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EDITORIAL

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With this thought, we bring forth this journal before you.

TEAM

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Surrogacy as a Modern Form of Emerging Exploitation- A Time to Think

By Abdul Qadir J.A and Meghana T M
From: Alliance School of Law, Bangalore.

Abstract
The commodification of the human body has been drawn into sharp focus over the last several years as issues such as human trafficking for organs and sexual servitude have gained international attention. Unfortunately, another form of trafficking has evaded the same level of attention and outrage of the international community: surrogacy motherhood. Though many issues of human trafficking and exploitation have received international attention, some, like surrogacy, have been overlooked. Surrogacy commodifies both the surrogate mother and resulting baby, resulting in exploitation of the surrogate and a parental situation that is not in the best interest of the child.

Trafficking wrenches the term surrogate mother out of its present context of blaming women and highlights that women are the objects of international exchange. Trafficking situates surrogate arrangements in the system of gender inequality - as practice that enhances the subordination of women by making women into reproductive objects of global exchange. Much more damaging and unnatural factor is that it adversely affects the surrogate mother psychologically as she is required to surrender the child as soon as it is born which was part and parcel of her body. The entire process of reproduction involves not only bearing and begetting but also rearing of the child. Indian women are vulnerable. The poorer the country, the more is the fear of exploitation. The combination of poverty, illiteracy and lack of power that women have over their own lives will land them in difficulties. However the proponents argue for it as they emphasize on individual freedom of choice and reproduction. This ideological clash warrants legislative action to manage the situation and prevent exploitation of women by either banning this practice or by strictly regulating it.

I. Introduction
The commodification of the human body has been drawn into sharp focus over the last several years as issues such as human trafficking for organs and sexual servitude have gained international attention. Unfortunately, another form of trafficking has evaded the same level of attention and outrage of the international community: surrogacy motherhood. Surrogacy motherhood is a commodification of the human person: the child becomes the mere object of a convention, while the surrogate mother is used as an incubator. Such commodification in itself violates the dignity of both the surrogate mother and the child.

Mother is such a sacred body who is always adored, loved and worshipped by her children for her unique capacity to give and rear life on the earth. Motherhood has always acquired highest place amongst all
the states of life. She gives birth to new life, nourishes it and sacrifices her own life for the welfare of the child. Such wonderful opportunity is not available to all women on the earth. Many are suffering from the problem of infertility or some diseases due to which they cannot beget children. They are longing to have a child of their own. Often adoption was the practice adopted by such people. Since it cannot provide them genetic connection with the child development in new reproductive technology has given a new ray of hope to such couple especially in the form of surrogacy. Though it was not so easily accepted by many in the beginning it is now widely used to fulfill their desire to have their own genetic offspring. Various reasons can be attributed to the growth of this practice.

Though many issues of human trafficking and exploitation have received international attention, some, like surrogacy, have been overlooked. Surrogacy commodifies both the surrogate mother and resulting baby, resulting in exploitation of the surrogate and a parental situation that is not in the best interest of the child. As news stories about illegal surrogacy rings continue to break, we are learning that they are, indeed, just the tip of the iceberg. Even surrogacy arrangements that seem to be voluntary and motivated by altruistic ideals are, when one is willing to look beneath the surface, a violation of the human dignity of mother and child. Surrogacy inherently transforms a woman’s body into a bread oven, a commodity, to be used and cared for while it is useful, and to be forgotten once the “contract” is fulfilled. This growth has increased the demand for women with healthy uterus to beget children for them. India being country with more number of poor people has become the popular destination for such aspirants as the medical expertise, surrogate women, and other facilities required are available at a very low cost. Foreigners fly to India for realizing their dream. This practice has grown to such an extent that it is labeled as womb outsourcing industry and being calculated in terms of billion dollars. More than any other medical technology this reproductive technology has given significant powers to human beings over ), reproduction. The surrogacy arrangements allow the creation of non-traditional families. Surrogacy may affect the society, the country as a whole because of its impact on the family structure, which is the primary institution of a society. Disruption of family structure has manifold effects on the education, health and welfare of the children. Procreation has been taken to the marketplace. Motherhood is for sale. Baby factories and mother machines are available to get an offspring. It not only raises fundamental questions pertaining to procreation, it foundation and the procedure involved, but also creates dilemma as to its socio-economic fit. The body politics and its manipulation through technology has been the matter of serious discourse. It involves various ethical, moral, legal, social, economic, psychological and political issues that need to be determined and analyzed in the context of fast growing surrogacy industry in India. Now the practice of surrogacy has taken the form of a source of livelihood for poor women in India. The apprehension in this regard is that a woman
who is easily susceptible to abuse may further be exploited. Though there are arguments to favor this practice on the ground of freedom of woman to choose as to the use of her body it is very difficult to imagine such an independent status of woman in India where she is regarded as second class person or considered always subordinate to male member of the family. In this connection it becomes very essential to debate on the concept of surrogacy, its practice and its implications on women.

II. Meaning and Concept of Surrogacy

The word 'surrogate' has its origin in Latin word 'surrogatus', past participle of 'surrogare', meaning a substitute, that is, a person appointed to act in the place of another. Thus, a surrogate mother is a woman who bears a child on behalf of another woman, either from her own egg (traditional) or from the implantation in her womb of a fertilized egg (gestational) from other woman. This arrangement involves an agreement between commissioning parents and the surrogate mother through which surrogate agrees to bear, beget and relinquish the child of commissioning parents after carrying it to full term. In return she may agree to get compensation or she may do it for altruistic purpose. Surrogacy can be classified in different ways. It can be altruistic if no compensation is involved in the arrangement whereas it is commercial surrogacy if compensation is paid to the surrogate mother.

It is traditional or partial surrogacy if surrogate’s egg is used and she is artificially inseminated with the sperm of the donor or biological father. It is gestational or full surrogacy if done through TV process, by implanting embryo in her womb and her eggs are not used. In IVF process fertilization takes place outside the womb whereas it happens in the womb of Surrogate in GIFT procedure. This arrangement leads to the creation of multiple fathers and mothers’ namely genetic mother (egg donor), gestational mother (surrogate), commissioning mother (social mother who is entering into contract with surrogate), genetic father (sperm donor) and commissioning father (social father who is entering into contract with surrogate).

India’s gestational surrogacy market utterly fails to uphold the four principles of medical ethics. In fact, it further oppresses a class of women who desperately need empowerment. And though India’s surrogacy market provides Indian surrogates with a significant source of income that they could not otherwise obtain in such a short amount of time, this benefit is starkly outweighed by the harms associated with commercial surrogacy the commodification and exploitation of India’s poor uneducated women. However, India is not without options to reduce the harm its gestational surrogacy market causes.

III. Historical Roots

Surrogacy is an ancient practice. Traces of its practice can be found during ancient period in India as well as in the west. In Mahabharata there are various instances of in vitro fertilization and womb transfer. Great sages of ancient India debated and successfully conducted experiments to
reproduce offspring. Parthenogenesis in human beings was known to our sages. A child can be produced without sexual intercourse between man and a woman. Gandhara, wife of King Dhritarashtra, conceived but the pregnancy went on for nearly two years; after which delivered a mass (mole). Bhagwan Vyasa found that there were 101 cells that were normal in the mass. These cells were grown in vitro (Ghruita Kumbha) till full term. Of these 100 developed into male children (Duryodhana, Duhschasana, and other Kouravas) and one as a female child called Duhsheela. Dr. P. V. Vartak convincingly argues that all the Pandavas were born through parthenogenesis system.

Another instance from Mahabharata is the embryo transfer from the womb of Devaki to Rohini to protect the child (Balarama) from being killed by Kansa. It has been mentioned both in the Bhagvata Purana and the Vishnu Purana that birth of Balram took place due to embryo transfer from Devaki’s womb to the womb of Rohini. Even Lord Krishna was begotten by Devaki but reared by Yashoda, who is referred to be surrogate mother by today’s surrogate themselves. It is believed that 24th Tirthankar Lord Mahavira was born after an embryo had been transferred from one woman’s womb to another one’s. During Biblical times an interesting story that runs around Sarah, the wife of Abraham, could not have children in the beginning. She instructed her maid Hager to go to Abraham to produce them a child. Hagar gave birth to a son called Ishmael. Ishmael was the first child in history of western countries where Christianity is their religion born due to the so-called traditional surrogacy program. During medieval period, services of wet nurses and concubines were used. This situation prevailed until the final decades of the twentieth century, when aseries of technological developments re-created the option of arm’s length conception.

IV. New Era of Modern Reproduction

The past half century has witnessed a revolution in human reproduction. With the birth of Louis Brown (first test tube baby in the world) in England in 1978 and Kanupriya (first in India during the same year) in India the new reproductive technological era began. Various treatment were made available to infertility problems viz. Artificial Insemination, oldest Artificial Insemination by donor - AID & Artificial Insemination by Husband- AIH), Invitro fertilization, GIFT (gamete intrafallopian transfer), ZIFT (zygote intra fallopian transfer), super ovulation with fertility drugs, TUDOR (trans vaginal ultrasound-directed oocyte recovery), embryo transfer, and surrogacy. AID and AIH are solutions to

1 Parthenogenesis means reproduction from an ovum without fertilization, especially as a normal process in some invertebrates and lower plants.
3 Ibid. at 215-223.
4 SAMA – A Resource group for women and health
5 The Book of Genesis, Chapter 16
6 Debora L. Spar, For love and money: The political economy of commercial surrogacy, (12:2 May 2005 Review of International Political Economy)
male infertility problems whereas IVF and embryo transfers are solutions for both male and female infertility problems. Procreation has been made possible without sexual intercourse with the help of modern technology. First successful birth through gestational surrogacy in the world took place in the year 1984. In India it happened ten years later, in Chennai, for the first time. In 1997, an Indian acted as a gestational carrier, in order to obtain medical treatment for her paralyzed husband. India witnessed steep increase in surrogate births after Oprah Winfrey show in which a couple was interviewed who got their child through surrogacy in Anand, India during October 2007. Dr. Nayana Patel’s clinic became popular worldwide. In years, the number of births through surrogacy doubled with estimates ranging from 200 up to 350 in 2008 alone. With the popular film stars Amir Khan and Shah Rukh Khan of the Bollywood adopting this method to get children now it is being widely accepted, which was opposed earlier on the ground of ethical considerations.

All these circumstances prove that by any chance surrogate motherhood bears the mark of women exploitation, instead of being the landmark of women empowerment. It is a logical paradox. When a group of women (so called empowered) enjoys freedom over their body and mind, the other group (sells herself in terms of surrogacy) are being exploited for the same reason.

It is very difficult to arrive at the exact statistics pertaining to the existing surrogacy industry in India the sharp growth in the industry is evident from various reports published by the research institutions, newspapers and governmental organizations. As on 2005, there were an estimated 250 IVF clinics in India. To regulate the activities of the ART clinics National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India were issued by Ministry of Health and Family Welfare, Government of India and ICMR, New Delhi during the year 2005. Now ICMR has taken an initiation to create a registry of ART clinics for which it has called for submission of information by all the clinics and at present only 274 Assisted Reproductive Technology clinics in India are registered with Indian Council of Medical Research, New Delhi under National Registry of ART Clinics and Banks in India.

According to National Commission for Women there are about 3000 clinics throughout India that offer surrogacy services to not only Indian infertile couple but foreign couple as well. India’s reproductive tourism industry promoting surrogacy is estimated to be worth more

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7Centre for Social Research, New Delhi. "Surrogate Motherhood - Ethical or Commercial' 34 available at http://csrindia.org/index.php/publications (last visited on Nov. 29,2014)


than 25,000 Crore today.\textsuperscript{10} India is a favorite destination for commercial Surrogacy as these services are available at a very low cost as compared to other developed countries viz., USA, UK, and Canada etc. Lack of regulation, shorter waiting time, the possibility of close monitoring of Surrogates by commissioning parents, availability of large pool of women willing to be surrogate, infrastructure, access to cheap drugs, cheap labour, best medical expertise comparable to international standards and commercialization of Surrogacy are so the other reasons that promoted this industry in India.

In addition to the clinics there are various other agency services available in India like National and International health care consultants, travel agencies, law firms, surrogate agents, surrogate hostels, and tourism departments’ etc.\textsuperscript{11} India has become popular in this industry because of the prohibition or stricter regulation of this commercial Surrogacy in most of the countries. Another factor that contributes towards the rise in popularity of Surrogacy industry is that people in India (doctors, agents and even some Surrogates) are fluent in English language. There is rapid growth of this industry which is evident by the fact that it was worth $445 million in the year 2008 but now it is worth $5000 million. Earlier these services were available in few cities including metros like Anand, Surat, Jamnagar, Mumbai, Delhi, Bangalore and Chennai but now almost every smaller city offers this service namely, Jalandhar, Indore, Bhopal, Kochi, Madurai, Ahmedabad, Pune, Lucknow so on. Anand in Gujarat which is already popular for milk revolution has become world’s Surrogacy capital.\textsuperscript{12}

This arrangement costs $11, 000, (approximately Rs.5, 00,000/-) in India, while in the US, Surrogacy alone, excluding ART charges, costs $15,000/- (approximately Rs.6, 75,000/-). A similar arrangement in the UK costs about £10,000—(approximately Rs.7, 00,000/-). According to another research study conducted by Centre for Social Research, New Delhi, the fees for Surrogates are reported to range from $2,500/- to $7,000/- in India with $20,000/- to $25,000/- in comparison in United States of America. The total costs can be anything between $10,000/- and $35,000/- . This is a lot less than what intended parents pay in the United States, where rates fluctuate between $59,000/- and $80,000/- .\textsuperscript{13} Following observations can be deduced after analyzing all these statistics presented and the research

\textsuperscript{10} Anil Malhotra and Ranjit Malhotra, Surrogacy in India – A Law in the Making, 8(Universal Law Publishing Co. New Delhi, 2013).

\textsuperscript{11} Supra note 4 at 7, Also see : Preetia Nayak “The Three Ms. of Commercial Surrogacy in India” in Sayantani Dasgupta and Shamita Das Dasgupta Globalisation and Transnational Surrogacy in India – outsourcing life 3 (eds.3 Plymouth, UK: Lexington Books, 2014).

\textsuperscript{12} Ibid. at 2.

\textsuperscript{13} Supra note 7. Also see Usha Rengachary Smerdon "Crossing Bodies, Crossing Borders: International Surrogacy between United States and India" 39: 1 2008 Cumberland Law Review p.32 and Sharmila Rudrappa “Mother India- Outsourcing Labor to Indian Surrogate Mothers” in Sayantani Dasgupta and Shamita Das Gupta (eds.), Globalization and Transnational Surrogacy in India-outsourcing life 125 (Lexington Books, Plymouth UK, 2014)
data published by Centre for Social Research, New Delhi\textsuperscript{14}.

1. Surrogate mothers are available at a very low cost and receive very meager amount of money for the services they render compared to their counterparts in foreign countries especially United States of America.
2. Almost all surrogate mothers decided to go in for surrogacy due to their poverty.
3. Majority of them are illiterate and are employed as domestic helpers, house maids, construction workers and earned very low income with less than Rs.3000/- p.m.
4. Most of them belong to nuclear male dominated family and husbands do not mind to allow them to be surrogates.

These statistics, inferences and rapid growth of this industry make us to ponder over the aspect of surrogacy from the point of view of women's rights.

V. Surrogacy as a new mode of exploitation

The present form of surrogacy prevalent in India is suffering from many anomalies and is not sufficient to deal with various problems coming from surrogacy. It is correct that every person has a right to start a family and surrogacy is one such way through which infertile couples can fulfill their dreams but it is not accepted that just to fulfill their dream life and health of another person has to suffer so much. One of the anomalies suffered by the surrogacy practices in India is the lack of any post and pre pregnancy counseling of the surrogate so as to make sure that the surrogate mother is fit, both mentally and physically to carry a child for another person, this counseling is also necessary to make sure that the consent is free from any kind of influence and the act is a voluntary act of the surrogate mother. This counseling will help her in measuring the pros and cons of the action so as to avoid any future tribulations.

Family is the primary institution of the society. It is the family, more particularly mother, plays a vital role in creating future citizens. She nourishes, nurtures, socializes the child. It is this family, the bonding; the upbringing makes future of the country. Therefore it becomes essential to see how families are made, what policies and practice govern the structure of the family. The responsibility of the state to control the lives of members of the family and to determine the structure of the family is equally important. In this connection various arguments are proposed mainly accusing surrogacy as a new form of exploitation of women. Hence it has become important now to find out a way to secure rights of surrogates. New reproductive technologies have made the body a property that can be bought, sold and hired. In the absence of legislation abuse of rights of the vulnerable groups is very much possible.

Commodification itself is an attack on the dignity of the child, the surrogate mother and the commissioning parents and everyone else. Children and the surrogate mother are objects here in the surrogacy arrangement to be bought or hired.

"Surrogacy compromises the dignity of the child by making the child the object of a contract-a commodity. It further

\textsuperscript{14}Supra note at 7.
compromises the dignity of the mother, even if her participation is voluntary, by merely treating her as a 'womb for hire.'\(^{15}\)

Hence, dealing with human body as a commodity is prohibited under the Constitution of India. Trafficking involves exchange of human beings, their body and its parts. It also includes exchange of bodily capacities\(^ {16}\). Trafficking benefits men, who in the guise of doctors, lawyers, brokers or agents carry on the exchange of women's bodies for surrogate contracts. Janice Raymond observes:

"Trafficking wrenches the term surrogate mother out of its present context of blaming women and highlights that women are the objects of international exchange. Trafficking situates surrogate arrangements in the system of gender inequality - as practice that enhances the subordination of women by making women into reproductive objects of global exchange\(^ {17}\).

Trafficking in women and children is an offence both at national and international levels. It is argued that women are forced to become surrogates and their free consent cannot be termed free as they are driven by the situation of poverty and large sum of money is involved. It is apprehended that it also amounts to baby sale and babies are trafficked across international borders though there are various arguments that agreement is entered into even before the child is born hence it is not sale of babies.

Another serious objection to surrogacy is that it amounts to prostitution. Prostitution is also a form of exploitation of women. Though it is not prohibited in India any activity that promotes prostitution is an offence. Both are equated for the reason that saleshire of reproductive organs of the body is involved in them. The compelling reason behind women's decision to opt for prostitution or surrogacy is same.

