External Affairs of India
Extradition request for an accused/ fugitive can be initiated after charge sheet has been filed before an appropriate Court and said court having taken cognizance of the case has issued orders/directions justifying accused/fugitive’s committal for trial on the basis of evidence made available in the charge sheet and has sought presence of the accused/fugitive to face trial in the case. All extradition requests should be supported by documents and information enumerated by the Ministry in its website.444

The request for extradition and the documents thereof should be prepared as per the requirements of the extradition treaty between India and the country concerned from which the fugitive is to be extradited to India.445

Extradition of Fugitive Criminals to Foreign States
Sections 4 to 11 under Chapter II of the Act discuss the procedure to be followed while extraditing a fugitive criminal to foreign states. Chapter II is generally applicable to extradition requests. In other words Chapter II is general and Chapter III is exceptional.

443 “Indian Practice”, p.184, shodhganga.inflibnet.ac.in/bitstream/10603/8652/12/12_chapter%204.pdf
444 http://www.mea.gov.in/extraditionguidelinesabroad.htm
445Ibid
As already mentioned, Chapter III is applicable to treaty states as per the terms of the concerned treaty. The Delhi High Court has observed that “Our inquiry reveals that only two treaties, that is between India and Bhutan and India and Turkey, make Chapter III applicable. In all other cases of treaties or arrangements, it is Chapter II, along with the provisions other than Chapter III that are enforced.”

Section 5 prescribes that where a Requisition is received in the manner set down in the preceding provision, the Central Government has the discretion to issue an order to any Magistrate who would have had jurisdiction to inquire into the offence if it had occurred within his jurisdiction directing him to inquire into the case.

The Act has endowed the Central government with unfettered right to turn down the request for extradition. Describing the discretionary powers of the Government, the Supreme Court in Hans Muller v. Superintendent, Presidency Jail has maintained that “The law of Extradition is quite different. Because of treaty obligations it confers a right on certain countries (not all) to ask that persons who are alleged to have committed certain specified offences in their territories, or who have already been convicted of those offences by their courts, be handed over to them in custody for prosecution or punishment. But despite that the Government of India is not bound to comply with the request and has an absolute and unfettered discretion to refuse.”

Under Section 6 the Magistrate must simultaneously issue a warrant for the arrest of the fugitive. Section 7 of the Act with its four sub sections deals with the procedure before the magistrate in inquiry. Sub section (1) governs the jurisdiction and powers of the magistrate. It is of great importance as it bestows on the magistrate powers of inquiry akin to that of the Court of Session or High Court. Sub section (2) provides about the need to consider evidence required for determination of the extraditability and non-political character of the offence. Sub section (3) gives power to magistrate to discharge the fugitive criminal if no prima facie case is made out. In case a prima facie case is made out, Sub Sec(4) accords power to magistrate to commit the fugitive criminal to prison to await the orders of the Central Government. The report of his enquiry has to be sent to the government. If the fugitive criminal desires to make any submission to the Central Government, a written statement to that effect may be sent along with the report of the magistrate. Under Section 8, when the Central Government decides to surrender the fugitive criminal to the requesting state, it may issue warrant for the custody and removal of the offender for his delivery at a decided place and to a specified person.

Section 9 is about the power of magistrate to issue warrant for the arrest of a fugitive criminal if in his opinion on the basis of such information and evidence which he received in that regard, it would have been justifiable to arrest him if the offence of which he is accused of or has been committed within the local limits of his jurisdiction. Section 10 assumes importance in the context of application of sub section (2) of Sec 8 because it deals with the manner of receipt of evidence. It provides that the documents duly authenticated are to be taken in as evidence.

446 Ram K Madhubani v. Union of India, CDJ 2008 DHC 1838
447 Section 5, The Indian Extradition Act, 1962
448 Hans Muller v. Superintendent, Presidency Jail, AIR 1955 SC 107
The necessary documents to be in proceedings against the fugitive are the warrants issued by a court of foreign state in case of an accused and the certificate of conviction in case of convict and also the depositions or statements on oath taken by any court of justice outside India or their photocopies. All these documents are to be duly authenticated before being taken as evidence in the inquiry.

**Provisional Arrest**

In case of urgency, India may request the provisional arrest of the fugitive, pending presentation of an extradition request. A provisional arrest request may be appropriate when it is believed that the fugitive may flee the jurisdiction. A request for provisional arrest may be transmitted through diplomatic channels through CPV Division of Ministry of External Affairs. The facilities of International Criminal Police Organization (ICPO- INTERPOL) may also be used to transmit such a request through National Central Bureau of India, CBI, New Delhi. The Police/Law Enforcement Agency concerned in India, prepares the request for a provisional arrest and sends it to the Ministry of External Affairs, which in turn forwards the same to the concerned authority of the foreign country through diplomatic channels. India does not need a treaty to make a provisional arrest request to a foreign country. India can make a provisional arrest request to any country. India’s treaty partners have obligations to consider India’s requests. In the absence of a treaty, it is a matter for the foreign country in accordance with its domestic laws to determine whether to arrest the person according to India’s provisional arrest request.\(^{450}\)

**Extradition Treaties between India and Other Countries**

**India and Nepal**

India has signed an extradition treaty with Nepal in the year 1953. As per Article I of the treaty, strict reciprocity will be followed to extradite persons accused or convicted of a crime in the territory of one Government if found in the territory of the other under the conditions stated in the Treaty. However, neither of the governments will be liable to surrender persons belonging to other countries except if they are accused of having committed the offence of desertion from the Armed Forces.\(^{451}\)

The offences for which an offender can be extradited between the countries are enlisted under Article III which includes:

1. Murder or attempt or conspiracy to murder.
2. Culpable homicide not amounting to murder.
3. Grievous hurt.
4. Rape.
5. Dacoity.
6. Highway robbery
7. Robbery with violence.
8. Burglary or house-breaking.
9. Arson.
10. Desertion from Armed Forces.
11. Offences against the laws prohibiting the export and import of goods.
12. Embezzlement by public officers.
13. Serious theft, that is to say cases of theft where violence bar, been used or where the

\(^{449}\) http://www.mea.gov.in/extradition-faq.htm

\(^{450}\) Ibid

\(^{451}\) Article II, India-Nepal Extradition Treaty available at www.oecd.org/corruption/asiapacific/mla
value of the property stolen exceeds Rs. 500 and cattle stealing.  
(14) Abduction or kidnapping.
(15) Forgery and the use of what is known to be forged, counterfeiting or altering money or uttering or bringing into circulation counterfeited or altered money.
(16) Receiving of illegal gratification by a public servant.
(17) Escaping from custody while undergoing punishment after conviction for any of the offences specified in clauses (1) to (16).

The treaty specifies that neither of the government will surrender any person unless a requisition is duly made to the concerned government. Articles VI and VII of the treaty reflects the principle of double-jeopardy i.e. if the person has already been tried and discharged or punished by one government, he shall not be surrendered or detained. Article V envisages that no person shall be extradited for any political offence. Thus this treaty between India and Nepal reflects the principles followed under International Law. The crimes for which an accused can be extradited are crimes which mandate punishment of imprisonment for a minimum one year. Under this treaty all costs in pursuance of it shall be borne by the requesting state.

**India Bangladesh Extradition Treaty**

452 Article III, India-Nepal Extradition Treaty available at www.oecd.org/corruption/asiapacific/mla

The extradition treaty between Bangladesh and India came into effect 2013. Prior to this treaty, it is important to note that Congress led coalition government in India and Awami League government in Bangladesh engaged in many negotiations. In 1996, Sheikh Hasina’s government in Bangladesh had signed Ganges Water Treaty and Chittagong Hill Tracts Peace Agreement in 1997. During second term of Sheikh Hasina government, a number of accords were signed between the two countries in 2010: Agreement on Mutual Legal Assistance on Criminal Matters; Agreement on the Transfer of Sentenced Persons; and Agreement on Combating International Terrorism, Organized Crime and Illicit Drug Trafficking.

455 Under this treaty, an extradition offence is defined as any conduct which under the laws of both the countries is punishable by a term of imprisonment for a period of at least one year, irrespective of whether they fall within the same category or not. This provision is similar to the standards set by international law. Economic offences related to taxation and revenue has also been brought under the purview of this treaty. Under this treaty, political offences have been exempted. The following offences have been explicitly determined to be not of political nature:

1. Murder
2. Men-slaughter or culpable homicide

456 Article 2, India Bangladesh Extradition Treaty, 2013 available at cbi.nic.in/interpol/ext_treaties/Bangladesh.pdf
457 Article 2(4), India Bangladesh Extradition Treaty, 2013 available at cbi.nic.in/interpol/ext_treaties/Bangladesh
3. Offences causing bodily harm or injury
4. Offences endangering life or causing serious damage to property
5. The making or possession of explosive substances with the intention to cause serious damage to property or endanger life
6. Incitement to murder
7. Possession of firearm with the intention to cause serious damage to property or endanger life
8. Use of firearm to resist or prevent the arrest or detention of himself or another person
9. Kidnapping, abducting, false imprisonment or unlawful detention including taking hostage

The extradition treaty has refusal provisions too. Extradition of any person may be refused by the country concerned on grounds of national security. Also, political detainee would not be brought under the purview of this treaty. The trivial nature of the offence can also cause refusal of extradition.

The treaty can also be terminated at the notice of any one of the parties. The notice is to be given through the diplomatic channel and on receipt of such notice, within six months the treaty will be terminated.

458 | Article 6, India Bangladesh Extradition Treaty, 2013 available at cbi.nic.in/interpol/ext_treaties/Bangladesh

459 | “AnupChetia handed over to India: All you need to know about the ULFA leader”, available at http://indianexpress.com/article/india/india-news-india/anup-chetia-handed-over-to-india-all-you-need-to-know-about-the-ulfa-leader/

Extradition of Abu Salem

When Abu Salem entered the US, they tipped off the Federal Bureau of Investigation (FBI), which tailed him. Abu managed to get out of the US and entered Portugal through Lisbon after rigging up his papers. They went on to tip the Lisbon authorities that immediately seized the Indian gangster. And, the tables turned. Abu Salem found himself on the receiving end and, the Mumbai police, on their part had, scores to settle with the gangster whose extradition from Portugal is shrouded with as much controversy as his role in the city’s blackest blasts.  

There was no extradition treaty between India and Portugal in 2005 when he was extradited along with Monica Bedi. The absence of such a treaty initially created legal difficulties. Indian government sought his extradition under the United Nations Convention on Suppression of Terrorism of 2000 under which all member nations have to help each other in the war against terrorism. Portugal and India are both signatories to the Convention. In the meantime, the Portuguese court sentenced Salem and Monica Bedi to four years imprisonment for illegally entering and staying in Portugal on forged passports. The court also ordered that their extradition could be made only after they have completed their prison term. The Portuguese court ordered their extradition after the Indian government, through its lawyer, gave a solemn assurance that if convicted they would not be sentenced to death. The assurance was given since European law prohibits extradition of any accused to such a country where capital punishment was still a valid punishment. However, after being produced in India, he was charged with offences of murder, extortion and kidnapping. As such, dismissing the plea of the Central Bureau of Investigation (CBI), Portugal's Supreme Court upheld its lower court's decision that extradition treaty with India was violated in Abu Salem's case by slapping of new charges against the underworld don that attract death penalty. However, the Supreme Court of India held that his convictions are still valid. It held that the verdict of the Portugal court is “not binding” on courts here and Salem’s extradition to India is still “valid in the eyes of law”. But it allowed the CBI to drop additional charges slapped on Salem under the TADA and Explosive Substances Act after his extradition. At the time of Salem’s extradition, India had assured Portugal that no charges entailing death penalty or imprisonment of more than 25 years would be pressed against him, but such charges were later brought in. However, in the case of Daya Singh Lahoria v. Union of India it has been held that the Criminal Courts in the country have no jurisdiction to try in respect of offences which do not form a part of extradition judgment by virtue of which the petitioner has been brought to this country.

465 AIR 2001 SC 1716
and he can be tried only for the offences mentioned in the Extradition Decree.
India signed the Extradition Treaty with Portugal in 2008.

Conclusion
The law of extradition was designed to make the systems of reciprocal surrender orderly and principled, and to make abduction, military incursions and fraudulent deportations unnecessary as well as illegal. ICPO-Interpol has been a forerunner in international efforts to improve and accelerate existing procedure of extradition. Scholars like Hugo Grotius considered extradition to be a legal duty of states to either prosecute or extradite. But modern day scholars do not consider it to be legal duty. Only if there is a treaty between the states, there arises a legal obligation. In general, offences of a political character have been excluded but this would not cover terrorist activities. If an ordinary crime is committed in the course of committing an offence against the state that would be considered political because of its close association with the politics of the state. However, the treaties signed by India have a list of offences that cannot be considered as political offences. Most of these are crimes of serious nature such as murder, arson etc.

The extradition laws in India are in accordance with the Indian Extradition Act of 1962. The Act governs extradition, the most sought after tool in the administration of criminal justice across the world. It provides legal mechanism to facilitate extradition of fugitive criminals from India to the requesting foreign countries. CPV Division, Ministry of External Affairs, Government of India is the Central/Nodal Authority that administers the Extradition Act and it processes incoming and outgoing Extradition Requests. 466 Requests for extradition on behalf of the Republic of India can only be made by the Ministry of External Affairs, Government of India, which formally submits the request for Extradition to the requested State through diplomatic channels. Extradition is not available at the request of members of the public. 467 India has signed extradition treaties with 37 nations including U.K, USA, Australia, Vietnam, Uzbekistan, Korea, Germany and France. On the other hand, India has extradition arrangements with 9 countries. The extradition of Abu Salem was a landmark event as the extradition happened without treaty based on the principle of reciprocity. Most recently, the extradition requests made by India to UK for Vijay Mallya has been debated and discussed.

466 http://www.mea.gov.in/extradition-faq.htm
467 ibid

www.supremoamicus.org
JALLIKATTU- A CULTURAL RIGHT

By Sameeksha Shukla & Harshi Arora
From School of Law, University of Petroleum and Energy Studies, Dehradun

INTRODUCTION
The enormous protest of Tamil people against the ban on Jallikattu, a bull taming sport held during the harvest festival of Pongal, attracted large number of people’s attention across the world. A sport that was famous only in a few districts of Tamil Nadu suddenly acquired an authentic Tamil identity, over a decade after it drew the attention of those who makes their efforts and struggled to ban it. Animal lovers have been carrying out a legal battle against Jallikattu on the allegation that it amounted to cruelty to bulls. But the argument of the protesters is that the sport is not about bull taming but embracing them. From the view of the ancient Tamil literature, the person in favour of sports argued that the sport is more about embracing the bull rather than showing cruelty and human power over the bull.

The debate started for over a decade in courts, and other public fora, animal lovers, who came under a heap of banners like Animal Welfare Board of India (AWBI) and People for the Ethical Treatment of Animals (PETA), were ahead of those who wanted the conservation of their ancient culture. In May 2014, the Indian Supreme Court had struck down the Tamil Nadu Regulation of Jallikattu Act, 2009, and had banned the practice altogether along with bullock-cart racing in both Tamil Nadu and Maharashtra. In Animal Welfare Board of India vs. A. Nagaraja, the court stated, “Forcing a bull and keeping it in the waiting area for hours and subjecting it to the scorching sun is not for the animal’s well-being. Forcing and pulling the bull by a nose rope into the narrow, closed enclosure or ‘vadi vassal’ (entry point), subjecting it to all forms of torture, fear, pain and suffering by forcing it to go to the arena and also over-powering it in the arena by bull tamers, are not for the well-being of the animal.” Nine months later, in January 2016, the Indian government reversed the Supreme Court’s ban.

In that same year, a group of supporters of the Jallikattu the native of Alanganallur, the village near Madurai that is famous for the sport, demanding the removing of the ban. Many of the protesters were students who were expressing disparity with the local people. When police arrested the protesters, the news spread like fire through social networking sites and a group of students and other people in Chennai gathered at the Marina sands to demand the release of the students. On the same day, people all over Tamil Nadu organised unregulated protests, led by students and youth. The protest acquired an iconic place in the history of Tamil Nadu for many reasons. Not only was it massive, nonviolent, and spontaneous, it attracted and gathered people from all walks of life with a large number of women participating in the protest. The protesters saw the Jallikattu ban as an intrusion on Tamil culture and identity, though many of

468 K.S. Radhakrishnan, Pinaki Chandra Ghose. "Animal Welfare Board Of India vs. A. Nagaraja & Ors on 7 May

The might not have watched a live bull sport in their lifetime. Thus, Jallikattu became a symbol of Tamil pride.

**THE CONCEPT OF JALLIKATTU**
The literal meaning of Jallikattu is—Jalli/salli (coins) and kattu (tied)—grabbing a bag of coins tied to the horns of the bulls. A sport which is also known as eruthazhuuuthal and manzuvirthtu in Tamil nadu. It is the most popular bull taming festival in Tamil Nadu which is played during the Pongal festival on matte Pongola day. The tradition is the extended as a part of matte Pongal which is 3rd day of the four day long harvest Pongal.

Once the sloughing is done the farmers let their cows and bulls lose in the graze land away from the village. But after the harvesting was done the bulls were needed in the field for transporting the harvest. So here it all begins, the farmers start hunting there bulls. They catch them by hanging on their humps and trying to stop the bulls from running from different tricks. So this is how the farming brings their bulls back on the field. The bull owner’s puts cash coin pouch on bulls head and reward them whosoever catches the bull for them. And this hunting of bull and getting reward from the bull owner named as Jallikattu.

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**HOW THE SPORT ACTUALLY PLAYED**
Bulls are brought to the arena the previous day and tied in coconut groves around the village. Fodder is brought along and water is provided by the host villagers. Sometimes fodder is also provided. A team of veterinarians, animal welfare officials inspect the bulls and give a medical certificate. Before the event starts, they are lined up in batches of 15 close to the rear side of the Vadis vaasal. After the temple bull of the host village has left the arena, each bull is taken into the vaadi vaasal, where Animal Welfare officers are present. The nose rope of the bull is cut and the bull is free to run. Young bulls and untrained ones

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[470] https://thewire.in/agriculture/banning-jallikattu-will-decimate-indias-indigenous-cattle-breeds
participating for the first few times hesitate to leave the vaadi and are prodded by their owners. It is not easy to move them as they weigh anywhere between 250-350 kilos. The experienced bulls (which have long memories) are familiar with Jallikattu events and offer their head to the owners to cut the rope. They plan their exit from the vaadi vassal and time their jump to avoid the players. These are intelligent animals and have evolved in this environment over millennia. The sport consists of holding on to the hump of the bull and running along with it for a given distance usually about 20-30 meters which is covered in barely 10-20 seconds. Although a few hundred players are present in the arena, only 2-3 attempts to get close to the bull and only 1 have a shot at grabbing the hump. Everything happens so fast that most players hit the dirt and the bulls go free. After leaving the arena, they go to a barricaded collection area of about 44,000 sq. ft. where experienced herders await the owners. Owners follow the bulls from the vaadi into the collection arena, this takes about 5-10 minutes. Once they enter, the herders help the owners rope in the bulls and take them out of the collection arena. 1-2 bulls will refuse to be roped and charge at everyone, some of them jump out of the collection area and make a run for it. Most of them head in the direction of their villages. There is the occasional injury due to the bulls not being roped.

Legal Framework for Protection of Cultural Rights

In February, 2017 People for Ethical Treatment of Animals (PETA) in order to quash the new law related to Jallikattu was passed by the Tamil Nadu Assembly. According to the new law, it brings back the bulls in the category of performing animals thereby giving an opportunity to conduct the bull-taming sport in the name of culture and tradition, despite of being already banned by the Supreme Court in the year 2014.

PETA has given certain reasons as to why Jallikattu should be banned in India. As PETA has demonstrated Animal Welfare Board of India (AWBI) authorized assessments, that bulls got so frightened by the large crowds of the people that they become very distressed and even jumped off the cliffs in order to escape the large crowds. The participants of Jallikattu purposely bamboozled the bulls by forcing them to consume alcohol; twisted and bite their tales; punched and stabbed them with sickle, knives and sticks causing severe hurt to them.471

A 2011 PETA examination discovered ill-use of animals at Jallikattu occasions in Alanganatham, Avaniapuram and Palamedu in Madurai. Examiners noted that the bulls were tied so decisively that they faced extreme uneasiness and pain, being hit with compress hands, having their tails bent and pulled and in addition being bounced on and wrestled to the ground. Bulls were scared, confused and provoked by the shouting crowds, amplifiers and forcefulness of the men gathering them, hopping on them and pulling them. Bulls struggling to escape the assault ran carelessly into wall.

PETA India also noted that the participants and to the non-participants as well. As from 2010 to 2014, media released reports in

which it was given that about 1100 human injuries and 17 deaths were caused by Jallikattu-styled sports or events, which also included the death of children. In Animal Welfare Board of India vs. Nagaraja, it was confirmed that the ban on the use of bulls was not structurally correct. It was also observed that forcing the bulls in order participate in the event which led to unnecessary pain and suffering, so such races were not permitted by law.

At 7 July 2011 report in The Gazette of India made using bulls as performing animals illegal. This applies to Jallikattu, kambala, bull races, bullfights and other uses of bulls for performances.

On 7 May 2014, the Supreme Court put a ban on use of the bulls as performing animals. The court also ruled that cruelty is natural in these events, as bulls are not physically matched to them. It also observed that forcing bulls to participate subjects them to, redundant pain and suffering, so it ruled that such races are not permitted by law.

Jallikattu, bull races and other similar events also violated the provisions of the Prevention of Cruelty to Animals (PCA) Act, 1960. This means the causing of unnecessary suffering to bulls which is inherent in these events has been illegal for 56 years.

Section 42 of the 7 May 2014 Supreme Court judgment says, “The Statement of Objects and Reasons of the TNRJ Act refers to ancient culture and tradition and does not state that it has any religious significance.

Even the ancient culture and tradition do not support the conduct of Jallikattu or Bullock cart race, in the form in which they are being conducted at present. Welfare and the well-being of the bull is Tamil culture and tradition, they do not approve of infliction of any pain or suffering on the bulls, on the other hand, Tamil tradition and culture are to worship the bull and the bull is always considered as the vehicle of Lord Shiva YeruThazhuvu, in Tamil tradition, is to embrace bulls and not overpowering the bull, to show human bravery”. It concluded, “Jallikattu or the bullock cart race, as practiced now, has never been the tradition or culture of Tamil Nadu”.

Section 43 of the same judgment reads, “PCA Act, welfare legislation, in our view, over-shadow or overrides the so-called tradition and culture. Jallikattu and Bullock cart races, the manner in which they are conducted, have no support of Tamil tradition or culture. Assuming, it has been in vogue for quite some time, in our view, the same should give way to the welfare legislation, like the PCA Act which has been enacted to prevent infliction of unnecessary pain or suffering on animals and confer duties and obligations on persons in-charge of animals”.

Section 3, 11(1)(a), makes it illegal if any person “beats, kicks, over-rides, over-drives, over-loads, tortures or otherwise treats any animal so as to subject it to unnecessary pain or suffering or causes, or being the owner permits, any animal to be so treated”. Section 11(1)(m)(ii), makes it illegal if any person “confines or causes to be confined any animal

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472(2014) 7 SCC 547
473 Animal Welfare Board of India vs. Nagaraja & ors.(2014) 7 SCC 547
474 AWBI vs. Nagaraja & ors.(2014) 7 SCC 547
475 AWBI vs. Nagaraja&ors.(2014) 7 SCC 547
(including tying of an animal as a bait in a

tiger or other sanctuary) so as to make it an

object or prey for any other animal”.

Further, the court held that Section 3 of the

PCA Act would be abused since the exercises

were dispensing pain on the animals. The

court likewise considered whether exercises,

for example, Jallikattu was a necessity under

Section 11(3)\textsuperscript{476} of the same Act and in this

matter as was previously held in the case of

BhuriNath and Others vs. The State of

Jammu and Kashmir & Others.\textsuperscript{477} Here, the

court held that anticipation, performance or

entertainment don’t fall under the exempted

classifications under Section 11(3) and was

not a need. The court additionally considered

the Statement of Objects and Reasons of the

TNRJ Act and held that the Act tried to

safeguard aged society and custom and not

religious noteworthiness. Bull as an animal

was likewise the vehicle utilized by Lord

Shiva, consequently the court brought out the

misinterpretations brought out by the

individuals regarding the role of the animal.

The Court has further held that AWBI was

right in its stand that Jallikattu and the

Bullock-cart race did infact violate Sec 3, Sec

11(1)(a) and Sec 11(1)(m)(ii) of the PCA

Act.

The Supreme Court clarified, “Fight can be

with an animal or a human being”. Its order

said, “Section 5 of TNRJ Act envisages a

fight between a Bull and Bull tamers, that is,

Bull tamer has to fight with the bull and tame

it.”\textsuperscript{478} Such fight is prohibited under Section

11(1)(m)(ii) of PCA Act read with Section 3

of the Act”.\textsuperscript{479}

The Tamil Nadu Regulation of Jallikattu

(TNRJ) Act was struck down by the Supreme

Court because it was “inconsistent and in

direct collision with Section 3, Section

11(1)(a), 11(1)(m)(ii) and Section 22\textsuperscript{480} read

with Articles 51A(g)&(h) \textsuperscript{481} and hence

repugnant to the PCA Act”.

Furthermore, Section 429 of the Indian Penal

Code reads, “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”.\textsuperscript{482}

\textbf{JALLIKATTU: BANNED OR LEGALISED}

Jallikattu, in recent has been a topic of intense

debate. In Tamil Nadu, many people opposed

the banning of this ‘bull taming sport’ as they

considered it as an important part of their

culture and tradition. This ban upon the sport

dates back to 2006, when a petition was filed

in the Madras High Court, seeking

permission to conduct Jallikattu. Though it

was banned by the single bench. But the

Divisional bench overturned the banning and

gave the permission to conduct Jallikattu

over certain conditions.

\textsuperscript{476} Prevention of Cruelty to Animals Act,1960

\textsuperscript{477}(1997) 2 SCC 745

\textsuperscript{478} Tamil Nadu Regulation of Jallikattu Act, 2009

\textsuperscript{479} Prevention of Cruelty to Animals Act,1960

\textsuperscript{480} Prevention of Cruelty to Animals Act,1960

\textsuperscript{481} Constitution of India,1950

\textsuperscript{482} Indian Penal Code,1860
Jallikattu still continued, with the ignorance of the conditions. Therefore, the Animal Welfare Board of India (AWBI) gave a notification restricting bulls from being exhibited or trained as performing animals. In the case of Animal Welfare Board of India and others vs. Nagraja and Others, the petitioners approached the Supreme Court with an appeal against the judgment of the divisional bench. On the other hand the respondents claimed Jallikattu is a traditional sport of Tamil Nadu and therefore it should not be banned.

The Supreme Court passed an interim order which recognized the validity of the abovementioned AWBI notification and the rights which were guaranteed to the bulls under the Prevention of Cruelty of Animals (PCA) Act. In context of the cruelty inflicted upon the bulls, the Supreme Court put bar on Jallikattu recapitulating the ‘five freedoms’ which include:

- Freedom from hunger, thirst and malnutrition
- Freedom from fear and distress
- Freedom physical and thermal discomfort
- Freedom from pain, injury and disease; and
- Freedom to express normal patterns of behavior

However, despite the notification given by AWBI and the Supreme Court in the year 2014, on 8th of January 2016, a notification was issued by the Environment Minister Prakash Javadekar exploiting the certain ambiguities in the legal policies and rules, whereby Jallikattu bulls were removed from the list. Animal welfare activists and organizations approached the Supreme Court and asked to put an injunction to this notification.

On January 12, 2016 a writ was filed before the Supreme Court to quash the above said notification. In Compassion Unlimited Plus Action vs. Union of India and Others, the Supreme Court put a stay on the notification that was issued by the Environmental Minister on 8th January, 2016.

But again, an effort was made to avoid the judicial order; the Tamil Nadu state government, exercising its power under the Constitution, came up with an ordinance evading the ban and legalizing Jallikattu by changing the name and nature of Jallikattu from a ‘sport’ to a ‘fair’. The ordinance was promulgated by the Governor of Tamil Nadu which removed the ban from Jallikattu.

**CONCLUSION**

It offers indispensable lessons for India where increasing attempts are being made to eradicate malcontents in various cultural practices under the guise of culture leveling. There are both good and bad outcomes. Difficult task rests with the Supreme Court of India over the decision of either the retaining a complete ban on the Jallikattu or regulating the controversial practice. It is customary that these ancient traditional practices are left as they are but with rules to organise and regulate them. But if Jallikattu is banned, livestock keepers will be forced to abandon the raising of native livestock, which already stands threatened, and it would be the death
knell of native cattle species in Tamil Nadu. It only required rules and can be implemented to enhance the safety of the animals and men if required. India has already lost many cattle breeds and it can’t afford to lose any more.

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JUVENILE DELINQUENCY
LEGISLATION IN INDIA

By Samridhi Poddar & Sarthak Mishra
From Government Law College, Mumbai &
Symbiosis Law School, Pune

“I think it's important for us as a society to remember that the youth within juvenile justice systems are, most of the time, youths who simply haven't had the right mentors and supporters around them - because of circumstances beyond their control.”

Q'orianka Kilcher

Introduction
Juvenile delinquency refers to criminal acts performed by juveniles (that is, individuals below the age qua which ordinarily, criminal prosecution is not possible). Exact definition of ‘juvenile delinquency’ is a debatable issue, more so when any unacceptable behaviour vis-à-vis juveniles can be brought under the broad-head of ‘delinquency’. Things to an extent complicate more-so, when we find that, each Member State of the United Nations is at a legal liberty to define the term ‘juvenile’ in a manner which is compatible with the legal system and the social welfare objective of that Member State. According to the New Mexico definition, a delinquent juvenile is one who, by habitually refusing to obey the reasonable and lawful commands of the parents or the guardians (or other persons of lawful authority), is deemed to be habitually uncontrolled, habitually disobedient or habitually wayward. The Supreme Court of India in the case of Raghbir v. State of Haryana484 took occasion to define the term ‘delinquent child’ as follows: “a child, who has been found to have committed an offence”. P. Ramanatha Aiyar’s Concise Law Dictionary, defines the term ‘delinquent child’ as follows- “a legal infant who has either violated criminal laws or is engaged in disobedient or indecent conduct, and is in need of treatment, rehabilitation, or supervision” 485

Juvenile justice is based on two philosophical concepts parens patriae and individualised treatment. The doctrine of parens patriae allows the court to conduct the proceedings principally to determine what should be done in the best interests of the child; trials are not to be conducted for determination of criminal guilt and rendering of punitive sentences. Doctrine of individualised treatment views the disposition of decision primarily for rehabilitation of delinquent juveniles. It seeks to prescribe a treatment qua juvenile delinquents that fits the needs, personality, psychological development and social circumstances of juveniles in conflict with law.

The Question of the Hour
Most debated question of the hour is, whether or not, juvenile delinquents should be tried as ‘adults’. The U.N. Convention on the Rights of the Child 486

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486 The U.N. Convention on the Rights of the Child is an international statement qua the civil, political, economic, social and cultural rights of children. The
requires, all signatory countries to treat, every individual below the age of 18 years as a ‘child’. The provision qua the trying of a juvenile as an adult is in contravention of the Convention. The U.N. Rules for the Protection of Juveniles Deprived of their Liberty, 1990, by virtue of Rule 11 states that, individuals below the age of 18 years are to be regarded as ‘juveniles’.

The Juvenile Justice Bill, 2014, has taken a captivating position, that is, adolescents in the age classification of 16-18 years, conferring genuine or egregious offenses are to be attempted as grown-ups with no capital punishment or life detainment set against them. Under the 2000 Act, the position is unique; a reprobate adolescent matured 16 years or above, blamed for an offensive wrongdoing is to be set by the Juvenile Justice Board in an establishment called ‘place of security’ for a time of 3 years. In the event that we pass by the rationale of the present Act (the 2000 Act), the adolescent denounced (matured 17 years) in the Nirbhaya case, in spite of the fact that was most ruthless, forceful, creature like and twisted in the commission of assault and murder of the 23-years of age; he (the blamed), according to the arrangements of the 2000 Act, ought to be kept in the ‘place of security’ for a time of 3 years and afterward ought to be discharged with a legitimate assumption that the charged has been changed. Assuming, nonetheless, the adolescent blamed was for 18 years old, at that point it was open for the State to have attempted him as a grown-up, imposing against him capital punishment. This, with greatest respect is illogical and more-so in the nature of a legal absurdity. The approach of the Proposed Bill (the 2014 Bill) is sound, for it states that the Juvenile Justice Board, for an accused in the age category of 16-18 years, will decide on a case-by-case basis, whether the accused should be treated as a child or as an adult. The Board, aided by a team of experts will decide this based on the assessment of mental state of the accused. The true test of juvenility is not the age but the level of mental maturity of the offender.

**Juvenile Justice (Care and Protection of Children)**

Amendment to the Juvenile Justice Act, 2000, passed in the Lok Sabha, allowing juveniles in the age category of 16 to 18 years, accused of heinous crimes, to be tried as adults has brought to fore a debate, whether or not such an amendment is justified. To say that, the amendment to, the 2000 Act is a political over-reaction qua the December 16, 2012, Delhi Rape Case (Nirbhaya Tragedy) is wholly incorrect. We must understand that women today are facing brutal attacks not just from ‘adults’ but also from mushrooming ‘children’. In the United States, when a juvenile commits a serious offence or a violent crime, the jurisdiction of juvenile court is waived and the case is transferred to the adult court. Such a practise is not without merit, especially in India where there has been ‘sprint’ rise in juvenile crimes of heinous nature. Few of the incidents are listed below-

**a. Odisha- Graham Staines Murder Case:**
In April, 1999, first accused arrested for the murder of Australian missionary Graham Staines in Odisha was the 13 years old

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Chenchu Hansda. It is said that he was seen near the charred van of Staines which formed the basis of his arrest. Chenchu Hansda was sent to a reformation home for three-years by the Juvenile Justice Board.  

b. Delhi- Nirbhaya Tragedy: In December, 2012, a physiotherapy student was brutally gang-raped in a moving bus in which she was travelling with a male friend. One of the co-accused was under-age.

c. Mumbai- Shakti Mills Gang Rape: In July/August, 2013, out of seven persons arrested in two separate gang-rape cases in Shakti Mills Compound (Mumbai), two were minors.

The 2014 Bill provides for the following:

a. Treatment qua Juveniles: Juveniles aged between 16 years to 18 years committing serious or heinous offences could be tried as adults. Juveniles in no case can be inflicted with life imprisonment or death penalty.

b. Offences and Penalties: The offense of assaulting, abandoning, abusing, or willfully ignoring a tyke will draw in discipline of up to 3 years of detainment as well as fine of rupees one lakh. Punishment for the offense of utilizing a tyke to beg is detainment of up to 5 years and fine of rupees one lakh. A man who provides for a kid an inebriating or opiate substance will be obligated for detainment of up to 7 years and fine reaching out to rupees one lakh. The punishment for offering or purchasing a child for any reason will be detainment of up to 5 years and fine of rupees one lakh.

c. Juvenile Justice Board: As per the provisions of the 2000 Act, the Juvenile Justice Board conducts an inquiry and thereafter directs the placement of the delinquent juvenile in any fit institution for a period not exceeding 3 years. The 2014 Bill provides that, a preliminary inquiry should be conducted in certain cases by the Juvenile Justice Board, to determine whether the delinquent juvenile should be placed in a juvenile protection home, or be sent to the Children’s Court for trial, or be tried as an adult.

d. Child Welfare Committees (CWCs): The 2014 Bill provides for the constitution of CWCs in each district to deal with children in need of care and protection. CWCs shall comprise of a chairperson and four other members (at least one of the four members should be a woman), who shall be experts on matters relating to child welfare. As per the 2014 Bill, a child who is found to be in need of care and protection has to be brought before CWC within 24 hours; post this, a social investigation-report is required to be prepared within 15 days. The CWC, after assessing the report, shall make recommendations, whether or not the child is to be sent to a children’s home or another facility for long term or temporary care. Post the analysis of the report, CWC shall decide upon the declaration, whether or not the child is free for adoption or foster care.

e. Appeals: As per the provisions of the 2000 Act, an appeal can be preferred to the Sessions Court within a period of 30 days of the rendering of the order by the Juvenile Justice Board; further appeal can be preferred to the High Court. As per the 2014 Bill, an

488 RanjanaKumari (Director, Centre for Social Research), Brutal Juveniles, The Hindustan Times, 31 May 2015, p. 15.
appeal can be preferred to the Children’s Court within a period of 30 days of the rendering of the order by the Juvenile Justice Board; further appeal can be preferred to the High Court. For placement of the delinquent juvenile in a ‘foster care’, an appeal can be preferred to the District Magistrate.

f. Clause 7 of the 2014 Bill: Clause 7 of the 2014 Bill, states that, any individual in the age category of 16-18 years, if commits a serious offence (ordinarily, calling for 3-7 years of imprisonment) or heinous crime (ordinarily, calling for a minimum of 7 years of imprisonment), then he is to be tried as an adult, if he is arrested on completion of 21 years of age; irrespective of the fact that, on the date of commission of the offence, he was a minor (or a juvenile). Thus, Clause 7 of the 2014 Bill allows for a person who was a juvenile on the date of offence to be dealt with under the criminal justice system (as against the juvenile justice system) if arrested on completion of 21 years of age.

Conclusion and Suggestions
The very fact that a huge majority of children in India are in a condition of suffering evidences the inability of the laws to provide protection to them despite the fact that they were primarily enacted to meet this end. The Convention on Rights of the Child celebrated its silver jubilee last year but there is no reason for the children to rejoice, at least in India. This paper has clearly highlighted the shortcomings in the Indian juvenile justice mechanism which have contributed to their failure in providing protection to the children.

At this juncture, a few suggestions to remedy the current state of juvenile justice in India have been made hereinafter. The Juvenile Justice Board is of immense importance in the entire juvenile justice system and hence, a special training programme in child welfare and child psychology must be prepared for the officers of the JJB including the Principal Magistrate.

Further, the ambience of the JJB should be child friendly. It should not bear the look of a normal court room. The child must be made comfortable and not be treated in like manner as an accused is in a court room. It will be even better if the Board can conduct its affairs in the observation homes itself.

Also, the Principal Magistrate should not be entrusted with any other work of the criminal court except that of the Juvenile Justice Board as the Board is required to complete the enquiry within 4 months.

Due to the variations in state rules from state to state, there is an ambiguity regarding proper implementation of provisions of the Act. Therefore, common rules should be followed throughout India in all Juvenile Justice Boards.

It is common knowledge that the homes meant for children in conflict with law as well as those in need of care and affection are in a shabby state of affairs. It is important that there should be separate homes for both these categories of children not only in law but also on ground. Further, the homes for children should be under CCTV coverage to facilitate inspection and supervision by the Board and surprise visits be made at these homes. It is also desirable that senior citizens be involved in these homes as community resource persons to look after the well-being of the children.

Nevertheless, the Indian legislature’s effort at enacting this law for child protection has to be appreciated despite the inadequacies. It is commendable that the Indian legislature has tried to fulfil its obligations under the Convention. As far as the law is concerned,
apart from correcting the loopholes in the law, its implementation has to be stressed upon. Until and unless, black and white written on the paper is transformed into colour in the real world, the achievement of the Conventions goals will remain a distant dream for the Indian state.

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BIOTERRORISM: AN OVERVIEW

By Siddharth Baskar & Atishay Sethi
From Amity Law School, Amity University, Noida, U.P. & B.V.D.U, Law College, Pune

Abstract
The release of toxins, bacteria, and various harmful agents released in the environment with the sole intent of causing harm, illness or death among humans, animals or plants is a bioterrorism attack. All these agents causing death or illness among humans, animals are found in the nature. To increase the severity of the attack these agents are mutated or altered. This is done to increase its resistance against current medicines or altered to spread it in the environment. Bioterrorism is a strategic area, where there is a legal lacuna. In this review, Bioterrorism in India, related laws and role of U.N is focussed. India armed with the Terrorism act condemns the act of terrorism but it does not elaborate on bioterrorism. Prevalence of effective laws can play an important role to reduce such attacks. It will also create more fear in the minds of the perpetrators. Collective international efforts to curb such attacks at a global level are required to make the world free from the risk of bioterrorism.

Introduction
“Terror is often inflicted upon the weaker sections of the society at the most unexpected place and time.”
Terrorism has made its way into the world as one of those issues which requires international attention. Terrorism is the use of weapons and violent means against civilians for political aims by inflicting terror within people. Terrorism has no geographic limitations. The world has witnessed terrorism every now and then, be it, 26/11 Mumbai Attack, 9/11 US terrorism attack or the bombings in regions like Syria. However, the world has increased its capability of dealing with these terrorist attacks. But it has ignored bio-terrorism which is not a popular use of terror and chaos. Bio-terrorism has a strong potential as a threat in the near future. This form of terrorism is the use of biological agents like influenza virus, anthrax, bacteria among many other agents that are able to create community disruption, chaos and inflict terror among the society. Bioterrorism is also capable of mass destruction as evident from the fact that Spanish flu killed more than those killed in the World War 1. “Bill Gates in one of his speeches stated that he is afraid of bioterrorism as the world is not prepared for one such attack if executed properly.”

The world does not have the medical preparedness nor the proper execution or readiness of the medical team. He further suggested that in order to be prepared, the medical team should work in co-ordination with the military. Before we begin to study why the biological weapons are a potential threat, let’s examine one such past biological outbreak to understand what this potential threat really is.

Spanish Flu
“The Spanish Flu was one of the greatest epidemic in the history as it killed around 20 – 50 million people. Approximately half a

489 Sarah Knapton, Bill Gates: Terrorists could wipe out 30 million people by weaponising a disease such as smallpox, The Telegraph (March 26, 2018, 12:21 AM).

billion people were infected with the flu. It killed more people than the World War I which killed around 18 – 20 million people. The Spanish Flu got its nickname from the fact that Spain was hit the hardest from this flu. It is also known as “La Grippe” and lasted around a year from 1918 – 1919. Around 6, 75,000 Americans died of this influenza epidemic which was ten times more powerful than the World War 1. During this epidemic, people were asked to wear masks and the public places were shut down. The Spanish Flu spread throughout the globe but the main areas initially affected were North America, Europe, Africa and Asia. The mortality rate was extremely high in India at around 50 deaths from influenza per 1,000 brown people. One of the ironical facts about this flu was that it primarily affected people between the age group of 20 to 40 years old. There have been many hypotheses regarding how this flu must have originated or how this flu grew so rapidly. Many people believed of this epidemic as a biological warfare tool of the Germans. A study found that places where humidity was more had been severely affected as humidity provides dissemination of bacteria.”

Research conducted in late 2000s

“In 2008, researchers found out what made this flu so deadly apart from lack of medical preparedness, the virus consisted of three genes which weakened the victim’s bronchial tubes and lungs that paved the way for pneumonia.”

Is the manufacture of bio weapons dangerous?

Integrating biological pathogens and manufacturing bioweapons is a dangerous activity. To cite an example let us take anthrax. The biological agent used is *Bacillus anthracis* and in order to infect a person approximately 8,000 to 50,000 bacteria are required. Hence, it would be appropriate to say that bioterrorism surely could prove to be a tool for bio terrorist attacks in the near future.

Evidence for Bioterrorism

- Historically the use of biological weapons includes those practiced in the middle ages when diseased carcasses and bodies were catapulted over enemy walls. It was done to induce sickness in humans or animals in Europe.
- The Siege of Caffa in 1346: It is one of the first bioterror attacks recorded where plague was used to make the inhabitants of city Caffa ill.
- French and the Indian war: This is also known as the seven year war from 1756 – 1763. In this war it is reported that the British had supplied Indians with small pox infected blankets.
- During the Indo – Pakistan war in 1965 the scrub typhus outbreak came under notice. This is caused by *Orientiatsutsugamushi*. The soldiers who

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491History.com Staff, Spanish Flu, History TV (Mar. 27, 2018, 6:11 PM), [https://www.history.com/topics/1918-flu-pandemic](https://www.history.com/topics/1918-flu-pandemic).
were affected in this war were characterized with constant coughing, headache, fever and breathlessness.

- During the Gulf war in 1995, it is reported that Iraq started producing bombs and rockets containing *Bacillus anthracis* and botulinum toxin. These are bio warfare agents.

- Both the world wars I and II have indicated that bio weapons have been used i.e. use of anthrax, cholera, shigella and so on. Various mysterious outbreaks of plague have been observed in the Indian States of Gujarat and Maharashtra (1994). The government even had no idea how such plague spread through these states. There was also no idea how it originated. It was however reported to be pneumonic plague. The government declared international public health emergency.

- From the above it is clear that history has sufficient evidences that bio weapons have been used to spread terror and kill thousands of people.

**Bioterrorism Agent’s classification system**

The agents of bioterrorism can be classified under three main categories specifically – Priority category A, priority category B and priority category C. These are classified according to the potential highest risk impacts it has on individuals.

- Category A: They include organisms that can be disseminated easily. It spreads from one person to another very quickly. They are the highest priority agents. Some examples include plague, small pox, anthrax, *Bacillus anthracis* etc. They have potential high health risk impact and can cause high mortality. It can create public panic and social disruption.

- Category B: They are comparatively easy to disseminate. They have lower mortality rates and cause moderate morbidity. Some examples include Brucella species, Salmonella species etc.

- Category C: These agents include pathogens that might be used in such way for mass dissemination because of its easy availability, easy production, high mortality rates and further its ability to cause major health effects. Some examples include Hantavirus and Nipahvirus.

**Bioterrorism and Bio warfare**

“Biological Warfare is the usage of biological weapons for the purpose of wars. It is generally used against the military. It targets the homogenous population of the fit and healthy. They include adults who have undergone pre-attack vaccinations. The use of these weapons in biological warfare is on the field so the timings of the attack are known and response to these attacks is available depending on the type of biological agents used. The main aim of these types of attacks is to disrupt the enemy forces or to cause mass destructions.

While on the other hand, bioterrorism is the usage of biological weapons to cause terror, chaos and disruption of community. The targets for these attacks are heterogeneous civilian population of elders, adults, children and the immuno-compromised. Unlike bio warfare, since the targets are civilians in a local area, there is no pre attack vaccination and the detection of the attack may not even be possible as they are very difficult to trace the illness and might take time from several hours to weeks depending on the agent. In
What is more dangerous: Bio warfare or Bioterrorism?
Bioterrorism can be considered to be more dangerous as stated below:

Usage: Bioterrorism is used on the civilians who are not prepared beforehand for such attacks which can cause dissemination of the virus among other civilians from those infected while on the other hand, bio warfare is referred to use of bioweapons on the military which often comes prepared with pre-attack vaccines and limits the effect of these weapons. So, Bioterrorism, in this regard is more harmful.

Timing: Bioterrorism is more harmful in terms of timing as the time and place of attack in bio warfare is known while in a bioterrorist attack, the place could be anywhere and it may take time to trace the attack from several hours to weeks depending on the agents used.

Aim: bioterrorism aims to create chaos and terror among people which may not be the case in bio warfare the aim is to disrupt the enemy forces.

Bioterrorism in India
- With hostile neighbouring countries like Pakistan and China- there is always a possibility of a bio threat. The need for India is to have strong regulations to handle such situations. The problem of bioterrorism has not been highlighted by the laws of the country. It has only found a passing mention in P.O.T.A – Prevention of Terrorism Act, 2002.
- “Article (3)a of P.O.T.A states – “Whoever with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act.
- Article 4 – specifically mentions where an individual is unauthorised to use arms, bombs, dynamite or any hazardous substance which capable of mass biological destruction or any such threat to life of humans would be guilty under terrorist act. The prison sentence may be life-long with a fine extending up to 10 lakh rupees. These are only the two instances where there has been some specific mention of bioterrorism but are inadequate.”


493 The Prevention of Terrorism Act 2002, Punishments for and measures for dealing with
Advances in the bio–tech sector of our country has made possible bio terrorism threats even more possible. The terrorist organizations like Al Qaeda, Lashkar-e-Taiba etc. have their bases well established in India. The impact of a bioterrorism attack in India can be massive even if there is an accidental release of any bio hazard it would have large number of people killed. Hence new laws need to be established with regard to bioterrorism. The P.O.T.A needs to be updated and more stringent laws need to be made applicable on such crimes.

There have been various cases of bioterrorism in India and various countries. We need to learn from these foreign countries about the required legal regulations. Bioterrorism is a trending act of terror and to conquer it we must act now and work towards a change.

**Role of United Nations**

United Nations over the years has become such an organization which governs and makes laws, regulations so that world peace is maintained. Being of such primary importance, it has played a great role in reducing bioterrorism from time to time by initiating various treaties and keeping a check on other countries.

The Geneva protocol 1925 was adopted by international conference on control of international trade in arms and implements of war as governed by the League of Nations, where many countries met and decided to prohibit the use in the war of poisonous gases, analogous liquid. All states agreed to prohibition and not to use them in first place.

B.W.C – Biological Weapons Convention came into force on 26th March 1975. The United Nations came up with its idea to disarmament treaty of banning the production, development and stockpiling of weapons of mass destruction. The second conference held in 1986 agreed to confidence building measures to particularly reduce doubts or suspicions and make an international friendly relation. In the third conference in 1991 to make the C.B.M (confidence building measure) much stronger a group of governmental experts had been established to take into the matter of bioterrorism.

“At a Special Conference in September 1994, the States parties agreed to establish the Ad Hoc Group of the States parties to the BWC in order to negotiate and develop a legally-binding verification regime for the Convention”.

In the 1996 and 2001 conference the Ad hoc group had to intensify its work but it was unable to draft legal instrument (protocol).

Finally in 2006 the United Nations General Assembly adopted – UN global counter terrorism strategy which aimed at a four pillar strategy. To ensure ultimate human rights and law. It is reviewed every two years and further changes are made if required with the assent of the member of U.N.

The four pillar strategy – They include: Addressing the conditions conducive to the

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spread of terrorism. Measures to prevent and combat terrorism. Measures to build states’ capacity to prevent and combat terrorism and to strengthen the role of United Nations system in that regard. Measures to ensure respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism.\textsuperscript{495}

- The United Nations has played a pivotal role in making the world realise the importance of peace and to establish a healthy relation. It has made its efforts to make more laws, treaties for the international peace and security.

- With the advent of technology and rapid development in science and the biological sector the United Nations has framed its rules and regulations whereby the countries a know their boundaries and limits.

- Bioterrorism is a very serious problem and the combat such problem all the countries need to cooperate and work together as one towards establishing peace and eliminating terrorism.

**Future of Bioterrorism**

In a world full of threats of war of all kinds be it nuclear war, war on terrorism, poverty or even global warming, there is one potential war using biological weapons coming up in future which is often ignored and if executed with precision could lead to the death of millions.