Much more damaging and unnatural factor is that it adversely affects the surrogate mother psychologically as she is required to surrender the child as soon as it is born which was part and parcel of her body. The entire process of reproduction involves not only bearing and begetting but also rearing of the child. Surrogate bears and begets the child and commissioning mother has to continue with rearing of the child which is described by many as deconstruction of motherhood. In this process both the surrogate mother and the child are at loss. The greatest harm caused in this process is that it adversely affects a woman’s physical health. As it is well said and known that whenever a mother gives birth to a baby it is a rebirth for her as well. That is the extent of risk involved where her life itself will be threatened. Moreover risk of failure is there in every stage of this treatment. Only about 60 to 80 percent of IVF attempts at fertilization are successful and most of those

\(^{15}\) A paper by the Iona Institute “the ethical case against surrogate motherhood: what we can learn from the law of other European countries' available at www.iona institute.ie 5 (last visited on June 17, 2015)


do not result in pregnancy\textsuperscript{18}. In order to ensure success more than one embryo is placed in the surrogate's womb which may result in unwanted multiple pregnancies leading to health hazards for the surrogate. The possible risks of multiple pregnancies are increased chances of miscarriage, obstetric complications, premature deliveries, and birth complications. Fetal reduction may cause bleeding, perforation, infection, premature labour, and loss of all fetuses\textsuperscript{19}. Repeated IVF procedures leave surrogate exhausted and it is very painful\textsuperscript{20}. It is also very much likely that a surrogate might get infected with HIV or Hepatitis if the donors or commissioning parents have these transmitting diseases. However, it can be controlled by thoroughly testing the sperm and ovum before fertilization.

In spite of all these adverse consequences, if women opt for being surrogate there must be some strong reason behind it. The reason may be either to help them (i) voluntarily; or (ii) to submit themselves voluntarily out of necessity or compulsion; or (iii) involuntarily out of force, intimidation or coercion. Only those people with too much of love care and compassion towards others will be ready to help infertile couple altruistically the instances of which are very rare. Only poor women will be ready to take such risks out of compulsion or due to coercion. Poverty is the driving force for women to go in for this practice. There are various situations which make a woman's life vulnerable. She is susceptible to attack and infertility is one in which she may be exploited. Her position, whether commissioning mother or surrogate mother, is equally under threat. This is true throughout the world. As per previous reports published worldwide and in India a woman is still not an independent sole but acts under the control and influence of male member of the family or society. Though many women regard pregnancy as creative and positive experience\textsuperscript{21} and become ready to be surrogates to help infertile women, they do so out of economic compulsion\textsuperscript{22}. Their freedom of choice is controlled by various social and psychological concerns. It may be a woman’s private choice but it is argued that it is publicly sanctioned violence against women\textsuperscript{23}. Moreover, most of the women who engage in surrogacy are usually poor. They are from lower middle class strata predominantly uneducated, married, often engaged in casual work, and in need of quick money (that would otherwise take many years to earn) to solve their poverty issues. The need for money is so much that infertile couple bargain a better price favorable to them as a result of competition among surrogate women. Some of them have chosen it as last decent resort to earn money after suffering lot of trauma due to their poverty.

\textsuperscript{19}Supra note 4 at 65.
\textsuperscript{20}Supra note 7 at 36
\textsuperscript{22}Almost all the women are poor and opted for being surrogates out of economic necessity as per the study conducted by CSR, New Delhi. See supra note 7.
\textsuperscript{23}Supra note 16 at 8.
All these arguments are supported by the data collected by research study\(^{24}\). It interferes with the nature and leads to exploitation of poor women in underdeveloped countries who sell their bodies for money\(^{25}\). There is evidence that most of the surrogates are uneducated, unemployed or employed with very trivial wages, unsupported by their partner and are responsible for children and family. According to the study\(^{26}\), it is always the surrogate woman who has to compromise and bear the burden if there is any problem. First of all, she would like to remain anonymous due to social stigma attached to it. She is not paid properly the promised amount or under paid and she has no means or capacity to fight for her rights. Benefits can be derived only when there is equal exchange – money paid for the service rendered. But in reality there is a contract amongst unequals. She is neither aware of the terms of the contract nor is explained of various risks involved in the process. The contract is always biased in favour of the financially sound commissioning parents and freedom of the surrogate is an illusion. All the surrogates belong to the male headed/dominated nuclear family which means that they become surrogate mother with the approval of the husband. Their choice is not free and they act out of compulsion. They are exploited by the clinic as well by not paying their due. Surrogates even had to lose their daily wages to travel to the clinic for IVF attempts. They are compelled to stay at hostels away from home throughout the period of pregnancy\(^ {27}\). These are some of the instances of their exploitation. Weaker section is always liable to be exploited. The more astonishing fact that the contract between the surrogate mother and the commissioning parents is entered into after the confirmation of the pregnancy during the second trimester of the pregnancy\(^ {28}\) gives account of extent of exploitation. She is compelled to sign the document as she is already four months pregnant forcing us think to that is nothing but slavery. Neither she nor her husband are able to read or write and are explained the terms of the contract which is beyond s and cannot refrain back. Thus it is similar to slavery as slaves do not have self-ownership and are bound by the orders of the masters. Surrogate mothers are used as an instrument or object to achieve the desired end i.e. child. Hence it is seriously objected as it amounts to slavery.

Even in case of abortion decision due to abnormality of the fetus it is the commissioning parents who decide on the issue not the surrogate. In such case the compensation is not paid in some places where as in other places it is claimed that half the promised amount is paid. It is disturbing to note that most of the cases the money paid to the surrogates is coaxed by their alcoholic husbands and surrogates position remains same as before. She has to surrender her body completely to doctor and cannot refrain back.

\(^{24}\text{Supra note 7 at 29.}\)

\(^{25}\text{Dr. Justice A. R. Lakshmanan, Chairman, Law Commission of India address on “Surrogacy: The Future of Children” at Faculty of Law, Punjab University, Chandigarh. (2009) 2 MLJ p. 10.}\)

\(^{26}\text{Two research studies conducted by Centre for Social Research, New Delhi in five cities namely Anand, Surat, Jamnagar, Mumbai and Delhi (which are main cities offering surrogacy services in India) See Supra note 7.}\)

\(^{27}\text{Supra note 7.}\)

\(^{28}\text{Supra note 7 at 40.}\)
These states of affairs explain the extent of exploitation that takes place in surrogacy arrangement. It is the clinics in majority of the cases that exploit these poor women. It is quite natural that in a country where domestic violence is deep rooted in every household woman may be forced to become Surrogate. All these accounts make it clear that surrogacy brings new mode of exploitation of women which may be successfully practiced in the absence of any legislation.

This practice has every potential to exploit surrogates as they belong to poor families, are illiterate and are not aware of their legal rights. Exploitation is unethical and selfish use of human beings for satisfaction of personal needs or desires which may be in the form of human trafficking, bonded labour, slavery, forced labour, prostitution, economic exploitation, child labour etc. Though all these forms of exploitation are prohibited under the Constitution of India and various laws there is need for specific legislation to clarify and control exploitation in the form of surrogacy as it is allowed since 2002 in India. Every person has right against exploitation. Surrogacy is opposed on the ground that it amounts to human trafficking, slavery and there is economic exploitation.

The term exploitation implies harm. Lot of harm physically and mentally is caused to the Surrogate Women as she has to bear the consequences of the physical labour by giving birth to the child, hormonal changes and mental agony suffered by staying away from her own family and handing over the child soon after the delivery.

Exploitation involves coercion and deception in variety of forms. It may in the form of giving misleading information about their rights and privileges in order to keep them in the position of dependency. The same kind of activity can be seen in surrogacy practice wherein they are compelled to sign the contract documents and are not notified about the terms of the contract, health hazards involved in the process etc. Financial inducements are softer threats that are used to coerce a woman to be surrogate. The exploitation may be both consensual and nonconsensual. Here even if consent is given surrogates allow themselves to be exploited to as they do not have viable options and is given in the circumstances of financial desperation 29.

Even though some opine that surrogacy should be treated as a means of earning a livelihood and the body as a resource and product asset can be utilized; absence of free consent or lack of independence among Indian women make the opponents to strongly resist it. A market created where people are willing to buy commodities and sell body parts further worsens the exploitation situation of women who are already oppressed 30. It exploits socio-economic class differences. Financial and emotional needs of the surrogate and couple are used as currency. It is a form of medical violence against Women which is dangerous, destructive, debilitating and demeaning.

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30 Sarojini N. B. and Dharashree Das «ARTS: Voices from Progressive bias s and Assisted Reproductive Technologo”India” (eds.)Movements” in Sandhya Srinivasan “Making Babies: 36 (Zuban, New Delhi2010).
VI. Conclusion
Infertility is an age old problem that causes mental agony and trauma to the infertile couple. Though it is not life threatening this problem creates a sense of useless life in the minds of the couples especially the female. Barren Women are treated as incomplete women and face social exclusion. Adoption was resorted to as a last resort earlier. Now the availability of IVF technique using which couple can have their own genetically related child has given a new ray of hope and has acquired the place of adoption successfully. But in a country like India where women are subject to violence, abuse and exploitation to a greater extent surrogacy can be viewed as a new social problem. In this context, surrogacy may pave the way for further exploitation of women. Indian women are vulnerable. The poorer the country, the more is the fear of exploitation. The combination of poverty, illiteracy and lack of power that women have over their own lives will land them in difficulties. Even Law Commission of India in its 228th report has stated that a woman is respected as a wife only if she is mother of a child, so that her husband's masculinity and sexual potency is proved and the lineage continues.

The interest of the intended parents need to be given adequate attention due to the fact that, surrogacy is the last option available to them and any failure in the arrangement would be detrimental to them. Unfortunately, most of the countries have not considered the issue of various rights and duties of intended parents seriously. However, a close examination of many surrogacy arrangements, legal provisions and case laws indicates that, the intended parents are entitled to the following rights, such as right to select a surrogate mother; right to impose restrictions upon surrogate mother; right to information and visit surrogate mother during pregnancy; right to custody and parentage of child; right to maternity and paternity leave for intended parents.

In the absence of any legislation it is difficult for the courts to decide the legality of the surrogacy contract, rights of the surrogate, child and commissioning parents. Courts started determining taking into consideration the best interest of the child. Various committees worldwide were constituted to study the implications of this new technology. Most of the countries either prohibit or strictly regulate surrogacy. Very few countries have allowed its practice. The thought that it destroys the family structure, values, mental and physical health of human beings consequently resulting into unhealthy society has made various opponents to propagate for its ban. However the proponents argue for it as they emphasize on individual freedom of choice and reproduction. This ideological clash warrants legislative action to manage the situation and prevent exploitation of women by either banning this practice or by strictly regulating it.

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Execution of Mediation in Matrimonial Disputes

By Abhishek Kumar

www.supremoamicus.org
1. Introduction

Buddha said, “Mediation brings wisdom, lack of mediation leaves ignorance. Know well what leads you forward and what holds you back; choose that which leads to wisdom.”[1]

Mediation is a form of alternate dispute resolution mechanism, which aims to assist two (or more) disputants in reaching an agreement. It is an agreement, or a kind of compromise, which the parties themselves determine, rather than accepting something imposed by a third party. The unjustified delays in delivery of justice, as in the courts, hinder the credibility and efficiency of entire justice delivery system of the country.

In a developing country like India, with major economic reforms, Alternate Dispute Resolution mechanism could be one of the best strategies for quicker resolution of disputes to lessen the burden on the courts and to provide suitable mechanism for effective resolution of disputes.

This research paper talks about the status of mediation in matrimonial disputes in the states of Punjab and Haryana basically and the success rate of mediation under such cases. Moreover, the statistical data of the actual improvement in the justice delivery system outside the court rooms and the level of crime rate have also been discussed hereafter.

2. Historical Perspective

As recorded in Mulla’s Hindu Law, ancient India began its search for laws since Vedic times approximately 4000 to 1000 years B.C. The early Aryans were very intellectual, who primarily resorted to the written law of divine wisdom, reason and prudence, which according to them governed heaven and Earth. This was one of the first originating philosophies of mediation.

The era of Dharma Shastras (code of conduct) followed the Vedic epoch, during which the jurists developed the philosophy of basic laws. They recognized existing usages and customs of different communities, which were used as a tool for resolving the disputes, as an indigenous method.

During the days of Yajnavalkya, there was an unprecedented growth and progress of trade, industry and commerce and the Indian merchants are said to have sailed the seven seas, sowing the seeds of International commerce. These associations were invested with the power to decide cases based on the principles of justice, equity and good conscience.

The Buddhist aphorism reflects acceptance of the principle that mediation focuses on the future instead of dwelling in the past. Ancient Indian jurist, Patanjali said, “Progress comes swiftly in mediation for those who try the hardest, instead of deciding, who was right and who was wrong.”
During the Mughal rule, Emperor Akbar depended upon his mediator minister, Birbal. The most famous case was when two women claimed motherhood of a child, the mediator suggested cutting the child into two and diving its body and giving one half to each woman. The real mother gave up her claim to save the child’s life whereas the fake mother agreed to the division. The child was then given to the real mother. Though this is not a fully developed example of modern mediation, it is an example of interest-based negotiation where the neutral third party seeks to identify the underlying needs and concerns of the parties.[2]

As societies grew in size and complexity, informal decision-making processes became more structured and they gradually took the shape of a formal justice delivery system.

2.1 Mediation in India

In India, during the pre-British rule, the Mahajans were respected, impartial and prudent businessmen, who used to resolve the disputes between the merchants through mediation. The British system of justice gradually became the primary justice delivery system in India during the British regime of about 250 years. The British courts gradually came to be recognized for its integrity and gained people’s confidence.

The concept of mediation received legislative recognition in India for the first time in the Industrial Disputes Act, 1947. Arbitration, as dispute resolution process, was recognized as early as 1879 and also found a place in the Civil Procedure Code of 1908.

The Supreme Court held the constitutional validity of newly inserted Section 89 in CPC in Salem Advocate Bar Association, T.N. v. Union of India.31

Section 89 of the Civil Procedure Code reads as follows, “Settlement of disputes outside the Court”

Where it appears to the court that there exists elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may formulate the terms of a possible settlement and refer the same for:

(a) Arbitration;
(b) Conciliation;
(c) Judicial settlement including settlement through LokAdalat; or
(d) Mediation

The Supreme Court of India in Afcons Infrastructure Limited and Another v. Cherian Varkey Construction Co.(P) Ltd.32, interchanged the definitions of “mediation” and “judicial settlement” as given in Section 89, (Relevant Para : 11 to 13). It was also clarified that there is no requirement to formulate the terms of settlement as per mandate of Section 89. (Relevant Para : 14 to 19).[3]

3. Mediation in Matrimonial Disputes

Mediation is an informal, quasi-judicial, voluntary, ‘without prejudice’, unbiased, confidential process, which enables parties to express their concerns, exchange

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31(2003)1 SCC 49
32(2010)8 SCC 24
necessary information and make a good faith attempt to understand each other, in the presence of a neutral third party, who catalyzes the process of resolution and enables parties/disputants to dispose of their solution at their will.

Mediation in context of the matrimonial disputes is very different from that of the commercial disputes, just because of the difference in its nature. The data that has been collected revealed out the approximate of 95% of disputes to be matrimonial, 3% to be family disputes as between father-son, mother-daughter, etc. or any other relative, and 2% to be the property or water disputes.

Fig. 1 shows the distribution of general disputes that are referred to the mediation centre of Punjab and Haryana High Court.

### Nature of Disputes

- **Matrimonial**
- **Family dispute**
- **Property/water dispute**

Fig. 1. The nature of general disputes referred to Mediation

Further, the general expression also includes in itself, the kinds of disputes or problems that arise under the category of matrimonial disputes. The nature of cases that are experienced under this category can be stated as follows,

### 3.1 Section 438 CrPC - Anticipatory Bail

The grant of bail to the person apprehending arrest is given under Section 438 CrPC. In Mediation, the disputes are settled and the fact is cleared with the help of the availability of witnesses, that whether the person concerned is apprehended falsely for the arrest or not. A settlement made under the mediation can be helpful in taking an anticipatory bail from the Court because now, the Court would not have to indulge into the legal proceedings for proving the apprehension. The cases that have been witnessed in the mediation centre include that of *Hani v. State of Haryana and Another*[^34](2016), where anticipatory bail has been granted by the Court, on account of the settlement by mediation; and in *Parneet Singh Swani and others v. State of Punjab and Another*[^35](2014), where the anticipatory bail was granted by the Court, after receiving the full-fledged report from the mediation centre stating the proof of false apprehension. Approximately, 40% of the total cases in mediation are of this kind.

### 3.2 Section 482 CrPC - Quash Petition

In context of Section 482 CrPC, the quashing of an FIR is possible with the help of mediation report. The parties, if wish to settle the dispute economically and without much delay, take the assistance of mediation and get their petition quashed, as it has been the inherent power of the High Court.

[^34]: AIR 2016 SC 1
[^35]: AIR 2014 SC 785
granted under Section 482 CrPC. In the case of Kulwinder Singh and Others v. State of Punjab and Another\(^{36}\) (2007), a petition has been filed, on the basis of mediation report to quash an FIR under Sections 379/466/471/120B IPC. The FIR was quashed, seeing the report of mediation to have validly settled the dispute.

Another case of Gian Singh v. State of Punjab and Others\(^ {37}\) (2012), had its FIR quashed on the basis of the mutual settlement under mediation. An Approximate of 35% of such kind of cases are witnessed. (Fig. 2.)

3.3 Section 125 CrPC- Maintenance

The cases of maintenance that are filed in the Courts can be brought to the mediation centre, and to save time and money, the help of mediators can be taken in resolving the matter. In courts, the amount of maintenance shall be presumed to be as per the relevant substantive laws, while in mediation, the amount/quantum of maintenance can be mutually decided by the parties. It is informal and more satisfactory than the Courts.

In Rahul Labroo v. Priya (2015), the dispute of maintenance was settled in the mediation and subsequently, the case was finally withdrawn from the competent Court of Law. This was an instance of justified economic balance for the parties.

Another case of Rekha v. State of Haryana and others (2014), states the use of mediation in dealing with the settlement of the dispute under Section 125 CrPC, where both the parties had a settlement by agreeing to the amount of satisfying maintenance that was very genuine and was within the scope and reach of the husband. It was seen and felt that there was no force used, unlike in law, to pay the maintenance, but it was resolved in a very peaceful way. Approximetely, 75% of the cases are seen under Section 125 CrPC in the mediation Centre of Punjab and Haryana High Court, Chandigarh. (Fig. 2.)

3.4 Domestic Violence Disputes

There are several kinds of disputes violating the domestic rights of the spouses, while in co-habitation. The cases of such disputes are also settled peacefully by mediation. Some of the cases, as that of Ashok Kumar v. AnupamaSharma (2015), had a settlement of their dispute by mediation. The nature of dispute is the emotional torture to the wife at every step of daily routine, the unjustified beatings after being drunk, abusing the children, social imbalance, and various other factors lead to such violences, as a result of which, most of the times, the wife and the children become the victims.

In some cases, the In-Laws Interference proves to be the dominating factor that leads to domestic violence, as was seen in AmarjitKaur and others v. NeerajBala (2009), where the Mother-in-law used to unnecessarily torture her daughter-in-law, to have not brought a good amount of dowry. Most of the times, she used to beat the innocent girl. This case was referred to mediation and was successfully settled then and there. Approximately, 80% of the cases

\(^{36}\)2007 (4) CTC 769
\(^{37}\)(2012)10 SCC 303
are such of a nature that are being witnessed in the recent times in mediation. (Fig. 2.)