“These agents of biological nature are not just small in nature but deadlier than other forms of terrorism if executed properly as there is not much medical preparedness for a large scale outbreak. This is one of the issues that need to be addressed. Advanced weaponries and technologies which can prevent wars on large scales to an extent today exist but it lacks behind in the biological wars where the medical preparedness or facilities to handle the situation are lacking. The biotechnology industry has expanded significantly and these weapons can be made very easily as they are found in nature and are inexpensive. The attacks of terrorism by armed weapons and bombings are far more complex than this form of terrorism which makes it a reason of possibility of a new approach for producing terror amongst all these transnational terrorist groups. The increased use of biological weapons for terrorism is because they are very difficult to trace the illness and make take time from several hours to weeks depending on the type of agent. Bioterrorism is a potential threat in the present scenario. For a large scale bioterrorism attack effective biological agents are required to cause damage. The procurement of such pathogens may be difficult. Experts warn that bioterrorism attacks are deadly weapons that terrorists can use for mass destruction.”\textsuperscript{496}

**Conclusion**

This issue of bioterrorism has been ignored for a long time and this ignorance can prove to be detrimental to not just a nation but to the entire world if appropriate steps or measures are not taken. Bioterrorism is capable of far more potential than it portrays and with the technological advancement, expansion of biological labs, possibilities of using biological weapons by the terrorists has

\textsuperscript{495}United Nations Office for Disarmament Affairs, Biological Weapons, (26 March 2018, 16:54) \url{https://www.un.org/disarmament/wmd/bio/}.

increased more than ever in today’s world. It is suggested that a strong institutional and legal framework be established to deal with the special issues relating to bio-terrorism.

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ABSTRACT

In India, "Cyber Laws" are handled under the 'Information Technology Act, 2000' (IT ACT, 2000), which came into force on October 17, 2000. The primary objective of which, is providing recognition to electronic commerce (also known as e-commerce) and facilitating the filing of electronic records with the Government. It is pertinent to keep in mind that all the laws that are existing in India are enacted way back. It was virtually impossible to imagine the idea of something called the 'Internet' keeping in mind the socio-economic, cultural, political, and technological scenario(s) of the relevant time. The arrival of the internet gave emergence to a various number of technical glitches and legal loopholes which exist due to the so-called 'cyberspace' required the enactment of Cyber Laws. In a country where the society is becoming more and more dependent on technology, crime which is based on electronic law-breaking will increase inevitable and lawyers need to go the extra mile to provide justice. In this paper, the author shall take a look at the vigorous efforts taken by the law makers to ensure that the 'technology' available is used for the better, ethical, and legal purposes and not for committing crime. The author shall take a look at the laws established to curb the increasing committing of cyber crime from the Indian Technology Act, 2000 to various institutions like Indian Computer Emergency Response Team (CERT-In), Centre for Development of Advanced Computing (CDAC), and Data Security Council of India (DSCI) in order to enhance the security of Information Technology Systems.

Keywords

Internet, Cyberspace, Cyber Law, E-Commerce, Data Security.

INTRODUCTION.

The Computer based world of Internet is also popularly known as the 'Cyberspace'. The laws that exist in this area are referred to as the 'Cyber laws'. Cyber law can also be defined as the law governing over computers inter-networked all over the world. The growth of economic-commerce, which touches almost all forms of commercial transactions and activities is due to the existence of Cyberspace. This has brought the need for the lawmakers to strengthen the legal infrastructure of the society. Cyber law encompasses laws relating to Intellectual Property, Data Security, and Cyber Crimes. In this article we shall take a brief look at the history of Cyber Law in India. We shall take a look at what Cyber Law is, What is it's need, and why to enforce and strengthen the legal framework related to Cyber Law in India?

II. CYBER LAW - A BRIEF INTRODUCTION.

The word 'Internet' is used in every day speech, before understanding what Cyber Law is, let us see what the Internet is. The internet is defined according to the business dictionary as "A means of connecting a computer to another computer anywhere in the world through dedicated routers and
servers. Now when defined in such a way, the immediate question that pops up is, ‘Why connect two computers?’ The answer to this question is that when two computers are connected, they can share and access all kinds of information like text, audio, video, graphics, and other computer programs. This allows for the people working in the related field to create various opportunities on the 'Cyberspace'. The various online-shopping sites, streaming websites, etc., are only existing due to the Internet that has connected computers across the world. This has enabled commercial transactions with the click of a key. This is also termed as 'electronic-commerce' (also known as e-commerce).

Now that we've taken a look at what the Internet is. Let us see the various ways in which cyber criminals function. Firstly, cyber crimes have been categorized into two for better understanding.

1) Using the Computer as a target.
   a) Unauthorized hacking:
      Unauthorized hacking is basically gaining access to another computer on the network by instructing or communicating with the logical, arithmetical and memory function resources of a computer. Entry without the permission of the owner or for unlawful purposes is called as Unauthorized hacking. Some hackers code programs that are designed to destroy computers, whereas some hackers code programs that steal credit card information, transfer money from various banks to their accounts.
   b) Trojan Attack:
      Programs that are proposed as healthy and useful to the user but turn out to be damaging to the computer are called 'Trojans'. They are usually disguised in the forms of excel sheets and games.
   c) Virus Attack:
      Programs that have the ability to access other programs and infect them resulting in the multiplication of these programs is called a virus.
   d) Electronic Mail Attacks (E-mail):
      E-mail spamming, bombing, spoofing etc., come under this category.
   e) Denial of Service Attacks (DOS):
      Flooding computers on the network with requests more than it can handle is called a 'Denial of Service' Attack. It is usually used to disrupt connection between two or more computers on the internet.

2) Using the Computer as a weapon.
   Pornography, Cyber Terrorism, IPR Violations, Credit Card Frauds, etc., come under this category.

With the advent of the 'Internet' and 'Cyberspace', Cyber criminals are able to utilize all resources available to disrupt or alter the computers connected on the internet to gain access. With this access, they are able to extract personal information related to the owner and use it for their personal benefits. This is a pressing issue in today's technological based scenario. Almost everyone today uses Computers, Smart Phones and has access to the 'Internet' and is vulnerable to any form of an attack. This has brought the need for the law makers to strengthen the legal framework related to Cyber Law in order to provide justice. In short, Cyber Laws can be defined as the laws that govern over computers that are

http://www.businessdictionary.com/definition/internet.html
connected all over the world through the 'Internet'. Cyber Laws govern laws related to Intellectual Property, Data Security and Cyber Crimes in general.

III. WHY DO WE NEED CYBER LAW?
As the world is becoming more and more technology-dependent and digitally advanced, all commercial activities can now be done through the internet. The initial objective of the internet was only to use computers as information-sharing tools. As the internet developed, people managed to use the 'Internet' to satisfy their commercial needs and wants by e-commerce. Thus, all the legal issues that are raised when any form of illicit activity is committed on the internet are governed by the 'Cyber Laws'. There are a variety of reasons as to why we need Cyber Law. The first and foremost of which is the protection of the rights of internet users. Cyber crimes such as, Online Fraud, Share Trading Fraud, Credit Card Theft, Virus attacks etc., are becoming common by the minute. As all the businesses are using the 'Internet' to store electronic data and conduct commercial activities, it becomes quite easy for the Cyber Criminal to access this data through various methods, alter the data newly accessed and benefit from this. To curb the ever-so increasing criminal possibilities that have arisen with the advent of the 'Cyberspace', the lawmakers need to strengthen the legal framework of the Constitution. Thus, we have Cyber Laws in place to represent and define the norms of the Cyber Society.

IV. CYBER LAW IN INDIA.
Cyber Law in India is governed under the Information Technology Act, 2000, which came into existence on October 17, 2000. Any Cyber Crime committed by any person with a computer, computer system, or a computer network located in India is brought under the purview of this act. Not a lot of cases have been recorded in this field as the Act itself was passed in the year 2000. However we have had a landmark breakthrough judgment in the year 2015. The case of Shreya Singhal vs. Union of India. This case challenged the constitutional validity of Section 66A of the Information Technology Act, 2000 from the perspectives of the principles on which the Indian Constitution was drafted upon. The court declared it's judgment, marking the said section Unconstitutional. It was a landmark judgment because it upheld Section 69A and Section 79 of the Information Technology Act, 2000 (intermediaries).

As we can see that there is a certain amount of legal progress in the field, let us take a look at the agencies and institutions set up in the country to curb Cyber Criminal activities and filter the internet.

As we are already aware of the fact that Cyber Crime can only be curbed with proper cooperation from different stakeholders like Internet Users, Service Providers, Industries etc., we need to have adequately staffed institutions set up everywhere in India. The Government has set up an Inter Departmental Information Security Task Force (ISTF). Indian Computer Emergency Response Team (CERT-In) is the agency set up to

498 W.P.(Crl).No. 167 of 2012
respond to computer security incidents when they occur. Apart from these, there are a various number of other institutions that have been set up in order to monitor and apprehend Cyber Criminals. Some of these include:
1) National Cyber Coordination Centre (NCCC)
2) Cyber Command for Armed Forces
3) Crime and Criminal Tracking Network & Systems (CCTNS), in addition to the creation of sector-specific CERTs for power sector.
4) Centre for Development of Advanced Computing (CDAC)
5) Data Security Council of India (DSCI)

It is implied that Cyber Criminals can only be apprehended when they victims of the Crime be it an individual or an organization, coordinate with the law enforcement agencies for effective response. India, has to effectively improve its mechanisms to secure the Cyber Space and provide maximum Cyber Security. These institutions being set up show progress and help to curb the society of the Deep Web Criminals.

V. CONCLUSION
To sum up the above article, as the technology usage is increasing and effectively improving work-space scenario, it is pertinent to keep in mind that, establishing laws immediately would be the best way to go. The institutions set up by the government are formed primarily with that objective in mind. As this develops, it will be further easier to curb the criminal activities provided this is taken seriously and as an imminent threat. Technology is undoubtedly a double-edged sword, it can be used for good purposes (Businesses, White Hat Hackers etc.,) and for bad purposes (Black Hat Hackers, Online Frauds, Scammers etc.,). Hence, the law makers should take tenacious efforts in ensuring that these activities are minimized and the rate of Cyber Crime in the nation is reduced. villainous computer expert to spread viruses, trojans and malicious software over the internet. Cyber Crime is a threat that is becoming more and more dangerous by the minute. Countries, with inadequate security systems for these kinds of attacks will be immensely vulnerable in the future economy. The only solution for this, is that the governments should analyze their situation and determine if they are in a position to combat such criminal activities, and to the layman, self-protection is the only option, because who knows? You might be the next victim.

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ASSAM- A CONFLICTING STATE
By Simran Bhaskar  
From UPES, Dehradun

ABSTRACT

Assam is the home of several indigenous tribes, including the Bodos, who comprising 5% of total population. The Bodos are both Hindus and Christians. The large scale migration of ethnic Bengali Muslims from Bangladesh to British colonial rule in India, when they were imported as laborers. In this way, preceding the parcel of the sub-landmass, Muslim political pioneers urged Bengali Muslims to relocate to Assam for political purposes and imagined Assam as a component of Pakistan's eastern wing alongside East Bengal. Pakistani pioneers kept on stating claims over Assam after segment, including Pakistani's Prime Minister Zulfikar Ali Bhutto and East-Pakistan pioneer Sheik Mujibur Rahman. The mass populace development of Bengali Muslims into Assam proceeded after the takeoff of the British and multiplied with the making of Bangladesh in 1971. Since 1971, vast quantities of Muslim vagrants from Bangladesh have wrongfully crossed the permeable Indo-Bangladesh fringe into India’s northeastern states, including Assam, for monetary reasons.

INTRODUCTION

Assam is located in the North-eastern part of India and shares international borders with Bhutan and Bangladesh. It is home to several indigenous tribes, including Bodos. A mass influx of Bangladeshi Muslim has been a destabilizing force in Assam and has resulted in a number of political and security challenges. After years of negligent behavior by the Assamese government for illegal migration the Bodos launched an armed insurgency in the 1980s to carve out a separate state for Bodoland. The creation of the Bodoland Territorial Council and Bodoland Territorial Area District has failed to protect the rights of the Bodos and curb the unabated migration from Bangladesh, leaving them increasingly vulnerable.

1.2 Bodos-

The Bodos are ethnic and phonetic native gathering of the Brahmaputra Valley in the North-eastern piece of India. The Bodo individuals are the primary occupants of the Brahmaputra Valley. The Bodo dialect is a Sino-Tibetan dialect formally composed utilizing Devanagari content. It was composed utilizing Latin Script and Assamese content previously. A few researchers propose the dialect used to have now lost content known as Deodhai. They hone a culture known as Bathousim and worship the plant called Siju as an image of Bathou Symbol. The popular society moves of Bodo Tribe, for example, Bardaichikhla and Bagurumba.

1.1. Assam Rifles-

The Assam Rifles is the most seasoned paramilitary power of India. The unit can follow its heredity back to a paramilitary police constrain that was framed under the British in 1835 called Cachar Levy. From that point forward the Assam Rifles have experienced various name changes-The Assam Frontier Police(1883), The Assam Military Police(1913), at that point at last progressed toward becoming Assam Rifles in 1917. The Assam Rifles and its forerunner
units have served in number of parts, clashes and theaters including World War I, World War II and even in Postwar Period.

SOCIO-POLITICAL & ECONOMIC CONDITION

Assam has a composite culture of numerous tribes, races each portraying peculiar ethnic identity. The socio-political condition of Assam is great. It will be injustice and unethical to point out a single tribe or race amongst all, as Assamese because Assam equally belong to those communities who do not understand Assamese. These people speaks duans. These tribes like the Bodo, karbi, chutia, miri etc practice their traditions, customs, religious, belief and language, inhabiting the hilly areas, are the original inhabitants of Assam.

In the 12th and 13th centuries Ahoms and Muslims came to Assam. The Ahoms are originally conquerors from Thailand who had come to Assam form the east and mesmerized by the virgin beauty of this land, settled down here embracing its language and way of life. In face, the name, Assam, is believed to have been given by the Ahoms who ruled Assam for seven hundred years. In late 20th century(1967) when the social movement of the Bodo exerted its force with its political character. The Bodo who have been living in the North-easteren region of India since time immemorial, for the first time a vigorous movement of Bodos was launched demanding equality, economic, and social justice, political and civil rights, right to land, language and culture. The political movement of Bodos was the greatest human struggle and it ran up to the beginning of the 21st century. This struggle is known as “Bodoland Movement. The political consciousness of the Bodos is reflected in their Charter of Demand. On 13th January 1967 the then Prime Minister of India Mrs. Indira Gandhi in a talk to the Mizo union made a statement that the centre had a policy to reorganize the state of Assam on the basis of federal structure. The All Bodo Students Union of undivided Goalpara District welcomed this policy of the centre. Since then the All Bodo Students Union has been demanding the division of Assam and the creation of a separate state Bodoland for the Plain Tribals of Assam. A political party awakening of the Bodos took a new turn on 27 February 1967 by the formation of the “Plains Tribal Council of Assam” which raised the demand for a separate state named “Udayachal,” in order to protect economic interest of the Plain Tribals and to bring about the development of the society of Plain Tribals which include both Bodo and non-Bodo. The political party meanwhile remained barren, and people.

All these facts serve as an introduction to the diverse yet composite culture of Assam. This is a society that has emerged out of intermingling of diverse races and tribes, yet living peacefully cultivating a feeling of brotherhood and oneness. Assamese, a peace loving community, historically speaking, has always embraced everybody who has come to this land forgetting all religious and communal differences.

The Economy of Assam is to a great extent farming based with 69% of the populace occupied with it. Main Bhabananda Deka was the primary Assamese Economist and Research Scholar to start formal broad
research on economy of Assam for five centuries ideal from the season of Srimanta Sankardev. His research based book *Asomor Arthaneen* is acknowledged as the first ever research based Assamese book on Assam Economics.

**AGRICULTURE**

Farming records for more than 33% of Assam's pay and utilizes 69 percent of aggregate workforce. Assam's greatest commitment to the world is its tea. Assam creates a portion of the finest and most costly teas on the planet. Other than the Chinese tea assortment *Camellia sinensis*, Assam is the main area on the planet that has its own assortment of tea, called *Camellia assamica*. Assam tea is developed at rises close ocean level, giving it a malty sweetness and a natural flavor, instead of the more flower smell of good country e.g. Darjeeling, Taiwanese teas. Assam likewise represents decent amount of India's generation of rice, rapeseed, mustard, jute, potato, sweet potato, banana, papaya, areca nut and turmeric. Assam is likewise a home of substantial assortments of citrus natural products, leaf vegetables, vegetables, valuable grasses, herbs, flavors, and so on which are for the most part subsistence crops. Assam is a noteworthy maker of raw petroleum and flammable gas in India. Assam is the second place on the planet where oil was found. Asia's first fruitful mechanically bored oil well was bored in Makum (Assam) route in 1867. The second most established oil well on the planet still creates raw petroleum. The majority of the oilfields of Assam are situated in the Upper Assam locale of the Brahmaputra Valley.

Assam has four oil refineries arranged at Guwahati, Digboi, Numaligarh and Bongaigaon with a total breaking point of 7 MMTPA. BRPL is the primary S&P CNX 500 mix with corporate office in Assam. One of the best open zone oil association of the country, Oil India Ltd. has its plant and headquarter at Duliajan.

**INDUSTRY**

Aside from tea and oil refineries, Assam has couple of enterprises of criticalness. Mechanical advancement is hindered by its physical and political seclusion from neighboring nations, for example, Myanmar, China and Bangladesh and from the other developing South East Asian economies. The locale is landlocked and arranged in the eastern most fringe of India and is connected to the terrain of India by a surge and typhoon inclined tight passage with feeble transportation foundation. The worldwide airplane terminal in Guwahati is yet to discover aircrafts giving better direct global flights. The Brahmaputra reasonable for route does not have adequate foundation for worldwide exchange and achievement of such a safe exchange course will be subject to legitimate channel upkeep, and political and exchange associations with Bangladesh.

**FORMATION OF BODO LIBERATION TIGERS FORCE**
After six years mass movement led by ABSU-BPAC another Bodo insurgent group came into existence of Bodo Liberation Tigers (BLT) on 18th June, 1996 at Alaikhungri village, Kokrazhar. BLT was formed with the Chairman and Secretary General of Premising Brahma and Harkhab Basumatary alias Samrat Basumatary. The gathering requested a different nation for the Bodo individuals to be cut out of Assam. The pioneers of the BLT, together with the pioneers of the All Bodo Students' Union, framed a political gathering called Bodo People's Progressive Front Prior to 1996 outfitted association was casually existed and its Chairman was Chilagang Basumatary. After Hagrama Mohilary false name Thebla and Derhasad Basumatary progressed toward becoming Secretary General of the BLT. On 6th Deember 2003 at Kokrajhar District Sports Association field Hagrama Basumatary, Chairman and Commander-in-Chief of BLT led his cadres and surrender of arms in front of lakhs of people. Hagrama Basumatary lowered the BLT flag and raised the white flag of peace. Hagrama Basumatary handed over an AK-47 rifle for surrender ceremony. In this ceremony 2,641 BLT Caders surrendered. After democratic mass movement the BTC was officially formed after the swearing-in ceremony on 7, Dec. 2003 in the presence of L.K.Advani.

MEMORANDUM OF SETTLEMENT.

On 10 February 2003, agents of the BLTF and the legislatures of Assam and India achieved an understanding and marked a Memorandum of Settlement (MoS) in New Delhi. 2,641 units surrendered and set out their arms on 6 December 2003 at Kokrajhar. A dominant part of them were invested in the CRPF. On the next day, a between time 12 member gathering of the Bodoland Territorial Council (BTC) was formed in Kokrajhar.499

Memorandum of settlement signed on 10th Feb. 2003. NDFB AND CEASE FIRE. The main aims and objectives of NDFB was to creation of a “sovereign Boroland” in the North bank of Brahmaputra river. It was adopted in March 10, 1998 according to its constitution. After formation of 12 years the NDFB declared its objectives. They are-

- Liberateur Boroland from the Indian expansion and occupation.
- Free the Boronation from the oppression, colonialist exploitation and domination.
- Establish a democratic socialist society to promote equality, liberty and fraternity.
- Developed integrity and sovereignty of Boroland. From the 1st June, 2005, the NDFB observed a cease fire agreement with the Government of India.

FINDINGS-

Major findings of Bodoland Movement are-

- Before creation of BTC peoples face various problems such as social, economic, political, cultural, infrastructure etc. But after formation of BTC it developed shortly.
- After the long struggle of BLT, ABSU, BPAC, BTC formed in 2003

and first election held in 2005. The political party of BPF take dominance role in BTC.

- NDFB and BLT are two militant groups in BTC and Bodoland movement was a fratricidal movement.
- Main aims and objectives of ABSU were to create a separate State. But after creation of BTC autonomous Council formed.
- In BTAD there are four districts. They are Kokrazhar, Chirang, Baksa and Udalguri.
- In Dec. 7, 2003 there are 12 Member interim Council of Bodoland Territorial Council was sworn in the presence of L.K. Advani, Deputy Prime Minister of India.

The main provision of settlement was identified with "the formation of the Bodoland Territorial Council, a self-ruling self-overseeing body inside the State of Assam and under the arrangements of the Sixth Schedule of the Constitution of India to fulfill financial, informative and phonetic desires, socio-social and ethnic identity of the Bodos, and to quicken the structure headway in BTC area".

The BTC would include 3,082 towns in four areas Kokrajhar and the three yet to be made:

- Chirang
- Udalguri
- Baska.

The BTC have chosen 40 delegates and the Assam government would choose six more. Of the picked specialists, 30 seats would be put something aside for tribal pioneers, five for various indigenous Assamese pioneers, and the remaining five would be open for general test.

**CHANGES IN BODO INSURGENCY**

Exceptional interior contention among Bodo agitators has turned out to be the greatest obstacle to peace in Bodo-ruled ranges of Assam. Internal complexities inside the National Democratic Front of Boroland (NDFB), the primary surviving Bodo radical social affair, have also widened, following the discharge of its creator president, Ranjan Daimary, expected name D.R. Nabla. Prospects for yet another round of fratricidal clashes are certain, consequently speaking to an important hazard to the peace strategy.

**RESOLVING**

Bodo militancy can be effectively resolved by accommodating the only surviving Bodo militant outfit within the existing self-governing territorial council that came into existence in 2003. In the mid-1980s, the Bodos of Assam under its powerful understudy body, the All Bodo Students' Union (ABSU), which started an enthusiastic mass development requesting a different Bodoland state on the North of the Brahmaputra. The development went on for about 10 years and brought about the foundation of a regionally characterized self administering council known as Bodoland Autonomous Council (BAC) in 1993.

**NEGOTIATION**

Insurgency movements in India’s northeast would appear to be even more intractable and beyond solution if not for the ongoing ceasefires and peace negotiations between
the government and two dozen outfits in various states.

Products of the efforts by community based organizations, official initiatives or the plain bankruptcy of ideas of the rebel outfits, such negotiations have been the harbinger of tranquillity in many areas of the region.

BODO LAND MOVEMENT

Ethnicity and identity have been the key issues of mobilization in all of Northeast India. The movement has its emergence since the colonial period. The issue of land alienation, marginalization faced from the mainstream and dominant community and the prolonged social and economic backwardness due to the stepmotherly treatment of the state has been the main driving factor of the movement. The Bodos thought they claim to be the original inhabitants of the Brahmaputra valley has suffered in the hands of the dominant Assamese community in terms of allocation of resources, land alienation where a large chunk of land was grabbed from them and also dismal electorate representation in the colonial era (Basumatary, 2014). The general feeling of the Bodos is that of neglect, exploitation, alienation and discrimination for decades. The various policies adopted by the dominant Assamese community post-independence has led to the feeling of insecurity and threat to their identity by the minority group including the Dimasas, Karbi, Bodo, etc. Further, the Assamese move to make Assam a ‘nation province’ and the relentless stride towards homogenization and the forceful assertion of identity to the minority has backfired and led to the aggravation of the colonial ethnic cleavage. The introduction of the official language bill on October 10, 1960 which tries to enforce the use of Assamese as the official language across Assam by the state government, the decision of the Government of Assam taken on 1972 which imposed Assamese language as the sole medium of instruction in university and secondary levels of education, the decisions of the All Assam Student’s Union which tried to do away with the reservation and privilege hitherto enjoyed by the tribal and students belonging to schedule tribes in the hill district. All these moves apart from others has further widened the ethnic cleavage and threatened the linguistic identity of the minorities. The minorities and the Bodos in particular are demanding for self assertion and determination through the demand for autonomy i.e. for a separate Bodoa state, the Bodoland. This move is adopted in the first place since the Bodos who are the plain tribes are not covered.

The Bodo movement since its inception has taken different trajectories from the demand for more electoral inclusion to the demand for a separate state and further to the secessionist movement spearheaded by the insurgent groups. While some have resolutely expressed the need for more autonomy within the present set-up, other movements have evolved more militant, secessionist idea of political and geographical demarcation of territory. The aim and purpose of this

autonomy movement is not only to bring change in the existing system, but also to augment legitimate expressions of aspirations by the people having a distinct culture, tradition and common pattern of living.

DEMANDS OF BODOS-

➢ SEPARATE STATE

The demand for a different land for Bodos has its underlying foundations as back as 1930s when Gurudev Kalicharan Brahma, a pioneer of the Bodos submitted reminder to Simon Commission requesting for a different political set up for the indigenous and tribal individuals of Assam. This request was met neither by British India nor by Independent India. The second wave of demands came up in 1960s and the third one in 1980s. This time, interest for Bodoland started on 2 March 1987 under the administration of Upen Dranath Brahma of the All Bodo Students Union (ABSU) and its political association Bodo Peoples' Action Committee (BPAC). The objective of the ABSU/BPAC improvement was to get Assam segregated 50-50 among Bodoland and Assam.

The improvement twisted up observably horrendous soon. In 1993, the Assam Government went into a bipartite Bodo accord with ABSU to diagram a Bodoland Autonomous Council (BAC) to satisfy cash related targets of the Bodos. This examination assaulted due to non-utilization of different courses of action of the Accord. It broke down inside a year. The statehood request was again resuscitated by ABSU in 1996.