3.5 Guardians and Wards Act, 1980
Just because of the dispute that arises between the husband and wife, sometimes the custody of the children becomes a point of paramount concern. Such cases have been witnessed for mediation where mainly Section 12 of the Guardians and Wards Act, 1980 attracts notice into the matters. The mechanism and the opportunity of mediation has successfully been able to deal with such disputes and has given out fruitful settlement reports to the High Court.

In the case of Parminder Singh v. Bhupinder Singh and others (2017), the custody of a minor girl was concerned, and was settled peacefully under mediation. Same was the case of Shalu v. Mr. Rajinder Goel (2016). An approximate of 70% of the cases today in mediation is of such nature. (Fig. 2.)

4. Impasse-Deadlock: A challenge to break
Impasse-Deadlock: A word, which every mediator is scared of. There is hardly any mediation in which the mediator does not come across an impasse. It brings a great level of frustration in the mind of mediator for the reason that he has put hours of his precious time, but parties stick to their ego. The reason for the impasse is that the parties want to have a win-win situation. Impasse can be due to the following reasons,

(i) Parties wanting to be winner always;
(ii) Parties feel that to establish justice, they have to fight till the end, no matter how long it would take or what could be the possible result in the end;
(iii) Parties feel that the other party, who caused them grief/pain, should suffer serious consequences and emotional torture;
(iv) Parties do not want to accept the finality of the decision and feel that a neutral person could determine and give the option which could be acceptable but the same, if given by the other party will be rejected out rightly.

4.1 Practical tools to handle impasse
(i) Mediator has to primarily build trust in the process and in the mediator himself. The more trust a mediator builds in others, the more they will affirm his faith. It’s a climate that lays foundation for transforming conflict into satisfying outcome.
(ii) Mediator has to be patient, persistent and determined and let the parties to take a final call.

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Fig. 2. Nature of matrimonial disputes under mediation

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As per the data collected from mediation centre
(iii) Mediator has to appreciate the parties’ credibility, trustworthiness and good faith participation to ensure workability of any agreement.

(iv) Mediator must assist in exploring the hidden facts, concerns and fear to understand the true nature of the situation.

(v) Mediator must pack up the conflicting situation in a manner in which the parties take a balcony view and get a different approach towards possible remedies.

5. **Children: Victim of Ego in Marital Disputes**

Nowadays, the Indian society is facing a sad reality of increasing divorce rates. Marital disputes have become a social issue. The young generation is the real victim. With the many other complexities that a divorce has on the individual, family and society at large, children of divorced couples are the one who bear the main force of blow of the entire happening. Due to the tender age of such kids, they are unable to understand the actual cause of separation of their parents. Most of the time, they are being used as a bargaining weapon. In most of the cases, the parent (mother or father) in whose custody the child or children are, badly tutor their kid against the other parent.

*“The birth of a child is one of the biggest miracles of God and then comes separation called “Divorce” and the child custody becomes the biggest problem”.***

In family disputes including custody of child, parties come with a number of false allegations against each other. Here, they forget about the future and emotional feelings of the children. It has been experienced by one of the mediator that a minor girl appealed with her folded hands and tearful eyes to reunite her parents, but the parents stucked to their ego.

Another serious issue out of family disputes is regarding the post-separation custody of children where again the children suffer. Depriving love and affection of both the parents, more particularly due to alienation of the child by the custodial parent and denial of proper access to the non-custodial parent by the courts causes serious harm to the mental equilibrium of the child.

*“There can be a divorce between husband and wife but there can’t be a divorce between father and mother”.***

Thus, the child’s lifelong emotional health and stability is of paramount value and for that they must grow up with the feeling of love and respect towards both parents rather than just becoming a bargaining tool in the hands of either parent.


The recent case of 2017 is a very good evidence of the present scenario of cases that are referred for mediation. This case basically supports the point that it must be borne in mind that the object behind the enactment of Section 498A IPC and the Dowry Prohibition Act is to check and curtail the threat of dowry and at the same time, to save the matrimonial homes from destruction.
The Madras High Court has experienced that apart from the husband, all family members are suspected and dragged to the police stations. Though the arrest of those persons is not at all necessary, in a number of cases, such harassment is made simply to satisfy the ego and anger of the complainant. By appropriately dealing with such matters, the injury to the innocents could be avoided to a considerable extent by the magistrate, but, if the magistrates themselves accede to the bare requests of the police without examining the actual state of affairs, it would create negative effects thereby, the very purpose of the legislation would be defeated and the doors of conciliation would be closed forever. The husband and his family members may have difference of opinion in the dispute, for which, arrest and judicial remand are not the answers. The ultimate object of every legal system is to punish the guilty and protect the innocents. Blackstone’s true words support this conception, as he says, “It is better that ten guilty persons escape than that one innocent suffer”.

According to the Reports of the National Crime Record Bureau in 2005, for a total 58,319 cases reported under Section 498A IPC, a total of 1,27,560 people were arrested, and 6,141 cases were declared false on account of mistake of fact or law.(Table 1.)

While in 2009 for a total 89,546 cases reported, a total of 1,74,395 people were arrested and 8,352 cases were declared false on account of mistake of fact or law.(Table 1.)

According to the Report of Crime in India, 2012 Statistics, National Crime Records Bureau, Ministry of Home Affairs showed that for the year of 2012, a total of 1,97,762 people all across India were arrested under Section 498A IPC. The Report further shows that approximately a quarter of those arrested were women that is 47,951 of the total were perhaps mother or sisters of the husband. However, most surprisingly, the rate of charge-sheet filing for the year 2012, under Section 498A IPC was at an exponential height of 93.6% while the conviction rate was at a staggering low at 14.4% only. The Report stated that as many as 3,72,006 cases were pending trial, of which 17,000 were projected to the acquitted.(Table 1.)

In 2013, the Bureau further pointed out that of 4,66,079 cases that were pending in the start of 2013, only 7,258 were convicted while 38,165 were acquitted and 8,218 were withdrawn. The conviction rate of cases registered under Section 498A IPC was also a staggering low at 15.6%.(Table 1.)

In the last 10 years between 2005 and 2015, the number of cases being filed under section 498A IPC is on the rise and there is roughly a 10% rise in the number of pending cases each year. The number of pending cases at the end of 2015 is more than twice the number of pending cases at the end of 2005. At the end of 2005, 2.06 lakh cases were pending and this number increased to 4.77 lakh by the end of 2015, an increase of more than 130% in 10 years.
Table 1. Report of the National Crime Records Bureau

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases Reported</th>
<th>People Arrested</th>
<th>Acquitted</th>
<th>Convicted</th>
</tr>
</thead>
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<tr>
<td>2005</td>
<td>58,319</td>
<td>1,27,560</td>
<td>6,141</td>
<td>52,178</td>
</tr>
<tr>
<td>2009</td>
<td>89,546</td>
<td>1,74,395</td>
<td>8,352</td>
<td>81,194</td>
</tr>
<tr>
<td>2012</td>
<td>3,72,706</td>
<td>1,97,762</td>
<td>3,17,000</td>
<td>55,706</td>
</tr>
<tr>
<td>2013</td>
<td>4,12,438</td>
<td>2,19,454</td>
<td>38,165</td>
<td>7,258</td>
</tr>
<tr>
<td>2014</td>
<td>4,43,885</td>
<td>2,01,127</td>
<td>40,428</td>
<td>6,425</td>
</tr>
<tr>
<td>2015</td>
<td>4,77,986</td>
<td>1,29,994</td>
<td>39,658</td>
<td>6,559</td>
</tr>
</tbody>
</table>

This report merely showed the acquittal and the conviction rate under certain serious issues, which are not justified in the very first go. At the same time, violation of human rights of the innocent cannot be brushed aside. Certain safeguards against uncalled for arrest or insensitive investigation have been addressed by the Supreme Court. Still, the problem continues to a great extent.

To remedy the situation, the Supreme Court has laid down certain guidelines that are to be followed while dealing with such type of cases, and the guidelines are as follows,

(i) The involvement of civil society in the aid of administration of justice, apart from the investigating officers and the concerned trial courts being sensitized;
(ii) To facilitate closure of proceedings where a genuine settlement has been reached instead of parties being required to move High Court only for that purpose;
(iii) In every district, one or more Family Welfare Committees be constituted by the District Legal Services Authorities;
(iv) The committees may be constituted out of para legal volunteers, social workers, retired persons, wives of working officers or other citizens who may be found suitable and willing;
(v) Every complaint under Section 498A of the Indian Penal Code received by police or the magistrate be referred to and looked into by such committee. Such committee may have interaction with the parties personally or by means of telephone or any other mode of communication including electronic communication;
(vi) Till report of the committee is received, no arrest should normally be affected.

These guidelines were laid down by the Supreme Court in order to build up a certain level of change in the Report of the Bureau because the Report had shown a very drastic face of the implementation of the laws that are made so beautifully by the legislature. The Report revealed the actual status of the administration that is working for the execution of the laws, but is unfortunately unsuccessful due to certain discrepancies. Moreover, the Mediation and Negotiation concept that has really brought wonders in the field of administration of justice in the Indian land, requires a need to understand the mechanism and to know the actual

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39Rajesh Sharma &Ors. V. State of Uttar Pradesh &Anr.
benefits, that come out of the technique used in the same and the ultimate goal that it sets within itself to exclusively deliver a conduct of final peaceful settlement between the parties.

7. Future Perspective of Mediation in Matrimonial Disputes

ADR services, under the control, guidance and supervision of the court would have more authenticity and smooth acceptance. It would ensure the feeling that mediation is complementary and not competitive with the court system. The system will get a positive and willing support from the judges who will accept mediators as an integral part of the system. If reference to mediation is made by the judges to the court annexed mediation services, the mediation process will become more expeditious and harmonized. It will also facilitate the movement of the case between the court and the mediator faster and purposeful.

Again, it will facilitate reference of some issues to mediation leaving others for trial in appropriate cases Court annexed mediation will give a feeling that court’s own interest in reducing its caseload to manageable level is furthered by mediation and therefore, reference to mediation will be a willing reference.

Court annexed mediation will thus; provide an additional tool by the same system providing continuity to the process, and above all, the court will remain a central institution for the system. This will also establish a public-private partnership between the court and the community. A popular feeling that the court works hand-in-hand with mediation facility will produce satisfactory and faster settlements.

8. Success Rate of Mediation in Matrimonial Disputes

Before proceeding towards the success rate of mediation in matrimonial disputes, it is of prime importance to study that what actually makes the process of mediation and negotiation so effective. Some of the supporting points in this regard are as follows,

(i) Mediation saves time, energy and money;
(ii) Relieves the agony of the parties by giving them peace of mind;
(iii) Re-establishes relationships;
(iv) It is more practical, collaborative and future-oriented;
(v) It brings innovative and flexible solutions from the parties itself;
(vi) There is direct communication between the parties with no third party involvement;
(vii) It starts and ends with what the parties care about and want;
(viii) It takes seriously the issues that matter the most to the disputants—relationships, fairness, emotions, justice, respect, inclusions and fixing a problem;
(ix) Parties can discuss whatever concerns them; they are not restricted to only resolving one issue but the entire dispute;
(x) It is totally neutral, good faith participation process where confidentiality ensures trust and parties move into problem-solving mode;
(xi) The exchange of information during the process enables a disputant to understand possibilities well and find an effective and workable solution;

(xii) Parties realize that time and money is saved through mediation. Once agreement is reached, its execution is guaranteed.

After reading all these points that talk about the increment in the efficiency of the Mediation and Negotiation process, it can further be said that in the matrimonial cases specifically, there is more of emotional dispute than the external, superficial, materialistic dispute. To overcome this state of mind, the mediator plays a very important role of bringing the minds at peace of both the parties.

Moreover, in support of this inference, there is some statistical data which reveals the real status of mediation and its success rate in matrimonial disputes more accurately and more appropriately.

Fig. 3. A brief representation of the success rate of mediation in matrimonial disputes.

The Bar graph/scale shows the level of representation of both the husband and the wife, in matrimonial cases. It has been found that if both the husband and wife are represented in their case, so under judicial trials, the ratio is much less than that in mediation. Moreover, if it is compared with that of unrepresented husband and wife, then the ratio is comparatively more in the latter case. This shows that even though the couples are not represented in their cases judicially, they have a brighter option of mediation left with them.(Fig. 3.)

Moreover, if the specific ratio between husband and wife is seen, it can be inferred that the ratio of women is again comparatively more than that of men, both on represented and unrepresented grounds. This shows that mediation, as an effective Dispute Resolution Mechanism, is preferred over judicial trials at a very higher rate. The cases are not to be concerned here; the nature of the grounds for settlement is of prime consideration to evaluate or prove the success rate of the mechanism used for resolution—whether judicial or quasi-judicial.

9. Conclusion

Mediation is a healing process. It can do wonders. What a party doesn't get in court can certainly get here in their own comfort zone. Mediation is the most effective Alternate Dispute Resolution mechanism and no other method can do as best as mediation. This inference has been supported, with the aid of recent data that reveals the present scenario of mediation and negotiation.

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Basically, the following points can prove the nature and scope of the mechanism on practical grounds,

(i) 95% of matrimonial cases that come for mediation in itself proves the trust rate of the people in the efficiency of the mechanism; (Fig. 1.)

(ii) Under matrimonial disputes, the maximum number of cases, that of domestic violence and maintenance, prove the conscious level of people towards the mechanism; (Fig. 2.)

(iii) After evaluating the statistical data, referred in the case of Rajesh Sharma &Ors. V. State of Uttar Pradesh &Anr., the status of judicial trials and their subsequent results are derived out, which are far unsatisfied, due to which the mechanism of ADR has been preferred therein; (Table 1.)

(iv) Moreover, the level of representation of husband and wife under mediation, which is in higher proportion to that of the judicial trials, infers the fact of the efficiency of the mechanism. (Fig. 3.)

However, the success rate of mediation and negotiation has been extracted from the data collected, yet the preference can be leveled up for this mechanism in the near future, by generating the following volunteer steps,

(a) **Lack of Awareness:** People need to be made aware of the benefits of mediation and negotiation;

(b) **Remuneration Set-up:** The mediators are not paid up to mark, for some cases, because of which, it is but natural that the interest level and zeal of the mediator may fade, up to a certain extent, sometimes.

(c) **Court’s Co-operative Assistance:** - The courts need to work for developing increment in the processing of the mechanism, in order to increase its efficiency manifold;

(d) **Concern for Effectiveness:** - Formulation of productive schemes for the progressive functioning of the machinery and appropriate funds shall be raised for leveling the concept of mediation and negotiation to a certain point of sustainability.

(e) **Paramount Attention towards Marital Disputes:** - Matrimonial disputes are the social disputes, which disturb the mental and emotional background of the society at large, sometimes. And, most of the cases under mediation are those of marital disputes. Thus, it shall be looked into by the courts that appropriate assistance is provided to the mediation centres, for the effective working of the process.

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THE CASE FOR DATA PROTECTION AND PRIVACY LAWS FOR INDIA

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Abstract

- The concept of Right to privacy has always been considered as a very crucial topic of discussion. India, famed as the world’s youngest and largest democracy, with a population of over 1.37 billion, is at the threshold of evolving into a sophisticated democracy.

- Concept of privacy emergence – since the inception of civilization on this planet human being was covered with his privacy, earlier confined to story of Goddess Parvati bath and In Islam burkha system privacy; women lived in premises with trees and all; people gave notice before entering so trespass and privacy”

- Right to privacy is fundamental right guaranteed under Article 21 of Indian constitution because Right to life includes Human Dignity includes right to privacy.

- In this era data can be leaked very easily, so there is threat to the life and liberty of the citizens. data protection in this technological era is very important issue because peoples using social sites, applications, on internet without thinking about leakage of their data which can use this data for telemarketing, making the life of the consumers/citizens hell by selling all sorts of products to them.

Introduction

- The concept right to privacy has always been considered as a very crucial topic of discussion. And issue of data protection and right to privacy is correlated to each other.

- In this technological era, there is so much need of protection of our data because as we are using internet it is clear that we must have to keep safe our data because if the data leaked then it can be threat to life and personal liberty of human being.

- The meaning of Fundamental right is Rights essentials for complete development of human being and complete development means Moral, Intellectual, Physical, Religious and Social, Economic and Political development and if anyone violates these developments in anyway then it will be considering as violation of right to privacy under article 21 of Indian Constitution.

- The problem of protection of data is also a topic of debate because in security purpose this is very important and the present events can’t be ignored that how much cybercrime is effective in this present time so we must have to be aware about the protection of our data and government have
duty to protect the data of their citizens by using their legislative and executive power.

- Term data protection and privacy also related to each other because if data of individuals will be leaked then it will be considered as violation of right to privacy under article 21 of Indian Constitution.

- Every people have to aware about his/her personal data and think once before providing your data to any person, company, etc.

**DATA PROTECTION**

The data protection is very important to survive in this digital era so we have to be careful during sharing our data because in these days people gave their data easily to any company or organization. There are some points which will clarify about data protection—

- **Technical data security threat to information system**
- **Absence of security structure**—there are some companies and organizations do not have an established security system due to insufficient appointment of I.T officers in their organization which results there is threat to leakage of data.

- **Internet websites**—there are some malicious codes which can be transferred to a computer through browser webpage that have not undergone security updates so there is chance to be downloaded of a malicious file which results there is threat to leakage of data.

- **Use of mobile devices**— use of mobile devices or laptops or handled devices including smartphones, tablets, the Data of the devices can be leaked in the way of device can be lost or stolen or their security can be compromised by malicious codes invading the operating system.

- **Use of removable devices**— at the time of using of personal computer we insert some removable devices such as pen drive and card readers if these removable devices have some malicious content then it can be harm the data of computer.

- **Unauthorized Application Use**— use of unauthorized applications also creates threat to leakage of data because their terms and conditions don’t read by anyone which contains permission of reading data and delete data of using device.

- **Huge number of data are also collected by private entities**
- **Effect of leakage of data**
- That the Present scenario shows that many crores data of citizens was leaked from database and now this data is in the hands of the private companies, which can use this
data for telemarketing, making the life of the consumers/citizens hell by selling all sorts of products to them

**Ex-**

1. Hacking of bank accounts.
2. Misappropriation of data.
3. Misuse of Passwords and Login/Logout Procedures

- **Steps taken by government of India for protection of data**
  - No specific data is being maintained for cases of online harassment against women. However, as per the NCRB data under cybercrimes 589, 1203 and 758 cases of Publication/transmission of obscene, sexually explicit content (Under section 67 A, 67 B and 67 C of the Information Technology Act) has been registered during 2012, 2013 and 2014 respectively.
  - After consultation on Cyber Crimes in India held on **23.07.2015**, National Commission for Women has submitted a report which inter-alia recommended for opening of more cyber cells, dedicated helpline numbers and imparting of proper legal, setting up forensic labs and technical training law enforcement agencies like police and judiciary to combat cybercrime.
  - The **Information Technology Act, 2000** together with Indian Penal Code have adequate provisions to deal with prevailing Cyber Crimes. It provides punishment in the form of imprisonment ranging from two years to life imprisonment and fine / penalty depending on the type of Cyber Crime. However, the Government has taken following steps for prevention of Cybercrimes:
    - (i) Cyber Crime Cells have been set up in States and Union Territories for reporting and investigation of Cyber Crime cases.
    - (ii) Government has set up cyber forensic training and investigation labs in the States of Kerala, Assam, Mizoram, Nagaland, Arunachal Pradesh, Tripura, Meghalaya, Manipur and Jammu & Kashmir for training of Law Enforcement and Judiciary in these States.
    - (iii) In collaboration with Data Security Council of India (DSCI), NASSCOM, Cyber Forensic Labs have been set up at Mumbai, Bengaluru, Pune and Kolkata for awareness creation and training.
    - (iv) Programmes on Cyber Crime investigation. National Law School, Bangalore and NALSAR University of Law, Hyderabad are also engaged in conducting several awareness and training programmes on Cyber Laws and Cybercrimes for judicial officers.
    - (v) Training is imparted to Police Officers and Judicial officers in the Training Labs established by the Government.
    - (vi) The Scheme for Universalization of Women Helpline has been approved to provide 24-hour emergency and non-emergency response to all women affected by violence.

This information was given by the Minister of Women and Child Development, Smt Maneka Sanjay Gandhi in a written reply to an untarred question in the Lok
Sabha.

PRIVACY LAWS FOR INDIA
This is the very big topic of debate that whether right to privacy is a fundamental right or not but on the analysis of honourable court’s judgement, now it is clear that right to privacy is fundamental right guaranteed under article 21 of Indian Constitution.

Answer of this debate have two faces including past and present judgements of honourable court.

Past judgements of honourable courts of India which shows that right to privacy is not a fundamental right.

- The right to life under article 21 does not includes right to privacy
  that the respondent argued in high court that there is no right to privacy provided in any provision of the constitution of Mandi.
  - The right to privacy is not a fundamental right
    this statement is learned from the past judgements of hon’ble courts.
  - The right to privacy is not a fundamental right this statement is learned from the past judgements of hon’ble courts.
    - that the respondent argued in high court that there is no right to privacy provided in any provision of the constitution of Mandi.
  - That term life mentioned in the art.21 doesn’t means only right to breathe.
  - Right to life includes right to life with human dignity.
  - One can enjoy his life and liberty.

- In case of Rajagopal vs. state of T.N. the court stated an exception in this case where a person voluntarily involves himself into a controversy or invites one, that person would not fall under the right to privacy.

- in case of Govind vs State of MP, despite agreeing that right to privacy is the emanation of art.19 and 21 of the constitution, the top court held that right to privacy cannot be made an absolute right.

- In the judgement of MP Sharma vs Satish Chandra, the honorable court observed that right to privacy is not a fundamental right.

Thus, according to above judgements and other legal scenario shows that right to privacy is not a fundamental right.

Latest conclusion of honorable courts which shows that right to privacy is a fundamental right.

The right to life under article 21 includes right to privacy

Art. 21 of the Indian constitution says that:
“No person shall be deprived of his life or personal liberty except according to procedure established by law”

- Right to life includes right to life with human dignity and right to privacy is intrinsic part of human dignity.
  - That term life mentioned in the art.21 doesn’t means only right to breathe.
  - Right to life includes right to life with human dignity.
  - One can enjoy his life and liberty.

- In the judgement of Maneka Gandhi v. Union of India the Supreme Court observed that Art. 21 and held that the right to live is not merely a physical right but
includes within its ambit the right to live with human dignity.

- In the judgement of Francis Coralie v. Union Territory of Delhi, Court observed that: “The right to live includes the right to live with human dignity and all that goes along with basis necessities of life.

- In the judgement of Chandra Raja Kumari v. Police Commissioner Hyderabad, it has been held that the right to live includes right to live with human dignity.

**Origin of privacy**

- An evaluation of the origin of privacy is essential in order to understand whether (as the Union of Mandia postulates), the concept is so amorphous as to defy description.

- The Greek philosopher Aristotle spoke of a division between the public sphere of political affairs (which he termed the polis) and the personal sphere of human life (termed oikos). This dichotomy may provide an early recognition of “a confidential zone on behalf of the citizen”. Aristotle’s distinction between the public and private realms can be regarded as providing a basis for restricting governmental authority to activities falling within the public realm. On the other hand, activities in the private realm are more appropriately reserved for “private reflection, familiar relations and self-determination.

- In an article published on 15 December 1890 in the Harvard Law Review, Samuel D Warren and Louis Brandeis advertised to the evolution of the law to incorporate within it, the right to live as “a recognition of man’s spiritual nature, of his feelings and his intellect”. As legal rights were broadened, the right to life had “come to mean the right to enjoy life – the right to be let alone”. Recognizing that “only a part of the pain, pleasure and profit of life lay in physical things” and that “thoughts, emotions, and sensations demanded legal recognition”, Warren and Brandeis revealed with a sense of perspicacity the impact of technology on the right to be let alone.

**RIGHT TO PRIVACY IS A FUNDAMENTAL RIGHT**

- Concept of privacy emergence – since the inception of civilization on this planet human being was covered with his privacy, earlier confined to private parts Goddess Parvati bath and In Islam burkha system privacy; women lived in premises with trees and all; people gave notice before entering so trespass and privacy”
UNION OF MANDIA AND ORS17, Hon’ble Supreme court held the following –

1. Kharak Singh has correctly held that the content of the expression ‘life’ under Article 21 means not merely the right to a person’s “animal existence” and that the expression ‘personal liberty’ is a guarantee against invasion into the sanctity of a person’s home or an intrusion into personal security. Kharak Singh also correctly laid down that the dignity of the individual must lend content to the meaning of ‘personal liberty’.

The first part of the decision in Kharak Singh which invalidated domiciliary visits at night on the ground that they violated ordered liberty is an implicit recognition of the right to privacy

The Hon’ble Court also held that-

3. (A) Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Mandian Constitution;

   (B) Life and personal liberty are not creations of the Constitution. These rights are recognized by the Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within;

   (C) Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution.

Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognized and guaranteed by the fundamental rights contained in Part III;

   (D) Judicial recognition of the existence of a constitutional right of privacy is not an exercise amending the Constitution nor is the Court embarking on a constitutional function of that nature which is entrusted to Parliament;

   JUSTICE K S PUTTASWAMY (RETD.), AND ANR. Verses UNION OF MANDIA AND ORS.

   (E) Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy, sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded.

   (F) Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognizes the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognizes the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is
4. Informational privacy is a facet of the right to privacy. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires careful and sensitive balance between individual interests and legitimate concerns of the state. The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union government while designing a carefully structured regime for the protection of the data. Since the Union government has informed the Court that it has constituted a Committee chaired by Hon'ble Shri Justice B N Srikrishna, former Judge of this Court, for that purpose, the matter shall be dealt with appropriately by the Union government having due regard to what has been set out in this judgment.

**ORDER OF THE COURT**

- The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.
- Court held that decision of Kharak Singh case is judicially correct.

Thus, that according to latest judgements and other legal scenario shows that right to privacy is a fundamental right.

**CONCLUSION**
Thus, it is clearly shown in above statement that right to privacy is a fundamental right and protection of data is very important for the security purpose of citizen’s life and personal liberty.

Government must have to make some rigid law for the protection of data because if this data will be leaked then it will be considered as violation of right to privacy under Article 21 of Indian Constitution.

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EXPANSIVE INTERPRETATION OF THE TERM ‘LIFE’ UNDER ARTICLE 21

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ABSTRACT

The article titled expansive interpretation of the term ‘life’ under article 21 is an attempt made by the author to explain as to what the term ‘life’ means and how it has been interpreted by the Supreme Court from time to time depending on the changing circumstances. The article first tries to trace the origin of the word ‘life’ in the writings of Hobbes, Locke and Rousseau and then tries to explain as to how life and liberty are inextricably linked. While writing this article the author has also kept in mind the deliberations in Constituent Assembly pertaining to article 21. The second part of the article deals with the various cases of the Apex Court related to Article 21 and the opinion expressed by judges through their judgements. More than 40 cases have been analysed by the author. As the article was written in the month of June prior to the Supreme Court declaring Right to Privacy as a fundamental right, the author has also examined the scope of privacy to some extent.

It is said that the Creator works in mysterious ways, perhaps in my view he makes things in mysterious ways too. The Earth is place to a variety of forms: both living and non-living. One of the important criteria which sets homo sapiens apart from non-living things is the fact that we are conscious of our surroundings and to me, this is what life is. It is the medium through which we can experience the marvels of this world, and appreciate the creations of the Almighty. The Earth without life would cease to exist. It is only due to life that our species have been able to prevail for more than 4 billion years.

With the growing passage of time, man became civilized; fear of life developed faith in the concept of God and hunger drove us towards hunting all sorts of animals. It was only after a couple of thousands of years that men resorted to agriculture to sustain themselves. As we became more civilized, it led to the conception of society but still in spite of all this, the threat to life loomed large. This led to men surrendering all their rights in a supreme authority who would look after all their interests, this activity formed the basis of the social contract theory which was given by Thomas Hobbes. He was of the view that men surrendered all their rights because people at that point of time were “brute, egoistic and nasty” and needed someone who could take the society
towards the path of progress. John Locke disagreed with the theory given by his predecessor, Thomas Hobbes, and said all the rights of men at that point of time were protected except that of property, meaning thereby that man’s natural rights like that of life, liberty and property remained with them. Rousseau took a completely different view that social contract was not a practical historical fact, but an instrumental hypothetical construction of reason. In fact, according to him there was no such contract among men during that stage. It can be said that Rousseau modified the vision of sovereignty in terms of democratic sovereignty. In totality, if we do a comparative study of all the three philosophers, we will find that the real objective behind their theory was to protect the concept of life and liberty.

It is believed that the more one tries to guard something, the more one makes it susceptible to attacks. Writing in terms of the Indian context, the very foundation of life and liberty were threatened the day India was first invaded. The concepts of liberty and life were propounded much later in the form of theory but it was under constant threat since Day One. The statement of Ala'ud-din- Khilji saying “Law is not what the Quran says but what I say” suggests the mindset of the rulers at that point of time. They did not care about the masses, they only cared for themselves. Another instance could be taken from Rome and that was when the whole of Rome was burning, Emperor Nero was busy fiddling with his violin. These instances only showcase the fact that life and liberty were not given any importance as they are given now.

THE ERA OF THE BRITISH

The concept of rights developed as a direct result of the impact of the western political thought on Indian leaders. Among the western political thinkers Harold J. Laski occupies an important place because he gave the concept of rights which was functional rather than being individualistic. Formal demand for the inclusion of fundamental rights in the constitutional set up for India was first made by nationalist leaders after the Montford-Declaration of 1918 that the progressive realisation of the self-government was the ultimate objective of His Majesty’s Government. During the nationalist movement in India there had emerged a strong opinion in favour of inclusion of rights in the constitution for three reasons:

I. To prevent the executive from acting arbitrarily
II. To achieve the ends of socio-economic justice
III. To ensure some amount of security and protection to various minority groups in India.

CONSTITUENT ASSEMBLY DEBATES AND THE INCORPORATION OF ARTICLE 21

In the Constituent Assembly, one school represented by such stalwarts like K.M. Munshi, A.K. Ayyar and Thakurdas

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41 Indian Government and Politics by A.S. Narang (Gitanjali Publishing House)
Bhargava influenced by the 19th century liberalism as manifest in the First Amendment to the American Constitution, placed negative liberty above everything else. Opposed to them was another school, represented by members professing far more democratic views, i.e. K.T. Shah, Seth Damodar Swarup and V.P. Tripathi. They declared their faith in the positive concept of liberty, suggesting thereby the incorporation of certain basic socio-economic rights for the common man to be guaranteed by the State. The leadership tried to grapple with the problem in its characteristic manner by striking a balance between the two.

Meanwhile, Sir Benegal Rau who happened to be India’s constitutional advisor visited Washington where he showed to Justice Frankfurter the draft of our life-and-liberty clause, which then read: ‘no person shall be deprived of his life or liberty except according to due process of law’. Frankfurter, J was appalled; he told Rau that ‘due process’ had been one of the major headaches for successive generations of judges of the US Supreme Court. The reason why it proved to be a headache was due to the fact that the Constitution did not define ‘due process of law’, and the courts, taking advantage of that, had given it such a liberal interpretation according to the facts of each case, as to enable itself to invalidate laws which, may be supposed to offend against

the ‘spirit of the Constitution’. This was clearly brought out in the observations of FRANKFURTER, J in Wolf v. Colorado.

“Due process of law conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society... It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. To rely on a tidy formula for the easy determination of what is a fundamental right for the purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. It belittles the scale of the conception of Due Process. The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognise that it is for the court to draw it by the gradual and the empiric process of inclusion and exclusion.”

He suggested that India should take as a model the then recent Constitution of post-war Japan and redraft the clause guaranteeing life and liberty in accordance with this document. On his return home, Rau conveyed to the Constitution Committee the advice of Justice Frankfurter; and pursuant to this advice, the draft of Article 21 was altered to read: ‘No person shall be deprived of his life or liberty except in accordance with procedure established by law’.

42 First Amendment: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech , or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances (U.S.A.)

43 Refer to footnote no. 2

44 The State of the Nation by Fali S. Nariman
45 (1949) 338 US 25
46 Refer to footnote no. 5
As we can see, the words used in Article 21 like life, liberty and procedure have wide connotations. The framers had done their part by incorporating this provision but it was a challenge for the Indian Judiciary to interpret the words used in this Article in such a way as the framers of the Constitution intended. From time to time, famed lawyers gave their own interpretation and so did the Judges.

**TIMELINE OF CASES**

Before analysing the cases and the judgements of the Apex Court in detail we should bear this fact in mind that life and liberty are not to be treated as two separate entities. Consider the concept of life as the trunk of a tree and liberty as its branches. Without the trunk, the branches will not survive, similarly, if the branches are severed off, the trunk would lose its identity.

Life, liberty and security are the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilised society. The object of Article 21 of the Constitution of India is to prevent encroachment upon personal liberty in any manner. In every civilised democratic country, liberty is considered to be the most precious human right of every person. In the expansion and interpretation of Article 21 of the Constitution, the Court has gradually increased the importance of Article 21 and covered the variety of rights under the umbrella of this Article. In other words, it may be said that Article 21 has become a *brahmastra* to justify every kind of directive. Individual liberty is a cherished right, one of the most valuable fundamental rights guaranteed by the Constitution to the citizens of this country. Just as liberty is precious to an individual, so is the society’s interest in maintenance of peace, law and order. A fair and effective administration of justice is the cornerstone of a society and an essential component of public confidence in the institutions of a Government. In other words, there can be no liberty without social restraint. Liberty as a social conception is a right to be assured to all members of a society, the liberty of some must not necessarily involve the oppression of others. If liberty be regarded a social order, the problem of establishment of liberty will be a problem of organising restraint which society controls over the individual. Therefore, liberty of each citizen is borne out and must be subordinated to the liberty of the greatest number, in other words, common happiness as an end of society, lest lawlessness and anarchy will tamper social weal and harmony and powerful courses or forces would be at work to determine social welfare and order. Thus, the essence of civil liberty and security is to keep alive the freedom of the individual subject to the limitation of social control which could be adjusted according to the needs of the dynamic social evolution\(^47\).

Ever since Indian constitution became effective, plethora of cases were heard before the Apex Court which involved the interpretation of Article 21. One of the earliest cases pertaining to Article 21 which

\(^{47}\) Harmonising Liberty and Security in Social Order by Devendra Kumar Arora (2015) 7 SCC J-6
was heard by the Apex Court was in 1964 and the case was *Kharak Singh vs Union of India*\(^48\).

In this case, the Apex Court interpreted the terms “life” and “liberty” by incorporating a portion of the statement given by Field, J in the famous case of *Munn v Illinois*\(^49\) (1876) in their judgement and that was:

“By the term “life” as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all these limits and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world”.

Pakistan Supreme Court also has taken a similar view in the case *Benazir Bhutto v. President of Pakistan*\(^50\). It was held “the right to life guaranteed by Art 9 is a sacred right which cannot be infringed, discriminated or abused by any authority”.

In India the Apex Court was also of the view that the fundamental right of life and personal liberty have many attributes and some of them are found in Article 19. If a person’s fundamental right under Article 21 is infringed, the state can rely upon a law to sustain the action; but, that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned.

The author is of the opinion that liberty is of no use if the quality of life of an individual is tantamount to an animal. The onus of protecting the interests of individuals is on the State. If the State resorts to actions which are in violation of the fundamental rights, the whole objective of Part III of the Constitution would be defeated.

Next was the case of *Satwant Singh Sawhney v. D. Ramarthnam*\(^51\) which was heard by a bench of 5 judges.

The Apex Court in its judgement cited a paragraph which was taken from the book of American Jurisprudence which defined the extent of “personal liberty” as:

“Personal liberty consists of the right of locomotion to go where and when one pleases only so far as the rights of others may make it necessary for the welfare of all other citizens”.

Speaking further regarding the idea of “personal liberty” the Court went on to say that in England, the right to go abroad was recognized as an attribute of personal liberty as in the year 1915 in Article 42 of the Magna Carta. The said Article reads “It shall be lawful to any person, for the future, to go out of our kingdom, and to return, safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the kingdom excepting prisoners and outlaws according to the laws.

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\(^{48}\) *Kharak Singh vs State of Uttar Pradesh*: (1964) 1 SCR 232

\(^{49}\) *Munn vs Illinois*: 94 U.S. 113 (1876)

\(^{50}\) *Benazir Bhutto vs President of Pakistan*: PLD 1998 SC 388, 606

\(^{51}\) *Satwant Singh Sawhney vs D. Ramarthnam*: (1967) SCR 525
of the land, and of the people of the us and merchants who shall be above”

This Article was omitted in the final version of the Magna Carta and Article 39 only dealt with personal liberty. Article 39 read:

“No free man shall be taken or imprisoned or disregarded or outlawed, or any way destroyed; nor will we go upon him, unless by the lawful judgement of his peers, or by the law of the land.”

The court also quoted Blackstone saying that “Blackstone divided jus personal-um (rights attaching to the person) into two: ‘personal security’ and ‘personal liberty’. Under the former he included rights to life, limb, body, health and reputation and under the latter, the right to freedom of movement.”

The expression ‘life’ and ‘personal liberty’ in Article 21, it is said, incorporated these two meanings respectively. There is no doubt that the Court accepted the meaning of ‘life’ as ‘personal security’ according to Blackstone’s definition.

Next in line was the famous case of Maneka Gandhi vs Union of India52 (1978) which was heard by a bench of 7 judges.

In this case the court defined the scope of Article 21, 19, and 14 and their interrelationship which is as follows:

“Article 21 occurs in part III of the Constitution which confers certain fundamental rights. Though the Article is couched in negative language, it confers the fundamental right to life and liberty. Fundamental Rights conferred by Part III are not distinct and mutually exclusive. A law depriving a person of personal liberty and prescribing a procedure for that purpose within the meaning of Article 21 has to stand a test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation. Ex-hypothesi it must also be likely to be tested with reference to Article 14. On principle, the concept of reasonableness must, therefore, be projected in the procedure contemplated by Article 21 having regard to the impact of Article 14 on Article 21.”