In 2003 under the NDA Government, a minute tripartite Bodo Accord was set apart between the Bodo Liberation Tiger (BLT), an attacker prepare, the Central Government and the Assam Government. By methods for assention, the Bodos were yielded the Bodoland Territorial Council (BTC), inside the State of Assam under Sixth Schedule.

➢ BODOLAND TERRITORIAL COUNCIL-

The Bodoland Territorial Council (BTC) has authoritative, managerial, official and budgetary controls more than 40 strategy ranges in the Bodoland Territorial Areas Districts involving four regions of Assam. The target of BTC was to satisfy financial, instructive and etymological desires and the protection of land-rights, socio-social and ethnic character of the Bodos; and accelerate the foundation improvement in BTC range. The areas of Kokrajhar, Chirang, Udalguri and Baksa went under the BTC regulatory range.

According to the 2003 accord, the BLT was required to surrender every one of their arms and changed over into Bodoland People's Front (BPF), a political gathering now administering the Council.

MURKY POLITICS of BODOLAND-

What happened later was more to inside dim governmental issues of the BTC. A portion of the previous activists of the BLT and pioneers of ABSU-CCBM pioneers constituted a Bodoland People's Progressive Front (BPPF). This BPPF got split into BPPF (Hagrama), drove by Hagrama Mahilary, the
past BLT boss and BPPF (Rabiram), drove by Rabiram Narzary, previous ABSU president. At the point when the principal decisions to the BTC occurred, these two groups got drew in into viciousness. Individuals offered command to BPPF (Hagrama) on the grounds that they felt that Mahilary, being the signatory to the Bodo Accord, would be in a superior position to convey more supports and improvement to BTC zones. The BPPF (Hagrama) was later renamed as Bodoland People's Front (BPF). There are two more associations dynamic in Bodoland as follows-

THE MOVEMENT AND ITS DECLINE-

The Bodo movement has succeeded in curving out certain administrative arrangement such as the BAC and the BTC but has failed to achieve its main goal of separate state (Fifty-Fifty Divide of Assam) or the secessionist movement of attaining a sovereign state. This failure can be attributed to the leadership failure and internal conflicts in leadership from the time of the movement by the student and political organizations to the armed struggle spearheaded by the militant groups. A number of political organizations spring up from the Tribal League, PTCA, ABSU, PDF, BSS, etc. which all has their own ideology and interest and there is a conflict amongst themselves. This has led to internal conflict which becomes the main weakness of the movement.

The movement however has failed to truly realize the concerns of the poor and the general masses and has failed to maintain a strong solidarity amongst the people which led to the internal crisis and leadership failure. The quest for power and internal politics has somehow cost the movement from realization of its main objective of separate state. The ethnic diversity of the state and the failure of the movement to incorporate these minority ethnic groups and its subsequent communal riots have cost the movement in some way. Also, the arms struggle and the turn in the movement from the democratic to the violent non-democratic process was a wrong turn in the movement which has led to its decline. The leadership crisis and the internal conflict amongst themselves was the greatest detrimental force in the movement. The movement in brief has passed through the emergence stage, the coalescence stage, the bureaucratization stage and the stage of decline not because of the realization of its goal but due to the failure to sustain the movement due to the aforementioned reason.

BODO- MUSLIM CONFLICT

The assaults in Assam, in a similar area where 2012 saw potentially India’s most pessimistic scenario of mass human dislodging inerable from strife, is just the following period of savagery in a severe mixed drink of ethnic issues and rivalry for assets that have pained this locale.

Here are five things you need to know about the Bodo-Muslim conflict in Assam.

1. There is a history that provides context to the continuing violence.

The regions of Kokrajhar, Baksa, Chirang and Udalguri (the last three were as of late made areas) are home to Bodos yet in addition to Muslims, OBCs and different gatherings. Actually, a great part of the
viciousness is revolved around the apparent fast development of the Muslim populace in the area. While Scheduled Tribes (principally Bodos) constitute about 33% of the populace in these four locales, the STs have really turned into a minority in the district, adding to profound instabilities among the ethnic Bodos with respect to the Muslims.

The history is that the Bodos, Assam's greatest tribal gathering, have had biting conflicts with different Adivasis and the Muslim "pioneers" (called hence on the grounds that parts of Assam have seen a very long time of movement from Bangladesh appropriate since the 1950s). The 1990s saw a dynamic insurrection and a Bodo development, a concurrent feeling of mistreatment among the non-Bodos who kept on getting pushed to the edge of legislative issues in Kokrajhar and the district encompassing it.

2. A peace accord was signed, but issues remain unresolved

Following quite a while of militancy and one fizzled peace accord, the Assam government and the Center (at that point drove by the NDA) marked a moment peace accord with the Bodo Liberation Tigers in 2003. This got ready for the arrangement of the BTAD, the Bodoland Territorial Autonomous Districts, involving Kokrajhar, Baksa, Chirang and Udalguri. The BTAD is represented, as per that understanding, by the Bodoland Territorial Council (BTC), a kind of semi-self-governing body much the same as some other tribal self-ruling bodies in the state.

Denoting the comprehension were the surrendered radicals of the Bodo Liberation Tigers (BLT) drove by Hagrama Mohilary who proceeded to outline the Bodo People's Front (BPF) which has been in charge in the BTC. The Congress party isn't for the most part display in the BTC, except for through the BPF.

The BTC accord gave political energy to a Scheduled Tribe aggregate that was truly hindered in that area. Be that as it may, it placed them against another gathering, the Muslims, likewise generally hindered in the state and in whatever is left of the nation.

3. Illegal immigration remains a grey area

The 2012 savagery was differently portrayed as having started over the Bodos' pulverization of a mosque or an under-development mosque in Kokrajhar or as having started after the executing of some BLT men by Muslims. In any case, open recognition was to a great extent that the skewed socioeconomics of Assam, owing for the most part to the proceeding with unlawful migration from Bangladesh - the Bengali-speaking "pilgrims" are likewise called "Bangladeshis" - were at the foundation of the ethnic viciousness.

The movement issue is an imperative factor, with Bodos trusting that the Muslim pilgrims bolster illicit workers who keep on arriving through the riverine zones. There have additionally been reports of widespread infringement of state-possessed woods arrive by Muslim encroachers. The Muslims live partly on forest land. They are now fleeing their homes, say reports.
"Despite the government's efforts to stop people from fleeing out of fear, 25 Bodo families fled to Kokrajhar from Fakiragram in Muslim-dominated Dhubri district. Bengali Muslims, too, were seen heading towards Dhubri district carrying their belongings," said the report.

4. Prevalence of arms adds a lethal ingredient to a deadly cocktail of ethnic strife and political scare mongering.

This report in The Hindu subtle elements the brutality that happened in BTAD in the course of recent days. "There were around 40 of them, some in fight uniform, and faces secured with dark fabric, and some others wearing khaki. Every one of them held weapons," says a survivor.

The political control of BTAD by previous Bodo radicals has implied that the prevalence of arms in the area proceeds.

Reports have said more than 100 illegal weapons have been seized in BTAD in the run-up to choices. Since January this year, 42 aggressors of the National Democratic Front of Bodoland (Songbijit gathering) have set down arms, while 18 others have been butchered in encounters.

This straightforward proximity of arms, joined with the Muslims' conviction that the Bodos will rely upon violence to drive Muslims out of the territory, adds to the fear factor. The 2012 ruthlessness saw reports of item mischief and pillaging and fire related wrongdoing also.

5. The Bodo leadership is itself fractured.

The gatherings of the limited National Democratic Front of Bodoland barely watch eye to eye. The counter talks gathering, the National Democratic Front of Bodoland (Songbijit), has denied its part in the strikes and has said it was "a political trap by Assam government to trigger clashes between two gatherings". A press clarification by NDFB Secretary (Information and Publicity Wing) NE Esara expressed, "We ask the Assam government and its experts to stay away from such affirmation without the littlest legitimation."

The virtuoso talks amass has starting late asked for that the National Register of Citizens in Assam be revived, confirming that 70 lakh to 80 lakh outcasts came wrongfully into Assam in the region of 1951 and 1971. It has as often as possible reviled violence by the counter talks gathering, refering to reports of compulsion, snatching and executing of guiltless people related with that gathering.

CROSS-BORDER MIGRATION

The extensive scale relocation from Bangladesh has essentially adjusted socioeconomics in India's northeastern states, prompting social, financial, and political pressures amongst tribals and Bangladeshi Muslim pilgrims. For example, in Assam, Muslims make up around 33% of Assam's populace, and 11 out of 27 areas in the state now contain Muslim greater parts. Bodo pioneers in Assam state that Bangladeshi Muslims are utilizing their developing energy to force their way of life and religion in the range. Unlawful Bangladeshi transients have efficiently appropriated cultivating, brushing, and woodland lands generally
utilized by the Bodos and different indigenous tribes in Assam for their work, prompting trepidation and disdain among the tribal populace. Alongside illicit transients, mediate bootleggers and other criminal components as often as possible cross the Indo-Bangladesh outskirt into Assam. Also, as per Indian authorities, numerous Bangladeshi Muslim pilgrims in Assam are presently occupied with the unlawful development and dispersion of opiates in the state. Some Indian political gatherings in Assam, for example, the Communist Party of India and the Congress, have professedly supported unlawful relocation from Bangladesh, utilizing Bangladeshi Muslim pioneers to fortify their political base and catch good votes in races. Additionally, unlawful vagrants can without much of a stretch get produced citizenship records, empowering them to vote and access taxpayer driven organizations.

In the 1978 Lok Sabha (bring down place of Parliament) by-decisions in the express, the names of 45,000 illicit Bangladeshi vagrants were found out of the blue on the voter's rundown, prompting fierce political distress coming full circle in the "Assam Agitation" (1979-1985) led by the All Assam Students Union (AASU). India's Supreme Court as of late noticed the size of the issue when it expressed that Assam was confronting "outer animosity and inward unsettling influence," because of the substantial scale relocation from Bangladesh.

The two India and Bangladesh have demonstrated woefully insufficient in managing the truth of the outskirt between the two nations. Ironicly the fringe which was drawn by the British in 1947 to sanely re-sort out the political space in the area has in the end produced its own particular madness, as well as made numerous new issues for the locale. The outskirt, with its long history of developments between individuals, societies, convictions, thoughts and traditions was totally unbelievable from the earliest starting point. Arrive on the two sides of the outskirt was for the most part cultivable and was bolted, and there were cultivates inside 40 yards of zero point on either side. Maybe the most imperative normal for the outskirt was that as a rule it was not touching. There are 53 waterways in the area which make working of the fringe more muddled. All of India's debate with East Pakistan identified with this outskirt, generally including streams (Report of the Indo-Pakistan Boundary Disputes Tribunal, 1958). The disagreement regarding the limit amongst Murshidabad and Rajshahi was an average case of these underlying debate where even the tribunal chose that the division of the line made by the limit commission 'is observed to be inconceivable". Considerably more ace problematic was that every nation included its enclaves inside the limit of the other, implying that the outskirt was overflowing with potential for issue. After the freedom of Bangladesh it was trusted that the fringe would lose a lot of its potential for making debate and hostility with the change of reciprocal relations. Tragically, even after over 25 years of the introduction of Bangladesh, all the exceptional issues amongst India and Bangladesh keep on being identified with the regular outskirt. These incorporate sharing of water-assets of regular streams, CHT, boundary of sea limits and the responsibility for Moore/Talpatty Island, illicit cross-outskirt exercises, unlawful relocation, Berubari passageway and the
giving of section/leave offices. Conviction about the sacredness of the fringe is weaker in this district than somewhere else in India. Endeavors to control the development of individuals and products, including timber, dairy cattle, materials, electronic merchandise, sugar, medication and lamp fuel, have fizzled. Out of a blend of sadness and political pre-sure, the legislature of India has manufactured spiked metal perimeter on parts of both Assam and West Bengal sides of the outskirt. Fencing project of 358 kms and 159 kms in south Bengal and Assam separately has been authorized. Different measures, for example, consistent watching and checkpoints proceed. In any case, these have not stemmed the stream of either individuals or products; in reality, it’s a well-known fact that fringe monitors on either side acknowledge and request influences from those looking to cross unlawfully. Because of the convergence, the measure of which is hard to assess, a steady condition of pressure exists, in Assam specifically and, different conditions of the north-east and additionally between transients, saw vagrants and the host groups. In the event that one is to acknowledge that relocation is a characteristic human marvel that happens in shifting degrees around the world, one should likewise acknowledge the way that couple of nations on the planet have effectively contained it, be it a superpower like the United States or a little nation like Germany. Once more, in the event that one is to pass by the start that movement, particularly illicit migration can't be halted, one must go above and beyond and say that it must be contained or regulated. Or, on the other hand rather, it can be consulted through a procedure of meaningful monetary acti-vities, trades, administrative systems, or more all through exchange. The issue of cross-fringe movement is now and then confused by religious factor. Either the general population of the minority groups look to the alternative of taking Economic and Political Weekly September 4, 1999 2549 This substance downloaded from 14.139.239.74 on Sun, 22 Oct 2017 16:24:05 UTC All utilization subject to http://about.jstor.org/terms protect in the neighboring nation exasperated with majoritarian insensi-tivities, or stay potential evacuees or illicit transients. Amid 1972-1993, an aggregate number of 41,25,576 individuals touched base in India from Bangladesh. Out of that an aggregate of 8,36,524 outstayed (contrast between the movement and displacement figures). Out of them 5,38,501 were Hindus.

RECOMMENDATION

The problem of Assam is unique. We have so many diverse ethnicities and no other state in India has a similar problem. Besides, lots of infiltration has taken place in Assam since centuries, which has compounded the problem.

The ground reality is that the problems of the Assamese people and Assam has not been resolved yet, and will not be resolved in the future. This is because Assam is one of the best political weapons political parties will use to gain minor benefits, and dump everything they promise, after the election. It is very much certain that the Delhiwalas seating in the AC offices will never feel our problems and troubles, and will continue to exploit us until we decide to "write our own destiny."

Some policy and recommendations to solve the problems are as follows-
• The Central Indian Government and State Government in Assam must make every single essential move to completely restore the casualties of the current mobs and guarantee the wellbeing of all groups in the state going ahead.
• India must secure the social, monetary, and political privileges of the defenseless tribal populace in Assam and extensively address the hidden issue of unlawful movement from Bangladesh.
• The U.S. ought to energize the Government of Bangladesh to execute solid measures to abridge the stream of illicit foreigners, activists, and medications from its side of the Indo-Bangladesh outskirt keeping in mind the end goal to avert assist destabilization of the area.

CONCLUSION
From the above analysis we can conclude that all the Bodo people and their political, social, cultural, literary or other organisations are in favour of the creation of a separate Bodoland State. A mass inundation of Bangladeshi Muslims has been a destabilizing power in Assam and has brought about various political and security challenges. Following quite a while of careless conduct by the Assamese government for unlawful movement the Bodos propelled a furnished uprising in the 1980s to cut out a different state for Bodoland. The creation of the Bodoland Territorial Council (BTC) and Bodoland Territorial Area District (BTAD) has failed to protect the rights of the Bodos and curb the unabated migration from Bangladesh, leaving them increasingly vulnerable.

But their survival would never be possible nor fulfilled. The Bodoland Movement had emerged a powerful autonomy Movement in Assam. It is observed that the formation of BTC has not fully satisfied the Bodo peoples. ABSU, Bodo National Conference (BNC), NDFB are now demand for creation of a separate State like Telangana.
REPRODUCTIVE TECHNOLOGIES AND RIGHTS OF WOMEN

By Vanshika Jain
From University Law College, Bangalore University, Bengaluru

ABSTRACT
In the last quarter of 20th century, the greatest irony of history is the rapidly advancing medical technology outpacing the law. The grey areas causing major social upheavals are the vital questions relating to amniocentesis, abortion and foeticide. The perplexing scenario shown by artificial insemination, reproductive industrialisation and surrogate motherhood are reducing the women’s body to a raw material. The Indian society is averse to treating a woman as a human being. It has perpetuated worst form of atrocities on women among which a new scientific technique in the form of sex determination tests is also added. It is likely to operate as a total denial of human rights of women. In 1870, infanticide was made an offence. Today female foeticide has appeared in place of female infanticide. This shows that even after a lapse of century our attitude towards the birth of a female child has not changed. This is the position in 1990 which is designated by the United Nations as the International Year of the Girl Child.

The research paper will highlight the multiple dimensions of such reproductive technologies and how these are a contributing factor in infringing the reproductive rights of women. The medical aspects are as imperative as legal aspects. The paper will deal with landmark decisions given by the Supreme Court, various legal provisions such as Medical Termination of Pregnancy Act, 1971, The Surrogacy Regulation Bill, 2016 and a women’s Right to Privacy which includes her Right to conceive and Right to abortion. Various countries are working in this sphere as a result of which plethora of International Conventions have been signed by India which will also be highlighted.

INTRODUCTION
There is no doubt in the statement that giving birth to a child or to put it differently, giving an heir to our Indian patriarchal society is the essence of being a woman. In olden times, a barren woman used to be abandoned by her in-laws or face the taunts of society. As times passed by, development became rampant in all spheres of life. One of these developments are Assisted Reproductive Technologies or ARTs which are now a global market in India. Earlier, it was impossible to determine the sex of the baby in the womb of mother until it was delivered. As medicine advanced, new techniques were devised for preventing the genetic, chromosomal disorders of the child in the womb. It also helped in ascertaining the sex of the child in the womb even in the early stages of pregnancy. This advancement of science turned to be a curse for the female child. Instead of using these techniques for medical purposes, the medical practitioners started using them only for sex detection. This led to India’s eminence for the high rate of foeticide and infanticide. This female foeticide is a big black spot on the face of Indian society.

Although the discovery of such technologies has open the doors of possibility for barren women to conceive but the way these technologies are used, needs to be
questioned. This is certainly heard at all times that how their emergence has benefited infertile couples but looking at a different shade of these technologies is also imperative. As mentioned earlier, development has also taken place in legal arena of such technologies. There are various non-profit organisations who are working for women’s rights and a part of these rights include their reproductive rights. Not only issues related to rights of such women need to be answered but also the rights of such female infants who are killed inside the womb needs to be addressed.

“You can tell the condition of a nation by looking at the status of its women.”

- Pt. Jawaharlal Nehru

Women's reproductive rights may include some or all of the following: the right to legal and safe abortion; the right to birth control; freedom from coerced sterilization and contraception; the right to access good-quality reproductive healthcare; and the right to education and access in order to make free and informed reproductive choices. Reproductive rights may also include the right to receive education about sexually transmitted infections and other aspects of sexuality, and protection from gruesome practices such as female genital mutilation (FGM).

**PRE-NATAL SEX-SELECTIVE ABORTIONS**

**MEANING**

According to Section 2(j) of the PNDT Act, 2002, Pre-natal diagnostic techniques include all pre-natal diagnostic procedures and pre-natal diagnostic tests.

A. **Pre-natal diagnostic procedures** mean all gynaecological or obstetrical or medical procedures such as: Ultrasonography, Foetoscopy, taking or removing samples of Amniotic fluid, Chorionic villi, Blood, Any tissue Fluid of a man or a woman before or after conception for being sent to a Genetic Laboratory or Genetic Clinic for conducting any type of analysis or pre-natal diagnostic tests for selection of sex before or after conception.\(^{501}\)

B. **Prenatal diagnostic test means:** Ultrasonography Test or analysis of Amniotic fluid, Chorionic villi, Blood.

Some techniques are-\(^{502}\)

- **ULTRASONOGRAPHY**

This is a non-invasive procedure that is harmless to both the foetus and the mother. High frequency sound waves are utilized to produce visible images from the pattern of the echoes made by different tissues and organs, including the baby in the amniotic cavity.

- **AMNIOCENTESIS**

This is an invasive procedure in which a needle is passed through the mother's lower abdomen into the amniotic cavity inside the uterus. Enough amniotic fluid is present for this to be accomplished starting about 14 week's gestation. For prenatal diagnosis, most amniocenteses are performed between 14 and 20 weeks gestation.

- **CHORIONIC VILLUS SAMPLING (CVS)**

In this procedure, a catheter is passed via the vagina through the cervix and into the uterus to the developing placenta under

\(^{501}\) Section 2(i) of PNDT Act, 1994.

\(^{502}\) library.med.utah.edu/WebPath/TUTORIAL/PRENATAL/PRENATAL.html.
ultrasound guidance. Alternative approaches are transvaginal and transabdominal. The introduction of the catheter allows sampling of cells from the placental chorionic villi. These cells can then be analysed by a variety of techniques. The most common test employed on cells obtained by CVS is chromosome analysis to determine the karyotype of the foetus. The cells can also be grown in culture for biochemical or molecular biologic analysis. CVS can be safely performed between 9.5 and 12.5 weeks gestation.

In the recent years, the technology has become an obstruction in maintaining the sex ratio in society. The new technology raised sex selective abortion. The most extreme expression of the preference for sons is female infanticide and sex- selective abortion. A study of amniocentesis in a Bombay hospital found that 96% of female foetuses were aborted compared with only a small percentage of male foetuses. Successive Census reports have highlighted our skewed sex ratio, but a survey published in the latest issue of the Lancet Magazine threw up shocking statistics. According to this study on female foeticide by an Indo-Canadian team, about 500,000 unborn girls are aborted in India every year. The researchers attribute this to rampant misuse of ultrasound technology for pre-natal sex determination. It is not only a human right of violation of the mother but her unborn child also. Also, this problem is not only limited to girl child but in cases of children found with some abnormalities.

The Pre- conception and Pre-Natal Diagnostic Techniques (Regulation and prevention of Misuse) Act, 1994

- Objective - Large scale misuse of such technologies in future would precipitate a severe imbalance in the sex- ratio. Therefore, it has become necessary to implement the Act uniformly in whole country. It is an Act to provide for the prohibition of sex selection and for regulation of pre- natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders and for the prevention of their misuse for sex determination leading to female infanticide.

Main provisions-
The PNDT Act provides for regulation of genetic counselling centres, genetic laboratories and genetic clinics and also regulates pre-natal diagnostic procedures. The medical professional running the genetic centre has to be registered under the PNDT Act (Section 3).

- It allows the use of prenatal diagnostic techniques for the purpose of specific genetic abnormalities or disorders only as per sec 4(2) and to put down a prohibition on the use of these techniques for determining the sex of the foetus by any such person under the Act. (Sec 3A).

- The Act also prohibits any kind of advertisements on pre-conception and pre-natal sex determination of foetus or sex selection of foetus is prohibited. The Act provides for three years imprisonment and fine up to ten thousand rupees as punishment in contravention of the Act (Sec 22 and sec 23).

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503 “Murder in the Womb” Times of India, Ahmedabad edition.
The Act provides for the constitution of a Central supervisory board (Sec 7) and State and Union territory supervisory boards (sec 16A).

The Act amended to prohibit sale of ultrasound machine etc., to persons, laboratories, clinics, which are not registered under the Act. (Sec 3B)

If any person such as a husband or any other relatives compel pre-natal diagnostic on any pregnant woman for the purpose other than those mentioned above shall also be punished with similar punishment and fine. (Sec 24)

Section 27 provides for all the offences under this act as cognizable, non-bailable and non-compoundable.

Written consent of the pregnant woman and prohibition of communicating the sex of foetus under Section 5 of the Act.

Amended Act - PNDT Act and Rules have been amended w.e.f. 14th February, 2003, including the title of the Act, keeping in view the emerging technologies for selection of sex and certain directions of Hon'ble Supreme Court after a PIL filed in May, 2000 by CEHAT, an NGO on slow implementation of the Act.

1. Pre Birth determination of sex with purpose of female foeticide is an offence.
2. Nobody can compel a pregnant woman to undergo such tests.
3. Nobody is allowed to advertise to do sex determination.
4. It is mandatory for all places, persons and bodies by whatsoever name called, doing genetic counselling, pre-natal diagnostic procedures tests having ultrasound machine, echo or scanner capable of detecting sex of foetus, to get registered with the appropriate authority.
5. Increased the punishment of fine from 50,000 INR to 1, 00,000 INR.

The first positive step forward was a favourable interim judgment by the Supreme Court on May 4, 2001. The order called for all the State Governments to take necessary steps towards the implementation of the Act. The Department of Family Welfare of Government issued handbills in national dailies that sex selection is criminalised. The Indian Medical Association made a turn around and issued a warning to its members at the national level.

First conviction held after decade under this Act - The maiden conviction was held by the Magistrate of Palwal Court, Haryana. The Learned Magistrate has shown the real object of the Act, by convicting and sentencing a doctor to two years’ imprisonment as an exemplary punishment. This is a type of crime where victim is only sufferer and has to pay more fees than the other ultrasounds.

INTERVENTION BY STATES
Turning the girl child from an economic liability into an economic asset is the most effective way of tackling the problem. The Government should give incentives for having a girl child through free education or extra PDS ratio. Anyone involved in the killing of girl child should be ostracized by society.

In this regard a big step has been taken by “Jat and Gujjar Mahapanchayat” on 7 October, 2006 at village Shouro in UP. They decided to boycott families which opt for selective abortions and hospitals where such tests are carried out.

SOCIAL RESPONSES
Today, a woman with more than one daughter has gun pointed at herself and her pregnancy. Many argue, why should
government deny her right to have a son instead of a third daughter? If the government has legislation for abortion, why not female foetocide?

There are two absolutist camps represented by feminists including extreme prochoice theorists and the other prolific activists. The feminists hold that the mother’s rights are prior to all other consideration. In this view, a woman’s freedom rests finally on her control of her own reproductive processes. Since she alone loses independence by giving birth, she alone has the right to decide to abort. The pro-life group claims that the viable foetus is a baby and its abortion is a form of killing or even a plain murder.