Justice Y.V. Chandrachud who was a part of the Bench said that the procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. He further added that the question whether the procedure prescribed by law which curtails or takes away the personal liberty granted by Article 21 is reasonable or not, has to be considered not in the abstract or hypothetical considerations like the provisions for a full-dressed hearing as in a court-room trial, but in the context primarily of the purpose which the Act is intended to achieve and of urgent situations which those who are charged with the duty of administration the Act may be called upon to deal with.

Justice Beg gave his own meaning and content of personal liberty in Article 21.

“The fundamental rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which

52 Maneka Gandhi v Union of India : (1978) 1 SCC 248

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every human being can develop his personality to the fullest extent. They weave a “pattern of guarantees on the basic structure of human rights”. It is obvious that Article 21, though couched in negative language, confers the fundamental right to life and personal liberty. So far as the right to personal liberty is concerned, it is ensured by providing that no one shall be deprived of personal liberty except according to procedure prescribed by law.”

If we do a comparative study between A.K. Gopalan case and Maneka Gandhi case we will find that the question of personal liberty too came up for discussion in the case of A.K. Gopalan vs State of Madras, in which this term was given a very narrow interpretation but there was no definite pronouncement made on this point since the question before the Court was not so much the interpretation of the words ‘personal liberty’ as the inter-relationship between Article 19 and 21. As far as the word procedure is concerned, according to Prof. Willis’ book on Constitutional Law, procedure must include the four essentials namely notice, opportunity to be heard, impartial tribunal and ordinary course of procedure.

The scope of ‘procedure’ was further explained by Justice Krishna Iyer in M.H. Hoskot vs State of Maharashtra (1978)

It was observed that procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself. Thus understood, ‘procedure’ must rule out anything arbitrary, freakish or bizarre. A valuable constitutional right can be canalised only by civilized process... What is fundamental is life and liberty. What is procedural is the manner of its exercise. This quality fairness in the process is emphasised by the strong word ‘established’ which means ‘settled firmly’ not wantonly or whimsically. If it is rooted in the legal consciousness of the community it becomes ‘established’ procedure. Procedural safeguards are the indispensable essence of liberty. In fact, the history of procedural safeguards and right to hearing has a human right ring.

This statement given by Justice Krishna Iyer only makes us aware of the importance of procedure. It is seen that the downtrodden are often the victims of injustice as they are unable to protect and defend their rights.

Keeping this thought in mind The American Bar Association has upheld the fundamental premise that counsel should be provided in the criminal proceedings for offences punishable by loss of liberty, except those types of offences for which such punishment is not likely to be imposed. In short, it is the warp and woof of fair procedure in a sophisticated, legalistic system plus lay illiterate indigents aplenty. The Indian socio-legal milieu makes free legal service, at trial and higher levels, an imperative processual piece of criminal justice where deprivation of life or personal liberty hangs in the judicial balance.

53 A.K. Gopalan v The State of Madras: 1950 AIR 27
54 M.H. Hoskot vs State of Maharashtra (1978) 3 SCC 544
The case of Sunil Batra v. Delhi Administration 55 · (1980) is also of importance as the word ‘life’ was interpreted with respect to the life of prisoners. The Court observed that:

It is imperative, as implicit in Article 21, that life or liberty, shall not be kept in suspended animation or congealed into animal existence without the freshening flow of fair procedure. Fair procedure in dealing with the prisoners calls for another dimension of access to law-provision, within easy reach, of the law which limits liberty to persons who are prevented from moving out of prison gates. In addition to all this, a substantial number of prisoners are undertrials who have to face their case in court and are presumably innocent until convicted. By being sent to Tihar Jail [high security prison in Delhi] they are, by contamination, made criminals— a custodial perversity which violates the test of reasonableness in Article 19 and of fairness in Article 21.

The U.S. Supreme Court too, like situations, has spoken firmly and humanistically. Justice Marshall was of the view that a prisoner does not shed his basic constitutional rights at the prison gate, and he fully supported the court’s holding that the interest of inmates in freedom from imposition of serious discipline is a ‘liberty’ entitled to due process.

The Apex Court regarding the condition of prisoners was of the view that prisoners are peculiarly and doubly handicapped. For one thing, most prisoners belong to the weaker segment, in poverty, literacy, social station and the like. Secondly, the prison house is walled-off world which is incomunicado for the human world, with the result that the bonded inmates are invisible, their voices inaudible, their injustices unheeded. So it is imperative, as implicit in Article 21, that life or liberty shall not be kept in suspended animation or congealed into animal existence without the freshening flow of fair procedure.

In Board of Trustees of the Port of Bombay v Dilip Kumar 56, which was heard by a division bench of the Apex Court (1982, the Court held that the expression ‘life’ in Article 21 does not merely connote animal existence or a continued drudgery through life but has a much wider meaning. Where the outcome of a departmental enquiry is likely to adversely affect reputation or livelihood of a person, some of the finer graces of human civilization which make life worth living would be jeopardised and the same can be put in jeopardy only by law which inheres fair procedure.

Further elaborating the interpretation of the word life, the Supreme Court in State of Maharashtra v Chandrabhan Tale 57 · subscribed to the arguments of the petitioner that the reduction of the subsistence allowance to Re 1 per month to the civil servant who is prohibited from engaging himself in any other avocation during the period of suspension contravenes even Article 21 on the ground that the only logical and possible result would be the death of the civil servant and the members.

55 Sunil Batra vs Delhi Administration: (1980) 3 SCC 488
56 Board of Trustees of the Port of Bombay vs Dilip Kumar: (1983) 1 SCC 124
57 State of Maharashtra vs Chandrabhan Tale: (1983) 3 SCC 387
of his family due to starvation. This statement of the Supreme Court according to the author expands the scope of the word ‘life’.

The take of the Apex Court regarding the plight of the weaker sections of the society in Bandhua Mukti Morcha v. Union of India58, which was heard in the year 1983 was that the right to live with human dignity, free from exploitation enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Article 41 and 42 at the least, therefore, it must include protection of the health and strength of workers, men and women, and the children of tender age against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person of the enjoyment of these basic essentials. Where legislation is already enacted by the State providing these basic requirements to persons, particularly belonging to the weaker section of the community and thus investing their right to live with basic human dignity, the State can certainly be obligated to ensure observance of such legislation, for inaction on the part of the State in securing implementation of such legislation would amount to denial of protection under Article 21.

In Sheela Barse v. State of Maharashtra59, which was decided in 1987, the Apex Court held that the meaning given to the term ‘life’ will cover the living conditions prevailing in jails. The court also held that the citizen does not have any right either under Article 19(1) (a) or 21 to enter into the jails for collection of information but in order that the guarantee of the fundamental right under Article 21 may be available to the citizens detained in jails, it becomes necessary to permit citizen’s access to information as also interview with prisoners.

According to Justice Sahai in Kartar Singh v. State of Punjab60, each expression used in Article 21 enhances human dignity and value. It lays foundation for a society where rule of law has primacy and not arbitrary or capricious exercise of power. ‘Life’ dictionary means, “state of functional activity and continual change peculiar to organised matter, and especially to the portion of it constituting an animal or plant before death; animate existence; being alive”. But used in the Constitution it may not be mere existence. Liberty is the most cherished possession of a man. “Truncate liberty in Article 21 and several other freedoms fade out automatically”. Liberty is the right of doing an act which the law permits. This article instead of conferring the right, purposely uses negative expression because the Constitution has recognised the existence of the right in every man. It was not guaranteed or created. One inherits it by birth. This absolutism has not been curtailed.

59 Sheela Barse vs State of Maharashtra: (1987) 4 SCC 373
60 Kartar Singh vs State of Punjab: (1994) 3 SCC 569
or eroded. Restriction has been placed on exercise of power by the State by using the negative. It is State which is restrained from interfering with freedom of life and liberty except in accordance with the procedure established by law. Use of the word ‘deprive’ is of great significance. According to the dictionary it means, “debar from enjoyment; prevent from having normal home life”. Since deprivation of right of any person by the State is prohibited except in accordance with procedure established by law, it is to be construed strictly against the State and in favour of the person whose rights are affected. Article 21 is a constitutional command to State to preserve the basic human rights of every person. The word ‘except’ restricts the right of the State by directing it not to fiddle with this guarantee, unless it enacts a law which must withstand the test of Article 13. Procedure established by law, extends both to the substantive and procedural law. Further mere law is not sufficient. It must be fair and just law. Even in absence of any provision as in American Constitution fair trial has been rendered the basic and primary test through which a legislative and executive action must pass. He also added the concept of speedy trial read into Article 21 is an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution. The right to speedy trial is a derivation from a provision of Magna Carta and has also been incorporated into the Virginia Declaration of Rights of 1776 and from there into the Sixth Amendment of the Constitution of United States of America which reads, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…”. The Apex Court took the help of Universal Declaration of Human Rights to explain the ambit of Article 21 in Consumer Education and Research Centre v. Union of India stating that Article 1 of the Universal Declaration of Human Rights asserts human sensitivity and moral responsibility of every State that “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. The Charter of the United Nations thus reinforces the faith in fundamental human rights and in the dignity and worth of human person envisaged in the Directive Principles of State Policy as part of the State envisaged under Article 21, enlarges its sweep to encompass human personality in its full blossom with invigorated health which is a wealth to the workman to earn his livelihood, to sustain the dignity of person and to live a life with dignity and equality. The Court further added that the expression ‘life’ assured in Article 21 of the Constitution does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure.

The right to health to a worker the court said is an integral facet of meaningful right to life, to have not only a meaningful existence but also robust health and vigour without which worker would lead life of misery. Lack of health denudes him of his livelihood. Compelling economic necessity to work in an industry exposed to health

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61 Consumer Education and Research Centre vs Union of India: (1995) 3 SCC 42
hazards due to indigence to bread-winning for himself and his dependents, should not be at the cost of health and vigour of the workman. Facilities and opportunities, as enjoined in Article 38 should be provided to protect the health of the workman. Provision for medical test and treatment invigorates the health of the worker for higher production or efficient service. Continued treatment, while in service or after retirement is moral, legal and constitutional concomitant duty of the employer of the State. Therefore, it must be held that the right to health and medical care is a fundamental right under Article 21 read with Articles 39 (e), 41 and 43 of the Constitution and make the life of the workman meaningful and purposeful with dignity of person. Right to life includes protection of the health and strength of the worker and is a minimum requirement to enable a person to live with human dignity.

As held Kirloskar Brothers Ltd v E.S.I. Corpn\textsuperscript{62} decided in the year 1996, that the interpretation of any Act must not only be in consonance with the objects but also the constitutional and fundamental human rights.

This only shows the seriousness of the Court with respect to the right of the workers.

The Apex Court further extended the horizons of the word ‘life’ in Surjit Singh v. State of Punjab\textsuperscript{63}: in the year 1996. The bench was of the view that self-preservation of one’s life is the necessary concomitant of

\textsuperscript{62} Kirloskar Brothers Ltd. Vs E.S.I. Corpn: (1996) 2 SCC 682

\textsuperscript{63} Surjit Singh vs State of Punjab: (1996) 2 SCC 336

the right to life enshrined in Article 21, fundamental in nature, sacred, precious and inviolable. The importance and validity of the duty and right to self-preservation has a species in the right of self-defence in Criminal Law. The court also cited a dialogue between the Divine and Garuda, the bird.\textsuperscript{#} Chapter 16 of the Garuda Purana Verses 17,18,and 20 have been mentioned which are as follows:

17\textsuperscript{#} Vinaa dehena kasyaapi canpurushaartho na vidyate

Tasmaaddeham dhanam rakshet payakaranaa saadhayat

Without the body how can one obtain the objects of human life? Therefore protecting the body which is the wealth, one should perform the deeds of merit

18\textsuperscript{#} Rakshayetsarvadaatmaanamaatmaa sarvasya bhaajanam

One should protect his body which is responsible for everything. He who protects himself by all efforts, will see many auspicious occasions in life

20Sharirarakshanopaayaah kriyante sarvadaa budhaih

Necchanti cha punastyaagamapi kushtaadiroginah

The wise always undertake the protective measures for the body. Even the persons suffering from leprosy and other diseases do not wish to get rid of the body
In *Gian Kaur v. State of Punjab* in the same year i.e. 1996, the question of law which was in front of the Apex court was that will right to die be within the ambit of right to life under Article 21? The Court observed that “When a man commits suicide he has to undertake certain positive overt acts and the genesis of those acts cannot be traced to, or be included within the protection of the “right to life” under Article 21. Article 21 is a provision guaranteeing protection of life and personal liberty and by no stretch of imagination can “extinction of life” be read to be included in “protection of life”. Whatever may be the philosophy of permitting a person to extinguish his life by committing suicide, we find it difficult to construe Article 21 to include within it the “right to die” as a part of the fundamental right guaranteed therein. “Right to life” is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of “right to life”.

To give meaning and content to the word ‘life’ in Article 21, it has been construed as life with human dignity. Any aspect of life which makes it dignified may be read into it but not that which extinguishes it and is, therefore, inconsistent with the continued existence of life resulting in effacing the right itself. The “right to die”, if any, is inherently inconsistent with the “right to life” as is ‘death’ with ‘life’.

The Court in *C.Masilamani Mudaliar v. Idol of Sri Swaminathaswami* (1996) with respect to right to ‘life’ held that:

“Equality, dignity of person and right to development are inherent rights in every human being. Life in its expanded horizon includes all that give meaning to a person’s life including culture, heritage and tradition with dignity of person. The fulfilment of that heritage in full measure would encompass the right to life. For its meaningfulness and purpose every woman is entitled to elimination of obstacles and discrimination based on gender for human development. Women are entitled to enjoy, economic, social, cultural and political rights without discrimination and on a footing of equality.”

With the growing passage of time, the court also extended the scope of this article to issues pertaining to environmental issues like pollution, particularly noise pollution. In *Noise Pollution, in re* the view of the Apex Court was:

“Right to life enshrined in Article 21 is not mere survival or existence. It guarantees a right of person to life with human dignity. Therein, are included, all the aspects of life which go to make a person’s life meaningful, complete and worth living. The human life has its charm and there is no reason why the life should not be enjoyed along with all permissible pleasures. Anyone who wishes to live in peace, comfort and quiet within his house has a right to prevent the noise as pollutant reaching him. No one can claim a right to create noise even in his

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64 Gian Kaur vs State of Punjab: (1996) 2 SCC 648
65 C. Masilamani Mudaliar vs Idol of Sri Swaminathaswami: (1996) 8 SCC 525
66 Noise Pollution, in re: (2005) 5 SCC 733
own premises which would travel beyond his precincts and cause nuisance to neighbours or others. Any noise which has the effect of materially interfering with the ordinary comforts of life judged by the standard of a reasonable man is nuisance.”

Former Chief Justice of India J.S. Verma in one of his lectures observed:

“The right to life with dignity is a recognized fundamental right under Art.21 of the Constitution of India and it is a basic human right inherent in human existence which is not the gift of any law. The law merely recognized an inherent right and is not its source. In this connection, it is better to take into consideration the distinction between the human right and civil liberty. In his book, the learned author has made distinction between the two i.e., human right is derived from natural law and other from positivistic (state made) law. In essence, it amounts to the distinction between a political right and natural right. The learned author further goes on to say thus:

Human rights are those that have derived from natural law which have evolved out of natural rights; rights inherent to people by virtue of their being human and being of a moral and rational nature and having a common capacity to reason. This comprises a core base of basic guarantees, including the right to life; freedom from slavery, servitude, and forced labour; the right to free movement (mobility); and, the right to food and shelter”

Regarding police atrocities, the view of the Apex Court in Prithipal Singh v. State of Punjab was:

“In view of the provisions of Article 21 of the Constitution, any form of torture or cruel, inhuman or degrading treatment is inhibited. Torture is not permissible whether it occurs during investigation, interrogation or otherwise. The wrongdoer is accountable and the State is responsible if a person in custody of the police is deprived of his life except in accordance with the procedure established by law. However, when the matter comes to the court, it has to balance the protection of fundamental rights of an individual and duties of the police. It cannot be gainsaid that freedom of an individual must yield to the security of the State. The Latin maxim salus populi est suprema lex - the safety of the people is the supreme law; and salus reipublicae suprema lex - the safety of the State is the supreme law, coexist.

In the famous case of Ramlila Maidan Incident, In re the court held that even right to sleep is an important facet of Article 21. The reasoning given by Justice Chauhan was:

“A person who is sleeping, is half dead. His mental faculties are in an inactive state. Sleep is an unconscious state or condition regularly and naturally assumed by man and

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68 CIVIL LIBERTIES by EDWIN SHORTS (1998 EDITION)
69 Prithipal Singh v State of Punjab: (2012) 1 SCC 10
70 Ram Lila Maidan Incident, In re: (2012) 5 SCC 4
other living beings during which the activity of the nervous system is almost or entirely suspended. It is the state of slumber and repose. It is a necessity and not a luxury. It is essential for optimal health and happiness as it directly affects the quality of life of an individual when awake inducing his mental sharpness, emotional balance, creativity and vitality.

An Irish proverb goes on to say that the beginning of health is sleep. The state of sleep has been described as Homer in the famous epic Iliad as “sleep is the twin of death”. A person, therefore, cannot be presumed to be engaged in a criminal activity or an activity to disturb peace of mind when asleep. Aristotle, the great Greek philosopher has said that all men are alike when asleep. To presume that a person was scheming to disrupt public peace while asleep would be unjust and would be entering into the dreams of that person.” The finding of the case of Wolf vs Colorado71 was also quoted saying that the citizens/persons have a right to leisure, to sleep, not to hear and to remain silent. The knock at the door, whether by day or by night, as a prelude to a search without authority of law amounts to be a police incursion into privacy and violation of fundamental right of a citizen.”

He further added Right to privacy has been held to be a fundamental right of the citizen being an integral part of Article 21 of the Constitution of India by this Court. It is in view of this fact, that in many countries there are complete night curfews (at the airport i.e. banning of landing and taking off between the night hours), for the reason that the concept of sound sleep has been associated with sound health which is an inseparable facet of Article 21 of the Constitution.

The Court concluded that an individual is entitled to sleep as comfortably and as freely as he breathes. Sleep is essential for a human being to maintain the delicate balance of health necessary for its very existence and survival. Sleep is, therefore, a fundamental and basic requirement without which the existence of life itself would be in peril. To disturb sleep, therefore, would amount to torture which is now accepted as a violation of human right. It would be similar to a third-degree method which at times is sought to be justified as a necessary police action to extract the truth out of an accused involved in heinous and cold-blooded crimes. It is also a device adopted during warfare where prisoners of war and those involved in espionage are subjected to treatments depriving them of normal sleep.

The case of Kishore Samrite v. State of U.P.72 decided on 18-10-2012 also sheds some light on the view of the court regarding the term ‘person’ According to the Court, “The term “person” includes not only the physical body and members but also every bodily sense and personal attribute among which is the reputation a man has acquired. Reputation can also be defined to be good name, the credit, honour or character which is derived from a favourable public opinion or esteem, and

72 Kishore Samrite vs State of U.P.: (2013) 2 SCC 398
character by report. The right to enjoyment of a good reputation is a valuable privilege of ancient origin and necessary to human society. Reputation is an element of personal security and is protected by the Constitution equally with the right to enjoyment of life, liberty and property. Although, character and reputation are often used synonymously, but these terms are distinguishable. Character is what a man is and reputation is what he is supposed to be in what people say he is”.

The case of National Legal Services Authority v. Union of India was a landmark case in recognising the rights of trans genders. The Apex Court held that:

“Right to dignity is also very much a part of Right to life and accrues to all persons. The recognition of one’s gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one’s sense of being as an integral part of person’s identity. Legal recognition of gender identity is, therefore, part of the right to dignity and freedom guaranteed under our Constitution.”

**Article 21 and Right to Privacy**

According to WESTIN’S PRIVACY AND FREEDOM, 1970 Edition, privacy is defined as:

“The claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others…. Privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means.”

Article 11 of the American Convention on Human Rights provide for right to privacy.

It read:

1. Everyone has the right to have his honour respected and his dignity recognised.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home or his correspondence or an unlawful attacks on his honour or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

Right to information and right to privacy were considered by the Supreme Court in S.P. Gupta v. President of India, it was held thus:

“The demand for openness is based principally on two reasons. It is now widely accepted that democracy does not consist merely of people exercising their franchises once in five years to choose their rulers and once the vote is cast, then retiring in passivity and not taking any interest in the Government.”

“Today it is common knowledge that democracy has more positive intent and its

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73 National Legal Service Authority vs Union of India: (2014) 5 SCC 438
74 COMMENTARY ON THE CONSTITUTION OF INDIA BY D D. BASU (8th EDITION)
75 S.P. Gupta vs President of India: AIR 1982 SC 149

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orchestration has to be continuous and pervasive. This means inter alia that people should not only cast intelligent and rational votes but should also exercise sound judgment in the conduct of the Government and merits of public policies or that democracy does not remain merely a sporadic exercise in voting but becomes a continuous process of Government’s attitude and habit of mind”

The judges went on to add:

“But this important role people can fulfil in a democracy only if it is an open Government where there is full access to information in regard to the functioning of the Government”. The Apex Court laid down that the right to information formed part of Art 19(1)(a)

In India Express v. Union of India76, it was held thus:

“Public interest in freedom of discussion of which freedom of the press is one aspect stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently, the decisions which may affect themselves”

Similarly in L.K. Koolwal v. State77, the Rajasthan High Court observed thus:

“The citizen has a right to know about the activities of the State, its instrumentalities, the departments and the agencies of the State. The privilege of secrecy which existed in old times that the State is not bound to disclose certain facts to its citizens does not survive to a great extent now”

The author is of the view that right to privacy by its nature conflict with freedom of information and other competing liberties. As we can see, privacy is not explicitly mentioned in the Indian Constitution. It has over the time been read with Article 21.78 During hearing in the PIL questioning the vires of the Aadhaar scheme, the Government took the stand that privacy was not a fundamental right. In support of their argument, the government relied on two judgements of the Supreme Court, i.e., M.P. Sharma v. Satish Chandra79 and Kharak Singh v. State of U.P80, wherein the majority judgement was that privacy was not inherent in Article 21. The Supreme Court accepted the submission and has referred the PIL for deciding on reading privacy into Article 21 to a larger bench. Interestingly, just before the hearing in the above matter, details of a draft Privacy Bill of 2014 were leaked and have been compared with an earlier draft of the Privacy Bill of 2011. Details of the 2014 Bill leaked disclose that the Bill specifically reads the right to privacy into Article 21.

Considering that privacy is a human right and India having undertaken to protect it as such, specific legislations protecting this right and also clarity in reading this right into Article 21 is imperative. In Govind v.

76 India Express vs Union of India: AIR 1986 Raj 515
78 Technology Law Decoded by N.S. Nappinai (LexisNexis 2017)
79 M.P. Sharma v. Satish Chandra: AIR 1954 SC 300
State	extsuperscript{81}, the Supreme Court read privacy into Article 21 to hold harassing domiciliary visits by police to be a violation of privacy. Catena of judgements thereafter have emphasised and reiterated inclusion of privacy, as part of Article 21 and right to life and liberty. The author is of the view that until and unless right to privacy is recognised and protected by the State, threat to one’s life and liberty will remain.

**The cases of waiver and the case for waiver in India**

Waiver can occur under various circumstances. A right may be waived for a singular specific purpose or it might be waived more generally. Waiver may happen spontaneously, with little reflection, on the other hand it might be made after thoughtful consideration and professional advice. Such waiver might have quite trivial consequences to an individual and hardly even be noticed. Alternatively, such waiver might have serious repercussions.

Undoubtedly, waiver implicitly does, operate in many occasions. Right to legal assistance and to be represented by the counsel are fundamental rights recognised under Article 21. In criminal trials it does happen that an accused may plead guilty, or enter into a plea bargain, or argue his defence himself. On such occasions he gives up and waives his right of being represented by a counsel, and of a complete trial proving his guilt. Can he at a later stage contend that he did it under a mistake or for some other reason and that he cannot waive his fundamental rights? Can the Court, then hold that he cannot waive his fundamental rights when in fact he had intelligently, knowingly and voluntarily waived the same? It cannot, and nothing to the contrary seems to have been upheld in India. In this context, Chapter XXI-A Cr.PC 1973, incorporated by virtue of the Criminal Law (Amendment) Act, 2005, provides for plea bargaining which was hitherto unavailable. Without doubt, plea bargaining involves waiver of many fundamental rights. Similarly, a number of rights under the Central and State Land Acquisition Acts, which automatically attract Article 300-A’s guarantee of right to property, have been held subject to waiver acquiescence and estoppel.

The right to reputation and the right to privacy have been held to be covered by Article 21 as fundamental rights. Does that mean that a libel action or an action claiming damages instituted after the expiry of limitation, or pleaded in a writ petition claiming violation of fundamental rights after lapse of a considerable period of time, which that person may have elected to waive during that period, cannot be defeated because a constitutional right cannot be waived?

It is submitted that a number of rights held to be covered by Article 21 can be waived, on applying the principles enunciated in U.S. As pointed out the right against unreasonable search and seizure, the right to be heard before being deprived of liberty and property under the “due process clause”, the right to privacy and a number of criminal rights recognised under Article 21 can be waived, in exercising discretion of personal representatives of the accused. The right to be heard before being deprived of liberty and property under the “due process clause”, the right to privacy and a number of criminal rights recognised under Article 21 can be waived, in exercising discretion of personal representatives of the accused.

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\textsuperscript{81} Govind vs State : 1975 AIR 1378
rights can be waived in U.S. These are the very rights guaranteed by Article 21 \(^{82}\).

**AUTHOR’S POINT OF VIEW**

Law does not evolve, it only meanders. We have seen as to how Article 21 has been interpreted from time to time by the court through various judgements. It seems that such wide interpretation to Article 21 will end where the sea appears to meet the horizon. To my mind, the interpretation of this article is, at times appears to be, another example of judicial activism. Reason being that the language used in this article is vague and can be easily expanded or twisted, as per the view, approach or philosophy of the bench dealing with an issue; whatever is convenient. In countries where there is a Charter of Rights or a Bill of Rights, judicial activism is much in evidence \(^{83}\). A classic instance is the judgement of the U.S. Supreme Court in *Griswold v. Connecticut* \(^{84}\), popularly known as *Contraceptive case*. There was a law in the State of Connecticut which made the use of contraceptive a criminal offence. Under the statute the police could barge into the sacred precincts of marital bedrooms to search for tell-tale signs of used contraceptives. The law was challenged on the ground that it breached the right of privacy. Privacy is not expressly mentioned in the U.S. Bill of Rights. However, the U.S. Supreme Court deduced the right of privacy on the reasoning that various guarantees in the Bill of Rights create zones of privacy. The minority dissented on the ground that it was for the legislature to create a right of privacy and not for the court.

The Supreme Court of the Republic of Ireland has also adopted the judicial technique of spelling out fundamental rights which are not expressly mentioned in the Irish Constitution on the basis that there are rights which are anterior to and are solely derived from the Constitution. The Supreme Court of Canada has also deduced fundamental rights which are not expressly mentioned in the Charter. Our Supreme Court has also deduced other fundamental rights which are not expressly mentioned in the Constitution. For example, the right to travel abroad, the right to education, freedom from cruel and inhuman punishment or treatment, etc. The only criticism to my mind which is made regarding judicial activism is that it tends to destroy the fabric of separation of powers. The Indian Constitution gives unparalleled power to the Supreme Court under Article 142(1) \(^{85}\). Coupled with the interpretation of Article 21, it can lead to a dangerous concoction. Having said that, it can prove to

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\(^{83}\) Judicial Activism Boon or Bane by Soli J. Sorabjee : (2008) 3 SCC J-24

\(^{84}\) Griswold vs Connecticut: 381 US 479, 510: 14 L Ed 2d 511 (1965)

\(^{85}\) Article 142- Enforcement of decrees and orders of Supreme Court and orders as to discovery , etc: 1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it , and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe .

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be advantageous as well. I think there is no universal prototype of judicial activism. It largely depends on the prevailing situation which varies from place to place and society to society. Relief of human suffering and the quest for justice are the main proponents of judicial activism in this country. Without judicial activism, our fundamental rights will remain ornamental showpieces and become teasing illusions unless they are translated by activist judges into living realities. Rights enshrined in the constitution are of no value if they are not able to serve the unimaginable and the mounting needs of the downtrodden and the people at large whose only protector is the constitution against the powerful and the mighty. This is where the need for judicial activism lies. When the state fails to protect the interests of the society by becoming the oppressor, the judiciary has to get the state back on track with the help of judicial activism. The fact that this mechanism can be misused cannot be ignored but to mind if it leads to improvement in the lives of the people then its objective is fulfilled as Cicero rightly said that “the welfare of the people is the paramount law”.

Before concluding one must remember that the highest judicial body dispensing justice consists of erudite men with great experience at the Bar and the Bench especially trained to deal against odd situations where they have encountered multiple disputes and offences in cases representing various facets of life thus they would never undertake a mission to undo the work contributed through ages with one sweep of parochial activism endangering life and liberty of the very people for whom the constitution has been made.

PHONE TAPPING: A VIOLATION OF RIGHT TO PRIVACY?

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Abstract
This research paper talks about the interception of telephone with reference to right to privacy. This prologue of interception of telephone is very restricted as it can only be done by showing some reasonable grounds. The aspects discussed primarily are Indian perspective on phone taping, preventive measures against interception of telephone, authenticity of an intercepted conversation, new aspect of the interception of telephone, right to privacy and right to privacy with respect to interception of telephone. This research draws upon mainly secondary data gathered from various books, National Journals, government reports, newspapers and different websites which pay attention on different facets of interception of telephone as well as right to privacy. It may be concluded that phone taping is not in violation of right to privacy only if it is done for the interest of public or in case of any emergency. The right to intercept telephone is restricted and cannot be done without the permission of the government. This research will endow with valuable information on interception of telephone with respect to right to privacy.

Key Words: Privacy, Interception, Taping, Right and India
The term ‘phone tapping’ also means wire tapping or interception of phone. It was first started in U.S.A in 1890s after the invention of telephone recorder. Although, the Supreme Court of U.S.A. didn't become a valid law until 1928, at the height of Prohibition. Roy Olmstead, a Seattle bootlegger, was convicted on the basis of evidence congregated by tapping a phone in his home. He then stated that, the authorities had violated his fundamental rights but the court upheld his conviction, stating that tapping somebody's phone is not a physical incursion of privacy. Prior to the attack on Pearl Harbor and the ensuing ingress of the United States into World War II, the U.S. House of Representatives held hearings on the legitimacy of interception of telephone for national defense. Important legislation and judicial decisions on the validity and constitutionality of wiretapping had taken place years before World War II. Conversely, it took on new urgency at that time of national crisis. In the case “Katz v. United States”86, Supreme Court of U.S. stated that wiretapping requires a warrant. In 1978, the Foreign Intelligence Surveillance Act (FISA) was created for issuing wiretap warrants in national security cases.

Indian Perspective on Phone Tapping

In India, Phone Tapping can only be done in an authorized manner with permission from the department concerned. However, if it is undertaken in an unauthorized manner then it is illegal and will result in prosecution of the person responsible for breach of privacy.

Telephones along with other communication devices are mentioned under Entry 31 of the Union List of the Indian Constitution and it is based on Entry 7 in the Federal List of the Government of India Act 1935. 87 As explained by Seervai, the Government of India Act itself had taken the necessary measures for the advancement of Science in Entry 7, List I, which resulted as “Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication” and Entry 3188, List I of the Indian Constitution preserved the entry, hence the requirement to construe the word ‘telegraphs’ lithely to consist of telephones, wireless, broadcasting etc. did not arise.89

The Central Government as well as the State Governments, both of them are provided with the right to intercept telephones under Section 5(2) of Indian Telegraphic Act, 1885. There are instances when an investigating authority/agency needs to record the phone conversations of the person who is under suspicion.90 Such authorities are required to seek acquiescence from the Home Ministry before moving forward with such an act. In the application to seek

86 389 U.S. 347 (1967)
88 Entry 31, Schedule VII, Constitution of India: Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.
89 Vikram Raghavan, Communications Law in India, 1st Edn., 2007, pg 109
permission, particular reasons need to be mentioned. Additionally, the need for interception of telephone must be proved. Then only the ministry will consider the application and grant permission upon estimating the merits of the application for interception.

Every agency fills out an authorization slip before placing a phone under surveillance. For the States, it is the State Home Secretary who signs this. Telephonic of politicians cannot be tapped officially—a qualifier on the slip states that the inspected person is not an elected representative. Now days, every cellular service provider has an aggregation station which is a clasp of servers called mediation servers as they intercede by linking the cellular operators and the law enforcement agencies to tap phones. There are two types of telephone tapping services obtainable these days i.e. Integrated Services Digital Network (ISDN) and the leased line. In ISDN service, an intercession server taps a call and then conveys it via Primary Rate Interface (PRI) line to the office of a government agency. Furthermore, the police will also be able to eavesdrop to the phone on their PRI line and store the recording of the intercepted call to linked computers. A sound file of the intercepted call can also be recorded and kept in the mediation server, concurrently.

**Preventive Measures Against Interception of Telephone**

1. **Procedural Safeguards**

   In the last few years, various scandals came in notice with respect to the subject of phone tapping. This issue became so concentrated that it was twisted into a political agenda. The opposition parties and the party in power started blaming each other. It was suspected that phones were intercepted by the government on command of the ruling party. It was the time when the Peoples Union of Civil Liberties [PUCL] filed a PIL 92 to the Supreme Court of India requesting them to clarify the law on the point of electronic tapping and interception. 93 The petitioners contended that the arbitrary power provided under Section 5 (2) of the Indian Telegraphic Act, 1885 should be regulated. They also argued that the amendment which was made to Section 5 (2) in 1971 was tremendously treacherous as it allowed interception not only in the times of emergencies and for public order and safety, but also for agitation of offenses.

   The Apex Court was of the view that intercepting of telephones or wiretaps as a whole is a staid incursion of privacy of an individual, and it was also acknowledged that right to privacy falls under Article 21 of the Indian Constitution. But Section 5 (2) was held to be Constitutional by the Court. Right to privacy is also enshrined in Article 1794 of the International Covenant on Civil and Political Rights (ICCPR), to which India

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91 Report of Standing Committee on Home Affairs

92 PUCL v/s Union of India [(1997) 3 SCC 433]


94 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.
is a party. When a person makes a telephonic call and communicates with another person, that person also exercises his right to freedom of speech and expression, which is provided under Article 19 (1) (a) of the Indian Constitution. Hence, interception of the call would infringe this provision, until and unless it falls under reasonable restriction provided under Article 19 (2). The main point which is a matter of concern here is that the Apex Court did not want to entirely morsel the system of phone tapping as the Hon’ble Supreme Court that in some cases it is very necessary to take some important steps like this for the security of the nation. But the Court did mandate the setting up of high-level committee to review the tapping of phones and ascertain whether the tapping was legal or not.

After the PUCL case, the Union Government bought some amendment in the Indian Telegraphic Rules, 1951 and inserted Rule 491-A to regulate the tapping of phones. But this amendment also did not bring any major change in the circumstances.

2. **Substantive safeguards**

In 1997, the Apex Court, in reply to a petition filed by Justice Sachar in the PUCL case, stated that Right to Privacy guaranteed under Article 21 is subject to some reasonable restrictions which might be made obligatory by the State. Reasonable restrictions can be imposed by the state in -

the interests of national sovereignty and integrity, state security, friendly relations with foreign states, public order or for preventing incitement to the commission of an offence.

Supreme Court while perpetuating the constitutionality of Section 5(2) in *P.U.C.L. case*, acknowledged the nonexistence of procedural preventions for the substantive provisions of the above mentioned Section and referred *Maneka Gandhi case* and took the significance of procedural patronage to any substantive provision which deals with the fundamental right of individual, into consideration, where it was opined:

"Procedural which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself.” Thus, the requirement of procedural safeguards for the provisions of Section 5(2) becomes significant in the light of ‘right to privacy’ guaranteed by Article 21, Constitution of India, 1950. Interception of private conversation, void of just and fair procedure, would infringe an individual’s right to privacy assured under Article 21, which might render the substantive provision, allowing interception, as unconstitutional.

Justice Kuldip Singh concisely stated:

“The first step under Section 5(2) of the Act, therefore, is the occurrence of any public emergency or the existence of a public-safety interest. Thereafter the competent authority under Section 5(2) of the Act is

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96 PUCL v/s Union of India [(1997) 3 SCC 433]
empowered to pass an order of interception after recording its satisfaction that it is necessary or expedient so to do in the interest of (i) sovereignty and integrity of India, (ii) the security of the State, (iii) friendly relations with foreign States, (iv) public order or (v) for preventing incitement to the commission of an offence.”

In the case of K.L.D Nagasree v. Government of India98, while referring the observation of the Court in P.U.C.L. case, it was held that:

“A bare reading of the above provision shows that for the purpose of making an order for interception of messages in exercise of powers under Sub-Section (1) or Sub-Section (2) of Section 5 of the Telegraph Act, 1885, the occurrence of any public emergency or the existence of a public safety interest is the sine qua non.”

The Act also provides safeguards against illegal and gratuitous interference in the telegraph and telephone mechanisms. According to Section 25, “any person intending to intercept or to acquaint himself with the contents of any message damages, remove, tampers, with or touches any battery, machinery, telegraph line, post or other thing whatever, being part of or used in the working thereof shall be punished with imprisonment for a term which may extend to three years or with a fine, or both.”