The argument that abortion is a right necessary to control over one’s self is based on a social contact model of society.

SURROGACY – COMMERCIALISATION OF WOMANHOOD?

Surrogacy is one of those changes, which has challenged both society and law, in terms of its recognition and regulation. The natural desire to have one’s own child has paved the way for recognizing the new techniques, which aim at fulfilling the desires to have a child.

MEANING

American Law Reports\(^{504}\) defines surrogacy as a contract in the following lines:

> “a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child’s birth.”\(^{505}\)

The Supreme Court of India\(^{506}\) has defined surrogacy as:

> “..a method of reproduction, whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracting party.”

SURROGACY AS A VIOLATION OF REPRODUCTIVE RIGHTS OF WOMEN

- Commercial surrogacy should be stopped because it favours none. To allow commercial surrogacy is to streamline a system where our own college-going daughters and sisters, their working wives, can get sucked into it with horrific physical and mental health consequences.

- The surrogate mother may face obstetrical or medical complications during pregnancy. For example, the surrogate mother is more susceptible to develop infections when another women’s eggs are transplanted in her.

- Miscarriage is very common in surrogate pregnancy.

- Since in most cases, more than one embryo is implanted in the uterus to enhance the chances of successful pregnancy, it also enhances the possibility of twins or triplets. Often, this becomes crucial for the mother’s health as well as that of the unborn babies.

- Again, for the poor women, surrogacy has become a very easy source of income since maximum surrogates are illiterate they are oblivious of their health risks which they can face later in their lives.


\(^{506}\)J. ArijitPasayat in Baby Manji Yamada v. Union of India, AIR 2009 SC 84.
conceiving leads to physical weakening of their bodies and the gravest danger involves the irregularity in their menstrual cycles.

- The absence of stringent legislations governing surrogacy has made India a surrogacy hub, a global market with an annual estimate of 900 crores INR. Surrogacy is banned in many countries and therefore, foreign infertile couples come to India to opt for surrogacy which has led to an underground black market of exploitation of surrogate mothers. In a case, a couple came from abroad and got their baby after the mother delivered the child. Unfortunately, the mother died during delivery. But the couple refused to pay any compensation because they said they had a contract only with the dead mother.

- The surrogate mother tries to avoid developing a special bond with the child in her and views the pregnancy as merely a way to earn the much-needed money. Surrogacy demeans the unique mother-child bond as women can now solely be used as “breeder-machines.”

- As far as the legality of the concept is concerned, reference of the Universal Declaration of Human Rights (UDHR), 1948 can be given, which ensures that “men and women of full age without any limitation due to race, nationality or religion have right to marry and find a family.” This right lays the foundation for the reproductive rights in UDHR. Article 12 which ensures the right to privacy and non-interference by others to every individual can be interpreted to include the individual’s rights to determine the number and spacing of their children.

- Right to life and personal liberty is one of the most basic and fundamental rights enshrined in the Universal Declaration of Human Rights, 1948. It has strong foundation in the International Covenant on Civil and Political Rights, 1996; as well as various regional human rights documents and many Constitutions.

SURROGACY REGULATION BILL, 2016
In order to control surrogacy and exploitation of surrogate mother, the Indian Government has taken steps in order to regulate the surrogacy procedures. The Surrogacy Regulation Bill, 2016, was introduced by Minister of Health and Family Welfare, Mr. JP Nadda in Loksabha on November 21, 2016.

Salient features of the proposed bill

1. The bill defines surrogacy as a practice where a woman gives birth to a child for an intending couple and agrees to hand over the child after the birth to intending couple.

2. The main objective of the bill is to prohibit the commercial surrogacy that is being taken place for renting Indian wombs for foreign couples.

3. The bill legalises only altruistic surrogacy.

4. The bill ensures that the children born out of surrogacy are legal and transparent.

5. Only legally wedded Indian couples can have children through surrogacy. It also ensures that at least one of the couples have been proven to have fertility related issues. Moreover, foreigners, NRIs, PIOs are not allowed to seek surrogacy in India.

6. The surrogate mother should be a close relative of the couple. Surrogate mother should be in the age limit of 25-35 years and

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507 www.iassolution.com/surrogacy-bill-2016-salient-features/
shall act as a surrogate mother once in her life time only.


8. A surrogacy regulation board will be set up at central and state level.

9. The Indian couple married for five years and do not have a surviving child is eligible for surrogacy. Infertile couple should be in the age limit of 23-50 years (woman) and 26-55 years (man).

10. Any establishment found undertaking commercial surrogacy, abandoning the child or exploiting surrogate mother or either selling or importing human embryo shall be punishable with imprisonment less than 10 years and fine of Rs 10 lakh.

PROTECTIONS TO PREGNANCY

“Grant us a hundred autumns that we may see the manifold world. May we attain the long lives which have been ordained as from yore”

- Rig Veda

The aforesaid shows that life is beyond price and it is not only a legal wrong, but a moral sin as well, to take away life illegally.

In India, abortion was not allowed and was offensive under IPC. However, since 1971, it is permitted under law only in special circumstances, including when the woman is raped, when the child suffers from severe disability or when there is a failure of contraceptive devices. Abortion continues to be a very tricky issue in the Indian context of sex-selective abortions. But it is imperative to understand that sex-selective abortions are a phenomenon that grew more out of the ability to know the sex of your child and not from the right to legal abortion. And it is this constant attempt to mix the two arguments that finds pro-choice activists and woman’s rights organisations having to tread carefully while working to create a space for contraception, abortion and a simultaneous intolerance to sex-selective abortions. Moreover, with the knowledge of the gender of the child available through a variety of techniques and definitely by the 20 weeks cut off period for a legal abortion.

The suction evacuation is a method of choice in dealing with termination of first trimester pregnancy and this method has replaced Dilation and Curettage method which is the most commonly used method.

Law relating to pregnancy finds place under IPC as well as under some special legislations i.e. The Medical Termination of Pregnancy Act, 1971 and the already discussed PNDT Act, 1994.

A LOOK AT WOMEN’S REPRODUCTIVE RIGHTS

RIGHT TO CONCEIVE

One of the prime ends of the marriage is the procreation of children.

In a case before the Madras High Court, the doctor’s report didn’t disclose any abnormality of pregnancy and moreover the girl was quite capable of understanding things. She appeared to have definite about her future. When the counsel asked, what would she do if her husband deserted the child, she answered that she isn’t worried about it and she will bring it up herself. Therefore, the court expressed the opinion that she could not be deprived of the right to
conceive just because she was only 15 years of age.\textsuperscript{508}

\textbf{RIGHT TO ABORTION}
India allows abortion, if the continuance of pregnancy would involve a risk to the life of the pregnant woman or grave injury to her physical or mental health. The Medical Termination of Pregnancy Act came in force in 1971 which guarantees the Right of Women in India to terminate an unintended pregnancy. The rights provided as well as the restrictions imposed under the statute show that the very purpose of the state is to protect a living woman from dangers which may arise during an abortion process.

Right to abortion (termination of pregnancy) is a right up to the length of 12 weeks but should be terminated by authorised medical practitioner. In the second stage, the length of foetus is between 12 to 20 weeks, where abortion is not a matter of right but conditional right, allowed in certain circumstances only. But after completion of the 20\textsuperscript{th} week of foetus, there is no right of any woman to abort the foetus in any of the circumstances.

The question of right to abortion was raised in the case of Niketa Mehta, where she was denied the right. She discovered in the 24\textsuperscript{th} week of her pregnancy that the baby suffered from a heart disease and will need a pacemaker every 5 years. Considering her middle-class background, she wanted the pregnancy to be terminated which wasn’t allowed by the Bombay High Court, ironically, on the grounds of “mercy killing” even till 20\textsuperscript{th} week of pregnancy as the medical opinion was contrary.

\textbf{ABORTION AS A HUMAN RIGHT}\textsuperscript{509}
It is a woman’s individual rights, right to her life, to her liberty and to the pursuit of her happiness that sanctions her right to have an abortion. A women’s reproductive and sexual health shape her reproductive choices. Reproductive rights are internationally recognised as critical both to advancing women’s human rights and to promoting development. In recent years, governments from all over the world have acknowledged and pledged to advance reproductive rights to an unprecedented degree. Each and every woman has an absolute right to have control over her body, most often known as \textit{bodily rights}.

Article 1 of the American Declaration of Rights and Duties of Man and the Inter American Commission of Human Rights say that abortion is legalised until the end of First trimester. Right to life is protected from the moment of its conception by Articles 6(1) of the ICCPR, Article 2 of the European Convention of Human Rights and Article 4 of the African Charter of Human and People’s Right.

The right of a woman to her private life has been the basis on which a number of international bodies have upheld the right of a woman to have an abortion. The right to freedom of expression and access to information has been used to argue for the right of women to receive information about abortion options and also to decide freely and responsibly to the number and spacing of her children.

\textbf{IMPLICATIONS OF NEW REPRODUCTIVE TECHNOLOGIES (NRTs) IN INDIA AND THIRD WORLD}

\textsuperscript{508}AIR 1996 Journal Section 136.

\textsuperscript{509}Women and Law by Krishna Pal Malik.
The reproductive technologies also throw up a lot of issues in the Indian context which need to be debated separately. Most of the literature available on NRTs has a western perspective. It is only recently that some social science research has been conducted in India on these issues that they have been brought to light. In India, as in many parts of the world, women's self-worth and value is usually dependent upon their reproductive functions. Women go to great lengths to ensure that they have a number of children and if possible, often desired sex, which is male. This is the result of the socialization process and/or family pressure in a patriarchal context. Reproductive technology has been used by women of various cultures, classes and regional groups for many years. Since one of the major goals of the government's reproductive health programme is birth control and providing contraception, the search for long lasting and effective contraceptives is still on. In this context, the trials of the implant, Norplant-6, and the introduction of the injectable, Depo-Provera created quite a furore in the recent past. The vulnerable sections of society are targeted for the promotion and use of some new technology, the safety of which has not been established. Infertility technology too has been introduced in the last few years. Individual right and choice are easily turned against women and are distorted or manipulated. Amniocentesis and Ultrasound are more familiar and popular NRTs which are misused to detect the sex of the foetus followed by abortion if the foetus not of the desired sex. The law against pre-natal diagnostic techniques is difficult to implement, has loopholes and till now has been ineffective. Other techniques like Sonography, Foetoscopy, Needling and Chorionic Villi Biopsy are also used for sex-determination. Even sex-preselection is now offered by some clinics in Bombay and can be done as part of the IVF procedure. Some technologies which are used to assist in labour and childbirth like cesarean sections are being increasingly used by clinics, usually for a profit motive.

NEGATIVE IMPACTS

- Most contraceptive technology promoted by the reproductive health programme in India is problematic and even if it is not problematic, the health services are not effective enough to deal with the complications arising out of their use.
- Most methods have side-effects and sterilization programmes are mostly directed at women. The State, until recently, was more concerned about achieving targets. Though many reproductive health programmes in the country are promoting oral pills, condoms and intra-uterine devices (IUDs) in the community, the trials of some hormonal contraceptives (like NETEN and Norplant-6) were conducted among women of lower socio-economic groups in some parts of the country.
- Recently, there was furore over the safety of the injectable, Depo-Provera marketed in India by a multinational company and over the use of Quinacrine which was used to sterilise women.

510 Amniocentesis and Ultrasound are more familiar and popular NRTs which are misused to detect the sex of the foetus followed by abortion if the foetus not of the desired sex. The law against pre-natal diagnostic techniques is difficult to implement, has loopholes and till now has been ineffective. Other techniques like Sonography, Foetoscopy, Needling and Chorionic Villi Biopsy are also used for sex-determination. Even sex-preselection is now offered by some clinics in Bombay and can be done as part of the IVF procedure. Some technologies which are used to assist in labour and childbirth like cesarean sections are being increasingly used by clinics, usually for a profit motive.

511 Ibid.
NRTs are used not only as part of government programmes for population control but are also a part of day to day family life. Not just contraception, but fertility/infertility issues are also important. Infertility is a 'problem' even in an overpopulated country like ours as women pay a huge social cost for childlessness.

Infertility treatment (AI and IVF) has made inroads into the private clinics and hospitals of Delhi and other metropolitan cities. But this treatment is expensive, complicated and has a high failure rate resulting in psychological and physiological problems for women.

The use of these technologies also creates ethical and socio-legal complications. In the United States for instance, kinship relations have been altered in some cases, legal battles over eggs and sperms and complications due to surrogate motherhood are going on. It will not be long before similar problems are faced by our society.

The revised strategy for family planning in India in 1986, made women and children the focus of technological intervention since child spacing through the use of hormonal contraceptives and maternal and child health services became its mainstay.

The relevant socio-economic interventions and health aspects of family planning got relegated to the background. Since the Family Planning Programme experiment with vasectomies was brief, it revived its focus on women, excluded their ill health and dealt with their reproductive capacity by suggesting use of hormonal contraceptives like Depo-Provera, NETEN and Norplant which have a negative impact on women's health.

Hormonal contraceptives are being pushed in the name of a women's right to have more choices, but she has no role in the making of these choices. Research funds are diverted towards surer not safer contraceptive. Technology which are provider controlled and which make women dependent.

The use and trials of the NRTs are considered by some activists as another aspect of violence against women. The effect of NETEN and Norplant, which have been tested, has not been studied on the health of anaemic women and 70 percent of Indian women are known to be anaemic. The fight is not against technology per se but the exploitative social structure that seeks to control women's minds and bodies.

Amniocentesis and sex-preselection technologies have made the situation worse for the girl child. Women who undergo these tests and themselves opt for male children and are victims of socialization which make them internalise the present values of a patriarchal society. Even if the health services improve, it is argued that women will not improve their own health because the body is seen in their own perception as an instrument of wifehood, motherhood and the care often family.

The problem of women's reproductive health in India has to be looked at within a general context of poverty, class and gender inequalities and unequal access to resources. Since reproduction forms a central theme for women's health, male control of women's reproductive life limits women. Medical systems are shaped by professional values controlled by a professional elite who controls and directs the work of large and relatively poorly paid care givers who are mostly women.

COMMENT
The demand for reproductive rights needs to address the ethics involved in the increasing medicalisation of reproduction through technological interventions in pregnancy, conception, child-birth, contraception and menopause. The value-neutrality of these technologies such as in vitro fertilisation, foetal surgeries, sex-detection, sex-pre-selection, caesarean sections, hormonal implants, injectable vaccines and hysterectomies, should be questioned. The demand for reproductive rights has to counter the appropriation of language and the increasing medicalisation of women's bodies by placing the issues of safety, informed choice and ethics in context.

The first global women's health and reproductive rights meeting in Amsterdam marked the birth of the international reproductive rights movement which promoted the belief that women should be subjects not objects of population policies. Terms like 'reproductive rights', 'reproductive health' and 'reproductive self-determination' gained currency during the 1980s. The definition of reproductive rights as given by the Women's Global Network for Reproductive Rights, is as follows: Women's right to decide whether, when and how to have children regardless of nationality, class, age, religion, disability, sexuality or marital status: in the social, economic and political conditions that make such decisions possible. These rights include access to safe, effective contraception and sterilisation and safe legal abortion, safe woman-controlled pregnancy and childbirth; safe effective treatment for the causes of infertility; full information about sexuality and reproduction, about reproductive health and reproductive problems and about benefits and risks about drugs, devices, medical treatment and interventions; and good quality comprehensive reproductive health services that meet women's need and are accessible to women.

The exercise of 'choices' or 'reproductive rights' cannot be seen in isolation from socio-economic, political, cultural and ideological structures. Women not only want to make an informed choice about contraceptives, child-care facilities, a better future for their children and an appropriate constellation of health service, but also want control over their life situation, sustenance, safe workplace, clean drinking water, sanitation, secure living place, gender relations, no violence and no abuse. Women not only need control over their fertility but also over their sexuality and life situation. All these are inseparable preconditions for the exercise for any choice and in that case the claim for reproductive rights is a limited demand. It has the danger of reinforcing the view of all reproductive activity as the especially biologically destined province of women.

Addressing issues of gender-based violence is crucial for attaining reproductive rights. The United Nations Population Fund refers to "Equality and equity for men and women, to enable individuals to make free and informed choices in all spheres of life, free from discrimination based on gender" and "Sexual and reproductive security, including freedom from sexual violence and coercion, and the right to privacy," as part of achieving reproductive rights, and states that the right to liberty and security of the person which is fundamental to reproductive rights obliges states to:

- Take measures to prevent, punish and eradicate all forms of gender-based violence,
• Eliminate female genital mutilation/cutting.

CONCLUSION
The national law against Pre-natal Diagnostic Technique (Regulation and Misuse) Act, 1994 is a positive step which enabled the National Human Rights Commission to direct the Medical Council of India to take action against doctors found abusing pre-natal diagnostic techniques. There is a need for sustained campaigning and active monitoring of the Act. State Governments should realise the importance and priority of the law and not merely treat it with their usual non complacency. Structures for implementation of the 1194 law need to be created at the district level. Volunteers have to be actively mobilised to monitor registration and functioning of sex determination clinics at different districts. Cases have to be filed against the violators and social consciousness has to be raised against the crime. Impotently enough, the medical community itself should endorse intolerance to its members who assist in sex selective abortion. Media also plays an important role as an agent of social change. It can create positive role models, bring about new precedents, and set examples, which the masses can imbibe into their daily life. It is media that can emphasize the criminal nature of such technologies and inform about its scope as well as its horrifying consequences for the nation. The government can make a difference at the policy level through interventions by the organs of the state. The effectiveness of all the Acts and laws depends on the proper implementation. Therefore, the government should take measures to see that laws are implemented in a proper manner. NGOs are important agents in research and sensitization on burning issues by gathering and then disseminating information on the problem they give rise to the social awareness in the general public. The long term task is to foster a culture of goodness and human dignity which inoculates individuals and institutions against the infection of despicable human practice. The role Akal Takht in Punjab is worth mentioning. The Apex religious organisation of the Sikhs have issued directions to the community not to indulge in inhuman and immoral practice of female foeticide and to take stern action against those who will violate this direction that is offenders would be excommunicated. Almost all communities have organisations similar to the Akal Takht if they made a concerted effort to educate their flock and if need be boycott those guilty of this crime. A radical social change could come about. All the practices leading to the violation of a woman’s dignity should be eradicated from their roots. Only then we can make this society a better place to live in.

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EMPERICAL RESEARCH METHOD:
OSERVATION, INTERVIEW,
QUESTIONNAIRE, SURVEY

By Varun Joshi
From UPES, Dehradun

I. INTRODUCTION

Empirical research is research using empirical evidence. It is a way of gaining knowledge by means of direct and indirect observation or experience. Empiricism values such research more than other kinds. Empirical evidence (the record of one's direct observations or experiences) can be analyzed quantitatively or qualitatively. Quantifying the evidence or making sense of it in qualitative form, a researcher can answer empirical questions, which should be clearly defined and answerable with the evidence collected (usually called data). Research design varies by field and by the question being investigated. Many researchers combine qualitative and quantitative forms of analysis to better answer questions which cannot be studied in laboratory settings, particularly in the social sciences and in education.

In some fields, quantitative research may begin with a research question (e.g., "Does listening to vocal music during the learning of a word list have an effect on later memory for these words?") which is tested through experimentation. Usually, a researcher has a certain theory regarding the topic under investigation. Based on this theory, statements or hypotheses will be proposed (e.g., "Listening to vocal voice has a negative effect on learning a word list."). From these hypotheses, predictions about specific events are derived (e.g., "People who study a word list while listening to vocal music will remember fewer words on a later memory test than people who study a word list in silence."). These predictions can then be tested with a suitable experiment. Depending on the outcomes of the experiment, the theory on which the hypotheses and predictions were based will be supported or not, or may need to be modified and then subjected to further testing.

II. TERMINOLOGY

The term empirical was originally used to refer to certain ancient Greek practitioners of medicine who rejected adherence to the dogmatic doctrines of the day, preferring instead to rely on the observation of phenomena as perceived in experience. Later empiricism referred to a theory of knowledge in philosophy which adheres to the principle that knowledge arises from experience and evidence gathered specifically using the senses. In scientific use, the term empirical refers to the gathering of data using only evidence that is observable by the senses or in some cases using calibrated scientific instruments. What early philosophers described as empiricist and empirical research have in common is the dependence on observable data to formulate and test theories and come to conclusions.

III. USAGE

The researcher attempts to describe accurately the interaction between the instrument (or the human senses) and the entity being observed. If instrumentation is involved, the researcher is expected to calibrate his/her instrument by applying it
to known standard objects and documenting the results before applying it to unknown objects. In other words, it describes the research that has not taken place before and their results.

In practice, the accumulation of evidence for or against any particular theory involves planned research designs for the collection of empirical data, and academic rigor plays a large part of judging the merits of research design. Several typologies for such designs have been suggested, one of the most popular of which comes from Campbell and Stanley. They are responsible for popularizing the widely cited distinction among pre-experimental, experimental, and quasi-experimental designs and are staunch advocates of the central role of randomized experiments in educational research.

IV. OBSERVATION

Observation is the active acquisition of information from a primary source. In living beings, observation employs the senses. In science, observation can also involve the recording of data via the use of instruments. The term may also refer to any data collected during the scientific activity. Observations can be qualitative, that is, only the absence or presence of a property is noted, or quantitative if a numerical value is attached to the observed phenomenon by counting or measuring.

The scientific method requires observations of nature to formulate and test hypotheses it consists of these steps:

1. Asking a question about a natural phenomenon
2. Making observations of the phenomenon
3. Hypothesizing an explanation for the phenomenon
4. Predicting logical, observable consequences of the hypothesis that have not yet been investigated
5. Testing the hypothesis’ predictions by an experiment, observational study, field study, or simulation
6. Forming a conclusion from data gathered in the experiment, or making a revised/new hypothesis and repeating the process
7. Writing out a description of the method of observation and the results or conclusions reached
8. Review of the results by peers with experience researching the same phenomenon

Observations play a role in the second and fifth steps of the scientific method. However the need for reproducibility requires that observations by different observers can be comparable. Human sense impressions are subjective and qualitative, making them difficult to record or compare. The use of measurement developed to allow recording and comparison of observations made at different times and places, by different people. Measurement consists of using observation to compare the phenomenon being observed to a standard unit. The standard unit can be an artefact, process, or definition which can be duplicated or shared by all observers. In measurement the number of standard units which is equal to the observation is counted. Measurement reduces an observation to a
number which can be recorded, and two observations which result in the same number are equal within the resolution of the process. Senses are limited, and are subject to errors in perception such as optical illusions. Scientific instruments were developed to magnify human powers of observation, such as weighing scales, clocks, telescopes, microscopes, thermometers, cameras, and tape recorders, and also translate into perceptible form events that are unobservable by human senses, such as indicator dyes, voltimeters, spectrometers, infrared cameras, oscilloscopes, interferometers, Geiger counters, and radio receivers. One problem encountered throughout scientific fields is that the observation may affect the process being observed, resulting in a different outcome than if the process was unobserved. This is called the observer effect. For example, it is not normally possible to check the air pressure in an automobile tire without letting out some of the air, thereby changing the pressure. However, in most fields of science it is possible to reduce the effects of observation to insignificance by using better instruments.

Considered as a physical process itself, all forms of observation (human or instrumental) involve amplification and are thermodynamically irreversible processes, increasing entropy.

V. INTERVIEW

An interview is a conversation where questions are asked and answers are given. In common parlance, the word "interview" refers to a one-on-one conversation with one person acting in the role of the interviewer and the other in the role of the interviewee. The interviewer asks questions, the interviewee responds, with participants taking turns talking. Interviews usually involve a transfer of information from interviewee to interviewer, which is usually the primary purpose of the interview, although information transfers can happen in both directions simultaneously. One can contrast an interview which involves bi-directional communication with a one-way flow of information, such as a speech or oration.

Interviews usually take place face to face and in person, although modern communications technologies such as the Internet have enabled conversations to happen in which parties are separated geographically, such as with videoconferencing software, and of course telephone interviews can happen without visual contact. Interviews almost always involve spoken conversation between two or more parties, although in some instances a "conversation" can happen between two persons who type questions and answers back and forth. Interviews can range from unstructured or free-wheeling and open-ended conversations in which there is no predetermined plan with prearranged questions, to highly structured conversations in which specific questions occur in a specified order. They can follow diverse formats; for example, in a ladder interview, a respondent's answers typically guide subsequent interviews, with the object being to explore a respondent's subconscious motives. Typically the interviewer has some way of recording the information that is gleaned from the interviewee, often by writing with a pencil and paper, sometimes transcribing with a video or audio recorder, depending on the context and extent of information and the length of the interview.
Interviews have duration in time, in the sense that the interview has a beginning and an ending. Interviews can happen in a wide variety of contexts:

- **Employment.** Interviews in an employment context are typically called job interviews which describe a formal consultation for the purpose of evaluating the qualifications of the interviewee for a specific position. Interviews are seen as a useful tool in assessing qualifications. A specific type of job interview is a case interview in which the applicant is presented with a question or task or challenge, and asked to resolve the situation. Sometimes to prepare for job interviews, candidates are treated to a mock interview as a training exercise to prepare the respondent to handle questions in the subsequent 'real' interview. Sometimes the interviews happen in several waves, with the first interview sometimes being called a screening interview which is a shorter length interview, followed by more in-depth interviews later on, usually by company personnel who can ultimately hire the applicant. Technology has enabled new possibilities for interviewing; for example, video phoning technology has enabled applicants to interview for jobs despite being in different cities or countries than the interviewer.