3. Remedies

- Unlawful interception infringes the right to privacy and the aggrieved person can file a complaint in the Human Rights Commission.
- An FIR can be lodged in the nearest Police Station when illicit phone interception comes into the knowledge of the person.
- Moreover, the aggrieved person can approach the Court against the person/company doing the Act in an unauthorized comportment under Section 26 (b) of the Indian Telegraphic Act which provides for the imprisonment of 3 years for persons held for unlawful interception. An individual can also be prosecuted for authorized interception of telephone but sharing of the data of the same in an explicit manner.

**Authenticity of an Intercepted Conversation as Evidence**

Controversial Judgment in the Malkani Case

In the case of R.M. Malkani v. State of Maharashtra99 there was an issue that, whether criminal prosecution could be initiated against a person on the basis of certain incriminating portions of a telephone conversation that he had with another individual. In this case, the Appellant was a public official of Mumbai and he was trying to acquire illegal indulgence of Rs. 15,000 from a doctor, from whom he intended to incriminate in a case involving the death of a patient, negligently. The doctor was not concerned in paying the bribe and instead approached the Anti-Corruption Bureau of the Police. The doctor then, on the

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97 paragraph 23
98 AIR 2007 AP 102
99 AIR 1973 SC 157
instructions of the police officials, continued to have a telephonic conversation with the Appellant where they had a discussion regarding the amount of money which was to be paid, and also the location of delivery of money, etc. This conversation was traced and the Malkani had no intimation regarding the same. After tracing the call, the charges were filed against Malkani on account of the statements made by him during the phone call.

The Supreme Court was of the view, that having another person listening in on a conversation was a technical process and that there was no element of compulsion or coercion drawn in which would have otherwise violated the Act. With respect to the admissibility issue, the Court treasured the way, stating it a mechanical eavesdropping device”. However, then conceivably realizing that it was wrong, the court quickly added that -it should be used sparingly, under proper direction and with circumspection. The intercepted evidence was contrasted with a photograph of a pertinent event and on the basis of this assumption, it was determined that Sections 7 and 8 of the Evidence Act [1872] would not bar the admission of inappropriately acquired evidence. Furthermore, what the Apex Court did was to hold that illegally obtained evidence would be admitted in Court since the eavesdropper neither subjects the person to duress nor interferes with his privacy. While passing the order, Ray, J., was inclined by the American judgment on the subject. Reliance was placed on the judgment of the US Supreme Court in the case of Roy Olmstead v. United States of America\(^{100}\), which had by then been overruled by the Berger and Katz cases. In the Olmstead case the doctrine adopted, was that observation without encroachment and without the convulsion of any material fell outside the constitutional realm. Hence, Ray, J. was of the opinion that the interception of the conversation would not be hideous to Articles 20(3) and 21 of the Indian Constitution.

Following the aphorism laid down in the Malkani case, many judgments have been passed by the Courts accepting unlawfully acquired evidence for the intention of conviction. In the case of S. Pratap Singh v. State of Punjab\(^{101}\), the Supreme Court permitted the recording of a intercepted telephonic conversation between the Chief Minister’s wife and a doctor to be divulged as evidence to substantiate the evidence of witnesses who had mentioned in his statement, that such a conversation had taken place. Further, in Yusufalli Esmail Nagree v. State of Maharashtra\(^{102}\), a conversation was recorded via a tape recorder placed in a room and the same was admitted as evidence. In this case, the Appellant had made an offer to bribe a municipal clerk Munir Ahmed Sheikh. The clerk Sheikh intimated the police who then laid a trap at his house and obscured a voice recording equipment in the room where the bribe money was to be paid. After that, this recording was accepted as evidence by the Court to substantiate the Sheikh’s testimony. The Court observed that if a photograph is taken without the knowledge of the person

\(^{100}\) 277 U.S. 438 (1928)
\(^{101}\) AIR 1964 SC 72
\(^{102}\) AIR 1968 SC 147

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being photographed, following the same standard to the case of an interception of a conversation that is unnoticed by the talkers, will also be held significant and admissible. The Supreme Court at the time of delivering the judgment was highly influenced by an English Precedent, *R v. Maqsud Ali*\(^{103}\). In that case, two persons suspected of murder went voluntarily with the Police Officers and entered into a room which was unknown to them. There was a microphone attached with a tape recorder in another room. Afterward, when the suspected persons were left alone, the accused persons had a conversation during which various incriminating annotations were made. The Court decided that the tape-recording of the incriminating evidence had to be admitted as evidence as it was admissible evidence which proved the suspected persons guilty.

In *N. Sri Rama Reddy v. V.V.Giri*\(^{104}\), better recognized as the ‘Presidential Election case’ the Petitioner had alleged that a person Jagat Narain, had attempted to deter him from contesting the election. Then, their intercepted telephone conversation was presented in Court to disprove Narain’s allegations that the event by no means, took place. Here, the Court used the conversation to demonstrate that a “witness might be contradicted when he denies any question tending to impeach his impartiality” [Section 153 of the Indian Evidence Act] and thus observed that the intercepted recording itself would become the primary and direct evidence.

**New Aspects of Interception of Phone in India**

Even a privacy was introduces in India in the year 2011, which stated that “every individual shall have a right to his privacy — confidentiality of communication made to, or, by him — including his personal correspondence, telephone conversations, telegraph messages, postal, electronic mail and other modes of communication; confidentiality of his private or his family life; protection of his honour and good name; protection from search, detention or exposure of lawful communication between and among individuals; privacy from surveillance; confidentiality of his banking and financial transactions, medical and legal information and protection of data relating to individual.”

“The Union government has announced a fresh set of procedures for interception of telephones. The “Standard Operating Procedures (SOP) for Lawful Interception and Monitoring of Telecom Service Providers (TSP)”, bearing No.5-4/2011/S-II and dated January 2, 2014, have been accessed by *The Hindu*. Significantly, this comes two weeks after the Central government set up a commission to inquire into the Gujarat-based snooping scandal, allegedly involving BJP’s prime ministerial candidate Narendra Modi. According to the norms, requests would include interception and monitoring under the Indian Telegraph Act, 1885, for voice, SMS, GPRS, MMS, Video and VoIP calls. Additionally, authorized security agencies can seek information under Section 92 of the Criminal Procedure Code (CrPC) of call records (CDRs), home and roaming network, CDR by tower location and by calling/called number, location details of

\(^{103}\) [1965] All. ER. 464

\(^{104}\) AIR 1971 SC 1162
target number within home or roaming network, and so on. One specification detailed in the section “Validation of Interception Request” is that only the Chief Nodal Officer of a telecom company can provide interception if the order is issued by the “Secretary to the Government of India in the Home Ministry, in case of Government of India, or a Secretary to the State Government in charge of Home Department, in case of State Government.” In unavoidable circumstances, such orders can be issued by an officer “not below the rank of Joint Secretary to the GOI who has been fully authorized by the Union Home Secretary or the State Home Secretary.” Interception is subject to eight checks before monitoring is allowed. These include receiving the request “in a sealed envelope”, ensuring the delivery of interception by “an officer not below the rank of sub-inspector of police or equivalent.” Any inquiry process could, under the new SOP, check “whether the request was in original and addressed to the Nodal Officer” and from which “designated security agency” it came from. The SOP mandates that, any “request received by telephone, SMS and fax, should not be accepted under any circumstances.” This would mean that the government concerned would have to produce an original copy of its request that bears “the Union/State Secretary’s order number with date”, or an order and date by an officer of the rank of “Joint Secretary who has been duly authorized”. Non-compliance with the provisions can result in prosecution “as per the law of the land”. The SOP document is 45 pages long and divided into 11 sections. The sections include the operational structure, types of request, validation of interception request, legal intercept under number portability, reconciliation and pruning processes, consequences, list of 10 law enforcement agencies authorized to intercept and a set of 10 annexures relating to interception. The SOP require that if a request is made on e-mail, unless a “physical copy is not reached to the telecom service provider within 48 hours” the interception should be terminated and an intimation provided “to [the] concerned Home Secretary as a part of the fortnightly report.” The SOP require that records pertaining to such interception, such as letter and envelope, intercept form and internal interception request form should be “destroyed within 2 months of discontinuance of interception of such messages.” If, however, it is a case of “emergent request where Home Ministry Order for approval was not conveyed to the telecom company, then the telecom company cannot destroy such records until the Home Ministry order is conveyed or a list of such numbers is provided to the concerned Home Secretary intimating this fact.”

Right to Privacy in India

Article 21 of the Constitution of India states that “No person shall be deprived of his life or personal liberty except according to procedure established by law.”

The term ‘personal liberty’ also consists of ‘right to privacy’. A citizen has a right to


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safeguard his personal privacy, plus, that of his family, education, marriage, motherhood, child bearing, and procreation, among other matters.

Right to privacy has been briefly discussed in the recent Supreme Court judgment i.e. “Justice K.S. Puttaswamy & Anr v/s Union of India & Ors” 106. It is very important to discern that previously, right to privacy was considered as a “common law right” before it was briefly discussed in the Puttaswamy case. In the privacy it was stated by the Supreme Court that “Life and personal liberty are not creations of the Constitution. These rights are recognized by the Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within. Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognized and guaranteed by the fundamental rights contained in Part III. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognizes the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognizes the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.”107

Right to Privacy With Respect To Interception of Telephone

As amended in the recent Supreme Court judgment, right to privacy is an integral part of right to life, which is enshrined under Article 21 of the Indian Constitution. Interception of a telephone of an individual without any intimation infringes right to privacy of an individual. But the same can be done by the government if any special situation arises. The power is conferred to the government under section 5(2) of Telegraph Act. The provision laid down under section 5(2) gives power to government to intercept a telephone in interest of public or in a case of emergency. The power conferred under section 5(2) to the government is not absolute as it is a matter of privacy of an individual. Nobody can intercept a telephone of a person without taking permission from the government. Government can exercise its rights to intercept an individual’s telephone only to a certain extent, by showing reasonable grounds to do so. Government can exercise its right but outside a particular ambit because an individual has a right to privacy and he also has a right to safeguard his right to privacy.

Conclusion

106 2017 (10) SCALE E1

107 Conclusion of Puttaswamy case.
Right to privacy is a part of personal liberty which is provided under Article 21 of the Indian Constitution. A person has also the right to safeguard his privacy. There are some cases when the government has to act contrary to the fundamental rights of a person. One of them is interception of telephone. This is a very major step taken by government and to intercept a telephone of an individual, reasonable grounds to take such a step should be mentioned as it is a matter of someone’s privacy.

Interception of telephone is not in violation of right to privacy only if it done for the interest of public or in a case of emergency, as stated under section 5(2) of the Telegraph Act. Interception of telephone cannot be done in any case except the two which are mentioned above. Any evidence acquired through interception of telephone is also not in violation of right to privacy and it is also considered as admissible evidence. Interception of telephone without the permission of government is in violation of right to privacy of a person as a person may talk about his problems, child education, health etc. which he would not like to share it with anyone else. The powers conferred upon the authorities to intercept telephone are not absolute. There are some reasonable restrictions attached to it. Telephone of an individual cannot taped unless and until reasonable grounds are shown to do such act as no person shall be deprived of its personal liberty. Hence, phone taping is not in violation of right to privacy unless and until it is done for the interest of public or in a case of emergency.

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LEGAL AND POLICY CHALLENGES TO SURROGACY (Abstract)

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INTRODUCTION
This part of the essay broadly deals with where surrogacy comes context, what is surrogacy, from where the word originated and the different types of surrogacy. Thus, surrogacy actually is a form of third party reproduction in which a woman agrees to create and maintain pregnancy for another person. The main two types of surrogacies are: Traditional and Gestational surrogacy.

SURROGACY IN INTERNATIONAL PRACTICE
This part of the essay deals with the surrogacy laws in different countries because the laws relating to surrogacy are not same in all the countries and differs according to their practice. The essay mainly deals with main surrogacy laws in Australia, Canada, USA, UK and South Africa.

SURROGACY IN INDIA AND LEGAL FRAMEWORK RELATING TO SURROGACY
This part of the essay deals with surrogacy laws in India and how it has become an emerging leader in the surrogacy field. It deals with the salient features of National Guidelines for Accreditation, Supervision and Regulation of ART clinics as well the ART (Regulation) Bill 2010.

RESPONSE OF INDIAN JUDICIARY TOWARDS SURROGACY

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This part of the essay deals with how the judicial system responds to surrogacy in India and when the concept of surrogacy came before the Indian Judiciary. The first case where the concept of surrogacy came into question is the “Manji case” where the judicial system was provided with a chance to develop the surrogacy laws but failed to do so.

**THE SURROGACY (REGULATION) BILL 2016**

This part of the essay deals with the present surrogacy bill of 2016 and renewed guidelines for the present as well as its disadvantages and how it could affect the restricted people.

**CONCLUSION**

Thus, overall this essay deals with the legal and policy changes in surrogacy, its earlier status, how it has changed over time, the different surrogacy laws in other countries. The surrogacy laws in India, its present status and how adoption has taken its place. Thus, Instead of bringing a new life into the nation why not give a new life to children who have no one.

**LEGAL AND POLICY CHALLENGES TO SURROGACY**

**INTRODUCTION**

It is the birth right of every woman to conceive and cherish the feeling of motherhood. But infertility of a couple deprives them of this beautiful experience. But with the advancement of technology and development of new methods in the medical field now infertile couples can also procreate and surrogacy is one of them. The words ‘surrogate’ originates from the Latin word ‘surrogatus’ which means substitute.

Surrogacy is a form of third party reproduction in which a woman agrees to create and maintain pregnancy for another person. It has become a veritable and ethical conundrum. Surrogacy is either altruistic or commercial. Altruistic surrogacy is where the surrogate mother is not paid any monetary benefits and is motivated mainly by a desire to help an infertile couple to have a child of their own. This arrangement is usually seen where the surrogates are close friends or relatives to the parents. Commercial surrogacy is where, a gestational carrier is paid to carry a child to maturity in her womb. It is legal in several countries including India due to excellent medical infrastructure, high international demand and ready availability of poor surrogates. This type of surrogacy is usually referred to as ‘womb for rent’, ‘outsourced pregnancies’ etc.

**Types of surrogacy**

There are mainly two types of surrogacies that are recognized today, they are:

- **Traditional surrogacy**: This is also termed as complete surrogacy. In this type, the eggs of the surrogate mother and the sperm of the commissioning husband are used in conception of the child making her the genetic and biological mother of the child.

- **Gestational surrogacy**: In this type, an embryo created in vitro is transferred into the uterus of a woman who does not contribute the egg.
SURROGACY: INTERNATIONAL PRACTICE

Surrogacy laws differ from country to country. In many countries like Sweden, Spain, France and Germany, surrogacy is illegal since it is against their public policy and in few other countries only altruistic surrogacy is legal.

AUSTRALIA

- In all the states of Australia the surrogate mother is regarded by law to be the legal mother of the child and any surrogate agreement giving the custody to others is void and unenforceable. Here commercial surrogacy is illegal although the Northern territory has no legislation governing the laws of surrogacy whereas altruistic surrogacy is legal.

- In Western Australia and South Australia, altruistic surrogacy is legal only for straight couples and it is not legal for single people or same sex couples.

- In Tasmania, the law states that the surrogate must be at least 25 years old and it should not be her first pregnancy.

CANADA

- Surrogacy in Canada is legal but highly restricted. The legislation allows altruistic surrogacy and the surrogate mothers is not paid more than basic expenses, agencies that match surrogates and future parents are prohibited, and commercial services that support either the parents or the surrogates are not allowed. In the province of Quebec contracts involving surrogacy are unenforceable. Canadian law is very explicit, and is regulated by Bill C-6 (Assisted Human Reproduction Act). The act places the following constraints on surrogacy in Canada:
  - No person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid.
  - No person shall accept consideration for arranging for the services of a surrogate mother, offer to make such an arrangement for consideration or advertise the arranging of such services.
  - No person shall pay consideration to another person to arrange for the services of a surrogate mother, offer to pay such consideration or advertise the payment of it.

- The total cost of surrogacy in Canada is typically around $80,000 for a program that includes just one initial embryo transfer. Additional embryo transfers are between $3000 – $5000 for each attempt. All the care of the surrogate before and after childbirth is covered by social security and parents will not pay anything. But the care of the baby after the birth is the responsibility of the parents. Rates of hospital care for a baby are about $1000/day.

UNITED KINGDOM

- The Surrogacy Arrangements Act 1985 makes commercial surrogacy illegal. The surrogacy agreements are not valid even if it has been signed with the intended parents and they have paid the legal expenses within the framework of UK. Thus, paying more than the surrogacy
expenses are not allowed but the relationship status has got recognition under section 30 of the Human Fertilization and Embryology Act 1990.

- The surrogate has a legal right over the child, even if she is not genetically related to the child, till the time an adoption order comes.

UNITED STATES OF AMERICA
- In USA, the law of surrogacy varies from State to State. It ranges from banning surrogacy to enforcing them. The Assisted Human Reproductions Act 2004 permits altruistic surrogacy.

- Embryo research is not only included in one’s insurance cover in the US, it takes the cost of surrogacy package quite high and US citizens opt for India as their surrogacy destination.

- Here the surrogate mothers are made good only the expenses incurred as a result of pregnancy. And those who are found guilty are punished with a sentence of 10 years and a fine up to $500,000.

SOUTH AFRICA
- In South Africa, the surrogacy agreement is governed by the South Africa Children’s Act of 2005. Under this Act, to make the agreement valid it should be confirmed by the High Court before fertilization.

- Gay couples as well as single parents can also be intended parents. Single parents and a couple can opt for this option only if they have any physical inability and the surrogate should be a woman having at least one child.

- Also, the surrogate has the right to terminate the pregnancy, but, only after consulting the intended parents and if it is due to non-medical reasons she must be ready to make medical reimbursements.

SURROGACY IN INDIA
India is emerging as a leader in international surrogacy and a sought after destination in surrogacy related fertility tourism due to its low cost and favorable legal environment. Though the concept of surrogacy is considered as a new aspect for India it is actually an old concept which has its mention in the ancient mythology. With an increase in the global market the surrogacy industry in India has grown enormously. Indian surrogates have been increasingly popular with fertile couples in industrialized nations and has been made legal by the guidelines laid out by the Indian Council of Medical Research (ICMR).

LEGAL FRAMEWORK RELATING TO SURROGACY
The legal environment had been favorable with surrogacy being made legal in 2002, by the guidelines laid out by the ICMR. In 2008, the Supreme Court of India in the Manji’s case has held that commercial surrogacy is permitted in India with a direction to pass an appropriate law governing surrogacy. At present, the surrogacy contracts between the parties and the Assisted Reproductive Technique (ART) Clinic guidelines, are major guiding force.