- **Psychology.** Psychologists use a variety of interviewing methods and techniques to try to understand and help their patients. In a psychiatric interview, a psychiatrist or psychologist or nurse asks a battery of questions to complete what is called a psychiatric assessment. Sometimes two people are interviewed by an interviewer, with one format being called couple interviews. Criminologists and detectives sometimes use cognitive interviews on eyewitnesses and victims to try to ascertain what can be recalled specifically from a crime scene, hopefully before the specific memories begin to fade in the mind.

- **Research.** In marketing research and academic research, interviews are used in a wide variety of ways. Interviews are often used in qualitative research in which firms try to understand how consumers think. Consumer research firms sometimes use computer-assisted telephone interviewing to randomly dial phone numbers to conduct highly structured telephone interviews, with scripted questions and responses entered directly into the computer.

- **Journalism and other media.** Typically, reporters covering a story in journalism conduct interviews over the phone and in person to gain information for subsequent publication. Reporters can interview political candidates on television shows. In a talk show, a radio or television "host" interviews one or more people, with the choice of topic usually being chosen by the host, sometimes for the purposes of entertainment, sometimes for informational purposes. Such interviews are often recorded and some of them can be released on an interview disc.

- **Other situations.** Sometimes college representatives or alumni conduct college interviews with prospective students as a way of assessing a student's suitability while offering the student a chance to learn more about a college. Some services specialize in coaching people for interviews. Government officials may conduct interviews with prospective foreign students before allowing them to study in the nation.
VI. QUESTIONNAIRE

A questionnaire is a research instrument consisting of a series of questions (or other types of prompts) for the purpose of gathering information from respondents. The questionnaire was invented by the Statistical Society of London in 1838. Although questionnaires are often designed for statistical analysis of the responses, this is not always the case.

Questionnaires have advantages over some other types of surveys in that they are cheap, do not require as much effort from the questioner as verbal or telephone surveys, and often have standardized answers that make it simple to compile data. However, such standardized answers may frustrate users. Questionnaires are also sharply limited by the fact that respondents must be able to read the questions and respond to them. Thus, for some demographic groups conducting a survey by questionnaire may not be concrete.

A distinction can be made between questionnaires with questions that measure separate variables, and questionnaires with questions that are aggregated into either a scale or index. Questionnaires with questions that measure separate variables could for instance include questions on:

- preferences (e.g. political party)
- behaviours (e.g. food consumption)
- facts (e.g. gender)

Questionnaires with questions that are aggregated into either a scale or index include for instance questions that measure:

- latent traits
- attitudes (e.g. towards immigration)
- an index (e.g. Social Economic Status)

Usually, a questionnaire consists of a number of questions that the respondent has to answer in a set format. A distinction is made between open-ended and closed-ended questions. An open-ended question asks the respondent to formulate his own answer, whereas a closed-ended question has the respondent pick an answer from a given number of options. The response options for a closed-ended question should be exhaustive and mutually exclusive. Four types of response scales for closed-ended questions are distinguished:

- Dichotomous, where the respondent has two options
- Nominal-polychromous, where the respondent has more than two unordered options
- Ordinal-polychromous, where the respondent has more than two ordered options
- (Bounded)Continuous, where the respondent is presented with a continuous scale

A respondent's answer to an open-ended question is coded into a response scale afterwards. An example of an open-ended question is a question where the testier has to complete a sentence (sentence completion item).

In general, questions should flow logically from one to the next. To achieve the best response rates, questions should flow from the least sensitive to the most sensitive, from the factual and behavioural to the attitudinal, and from the more general to the more specific.

There typically is a flow that should be followed when constructing a questionnaire in regards to the order that the questions are asked. The order is as follows:

1. Screens
2. Warm-ups
3. Transitions
4. Skips
5. Difficult
6. Classification
Screens are used as a screening method to find out early whether or not someone should complete the questionnaire. Warm-ups are simple to answer, help capture interest in the survey, and may not even pertain to research objectives. Transition questions are used to make different areas flow well together. Skips include questions similar to "If yes, then answer question 3. If no, then continue to question 5." Difficult questions are towards the end because the respondent is in "response mode." Also, when completing an online questionnaire, the progress bars let the respondent know that they are almost done so they are more willing to answer more difficult questions. Classification or demographic question should be at the end because typically they can feel like personal questions which will make respondents uncomfortable and not willing to finish survey.

While questionnaires are inexpensive, quick, and easy to analyze, often the questionnaire can have more problems than benefits. For example, unlike interviews, the people conducting the research may never know if the respondent understood the question that was being asked. Also, because the questions are so specific to what the researchers are asking, the information gained can be minimal. Often, questionnaires such as the Myers-Briggs Type Indicator, give too few options to answer; respondents can answer either option but must choose only one response. Questionnaires also produce very low return rates, whether they are mail or online questionnaires. The other problem associated with return rates is that often the people who do return the questionnaire are those who have a really positive or a really negative viewpoint and want their opinion heard. The people who are most likely unbiased either way typically don't respond because it is not worth their time.

Some questionnaires have questions addressing the participant’s gender. Seeing someone as male or female is something we all do unconsciously, we don’t give much important to one’s sex or gender as most people use the terms ‘sex’ and ‘gender’ interchangeably, unaware that they are not synonyms. Gender is a term to exemplify the attributes that a society or culture constitutes as masculine or feminine. Although your sex as male or female stands at a biological fact that is identical in any culture, what that specific sex means in reference to your gender role as a ‘woman’ or ‘man’ in society varies cross culturally according to what things are considered to be masculine or feminine. The survey question should really be what your sex is. Sex is traditionally split into two categories, which we typically don’t have control over, you were either born a girl or born a boy and that’s decided by nature. There's also the intersex population which is disregarded in the North American society as a sex. Not many questionnaires have a box for people who fall under Intersex. These are some small things that can be misinterpreted or ignored in questionnaires.

More generally, one key concern with questionnaires is that there may contain quite large measurement errors. These errors can be random or systematic. Random errors are caused by unintended mistakes by respondents, interviewers and/or coders. Systematic error can occur if there is a systematic reaction of the respondents to the scale used to formulate the survey question. Thus, the exact formulation of a survey
question and its scale are crucial, since they affect the level of measurement error. Different tools are available for the researchers to help them decide about this exact formulation of their questions, for instance estimating the quality of a question using MTMM experiments or predicting this quality using the Survey Quality Predictor software (SQP). This information about the quality can also be used in order to correct for measurement errors.

Further, if the questionnaires are not collected using sound sampling techniques, often the results can be non-representative of the population—as such a good sample is critical to getting representative results based on questionnaires.

VII. SURVEY

A field of applied statistics of human research surveys, survey methodology studies the sampling of individual units from a population and the associated collection techniques, such as questionnaire construction and methods for improving the number and accuracy of responses to surveys. Survey methodology includes instruments or procedures that ask one or more questions that may, or may not, be answered.

Statistical surveys are undertaken with a view towards making statistical inferences about the population being studied, and this depends strongly on the survey questions used. Polls about public opinion, public health surveys, market research surveys, government surveys and censuses are all examples of quantitative research that use contemporary survey methodology to answer questions about a population. Although censuses do not include a "sample," they do include other aspects of survey methodology, like questionnaires, interviewers, and nonresponsive follow-up techniques. Surveys provide important information for all kinds of public information and research fields, e.g., marketing research, psychology, health professionals and sociology.

A single survey is made of at least a sample (or full population in the case of a census), a method of data collection (e.g., a questionnaire) and individual questions or items that become data that can be analyzed statistically. A single survey may focus on different types of topics such as preferences (e.g., for a presidential candidate), opinions (e.g., should abortion be legal?), behaviour (smoking and alcohol use), or factual information (e.g., income), depending on its purpose. Since survey research is almost always based on a sample of the population, the success of the research is dependent on the representativeness of the sample with respect to a target population of interest to the researcher. That target population can range from the general population of a given country to specific groups of people within that country, to a membership list of a professional organization, or list of students enrolled in a school system (see also sampling (statistics) and survey sampling). The persons replying to a survey are called respondents, and depending on the questions asked their answers may represent themselves as individuals, their households, employers, or other organization they represent.

Survey methodology as a scientific field seeks to identify principles about the sample
design, data collection instruments, statistical adjustment of data, and data processing, and final data analysis that can create systematic and random survey errors. Survey errors are sometimes analyzed in connection with survey cost. Cost constraints are sometimes framed as improving quality within cost constraints, or alternatively, reducing costs for a fixed level of quality. Survey methodology is both a scientific field and a profession, meaning that some professionals in the field focus on survey errors empirically and others design surveys to reduce them. For survey designers, the task involves making a large set of decisions about thousands of individual features of a survey in order to improve it.

The most important methodological challenges of a survey methodologist include making decisions on how to:

» Identify and select potential sample members.

» Contact sampled individuals and collect data from those who are hard to reach (or reluctant to respond).

» Evaluate and test questions.

» Select the mode for posing questions and collecting responses.

» Train and supervise interviewers (if they are involved).

» Check data files for accuracy and internal consistency.

» Adjust survey estimates to correct for identified errors.

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I. INTRODUCTION

The case debated on measure of the damages on breach of the contract in sale of goods - There was foreseeable consequence of breach in the knowledge of the parties - It was held that two principles in relevance to the compensation for loss of damage caused by the breach of the contract as per Section 73 of the Indian Contract Act, 1872, would be that the person who has proved a breach of a bargain to supply what he contracted to get was to be place, as far as the money could do it as if the contract had been performed - The reasonable steps should be taken to mitigate the loss consequent to the breach and debars him from claiming any part of the damage which was due to the person's neglect to take such steps.

II. FACTS

A suit was filed by firm Messrs. Harishchandra Dwarkadas (hereinafter called the respondent) against the appellant-firm Messrs. Murlidhar Chiranjilal and one Babulal. The case of the respondent was that a contract had been entered into between the appellant and the respondent through Babulal for sale of certain canvas for Re. 1 per yard. The delivery was to be made through railway receipt for Calcutta for Kanpur. The cost of transport from Kanpur to Calcutta and the labour charges in that connection were to be borne by the respondent. It was also agreed that the railway receipt would be delivered on August 5, 1957. The appellant however failed to deliver the railway receipt and informed the respondent on August 8, 1947, that as booking from Kanpur to Calcutta was closed the contract had become impossible of performance; consequently the appellant cancelled the contract and returned the advance that had been received. The respondent did not accept that the contract had become impossible of performance and informed the appellant that it had committed a breach of the contract and was thus liable in damages. After further exchange of notices between the parties, the present suit was filed in November, 1947. Written Dagduas were filed both by the appellant and Babulal. The contention of Babulal was that the contract had become incapable of performance and was therefore rightly rescinded. Further Babulal contended that he was not in any case liable to pay any damages. The appellant on the other hand denied all knowledge of the contract and did not admit that it was liable to pay any damages. Certain other pleas were raised by the appellant with which we are however not concerned in the present appeal.

III. ARGUMENT ADVANCED BY APPELLANT

The contention on behalf of the appellant is that the contract was for delivery for Kanpur and the respondent had therefore to prove the rate of plain (not colored) canvas at Kanpur on or about the date of breach to be entitled to any damages at all. The respondent admittedly has not proved the rate of such canvas prevalent in Kanpur on or about the date of breach and therefore it was not entitled to any damages at all, for there is no measure for arriving at the quantum of damages on the record in this case. Where
goods are available in the market, it is the difference between the market price on the date of the breach and the contract price which is the measure of damages. The appellant therefore contends that as it is not the case of the respondent that similar canvas was not available in the market at Kanpur on or about the date of breach, it was the duty of the respondent to buy the canvas in Kanpur and rail it for Calcutta and if it suffered any damages because of the rise in price over the contract price on that account it would be entitled to such damages. But it has failed to prove the rate of similar canvas in Kanpur on the relevant date. There is thus no way in which it can be found that the respondent suffered any damages by the breach of this contract.

IV. ARGUMENT ADVANCED BY RESPONDENT

It is urged on behalf of the respondent that the seller knew that the goods were to be sent to Calcutta; therefore it should be presumed to know that the goods would be sold in Calcutta and any loss of profit to the buyer resulting from the difference between the rate in Calcutta on the date of the breach and the contract rate would be the measure of damages. Now there is no dispute that the buyer had purchased canvas in this case for re-sale; but we cannot infer from the mere fact that the goods were to be booked for Calcutta that the seller knew that the goods were for re-sale in Calcutta only. As a matter of fact it cannot be denied that it was open to the buyer in this case to sell the railway receipt as soon as it was received in Kanpur and there can be no inference from the mere fact that the goods were to be sent to Calcutta that they were meant only for sale in Calcutta. It was open to the buyer to sell them anywhere it liked. Therefore this is not a case where it can be said that the parties knew when they made the contract that the goods were meant for sale in Calcutta alone and thus the difference between the price in Calcutta at the date of the breach and the contract price would be the measure of damages as the likely result from the breach. The contract was for delivery for Kanpur and was an ordinary contract in which it was open to the buyer to sell the goods where it liked.

V. ISSUE OF THE CASE

Three main questions arose for determination on the pleadings of the parties. The first was whether Babulal had acted as agent of the appellant in the matter of this contract; the second was whether the contract had become impossible of performance because the booking of goods from Kanpur to Calcutta was stopped; and the last was whether the respondent was entitled to damages at the rate claimed by it.

VI. JUDGMENT OF TRIAL COURT

The trial court held that Babulal had acted as the agent of the appellant in the matter of the contract and the appellant was therefore bound by it. If further held that the contract had become impossible of performance. Lastly it held that it was the respondent’s duty when the appellant had failed to perform the contract to buy the goods in Kanpur and the respondent had failed to prove the rate prevalent in Kanpur on the date of the breach (namely, August 5, 1947) and therefore was not entitled to any damages. On this view the suit was dismissed.
VII. JUDGMENT GIVEN BY HIGH COURT

The respondent went in appeal to the High Court and the two main questions that arose there were about the impossibility of the performance of the contract and the liability of the appellant for damages.

The quantum of damages in a case of this kind has to be determined under s. 73 of the Contract Act, No. IX of 1872. The relevant part of it is as follows:-

"When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it......."

"Explanation - In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

The two principles on which damages in such cases are calculated are well-settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debar him from claiming any part of the damage which is due to his neglect to take such steps: (British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London [1912] A.C. 673. These two principles also follow from the law as laid down in s. 73 read with the Explanation thereof. If therefore the contract was to be performed at Kanpur it was the respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be reimbursed for the loss. Even if the respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things.

But the learned counsel for the respondent relies on that part of s. 73 which says that damages may be measured by what the parties knew when they made the contract to be likely to result from the breach of it. It is contended that the contract clearly showed that the goods were to be transported to and sold in Calcutta and therefore it was the price in Calcutta which would have to be taken into account in arriving at the measure of damages for the parties knew when they made the
contract that the goods were to be sold in Calcutta.

The High Court held that the contract had not become impossible of performance as it had not been proved that the booking between Kanpur and Calcutta was closed at the relevant time. It further held that the respondent was entitled to damages on the basis of the rate prevalent in Calcutta on the date of breach and after making certain deductions decreed the suit for Rs. 16,946. Thereupon there was an application by the appellant for a certificate to appeal to this Court, which was rejected. This was followed by an application to this Court for special leave which was granted; and that is how the matter has come up before us.

VIII. CONCLUSION

In these circumstances this is not a case where it can be said that the parties when they made the contract knew that the likely result of breach would be that the buyer would not be able to make profit in Calcutta. This is a simple case of purchase of goods for re-sale anywhere and therefore the measure of damages has to be calculated as they would naturally arise in the usual course of things from such breach. That means that the respondent had to prove the market rate at Kanpur on the date of breach for similar goods and that would fix the amount of damages, in case that rate had gone above the contract rate on the date of breach. We are therefore of opinion that this is not a case of the special type to which the words "which naturally arose in the usual course of things from such breach" appearing in s. 73 of the Contract Act apply. This is an ordinary case of contract between traders which is covered by the words "which the parties knew, when they made the contract, to be likely to result from the breach of it" appearing in s. 73 of the Contract Act.
chance that the buyers could re-sell the cargo before delivery and not retain it themselves.

The second case on which reliance was placed is Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 1 All E.R. 997. That was a case of a boiler being sold to a laundry and it was held that damages for loss of profit were recoverable if it was apparent to the defendant as reasonable persons that the delay in delivery was liable to lead to such loss to the plaintiffs. These two cases exemplify that provision of s. 73 of the Contract Act, which provides that the measure of damages in certain circumstances may be what the parties knew when they made the contract to be likely to result from the breach of it. But they are cases of a special type; in one case the parties knew that goods purchased were likely to be re-sold before delivery and therefore any loss by the breach of contract eventually may include loss that may have been suffered by the buyers because of the failure to honour the intermediate contract of re-sale made by them; in the other the goods were purchased by the party for his own business for a particular purpose which the sellers were expected to know and if any loss resulted from the delay in the supply the sellers would be liable for that loss also, if they had knowledge that such loss was likely to result. We may in this connection refer to the following observations in Chao and others v. British Traders and Shippers Ltd. [1954] 1 All E.R. 779, which are apposite to the facts of the parties case:

"It is true that the defendants knew that the plaintiffs were merchants and, therefore, had bought for re-sale, but everyone who sells to a merchant knows that he has bought for re-
VOLENTI NON FIT INJURIA

By Varun Joshi
From UPES, Dehradun

I. Introduction

When a person gives his consent to suffer harm upon himself, he has no remedy for that in tort. If, the plaintiff voluntarily agrees to suffer damage, he is no allowed to complain and his consent serves as a defense for the defendant. Consent to suffer harm can be express or implied. For an instance, if a person invites somebody to his house, he cannot sue him for trespass, nor can anyone sue the surgeon after submitting to a surgical operation because he has expressively consented to these acts. Similarly, no action for defamation can be brought by a person who agrees to the publication of a matter defamatory of himself.

Many times the consent to suffer harm can be implied also. A person going on a highway is presumed to consent to the risk of pure accident. In the same way, a spectator at a cricket match cannot recover damages if he is hit by the ball.

For the defense of volenti non fit injuria to be available, the act causing harm must not go beyond a certain limit. A player in a game has no right of action if he is hit while the game is being lawfully played. But if there is a deliberate injury caused by another player, the defense of volenti non fit injuria cannot be pleaded. Similarly, if a surgeon negligently performs an operation, he cannot plea the defense.

In Hall v. Brooklands Auto Racing Club, the plaintiff was a spectator at a motor car race being held at Brooklands on a track owned by the defendant company. During the race, there was a collision between two cars, one of which was thrown among the spectators, thereby injuring the plaintiff. It was held that the plaintiff impliedly took the risk of such injury, the danger being inherent in the sports which any spectator could foresee, the defendant was not liable.

In Padma vati v. Dugganaika, while the driver was taking the jeep for filling petrol in the tank, two strangers took lift in the jeep. Suddenly one of the bolts fixing the right front wheel to the axle gave way toppling the jeep. The two strangers were thrown out and sustained injuries, and one of them died as a consequence of the same.

It was held that neither the driver nor his master could be made liable, firstly, because it was a case of sheer accident and, secondly, the strangers had voluntarily got into the jeep and as such, the principle of volenti non fit injuria was applicable into this case.

The defense of volenti non fit injuria was successfully pleaded in Thomas v. Quartermaine. There, the plaintiff, an employee in the defendant’s brewery, was trying to remove a lid from a boiling vat. The lid was stuck and by the plaintiff’s extra pull to it, it came off suddenly and the plaintiff fell back into the cooling vat which contained scalding liquid. The plaintiff was severely

512 Holmes v. Marther 1875
513 1933 1 KB 205
514 1975 ACJ 222
515 (1887) 18 QBD 685
injured. The majority of the Court of Appeal held that the defendant was not liable because the danger was visible and the plaintiff appreciated and voluntarily encountered the same.

In *Ilott v. Wilkes*, a trespasser, who knew about the presence of spring gun on a land, could not recover damages when he was shot by a spring gun. Similarly, damages caused to a trespasser by broken glass or spikes on a wall, or a fierce dog, is not actionable. If someone goes and watch a fire-work maker for my own amusement, and the shop is blown up, it seems he shall have no cause of action even if he was handling his material unskillfully.

II. The Consent must Free

For the defense of volenti non fit injuria to be available, it is necessary to show that the plaintiff’s consent to suffer harm was free. If the consent of the plaintiff has been obtained by fraud or under compulsion or under some mistake, such consent does not serve as a defense. Moreover, the act done by the defendant must be the same for which the consent is given. Thus, if you invite some person to your house, you cannot sue him for trespass when he enters your premises. But if the visitor goes to place for which no consent is given, he will be liable for trespass.

For example, if a guest is requested to sit in the drawing room and without any authority or justification, he enters the bedroom, he would be liable for trespass and he cannot take the defense of your consent to his visit to your house. Similarly, a postman has implied consent of the resident of a building to go up to a particular place to deliver the dak. For his entry up to that particular point, he cannot be made liable. If the postman goes beyond the limit and enters the rooms of the house, he would be liable for the trespass.

In *Lakshmi Rajan v. Malar Hospital Ltd.*, the complaint, a married woman, aged 40 years, noticed development of a painful lump in her breast. The lump had no effect on her uterus, but during surgery, uterus was removed without any justification. It was held that the opposite party, i.e., the hospital, was liable for deficiency in services. It was also held that the patient’s consent for the operation did not imply her consent to the removal of the uterus.

When a person is incapable of giving his consent because of his insanity or minority, consent of such person’s parents or guardians is sufficient. Thus, a surgeon performing a surgical operation of a child with the guardian’s consent is protected even though the child protests against the operations.

III. Consent obtained by Fraud

Consent obtained by fraud is not real and that does not serve as a good defense. In the Irish case of *Hegarty v. Shine*, it has, however, been held that mere concealment of facts may not be such a fraud as to vitiate consent.

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516(1820) 3 B & Ald 304 m
5171998

51814 COX C.C 145 (1878)
There, the plaintiff’s paramour had infected her with venereal disease and she, therefore, brought an action for assault. The action failed partly on the ground that mere non-disclosure of the disease by the plaintiff was not such a fraud as to vitiate consent, and partly on the ground ex turpi causa non oritur action. (It means that from an immoral cause, no action arises). In some criminal cases, it has been held that mere submission to an intercourse does not imply consent, if the submission had been by fraud which induced mistake in the mind of the victim as to the real nature of the act done.

Thus, in *R. v. Williams*, the accused, a music teacher, was held guilty of rape when he had sexual intercourse with a girl-student of 16 years of age under the pretence that his act was an operation to improve her voice. If, on the other hand, the mistake which the fraud induces is not such which goes to the real nature of the act done, it cannot be considered to be an element as vitiating the consent. In *R. v. Clarence*, it was held that a husband was not liable for an offence when the intercourse with his wife infected her with venereal disease, even though the husband had failed to make her aware of his condition. In *William’s case*, the victim misunderstood the very nature of the act which was being done. She had consented to the act of accused believing that to be a surgical operation. In the other case, on the other hand, the wife was fully aware of the nature of the act that was being done, although she was unaware as regards the consequences of the act done. Since she gave her consent knowing full well the nature of the act done, the consent was enough to save her husband from liability.

**IV. Consent obtained under Compulsion**

Consent given under circumstances when the person does not have freedom of choice is not the proper consent. A person may be compelled by some situation to knowingly undertake some risky work which, if he had a free choice, he would not have undertaken. That situation generally arises in master-servant relationship. The servant may sometimes be faced with the situation of either accepting the risky work or losing the job. If he agrees to the first alternative, it does not necessarily imply has agreed to suffer the consequences of the risky job which he has undertaken. Thus, “a man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice is conditional, so that he may be able to choose wisely, but the absence of any feeling of constraint so that nothing shall interferewith the freedom of his will.”

Thus, there is no volenti non fit injuria when a servant is compelled to do some work in spite of his protests. But, if a workman adopts a risky method of work, not because of any compulsion of his employer but of his own free will, he can be met with the defense of volenti non fit injuria.

**V. Mere Knowledge does not imply Consent**

For the maxim of volenti non fit injuria to be applicable, two points have to be proved—

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519 1923
520 1888

521 Bowater v. Rowley Regis Corporation 1944
i. The plaintiff knew that the risk is there.

ii. He, knowing the same, agreed to suffer harm

If only first of these point is present, i.e. there is only the knowledge of the risk, and it is no defense because the maxim is volenti non fit injuria. Merely because the plaintiff knows of the harm does not imply that he assent to suffer it.

In Bowater v. Rowley Regis Corporation, the plaintiff, a cart driver, was asked by the defendant’s foreman to drive a horse which to the knowledge of both was liable to bolt. The plaintiff protested but ultimately took out the horse in obedience to order. The horse bolted and the plaintiff was injured thereby.

Held, the maxim volenti non fit injuria did not apply and the plaintiff was entitled to recover. Goddard L.J., said: “The maxim volenti non fit injuria is one which in the case of master servant is to be applied with extreme caution. Indeed, I would say that it can hardly ever be applicable where the act to which the servant is said to be volens arises out of his ordinary duty, unless the work for which he is engaged is one in which danger is necessarily involved. A man, however, whose occupation is not one of a nature inherently dangerous but who is asked or required to undertake a risky operation is in a different position….it is not enough to show that whether under protest or not, he obeyed an order or complied with a request which he might have declined as one which was not bound to obey or to comply with. It must be shown that he agreed that what risk there was should lie on him.”

In Smith v. Baker, the plaintiff was a workman employed by the defendants on working a drill for the purpose of cutting a rock. By the help of a crane, stones were being conveyed from one side to other, and each time when the stones conveyed, the crane passed from the over the plaintiff’s head. While he was busy in his work, a stone fell from the crane and injured him. The employers were negligent in not warning him at the moment of a recurring danger, although the plaintiff had been generally aware of the risk.

It was held by the House of Lords that as there was mere knowledge of risk without the assumption of it, the maxim volenti non fit injuria did not apply, and the defendant was liable.

If a workman ignores the employer’s instructions and contravenes statutory provisions thereby causing damage to him, he can certainly be met with the defense of volenti non fit injuria. The case of Imperial Chemical Industries v. Shatwell illustrates the point. In that case, two brothers, George Shatwell and James, had been working in the defendant’s quarry. They tried to test some detonators without taking requisite precautions and their act was in contravention of statutory provisions also the employer’s orders in the matter. The same resulted in the explosion causing an injury to the plaintiff, George Shatwell. He brought an action against the defendants on the ground that his brother was equally responsible with him for the accident and the defendant was vicariously liable for his brother’s conduct. One of the defenses pleaded by the defendant was volenti non fit injuria. The plaintiff argued that the defense of volenti non fit

522 Supra 10
523 1891
524 1965
injuria is not applicable where there is a breach of statutory obligation. The House of Lords, however, rejected the plaintiff’s plea and granted the defense of volenti non fit injuria. Lord Reid said: “I can find no reason at all why the facts that these two brothers agreed to commit an offence by contravening a statutory prohibition imposed on them as well as agreeing to defy their employer’s order should affect the application of the principle volenti non fit injuria either to an action by one of them against the other or to an action by one against the employer based on his vicarious responsibility for the conduct of the other.

In Dann v. Hamilton, a lady, knowing that the driver of the car was drunk chose to travel in it instead of an omnibus. Due to the driver’s negligent driving, an accident was caused resulting in the death of the driver himself and injuries of the lady passenger. In an action by the lady passenger for such injuries against the representatives of the driver, the defense of volenti non fit injuria was pleaded but the same was rejected and the lady was held entitled to claim compensation. The reason why the defense of volenti non fit injuria was considered not to be applicable was that the degree of intoxication of the driver was not to such an extent that taking a lift could deemed to be consenting to an obvious danger. In the words of Asquith J.:”There may be cases in which the drunkenness of the driver at the material time is so extreme and so glaring that to accept a life from him is so like engaging in an intrinsically and obviously dangerous occupation, intermeddling with an unexploded bomb or walking on the edge of an unfenced cliff. It is not necessary to decide whether in such a case the maximvolenti non fit injuria would apply, for in the present case. I find as a fact that the driver’s degree of intoxication fell short of this degree, I, therefore, conclude that the defense fails and the claim succeeds.

VI. Negligence of the Defendant

For the defense to be available, it is further necessary that the act done must be the same to which the consent has been given. Thus, if while playing hockey, a player is injured while the game is being played, he can’t claim anything from any other player because he deemed to have consented to the incidents of the game he has gone to play. In case, another player negligently hits him with a stick, he can definitely make the other player liable and he can’t plead volenti non fit injuria because the injured player never consented to an injury being caused in that matter.

In Slater v. Clay Cross Co. Ltd, the plaintiff was struck and injured by a train driver by the defendant’s servant while she was walking along a narrow tunnel on a railway track which was owned and occupied by the defendant. The company knew that the tunnel was used by the members of the public and had instructed its drivers to whistle and slow down when entering the tunnel. The accident had occurred because of the driver’s negligence in not observing those instructions. Held, that the defendant was liable. Denning L.J., said:”It seems to me that when this lady walked in the tunnel, although it may be said that she voluntarily took the risk of danger from the running of the railway

\footnote{1939} \footnote{1956}
in the ordinary and accustomed way, nevertheless she did not take the risk of negligence by the driver. Her knowledge of the danger is a factor in contributory negligence but is not a bar to the action.”

VII. **In Rescue Cases**

‘Rescue cases’ form an exception to the application of the doctrine of volenti non fit injuria. When the plaintiff voluntarily encounters a risk to rescue somebody from an imminent danger created by the wrongful act of the defendant, he cannot be met with the defense of volenti non fit injuria.

**Haynes v. Harwood** 527 is an important authority on the point. In that case, the defendant’s servant left a two-horse van unattended in a street. A boy threw a stone on the horses and they bolted, causing grave danger to women and children on the road. A police constable, who was on duty inside a nearby police station, on seeing the same, managed to stop the horses, but in doing so, he himself suffered serious personal injuries. It being a ‘rescue case’, the defense of volenti non fit injuria was not accepted and the defendants were held liable. Greer, L.J. adopting the American rule said that “the doctrine of the assumption of the risk does not apply where the plaintiff has, under an exigency caused by the defendant’s wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty. However, a person who is injured in an attempt to stop a horse which creates no danger will be without remedy.

**Wagner v. International Railway** 528 an American authority on the point. There, a railway passenger was thrown out of a running railway car due to the negligence of the railway company. When the car stopped, his companion got down and went back to search for his friend. There was darkness, the rescuer missed his footing and fell down from the bridge resulting in injuries to him. He brought an action against the railway company. It was held that it being a rescue case, the railway company was liable. Cardozo, J. said:”Danger invites rescue. The cry of distress in the summons to relief. The law does not ignore those reactions in tracing conduct to its consequences. It recognizes them as normal. The wrong that imperils life is a wrong to that imperiled victim: it is a wrong also to the rescuer….the risk of rescue if only it is not wanton, is born of occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a delivery. He is accountable as if he had.**

**Baker v. T.E. Hopkins & Son** 529 is another illustration on the point. In this case due to the employer’s negligence, a well was filled with poisonous fumes of petrol driven pump and two of his workmen were overcome by fumes. Dr. Baker was called but he was told not to enter the well in view of the risk involved. In spite of that, Dr. Baker preferred to go into the well in view to make an attempt to help the two workmen already inside the well. He tied a rope around himself and went inside, while two women held the rope at the top. The doctor himself was overcome by the

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527 1935
528 1921
529 1959
fumes. He was pulled from well and taken to the hospital. He, however, died on the way to the hospital. The two workmen inside the well had already died. The doctor’s widow sued the workmen’s employers to claim compensation for her husband’s death. The defendant pleaded volenti non fit injuria. It was held that the act of the rescuer was the natural and probable consequence of the defendant’s wrongful act which the latter could have foreseen, and, therefore, the defense of volenti non fit injuria was not available. The defendant was held liable.

VIII. Volenti non fit injuria and Contributory Negligence Distinguish

- Volenti non fit injuria is a complete defense. In contributory negligence, the damages which the plaintiff can claim will be reduced to the extent the claimant himself was to blame for the loss.
- In the defense of contributory negligence, both the plaintiff and defendant are negligent. In volenti non fit injuria, the plaintiff is negligent.
- In case of volenti non fit injuria, the plaintiff is always aware of the nature and extent of danger he encounters. In contributory negligence, the plaintiff may or may not know the nature and extent of danger.

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OUR INFORMATION, OUR RIGHTS

By ATITHYA
From Amity University, Noida.

INTRODUCTION

The free flow of information is a must for a democratic society as it helps assist the society in reaching its optimum potential and retaining among its people the spirit of debate and discussion. This freedom of information (Hereinafter, known as FOI) brings openness in the administration which helps to promote transparency in state affairs, keep government more accountable and ultimately, reduce corruption and benefit the entire society. FOI also makes people aware of the rights vested in themselves. These rights are essentially human rights which are vested in us from our birth to death. The Universal Declaration of Human Rights is generally agreed to be the foundation of international human rights treaties. It represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups. The point to be noted here is that since human rights apply on a domestic scale as well, the Government of the country needs to act appropriately to ensure human rights and fundamental freedoms within the country too.

Article 19 of the International Covenant on Civil and Political Rights (list of rights granted) states that ‘Everyone shall have the right…to seek, receive and impart information and ideas of all kinds, regardless of frontiers’ as it was considered that having access to information is necessary to know and secure our rights. It took 58 years for the Government of India to realise the importance of accessible information to the public. The Right to Information Act, 2005


532 International Covenant on Civil and Political Rights,
came into force with the aim of securing access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority.\(^534\)

**FORMAL RECOGNITION OF RIGHT TO INFORMATION- II**

The RTI law of 2005 has enabled any citizen to question decisions and policies made by the Government and their implementation as well. After a prolonged grass root level agitation by civil rights activists, the Central Government passed the much awaited Right to Information Act in the year 2005. As a result of this, all the information in relation to administration and governance, except classified and confidential sensitive information relating to national security, is now available to any citizen of our country.\(^535\) India's RTI Act is generally claimed as one of the world's best law with an excellent implementation track record. From the day the Act came into force, enlightened citizens have started using the law by making information requests in order get the police to act or get their entitlements of food grain under public distribution system or expose the corrupt officials. Most radical provision of the Act is that the information seeker need not to give any reason for it or prove his *locus standi*. Yet the task of implementing the law is not without major challenges. Lack of adequate public awareness, especially in rural areas, lack of proper system to store and disseminate information, lack of capacity of the public information officers (PIOs) to deal with the requests, bureaucratic mindset and attitude etc. are all considered as major obstacles in implementation of the law.\(^536\)

The formal recognition of a legal RTI in our country took place more than two decades before the legislation was finally enacted, when the Supreme Court ruled in *State of UP Vs. Raj Narain*\(^537\) that the right to information is implicit in the right to freedom of speech and expression which has been explicitly guaranteed by Article 19 of the Indian Constitution. Similar views were upheld in cases like *Bennett Coleman & Co Vs. Union of India*\(^539\), Peoples Union for Civil

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\(^534\) Centre for Development of Telematics, [http://www.cdot.in/rti-act.htm](http://www.cdot.in/rti-act.htm) Last Accessed on: 31.03.2018  
\(^536\) Briefing Paper, Analyzing The RTI in India [http://www.cutsinternational.org/cart/pdf/Analysing_the_Right_to_Information_Act_in_India.pdf](http://www.cutsinternational.org/cart/pdf/Analysing_the_Right_to_Information_Act_in_India.pdf) Last Accessed on: 31.03.2018  
\(^537\) AIR 1975 SC 865  
\(^538\) *Constitution of India, 1949: Article 19* reads: Protection of certain rights regarding freedom of speech etc (1) All citizens shall have the right(a) to freedom of speech and expression;(b) to assemble peacefully and without arms;(c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; and (f) omitted(g) to practise any profession, or to carry on any occupation, trade or business  
\(^539\) AIR 1973 SC 106
Liberties Vs. Union of India and Secretary, Ministry of Information and Broadcasting Vs. Cricket Association of Bengal\textsuperscript{540}. In S.P. Gupta v. Union of India\textsuperscript{541}, the right of the people to know about every public act, and the details of every public transaction undertaken by public functionaries was described.

The idea of a right to information, hence, was evolved by the judiciary by reading the same along with the fundamental right of a citizen’s freedom of speech and expression. As a reaction to this, several states of India began enacting their individual laws in relation to this newly evolved Right to Information. So, it can be said that Right to Information is a derivative of Article 19 of the Indian Constitution. It is to be noted that this entire Act can thrive only in awareness of the citizens of the country\textsuperscript{542}. One major problem that comes while implementing this Act is the lack of awareness\textsuperscript{543}.

A DECADE OF RTI ACT, 2005- USE AND MISUSE- III

RTI has been used as a tool not only to address personal grievances but also to shed light on various social banes like corruption. RTI is used as a tool of disclosure; providing statistics and other data. This data plays a key role in understanding the extent and nature of any problem. There are various social issues where RTI has been used as an instrument for positive change:

1) Sexual Harassment and Other Crimes Against Women

Realizing the importance of data and statistics, CSR filed an RTI on the Government of India’s RTI portal, requesting to know how many calls pertaining to crimes against women in India, specifically Delhi, were received. The data was requested for a period between 31 Dec 2012 to 15 March 2015. While going through the data, we discovered that a total of 10,35,238 calls were received in the specified time period. The calls (categorized into various case types) were analysed and the most frequent case types were clubbed into five broad categories, based on similarity of case type.

- Dangerous attack and Domestic Violence- 94,211 cases
- Dowry Death and Dowry violence and property cases- 10,210 cases
- Illegal Confinement, Mental trauma and Stalking- 8,650 cases

\textsuperscript{540} AIR 1995 SC 1236
\textsuperscript{541} AIR 1982 SC 149
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- Abduction, Acid Attack, Kidnapping, Missing and Murder- 17,543 cases
- Penetrative Sexual Assault, Sexual Abuse at Workplace and Sexual Assault- 35,025 cases

This data is extremely useful for any organization working for women’s causes as it helps in identifying the exact case types and their occurrences. Also, the data for sexual abuse is of particular importance as there is hardly any data available for these cases (especially those taking place at work). Thus, we can say that this RTI is in that sense, a revelation, and will set the way for more and better information at our disposal.

Acting on the 2011 Supreme Court directive to states to formulate a plan to provide relief and rehabilitate women who had been assaulted or raped, Kansara (A common man from Rajasthan) has used RTI to make sure the verdict is implemented. In the process, he has brought succour to a minor rape victim in his locality, a woman publicly molested in Guwahati and several trafficked children in Delhi. The curiosity of a rape convict couple to know about a dead woman through RTI proved costly for them as it helped police establish their involvement in three murders, leading a local court to sentence them to life. A different approach was taken on the usage of RTI when a woman filed an RTI application to find out all details about her prospective groom.

2) Corruption

The Merriam-Webster dictionary defines corruption as dishonest or illegal behaviour especially by powerful people (such as government officials or police officers). September 28 is celebrated internationally as Right To Know Day, highlighting the critical importance of people’s right to access information held by their governments. Social activists, civil society organizations, and ordinary citizens have effectively used the Act to tackle corruption and bring greater transparency and accountability in the government. Social activist Aruna Roy has described India’s RTI Act as “the most fundamental law this country has seen as it can be used from the local panchayat (a unit of local government) to parliament, from a nondescript village to posh Delhi, and from...

546 India Today article dated 02.06.2015 http://indiatoday.intoday.in/story/rape-convict-couples-curiosity-lands-them-in-jail-for-life/1278010.html Last Accessed on: 31.03.2018
ration shops to the 2G scam.” 549 Right to Information laws, or “sunshine” laws as they are commonly called, grant citizens the legal right to access information held by their governments, bringing much-needed transparency in the otherwise opaque functioning of government 550.

The Supreme Court has also stated that RTI is a formidable tool to fight corruption. 551 From the Commonwealth Games to the 2G scam, RTI queries have been the starting point of exposure in a score of recent cases of corruption. Not surprisingly, the success of the law has been its greatest threat 552.

Queries under Right to Information (RTI) Act have unearthed a scam in Maghamela - a festival which is observed by laks in the Oriya month of Magha. Queries by a local activist under RTI Act revealed that the kerosene supplied was not provided to people instead it was misappropriated by the retailers. Copies of the distribution register exposed forged signatures and thumb impressions of the beneficiaries 553.

With ‘Adarsh’ scam, India’s corrupt bureaucracy came to the forefront revealing few shocking facts. Then-Chief Minister of Maharashtra Ashok Chavan resigned when his name cropped up in this controversy along with few other politicians and bureaucrats. Government land – reserved for housing supporting war widows, was acquired for use building posh apartments priced below market value that violated most building regulations. It was only when Simpreet Singh, a citizen journalist, filed an application under the Right to Information Act that this scam was exposed, creating a stir amongst the politicians and the citizens of India 554. To cite another example, the media exposed a scam that indicted 40 bureaucrats including Sangli municipal commissioner D P Metake, conservator of forests Sunil Limaye and assistant collector Ajit Relekar of having allegedly grabbed government land personally or through their relatives in posh areas near circuit house in Kolhapur city, in southern Maharashtra. 555 As recently as

550 ibid
552 The Hindu, article dated 05.11.2012 http://www.thehindu.com/opinion/editorial/the-
553 Young India http://youngindia.net.in/flashnews/newsforuse/rti-reveals-huge-kerosene-scam/ Last Accessed on: 31.03.2018
554 WIRE, article dated 05.03.2015 http://simewire.com/chapter-5-scams-uncovered-through-rti/ Last Accessed on: 31.03.2018
555 Deccan herald, article dated 17.08.2011 http://www.deccanherald.com/content/184246/power-of-rti/article4064958.ece Last Accessed on: 31.03.2018

www.supremoamicus.org 291
25.03.2018 notice was issued to 11 officials for not giving information under RTI Act.\(^{556}\)

CBI was included in the second schedule of the Section 24 of the RTI Act which allows national and security organisations of the country listed under it from making any disclosures under the transparency. The agency, which is probing number of high profile corruption cases such as 2G scam, NRHM scam, Illegal ore mining, CWG scam, Tatra BEML scam besides other such cases pleaded that disclosure of information would defy the objective of keeping it in the exemption list which is why all such requests would have to be dealt with on a case to case basis and appropriate order passed.\(^{557}\)

3) Public Policies

In any society, governmental entities enact laws, make policies, and allocate resources. This is true at all levels. Public policy can be generally defined as a system of laws, regulatory measures, courses of action, and funding priorities concerning a given topic promulgated by a governmental entity or its representatives\(^ {558}\). RTI Act upholds the principles of accountability and transparency. These two pillars of the Act enable the civil society to improve public policy and efficiency\(^ {559}\). In India, the society has been divided into a number of classes. Where public policies are introduced for the betterment of the society as a whole, it is often seen that the rich are favoured and the basic human rights of the rest are grossly violated. RTI Act, if used intelligently and tactfully, can solve many of these problems\(^ {560}\). RTI got evolved to empower the Dalits, minorities, backward classes, the economically weaker sections and vulnerable groups\(^ {561}\).

An RTI query unearthed a major scam in the Public Distribution System, as many as 42 lakh bogus ration cards have been issued in Maharashtra leading to large scale

\(^{556}\) The Hindu dated 25.03.2018

\(^{557}\) India Today, article dated 02.11.2012

\(^{558}\) Dean G. Kilpatrick, Ph.D. National Violence Against Women Prevention Research Centre, Medical University of South Carolina https://mainweb-v.musc.edu/vawprevention/policy/definition.shtml Last Accessed on: 31.03.2018

\(^{559}\) Making the Forest Sector Transparent, Annual Transparency Report http://www.forestransparency.info/background/forest-transparency/32/transparency-and-the-right-to-information/ Last Accessed on: 31.03.2018

\(^{560}\) DNA India, article dated 07.02.12

\(^{561}\) The Shillong Times, article dated 23.08.2013
theft of food grain\textsuperscript{562}. Under the health sector of public policy, a recent RTI revealed that Out of 227 corporators, 61 have not asked a single question on health since being elected in the last three years from March 2012 to March 2015, while two corporators who have consistently been members of the Public Health Committee have not asked a single question on health. Elected representatives should become more engaged in the debates on public health policies, proposed legislations like Clinical Establishment Act, Health Surveillance Reports, etc., so as to preserve the basic human rights of people when it comes a health\textsuperscript{563}. Ram Kumar Thakur had filed RTIs which lead to the unravelling of the MNREGA scam in Bihar. He had filed around seven Right to Information (RTI) applications to expose the irregularities in payments under the rural employment scheme. The RTI replies were used as a legal document to force the State Rural Development Ministry to conduct a social audit of the scheme in the village\textsuperscript{564}.

\textbf{MISUSE OF RTI: An Issue of Concern}

There are numerous instances of Right to Information (RTI) Act, 2005, being misused.. Bhaskar Patil, State Information Commissioner in Nagpur, said that "There are instances where RTI information was sought on the same subject pertaining to particular ration card shop as many as 10 times. It clearly indicates that something is fishy. Even information of hotel owners was demanded. There is definitely third party interest involved in such applications. But providing information can't be denied as activists are smart enough to turn it into a public cause. In hotel owners' case, they may say that they want to check any violations in obtaining hotel licenses."\textsuperscript{565} An excellent example of the same would be the recent news about 2 netas caught extorting builders by misusing RTI information.\textsuperscript{566} Justice S H Kapadia said a very good law like Right to Information (RTI) was being misused to ask irrelevant and intrusive questions seriously impeding the working of the Judges and the Supreme Court\textsuperscript{567}. Indiscriminate and

\textsuperscript{566} Times of India, article dated 31.03.2018 https://timesofindia.indiatimes.com/city/mumbai/netas-using-rti-to-extort-bldrs-booked/articleshow/63562290.cms Last Accessed on: 31.03.2018
\textsuperscript{567} The Times of India, article dated 13.04.2017 http://timesofindia.indiatimes.com/india/Right-to-Information-good-law-but-being-misused-S-H-
impractical demands by applicants with no relation to transparency, accountability and eradication of corruption are proving to be counterproductive. The same statement has been reiterated by Justice Manmohan, who said the Right to Information (RTI) was a "cherished right" and seeking answers to "meaningless and vague queries" would adversely affect the efficiency of the administration and result in the executive getting bogged down with non-productive work of collecting and furnishing information. Some persons, in the garb of RTI activists and out of vengeance and personal vendetta, have misused the provisions of this Act. Having ulterior motive in mind, they have asked absurd, irrelevant and uncalled for questions under the Act. In order to get recognition in public offices, these RTI activists ask some very embarrassing questions under the Act, unmindful of the fact that the answer to these questions may involve wasting of lots of time of public authorities without serving any purpose at all. Speaking at the 7th annual convention of the Central Information Commission (CIC), Manmohan Singh pointed out that such unproductive queries are not only a waste of time but serve no social purpose.

The Fate of RTI users: Aruna Roy, a social activist, says "Attacks on activists are part of a deeply worrying trend where anyone challenging the power nexus of corporations-states-big money is brutally silenced and clamped down upon." The National Crime Records Bureau (NCRB), for the first time, will begin collecting data from across the country on attacks on Right to Information (RTI) activists, journalists, social activists and whistleblowers. But the manner in which the data is being collected is likely to lead to under-reporting of the cases in the government database. However, the database will record only in cases of 'grievous hurt of varying degrees', covered by Sections 325, 326, 326A and 326B of the Indian Penal Code. A list of activists who have been attacked in the past can be seen HERE.

Maharashtra is a state that has recorded the highest number of attacks, both fatal and non-fatal. The New Indian Express, article dated 01.03.2014, http://www.newindianexpress.com/nation/RTI-cherished-Dont-Misuse-It-Delhi-HC20140301/article2084971.ece Last Accessed on: 31.03.2018

India TV USA http://www.indtvusa.com/indian-pm-raises-concern-over-misuse-of-right-to-information-act/ Last Accessed on: 31.03.2018


Attacks on RTI Activists https://docs.google.com/spreadsheets/d/1FTKRKfmsXNgYg6HEVUx7-O7OeaRZLNa3FfN9MIII1CA/edit?hl=en#gid=0 Last Accessed on: 31.03.2018
otherwise, on RTI activists in India, a decade after the country passed its sunshine transparency act\textsuperscript{574}. Expressing concern over spurt in attacks on activists in the State, RTI activists under the banner ‘Youth Social Workers’ have demanded a crime branch enquiry into the brutal attack on disabled RTI activist Kesab Mahakud of Nayagarh district. Condemning the attack, social workers here have demanded proper protection to the RTI activists and demanded crime branch enquiry into the attack.\textsuperscript{575}

However not all is doom and gloom, action has been taken in many of the cases referred to above. Recently on 26.03.2018 the state information commissioner (SIC), Nagpur, Dilip Dharurkar, issued show-cause notice and also imposed penalty of Rs 2,000 to chief general manager (CGM) of Forest Development Corporation of Maharashtra (FDCM) for violating RTI Act provisions by causing delay in providing information by deliberately transferring application to irrelevant authorities.\textsuperscript{576}

LIMITATIONS OF THE ACT- IV

1) Lack of awareness: An Act can only be enforced and its strengths can be utilised only when the masses are aware of it. Though the Right to Information (RTI) Act ensures transparency in democratic governance, lack of awareness and the indifference of officials are a cause for concern, according to activists.\textsuperscript{577} Implementation of the Right to Information Act is still facing teething problems in most of the departments due to lack of understanding among the officials and lack of awareness among the information

\begin{itemize}
  \item \textsuperscript{574} The Times of India, article dates 06.09.2015 http://timesofindia.indiatimes.com/india/Maharashtra-a-most-unsafe-for-RTI-activists-10-killed-in-10-years/articleshow/48840985.cms Last Accessed on: 31.03.2018
  \item \textsuperscript{575} The Hindu, article dated 29.09.2015 http://www.thehindu.com/news/national/other-states/handicapped-rti-activist-alleges-attack-for-copbashing/article7699687.ece Last Accessed on: 31.03.2018
  \item \textsuperscript{576} The Times of India dated 26.03.2018. https://timesofindia.indiatimes.com/city/nagpur/show-cause-fine-against-fdcm-for-rti-violation/articleshow/63472450.cms Last Accessed on 31.03.2018
  \item \textsuperscript{577} The Hindu, article dated 03.08.2009 http://www.thehindu.com/todays-paper/tp-national/tp-tamilnadu/concern-over-lack-of-rti-act-awareness/article195474.ece Last Accessed on 31.03.2018
\end{itemize}
seekers.\textsuperscript{578} Sometimes, not only the citizens of our country, but even the officials (PIOs) lack awareness\textsuperscript{579}. Low awareness level: Section 26 of the Act states that the appropriate Government may develop and organize educational programmes to advance the understanding of the public, especially disadvantaged communities, regarding how to exercise the rights contemplated under the Act. However, as per the survey it was revealed that only 15\% of the respondents were aware of the RTI Act\textsuperscript{580}.

2) Constraints faced in filing an RTI Application: Non availability of user guides for RTI implementation for information seekers, no standard forms for RTI application, inconvenient submission channels for RTI application and the dubious payment mechanism are just some of the problems that are being constantly faced by RTI application filers. The RTI application filers lack assistance on filling of such form and the unfriendly attitude of the PIOs does not help as well\textsuperscript{581}.

3) Miscellaneous Issues: The Implementation of RTI requires the PIOs to provide information to the applicant through photocopies, soft copies etc. While these facilities are considered to be easily available at a district level, it is a challenge to get information from Block/ Panchayat level. In addition to lack of resources, PIOs lack the motivation to implement RTI Act. During the RTI workshops organised in the surveyed states, PIOs cited that there were no incentives for taking on the responsibility of a PIO; however penalties were imposed in cases of non compliance\textsuperscript{582}.

SUGGESTIONS- V

In light of all the information stated above, the following are the suggestions by the author of this paper.

1) Anonymity: As has been earlier stated, attacks on RTI activists are common these days. The Act, though well drafted, has forgotten how to protect the identity of the person. There should be a sense of anonymity in the RTI form whereby the RTI application filer should not be compelled to disclose his name. Even if the name must be disclosed it must fall upon the Government to ensure that the name of the RTI activist is not revealed to the Public at least until the issue has been dealt with. To do so the Government must come up with more stringent norms and rules.


\textsuperscript{579} The News, article dated 10.06.2015 http://thenews.co.in/viewinterview-

\textsuperscript{580} Key Issues and Constraints in Implementing RTI http://rti.gov.in/rticorner/studybypwc/key_issues.pdf Last Accessed on: 31.03.2018

\textsuperscript{581} Supra Note 49

\textsuperscript{582} ibid
which would actively penalise the source of such leaks, even criminalise such acts.

2) Include Private Sector: The Act has clearly dealt only with relation to public bodies, leaving the private and equally important sector of the society closed from the scrutiny of the public. So far as private sector is concerned like partnership business, private companies and factories, multinational companies which have their head offices outside India, NGOs not financed by the government etc. the Act remains silent. Therefore, private bodies or authorities are not under obligation to furnish any sort of information if asked for. For betterment of the society, at least certain sections of the private sector (For instance, health and education) should be included within the purview of this Act.

3) Clear Filing Process: A standard form should be used. The officers present to assist the RTI application filers should have been properly trained unlike the past, where they had no information themselves. If the guidelines and templates of pro-active disclosures implemented, it will help a lot to bring transparency in administration and lower the pendency of appeals before the Gujarat Information Commission (GIC) as citizen have to approach to GIC even in matters which should be available on pro-active disclosure whereas experiences suggests that governments have not been implementing it and people have to file RTI applications which ideally should be available on pro-active disclosure where one need not to file an RTI application.

In a welcome move the The Supreme Court, on 20.03.2018, directed all government authorities to ensure that the fee for a Right to Information (RTI) application does not exceed Rs. 50 and the fee for photocopying is not more than Rs. 5. The Bench comprising A.K. Goel and Justice U.U. Lalit issued the following directions:

On the fee: “We are of the view that, as a normal Rule, the charge for the application should not be more than Rs. 50/- and for per page information should not be more than Rs. 5/-. However, exceptional situations may be dealt with differently. This will not debar revision in future, if the situation so demands.”

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583 In the landmark decision of Sarbajit Roy v. Delhi Electricity Regulatory Commission,[viii] the Central Information Commission also reaffirmed that privatized public utility companies continue to be within the RTI Act, notwithstanding their privatization.
584 The WIRE article dated 28.03.2018
https://thewire.in/government/rti-implementation-study Last Accessed on: 31.03.2018
585 The Times of India, article dates 28.11.2013
586 ibid
On disclosure of motive:

“With regard to the requirement of disclosure of motive for seeking information, the Court ruled, “No motive needs to be disclosed in view of the scheme of the Act.”

On disclosure of information on matters pending adjudication: “With regard to the Rules debarring disclosure of information on matters pending adjudication, the Court clarified that “the same may be read consistent with Section 8 of the Act, particularly sub-section (1) in Clause (J) thereof”\(^{587}\)

All steps which will surely make the RTI act more effective in going ahead with its execution.

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\(^{587}\) livelaw.in dated 20.03.2018.
http://www.livelaw.in/fee-rti-application-not-exceed-
rs-50-rs-5-per-pages-motive-need-not-disclosed-read-sc-directions-read-order/. Last accessed on 31.03.2018
STALKING THE STALKER
SAVINGS THE VICTIM

By Maahi Mayuri, 
From New Law College, Pune

ABSTRACT
With the rise in Information Technology, emergence of new ways of communication, social networking becoming indispensable and innovations in the field of computers, cyber crimes are gaining momentum, and it is now emerging as one of the most vulnerable crimes. Thus, India facing it becomes inevitable. It is now becoming more common than physical annoyance. Hence it becomes vital to look into its types, analyse its incidents and thus look into the related laws.

By this research, we aim to provide a more clear understanding of the definition of cyberstalking, its prevalence, characteristics of both the victims and offenders of this crime, the modus operandi of the crime and the goal is to answer the question whether the India Judiciary is efficient enough to tackle the problem.

Keywords: CyberStalking, CyberStalker, Ingredients of CyberStalking, Information Technology Act

1. INTRODUCTION
Increased dependence of humans on Information Technology has brought with it, some boons as well as curses. We find new technologies and innovations everyday. But the growing global village, does have a dark side to it. The evil of cyber stalking has spread its roots deep down in almost every digital aspect.

Cyberstalking is the use of the Internet or other electronic means to stalk or harass an individual, group, or organization. It may include false accusations, defamation, slander and libel. It may also include monitoring, identity theft, threats, vandalism, solicitation for sex, or gathering information that may be used to threaten, embarrass or harass. Internet has thus become an easy medium for frauds, sexual exploitation, exploiting or harassing. It most commonly happens with with females, teenagers or children.

Cyber stalkers do not fear physical violence since they cannot be physically reached in the virtual world. From a friend, a colleague, a relative, or even a stranger, anyone could be a cyber stalker.

Those on the target list most commonly involve those who are Internet addicts, emotionally weak or unstable. But, this does not limit its scope, even a person of ordinary prudence, with no internet addiction could fall prey to cyber stalking. Most of the cyber stalking incidents go unreported and hence their true number can never be truly known.
2.1 NATURE OF STUDY
The mode of research is non empirical, i.e. doctrinal in nature wherein secondary data has been relied upon. It is based on information and interpretations.

2.2 SCOPE OF RESEARCH
This research covers the problem of cyber stalking as a whole prevalent in India, as well as its legal remedies. This research aims to develop a clear understanding of cyberstalking, its types, prevalence, characteristics of victims and offenders, its modus operandi and its redress under the Indian Judicial System.

3. IMPORTANCE AND SIGNIFICANCE
The 21st century is the era of Information and Communication Technology. With everything going digital, it thus becomes necessary with its associated evil. Cyberstalking being one of the most prevalent and vulnerable crimes, among cyber crimes, it thus becomes necessary to look into the problem.

4. LITERATURE REVIEW
- Christopher Reed (2000). “Internet Law; Text and Materials” Cambridge University Press
- Bocji Paul (2003). “Victims of cyber stalking: An exploratory study of harassment perpetrated” via the Internet First Monday, volume 8, number 10 (October 2003),
- URL: http://firstmonday.org/issues/issue8_10/bocji/index.html

5.1. AIMS AND OBJECTIVES
1. To study the rising problem of cyberstalking in India
2. To analyse the psychological reasons behind cyberstalking
3. To analyse the redress available for cyberstalking under the Indian Judiciary

5.2. RESEARCH QUESTIONS
1. What is Cyberstalking?
2. What are the psychological reasons behind the phenomenon?
3. Are the provisions in the Indian Judiciary enough to deal with the problem?
4. What can be done to improve the condition?
6. HYPOTHESIS
We thus hypothesize that provisions available under the Indian Judiciary & the IT Act are not stringent enough to efficiently deal with the offence of cyberstalking.

7. CYBER STALKING AND ITS PREVALENCE

7.1. WHAT IS CYBER STALKING?
Numerous have been made to define cyberstalking by various experts and legislators.

Elements
1. Involves the use of Internet or other electronic means. Computer is essentially an element of cyber criminality and it is either a tool or target of cybercrime.
2. Cybercrime can be committed without any physical contact.
3. The use is to stalk, harass or exploit an individual, a group, or an organization.
4. Identity of the person using cyber stalking space remains unknown
5. It is a form of cyberbullying
6. May include false accusations, defamation, slander or libel.
7. May also include monitoring, identity theft, threats, vandalism, solicitation for sex, or gathering information that may be used to threaten or harass.
8. May be accompanied by real-time or offline stalking.
9. It transverses jurisdictional boundaries. Presence of the offender is not required and crime can be committed from anywhere in the world with a mouse click.

Technology ethics professor Lambèr Royakkers defines cyberstalking as perpetrated by someone without a current relationship with the victim. About the abusive effects of cyberstalking, he writes that:

“[Stalking] is a form of mental assault, in which the perpetrator repeatedly, unwantedly, and disruptively breaks into the life-world of the victim, with whom he has no relationship (or no longer has), with motives that are directly or indirectly traceable to the affective sphere. Moreover, the separated acts that make up the intrusion cannot by themselves cause the mental abuse, but do taken together (cumulative effect).”

7.2. DISTINGUISHING CYBERSTALKING FROM OTHER ACTS
Distinction between cyber-stalking & other acts becomes necessary so as to understand the phenomenon better. According to Wikipedia, the following is the difference between cyber-stalking & cyber-bullying. Harmless actions can be perceived as cyber bullying but cyber-stalking is repetitive and
7.3. IDENTIFICATION
CyberAngels has written about how to identify cyberstalking:
When identifying cyberstalking "in the field," and particularly when considering whether to report it to any kind of legal authority, the following features or combination of features can be considered to characterize a true stalking situation: malice, premeditation, repetition, distress, obsession, vendetta, no legitimate purpose, personally directed, disregarded warnings to stop, Bharassment and threats.

7.4. STATISTICS
Cumulative Statistics for the year 2000-2013 by WHOA (Working to Halt Online Abuse)

8. TYPES OF STALKERS
8.1 CATEGORIES OF STALKERS
Cyber stalkers can be categorized into three types.

a) The common obsessional cyber stalker: He/She refuses to believe that their relationship is over. They mislead by portraying that they are harmlessly in love.

b) The delusional cyber stalker: They may suffer from mental illness like schizophrenia etc. Having a false belief that they are tied to their victims, they commit the offence. They assume that their victim loves them. A delusional stalker is usually a loner/ Those in the noble and helping professions like
doctors, teachers etc are often at risk for attracting a delusional stalker. Delusional stalkers are very difficult to shake off. Celebrities are often the most common prey.

c) **The vengeful cyber stalker**: These cyber stalkers are angry at their victim due to some minor reason—either real or imagined. Typical examples are disgruntled employees. These stalkers may be stalking to get even and take revenge and believe that they have been victimized. Ex-spouses can turn into this type of stalker.

### 2. PSYCHOLOGY OF CYBER STALKERS

1. **The Rejected Stalker**: This type of stalking is generally connected with a relationship with the victim. Either it is due to the break up of a relationship and the partner who ends the relationship is generally the victim. Personality traits of such stalker can include Egotism, Jealousy, Humiliation, Over-dependence & bad social skills. Stalking behaviors can be intrusive as well as persistent. The victim may face extortion and assault. Violence is generally involved in the relationship. The stalking type is generally the sturdiest when it comes to studying the criminality.

2. **The Resentful Stalker**: The stalkers personality may be irrationally paranoid. This kind of stalking is mainly done to seek revenge from the victim and thus scare and harm them. The victim may have humiliated the stalker in the past. Verbal threats, Obsessive Stalking & physical assault.

3. **The Predatory Stalker**: This form generally involves the stalker seeking sexual advantage over the victim. Sexual assaults are most likely to occur. Generally people with lower than normal intelligence, poor social skills, poor self esteem & those who are sexually deviant indulge in this type of stalking. Behavior can include monitoring the victims activities, obscene phone calls & messages, fetishism, etc

4. **The Intimacy Seeker**: The stalker who indulges in such behavior is usually shy, isolated & wishes to establish a romantic relationship with the victim. He/She believes they can be the “only one” for the victim who can satisfy their desires. If rejected, they may resort to violence & deviant behavior. Most cases of one sided love result into this type of stalking. They send the victims messages, letter & make phone calls expressing their love. Such stalkers do not bother about the legal implications of their acts because they think they are just challenges to overcome & a test to their love.

5. **Incompetent Suitor**: Similar to the intimacy seeker but they feel that any woman should be attracted to them. They constantly pursue the victim & ask for dates or a romantic or intimate relationship. The stalker may have stalked several others. They may have lower than normal intelligence but may
stop stalking if counselled or informed about legal implications of their acts.

8.3. STATISTICS

![Gender of Victims](image)

Figure 1: Cyber stalking statistics (source: Working to Halt Abuse Online)

9. TYPES OF CYBER STALKING

Easy availability of internet at low costs facilitates stalkers to it as a means to stalk people. Cyber stalkers use three different ways for stalking their target.(Ogilvie, 2000)

a. **EMAIL STALKING:** Email or electronic mail is the most commonly used network based application. Today, it has become the most common way to harass, threat or stalk a person. Stalkers send spontaneous mails in which lead to nuisance, hatred, obscenity or threats. Such stalkers repeatedly send mails to their victims for and try to initiate or fix a relationship or threaten and hurt a person.

This form also includes harassment by sending viruses or high volume of electronic junk mail to the victim. However, just sending viruses or telemarketing solicitations alone does not constitute stalking. But, if such communications are repetitive & in a manner which intimidates, then it may constitute concerning behaviors which can be categorized as stalking.

b. **INTERNET STALKING:** Stalkers comprehensively use the Internet to slander and endanger their victims. Cyber stalking takes on a public dimension. What makes it disturbing is that it appears to be the most likely to spill over into physical space. Generally, cyber stalking is accompanied by traditional stalking behaviors such as threatening phone calls, vandalism of property, threatening mail, and physical

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a. **Email Stalking:** Direct Communication through E-mail

b. **Internet Stalking:** Global communication through the Internet

c. **Computer Stalking:** Unauthorized control another person’s computer
attacks. There are important differences between the situation of someone who is regularly within shooting range of her/his stalker and someone who is being stalked from two thousand miles away.

c. COMPUTER STALKING: In this type, the stalker, by unauthorized access, controls victims computer. The stalker can thus communicate directly with his victim when the target computer connects to the Internet. Stalker assumes control of the victims computer and the only defense left for the victim is to renounce their current Internet “address”

More recent versions of this technology claim to enable real-time keystroke logging (keylogger) and viewing the computers desktop real time. It is not difficult to hypothesize that such mechanisms would appear as highly desirable tools of control and surveillance for those engaging in cyberstalking.

10. MODUS OPERANDI
According to Van Wilsem (2011, p.124) and Wykes (2007, p.167) stalkers often take advantage of the personal information stored on network sites, hard drives of personal computers, laptops, and smart phones to learn more about their victims. Some of the more industrious cyberstalkers also collect personal information about their victims through the use of hardware devices installed on the victim’s computer to monitor keystrokes, which enable the collection of passwords, PIN numbers, email accounts, and other personal information. Cyberstalkers may also use spyware software, which is available free over the internet or for purchase. Spyware allows a person anonymously to monitor the internet activity and habits of a target (Cox & Speziale 2009; Southworth, Finn, Dawson, Fraser, & Tucker, 2007, p.848; Reyns, et al., 2011; Wykes, 2007). Stalkers have also been known to use college campus computers and their internal networks to commit their cybercrimes (Peak, Barthe, & Garcia, 2008, p.257)

11. INCIDENTS OF CYBER STALKING

• Manish Kathuria v. Ritu Kohli (2001)

This is the first reported case of cyberstalking in India and the reason behind the 2008 amendment to the IT Act, it involved the stalking of a woman named Ritu Kohli. Manish Kathuria followed Kohli on a chat website, abused her by using obscene language and then disseminated her telephone number to various people. Later, he began using Kohli’s identity to chat on the website “www.mirc.com”. As a result she started receiving almost forty obscene telephone calls at odd hours of the night for
over three consecutive days. This situation forced her to report the matter to the Delhi Police. As soon as the complaint was made, Delhi Police traced the IP addresses and arrested Kathuria under Section 509 of the Indian Penal Code. The IT Act was not invoked in the case, since it had not come into force at the time when the complaint was filed.

While there is no record of any subsequent proceeding, this case made Indian legislators wake up to the need for a legislation to address cyber-stalking. Even then, it was only in 2008 that Section 66A was introduced. As a result, cases started being reported under this section as opposed to Section 509 of the Indian Penal Code, as was the case where a Delhi University student was arrested for stalking a woman from Goa by creating fake profiles on social networking websites, uploading pictures on them and declared her to be his wife. It is hoped that the decision in this would favour the victim.

However, in 2015, Section 66A was struck down as unconstitutional by the Supreme Court for being violative of Section 19(1)(a) of the Indian Constitution.

- **Karan Girotra v. State**
- The facts of the case are that Shivani Saxena, daughter of Sudhir Saxena, had lodged a complaint with the Police that she had married Ishan on 25.9.2009, however, the marriage between them failed within a few days as her husband, Ishan could not consummate the marriage. Both of them started living separately w.e.f. 1.10.2009 and it was amicably settled between them that after the expiry of one year of their marriage, both of them will file a joint petition, on mutual consent, for the grant of divorce, after which both the parties will be free to marry afresh.

It is further alleged by her that in the course of chatting on the internet, she had come in contact with Karan Girotra, about six years back from the date of the lodging of the complaint. On 3.4.2010, the petitioner is alleged to have told her that he had fallen in love with her and wants to marry her. On this, she allegedly told him that she is already married, whereupon the petitioner said that he would marry her after her divorce. On 15.5.2010, it is alleged that on the pretext of introducing the complainant to his family members, the petitioner called her to his house, where she found that there was nobody except his old bed-ridden maternal grandmother. It is alleged by her that, at about 8:00 P.M., the petitioner gave her soft drink, which was perhaps laced with some intoxicant and on consuming the same, she became unconscious. It is stated that when she regained her consciousness at about 10:00 P.M., she found herself completely nude and she also noticed that she had been sexually assaulted. On noticing this, she started crying and she was consoled by the
petitioner that she need not worry, as he would fulfill the commitment of marrying her. On 16.5.2010, she was shocked when she received her obscene pictures of the previous night. She confronted the petitioner with the said pictures, whereupon the petitioner represented to her that she need not worry about this and he is going to marry her. It has also been alleged that the petitioner threatened to circulate the objectionable pictures everywhere if she did not keep on maintaining physical relations with him. On the basis of this blackmail, she alleged that she was raped again on 18.5.2010. Subsequent thereto, on 9.7.2010, it is stated that a roka ceremony was held between the petitioner and the complainant at the restaurant in Delhi, where the mother of the complainant gifted the petitioner a santro car, jewellery, clothes and various other gift items. It has been alleged that the petitioner kept on sexually assaulting the complainant without her consent and on 12.9.2010, the petitioner informed the complainant's mother that he is breaking the engagement and he returned the car and the other articles, whereupon the complainant lodged a complaint in the month of June and the aforesaid FIR under Sections 328/376 of IPC read with Section 66A of the I.T. Act was registered by PS: Prashant Vihar, Delhi against the petitioner. As a result, Saxena filed a complaint under Section 66-A of the IT Act. Though the Court rejected the plea of anticipatory bail on the ground that nude and obscene pictures of Saxena were circulated by Girotra, an act which requires serious custodial interrogation, nonetheless it made some scathing remarks. According to the Court Saxena had failed to disclose her previous marriage to Girotra merely because she agreed to perform the engagement ceremony, even though such mention was made when Girotra had first professed his love to Saxena. The Court also took noted that there was a delay in lodging the FIR by Saxena. What is more shocking is that the Court held that Saxena had consented to the sexual intercourse and had decided to file the complaint only when Girotra refused to marry her.

This case highlights the attitude of the Indian judiciary towards cases involving cyberstalking. It is appalling that factors as redundant as a delay in filing the FIR have a huge bearing on the outcome of the case. It is for this reason that more stringent legislations are the need of the hour.

12. RELATED LAWS AND ANALYSIS

Prior to February 2013, there were no laws that directly regulate cyberstalking in India. India's Information Technology Act of 2000 (IT Act) was a set of laws to regulate the cyberspace. However, it merely focused on financial crimes and neglected interpersonal criminal behaviours such as cyberstalking. In 2013, Indian Parliament made amendments to the Indian Penal Code, introducing cyberstalking as a criminal offence.
1. 12.1. The Information Technology Amendment Act, 2008

The Information Technology Act of 2000 was enacted with an aim to recognize electronic records and facilitation of e-commerce. To this extent, hardly ten sections were incorporated that actually dealt with cybercrime. One of these was Section 67, which dealt with the publishing or transmitting of pornographic material through a computer resource. It did not consider the need for specialized provisions regarding child pornography. However, it is pertinent to note that this Act was a significant step forward from the existing law.

The IT Act, 2008, however, does not directly address stalking. The problem is dealt as an “intrusion on to the privacy of an individual” than as regular cyber offences.

The most used provision for regulating cyberstalking in India is Section 72 of the IT Act, 2008.

**Penalty for breach of confidentiality and privacy:** Save as otherwise provided in this Act or any other law for the time being in force, if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.

**Section 72A: Punishment for disclosure of information in breach of lawful contract:** Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both.

Cyber stalking is generally a bailable offense unless it causes severe defamation, sexual crimes, identity theft or terrorism.

Under the Indian Penal Code, 1860, the Indian Post Office Act, 1898 and the Indecent
Representation of Women (Prohibition) Act, 1986, only obscene visual representations were the focus of the legislation. It left out audio materials and simulated images—both of which are recognized internationally.

As far as Indian constitutional jurisprudence is concerned, obscenity is not a protected expression under Article 19(1) (a), and thus can be validly restricted under Article 19(2) on the ground of decency or morality. When obscenity is judged as per the proper tests, and is deemed to be obscene by the court, there can be no allegation of a violation of Article 19(1) (a). It is in this purview of removing the obscene material from the website that the site is blocked under the IT Act. Prohibition is merely a form of restriction of a fundamental right. As such, the object of the block is to prevent users Internet from accessing that material.

12.2. The Criminal Law (Amendment) Act, 2013
The act added Section 354D in the Indian Penal Code, 1860 which defines “Stalking” and provides punishment for the same.

(1) Any man who—
1. follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or
2. monitors the use by a woman of the internet, email or any other form of electronic communication,
3. commits the offence of stalking;
4. 5.
5. Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

12.3. Following sections of IPC deal with the various cyber crimes:
- Sending threatening messages by e-mail (Sec.503 IPC)
- Word, gesture or act intended to insult the modesty of a woman (Sec.509 IPC)
- Punishment for criminal intimidation (Sec.506 IPC)
- Criminal intimidation by an anonymous communication (Sec.507 IPC)
- Obscenity (Sec. 292 IPC)
- Printing etc. of grossly indecent or scurrilous matter or matter intended for blackmail
- (Sec.292A IPC)
- Obscene acts and songs (Sec.294 IPC)

12.4. Problems in Enforcement
“Even with the most carefully crafted legislation, enforcing a law in a virtual community creates unique problems never
before faced by law enforcement agencies.” (Ellison 1988)

“These pertain mainly to the international aspects of the Internet. It is a medium that can be accessed by anyone throughout the globe with a computer and modem. This means that a potential offender may not be within the jurisdiction where an offence is committed. Anonymous use of the Internet also promises to create challenges for law enforcement authorities.”

Thus, anyone can fall prey to cyberstalking.

13. POSSIBLE REMEDIES (PREVENTIVE MEASURES THAT CAN BE TAKEN)

1. The Need for New Legislation
Effective legislations need to be enforced which provide stringent provisions for the offence of cyberstalking. The problem of jurisdiction should also be addressed by laws as Internet Crimes are not limited to a single territory.

2. Awareness
Apart from the judiciary taking action, people need to be aware about the problem. They should know what can cause a possible threat to them, and their code of conduct while in the global village.

3. Following the “Prevention is better than Cure” Rule
Users need to be cautious while interacting online. They should not share their personal information online, reveal the same to strangers. They should also make it a rule to save messages that are harassing or threatening in nature.

5.

6. 14. CONCLUSION
In 17 years since the Information Technology Act of 2000 was passed, dozens of cyberstalking incidents have been reported, but many more go unreported. The main reason behind this, is that the authorities who are concerned with registering such complaints or taking action in such matters are more comfortable with the traditional laws for the physical world. Section 354D of the Indian Penal Code, covers stalking & not cyber-stalking except for the monitoring of a woman’s communications by a man.

It is the need of the hour that the IT Act be amended to take into account cyber-stalking and cyber-bullying, which are the two most under-reported offences in the Indian society. The cases we looked into in our research also indicate that no serious consequences are faced by cyber stalkers and they easily get away with the offence.

90% of the victims of cyber-stalking are women. The IT Act’s section 66A gave some protection against the same but it was challenged as unconstitutional, and was struck down by the Supreme Court in March 2015.
We’ve already seen that under Section 72 & 72A of the IT Act, 2008, the maximum imprisonment is 2 years and 3 years respectively. Likewise Section 354D of IPC provides a maximum imprisonment of 5 years. The level of punishment thus provided under these sections are therefore not enough to further stop these crimes.

Cyber stalking often leads the victim to suffer from extreme mental agony, financial crisis, depression and often leads the victim to commit suicide. Victims report a number of serious consequences of victimization such as increased suicidal ideation, fear, anger, depression, and post traumatic stress disorder (PTSD) symptomology.

Creating such circumstances for a person should be strictly punished. Till date, there is no legislation in the Indian Judicial system that is efficient enough to deal with and prevent, the incidents of cyberstalking.

We thus conclude that our hypothesis is proved to be correct that the Indian Judiciary is not efficient enough to provide stringent punishment for the offence of cyber stalking.