SALIENT FEATURES OF THE NATIONAL GUIDELINES FOR
The ICMR along with the National Academy of Medical Sciences in the year 2005 established the guidelines for the accreditation, supervision and regulation of ART clinics. This was mainly established to ensure that the ART clinics throughout the country followed a uniform code of conduct. The guidelines provide for the registration of ART clinics, covers the treatment given, provides for the screening of the patients for the choice of procedure to be followed as well as prescribes the information and counselling to be given to the patients. Relating to surrogacy the guidelines mainly provide for the following:

- Children born out of surrogacy must be adopted by the genetic parents unless they are unable to prove that they are the genetic parents.
- Surrogacy should be adopted only when the patients are unable to conceive completely either physically or medically.
- The guidelines prohibit any kind of monetary aspect or advertising for surrogacy by the ART centres and surrogates are to be paid only genuine expenses for the pregnancy.
- The choice of selecting the surrogate depends upon the couple or a semen bank. If the surrogate is a relative of intending mother then she should belong to the same generation.
- The surrogate should be less than 45 years of age. She should satisfy certain tests for HIV and must further provide a certificate that she had not taken any drug through intravenous by a shared syringe or by blood transfusion.

A woman cannot act as a surrogate for more than three times in her lifetime. However, these guidelines have undergone a lot of criticism as they were non-binding in nature and failed to emphasis on the protection of the surrogate and the child.

**SALIENT FEATURES OF THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL 2010**

Considering the radical growth in the ART centres approached by infertile couples, the ICMR came up with a Bill called the Assisted Reproductive Technology Bill in the year 2010. The Bill provides for the constitution of National and State Advisory Board for Assisted Reproductive Technology to permit the permissible practices to be followed in these centres as well as provides for training in the clinics. It also promotes dissemination of information to the public regarding this. The 2010 Bill defines the duties of the ART centres so that the parties to the contracts are provided with proper information to give their true consent. It states that the surrogate mother should abandon all her parental rights on the child and the birth certificate is registered in the name of the intended parents. It also states that if the intended parents are from another country they should submit documents necessary to take the child born in India to their country.

Though this Bill proved to be effective than the guidelines, it also failed to answer certain ethical questions. Unlike abortion the consent of husband is necessary if a married woman wants to become a surrogate.
RESPONSE OF INDIAN JUDICIARY TOWARDS SURROGACY

The question of legal void on surrogacy first came up for consideration before the Indian Judiciary in the case of “Baby Manji Yamada Vs Union of India”108. In this case it was alleged that in the name of surrogacy a lot of irregularities was committed and a money market was being perpetuated. Here the petitioner was born to biological parents, Dr Yuki Yamada and Dr. Ikufumi Yamada through surrogate mother in the year 2008. But the biological parents later faced certain marital problems and were divorced by the time she was born. Later on, she was under the care of her paternal grandmother ad was issued a birth certificate in the name of her genetic father. Manji was also breastfed by her Indian surrogate mother; and she was issued a Certificate of Identification instead of a passport to make her transit out of India possible. Subsequently a writ petition was filed in the Rajasthan High Court challenging the legality of the surrogacy. Consequently, the HC ordered for the production of the child before it, but it was challenged by the grandmother on the ground that the writ petition was baseless as it was not proved in whose illegal custody the child was in the SC. But the SC set aside the order of the HC and aside the parents to seek redressal before the National Commission for Protection of Child Rights setup under the Commissions for Protection of Child Rights Act 2005. The SC, thus, in this case failed to discuss on the rights of the child born out of surrogacy as well the citizenship issues that could occur if surrogacy is not recognised in the country where the child is planned to be brought up.

THE SURROGACY (REGULATION) BILL 2016

The present Bill was proposed by the Central Government in view of actor, Tusshar Kapoor opting to become a single parent through surrogacy. As per the guidelines of the new proposed Bill actor Karan Johar could be the last single men or women to opt for surrogacy. According to the new Bill single men, women and gay couples are banned from opting for surrogacy. The features of the new Bill are as follow:

- As per the draft Bill, commercial surrogacy is prohibited. Any payment to a woman opting to become a surrogate mother is illegal.
- Surrogacy for singles, foreigners and persons of Indian origin is also banned.
- Only a blood relative of 25-35 years of age can become a surrogate
- The woman opting to become a surrogate mother should be married and should have a child of their own
- The Bill also prohibits egg donation
- The Bill also has guidelines for regulating clinics and hospitals that allow surrogacy
- It has provisions for providing legal aid to surrogate mothers

Thus, altogether, surrogacy is allowed only in an altruistic form and no monetary benefits are allowed according to the new draft Bill.

PITFALLS OF THE NEW BILL

The new Bill will actually make surrogacy disappear from India. The guidelines in the Bill will not only make it impossible for singles and homosexuals to become parents but also difficult for heterosexual couples

108 (2008)13 SCC 518; AIR 2009 SC 84
with infertility issues to have children through surrogacy. The clause on only blood relative aged between 25-35 years to become a surrogate mother will make it difficult for heterosexual couples to use this procedure. Since 2002 until today, India has been the surrogacy capital for foreigners from other countries, but, now with the new bill singles and homosexual couples are forced to venture out of the country especially US where surrogacy is legal. The new Bill will also have other negative effects such as blackmailing within the families, as well as unregulated black market in the field of surrogacy.

CONCLUSION
India, with its growth in medical tourism has been tagged to be the next leader in the ‘baby market’. Considering the economic backwardness in India, surrogacy has literally come as a rescue to many poor families. Though, surrogacy is considered as a blessing, the legal complications and lifelong injuries can never be negated. After the establishment of the new Bill, a lot of changes has been brought about in surrogacy, majority being a lot pf problems. Thus, it is necessary that India adopts a framework where affordable surrogacy is provided along with the protection of the surrogate mothers.

Thus, at present till 2016 there are about 50,000 adoptable orphans in India. With the new Bill, it has encouraged the intending parents whoever they may be to opt for adoption of orphans.

Instead of bringing a new life into the nation why not give a new life to children who have no one.

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MISUSE OF PUBLIC INTEREST LITIGATION

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Abstract
PIL is a normative claim and an innovative judicial procedure based on principle understandings for enhancing the social and economic rights of disadvantaged and marginalized groups to foster healthy judicial activism.

It is a highly effective weapon in the armory of law for reaching social justice to the common man and concerned with the protection of interest of the victims of governmental lawlessness, or social oppression or in denial of constitutional or legal rights.

Misuse of PIL comes in various forms such as Publicity, political rivalry, corporate gain, or personal interest. It is an undemocratic, unrealistic and dangerous tendency which is to be impeded by our judicial attitude. PIL must be accompanied by adequate judicial control to prevent this technique from being used as an instrument of coercion, blackmail or for other oblique motive. Media role is significant in highlighting and analyzing the impact of misuse to impede the tendency of abuse of PIL on judicial process through workshops, seminars and visual media.
This paper analyses the misuse of PIL and ensure that it seeks atonement of a genuine public harm or injury or there is no personal gain or oblique motive.

Keywords: - Marginalized, Judicial activism, Atonement, Misuse

Care has to be taken to see that PIL essentially PIL and is not allowed to degenerate into becoming political interest litigation or private interest litigation.

Justice A. S Anand

INTRODUCTION

The word “Public Interest Litigation” litigation is escorted for the protection of public interest or removal of their grievances. It is not explained in any statute or in any act. It is a litigation versed in a court of law by the court or any other individual party and elucidated by judges to consider the intent of public at large. It is not necessary that the person who is the sufferer of the violation of his or her right should personally approach the court for the discharge of the court’s discretion. The court while discharging its discretion of judicial review concluded that a very large section of the society because of acute poverty, socialism, discrimination and illiteracy had been denied justice for time archaic and the fact they have no entrance to justice especially, to provide entry to justice to the poor, destitute vulnerable, discriminated and disadvantaged sections of the society, thus court has initiated, emboldened and mobilized the public interest litigation. The litigation is culmination and product of the court’s deep and intense impetus to fulfill its bounded duty and constitutional obligation. In the words of the Supreme Court of India, it is aimed at “cultivating and developing the concept of PIL and approaching its long arm of sympathy to the poor, the ignorant, the tyrannized and the needy whose fundamental rights are crashed and violated and whose grievances go overlooked, un-represented and unheard.\textsuperscript{109} Since after the independence, the people of India adopted the “constitution of India” with a belief to administer the “sovereign socialist secular democratic republic” Among others, it desires to protect all its citizens’ socio-economic and political justice, liberty of expression, thought, faith worship and belief, Equality of prestige and contingency. These aims were not hardly aspirational. The founding fathers wanted to build an India where there is no any division on the ground of caste, creed, religion, sex and place of birth where everyone had equal rights and opportunities. They wanted to foster India into an absolute egalitarian society where all fundamental rights are protected and free from exploitation and servitude of the long suppressed people of India.\textsuperscript{110} The provisions related to FRs, DPs and independent judiciary together provided a firm constitutional authority to the expansion of PIL in India. It is emphasized that under article 32 a PIL can be filed in the Supreme Court\textsuperscript{112} for the enforcement of fundamental right and under 226 a High

\textsuperscript{109} Dr. Subhash C. Kashyap, The Framing of India’s Constitution 731-732 (2d ed. 2006)

\textsuperscript{110} Vasundhra Majithia, Public interest litigation, Social Action Litigation, private attorneys of law, Apr. 8, 2015

\textsuperscript{111} M. P Jain, Indian Constitution Law,423-424 (7th ed. 2016)

\textsuperscript{112} INDIA CONST. art 32
Court\textsuperscript{113} can be approached whether or not there is a violation of fundamental right. The development of PIL or SAL in India is hinderance by the locus standi rule. Locus standi is the term for the capability of a party to validate to the court in sufficient connection to and mischief from the law or action challenged to guide that party’s participation in the case. Otherwise, the court rule of “lacks standing” against plaintiff to bring the suit and dispose the case without considering the merit of the claim. Modification of the traditional stipulation of standing was sine qua non for the evolution of PIL and any public assistance in justice administration. PIL is the power given to the public by courts through judicial activism. Any person who admit that injustice being done to the society at large can the court for judicial remedy, only a person acting bona fide and with common interest in the proceedings of the PIL will have a locus standi and can access the court to clean the tears of the poor and needy, whose fundamental rights have been violated but not a person whose motive is of personal gain, private profit, political antecedent or any oblique consideration.

PUBLIC INTEREST LITIGATION
HISTORICAL DEVELOPMENT IN INDIA

The term “PIL” is an origin of the United States. Various movements in that country were introduced in the nineteenth century which led to the public interest law, which was part of the legal aid movement. In 1876 the first legal aid office was being established in New York. In the 1960s the PIL movement began to gain financial support from the office of Economic Opportunity, This encouraged the lawyers and public spirited persons to take up cases of the under-privileged and the and fight against dangers to the environment and public health and \textsuperscript{114} exploitation of consumers and the weaker sections of the society.

PIL in India can be called as an improved version of PIL in USA. Justice P. N. Bhagwati and Justice V. R. Krishna Iyer were listed among the first judges to introduce PILs in court. In 1979 the case Hussaianra khatoon vs. State of Bihar (1979) which was filed by an Advocate, considering the newspaper article which was published in Indian Express relating to the under trial prisoners of Bihar prison and then a judgment \textsuperscript{115} was announced Justice PN Bhagwati recognising the right of speedy trial and justice. This case opened a way of thought for the public at large. Earlier in PIL, the locus standi only belonged to the person who was aggrieved but now it has changed a bit and the locus standi is given to person acting bona fide and is having sufficient public interest to approach the court to wipe out the tears of the poor whose fundamental rights are violated or injustice is being done to them. In 1981 Justice P. N. Bhagwati in the case of

\textsuperscript{113} INDIA CONST. art 226

\textsuperscript{114} Anjali Srivastava, PIL A New Horizon, (Nov. 5, 2013) http://www.mondaq.com/india/x/273102/trials+appeals+compensation/Public+Interest+Litigation+A+New+Horizon

During this phase, the judiciary recognized the rights of these people and gave directions to the government to redress the professed violations. The second phase of the PIL started during the 1990s during which several significant changes in PIL took place. The filing of PIL cases now became more rampant and the specialized NGOs and lawyers started bringing up matters of public interest to the courts on a regular basis. The types of issues which were raised in PIL also expanded quickly—from the protection of environment to corruption-free administration, right to education, good governance, relocation of the industries, and sexual harassment at the workplace, rule of law and general accountability of the government and now PILs multiplied tremendously in the High Courts and the Supreme Court. Today, the various High Courts and the Supreme Court are equally loaded with normal litigation as well as public interest litigation with no end in each of them.

The misuse of PIL has become more usual than its use. Supreme Court came down with a view that if petitions are being filed just for publicity or political and personal gain. It will hamper the system of justice. PIL should be aimed for seeking redressal for public wrong or public injury and not for other oblique motives. Nowadays courts are also flooded with a large number of so-called PILs, whereas only a small percentage of that cases can genuinely be called PIL. It is not easy to appreciate the public and private interest, but it is feasible that courts have not meticulously enforced the requirement of PILs being targeted at espousing some public interest. Desai and Muralidhar certify the perception that: “PIL is being abused by people for private grievances in the clutch of public interest and pursuing publicity rather than accepting public causes. It is critical that courts do not grant “public” in PIL to be replaced by “private” or “publicity” by doing more cautious gate-keeping.

ABUSE OF PIL
Misuse of PIL is increasing day by day along with its multifaceted use. Many of the PIL activists have found PIL nowadays becoming a tool for harassment, since cases can be filed without heavy court fees and the results are also quick.

Shri V.S Vadevei, PIL a boon or bane? http://www.legalserviceindia.com/articles/pil.htm
Legal Correspondent, Misuse of PIL petitions, The Hindu, Mar. 15, 2004, at A1

Shri V.S Vadevei, PIL a boon or bane? http://www.legalserviceindia.com/articles/pil.htm
M.J Antony, use and abuse of PIL, Business Standard, Aug. 20, 2003

www.supremoamicus.org
In order to preserve the purity and righteousness of the PIL, it has become necessary to issue the following directions.

1. The courts must encourage genuine and bona fide PIL and effectively discourage and the frivolous PILS filed.

2. It would be convenient for each HC to formulate rules and encourage bona fide PILs rather than every individual devising its own procedure.

3. The courts should prima facie verify the documents of the petitioner before entertaining a PIL.

4. The court should ensure the correctness of the contents of the petition before entertaining a PIL.

5. The court should be satisfied that consequential public interest is involved or not.

6. The court should give supremacy to PILs involving larger public interest.

7. The courts before entertaining the PIL should ascertain that the PIL is aimed at seeking redressal of genuine public harm, and no other gain before filing the PIL. The court should also ascertain that the petitions filed by busybodies for extraneous and ulterior purpose must be discouraged by imposing heavy costs or by adopting similar novel methods to curb frivolous petitions.

ROLE OF JUDICIARY IN CONSTRUCTING PIL

At the time of 1970s only the aggrieved party or the party which were highly effected could approach the courts for justice. After the emergency era the high court reached out to a point and devised a means for any person of the public irrespective of the aggrieved to approach the court and seek legal remedy in cases where the public interest is at danger. Justice P. N. Bhagwati and Justice V. R. Krishna Iyer were the first judges to originate PILs in court. There have been many instances were letters and telegrams have been taken into consideration as PILs and heard. But now the Supreme Court and the High Courts have started taking up proceedings suo moto (of its own without anyone approaching the court) when something important came to them through the general media or through newspapers, television or through a letter etc. Later on the court kept on increasing the scope, and the area in which the jurisdiction would be provided.

COMPLICATION IN PERSUIT OF JUDICIAL ACTIVISM THROUGH PUBLIC INTEREST LITIGATION

It resembles that the misuse of PIL in India, which started in the 1990s, has come to such a stage where it has started overthrow the very objective for which PIL was introduced. In other words, the dark side is moving gradually to overshadow the golden side of the PIL project.

1. Publicity by regular litigants- This kind of misuse is done by people who are the regular \textsuperscript{121} litigants. In the case of Ashok Kumar Pandey vs. State of West Bengal justice described that meddlesome interlopers ,busy bodies etc. should be studied.

\textsuperscript{120}Suyogya Awasthy, Role of Judiciary in PIL, (July 31, 2016)

\textsuperscript{121}Manmeet Singh ,PIL A critical evaluation,( June 19,2015)

thrown out for filing PIL just for their own publicity, these kind of people approach the court for their publicity and to seek attention from the general media for fame and popularity. Such kind of PILs is defined as nuisance in the society.

2. Political interest litigation - PILs are filed by political parties just for political reasons, or for their aides against another political party, the court should not entertain these type of cases whose objective for filing a PIL is just a political gain. In the case of S.P Gupta vs. Union of India it is observed that it was just filed for the political gain.

3. Persons with vested interests - Many a times it has been observed that businessmen and companies wasn’t successful in their business or trade have resorted to PILs against their rivals for their own purpose. PIL was designed for the purpose of protecting the rights of the disadvantaged and marginalized groups who can’t knock the door of the court for justice. But nowadays it has become a tool for harassment. Most of the PIL are just filed for the publicity, personal interest or for political gain. Court before taking a PIL into consideration need to keep a check on the cases, ensure that bonafide action is there and nature of the case is for public interest...

5. Inefficient use of limited judicial resources - PIL has a potential to contribute to an efficient disposal of people’s grievances. But taking into consideration the number of per capita judges in India is much lower as compared to other countries and due to lack of judges both the supreme court and the high court are facing a huge backlog of cases, it is abstruse why the courts have not taken any measures to stop non-genuine PIL cases. In fact, by allowing frivolous PIL petitions, it wastes the energy and the time of the judiciary and due to this it violates the right to speedy trial of those who are waiting since long time. One of the major problem is that the courts are taking unduly long time in finally determining of even PIL cases, which are generally for public interest at large. The fact that courts are taking unduly long time to settle off cases might also recommend that the probably courts were not the most convenient forum to deal with the issues as PIL.

7. Judicial populism: Judges are human beings, but it would be inappropriate if they permit PIL cases on report of upraising an issue that is common in the society. Contrarily, the desire to become people’s judges in a democracy should not obstruct entertaining PIL cases which consists of an important public interest but are likely uncommon. The fear of judicial populism is not only academic and this can be seen from the observation of Dwivedi J. in Kesavananda Bharati v State of Kerala “the court is not chosen by the people and is not responsible to them in the sense in which the House of People is.


123 Pritam Kumar Ghosh, Judicial activism and PIL in India, GILS, Vol 3 No.1, (2013)


www.supremoamicus.org
However, it will win for itself a fixed place in the hearts of the people and enlarge its moral authority if it can switch the focus of judicial review to the protection of weaker sections of people rather than focusing on the numerical concept of minority protection in the society.

8. Symbolic justice: - Judiciary is often unable to ensure that its guidelines or directions in PIL cases are acceded with, for exponent, sexual harassment at workplace (Vishaka case) or the procedure of arrest by police (D.K. Basu case). No doubt, more provisional research is needed to prospect the extent of amenability and the differences made by the Supreme Court’s guidelines. But it seems that the judicial interference in these cases have made little progress in contesting sexual harassment of women and in reducing police barbarity in matters of arrest and detention. The second example of symbolic justice is provided by the emptiness of over conversion of DPSPs into FRs which making them justiciable.

8. Disturbing the constitutional balance of power: - Indian Constitution does not follow any rigid separation of powers, it still demonstrate the doctrine of checks and balances, which even the judiciary should respect. Prof. M. P. Jain discretion against such tendency “PIL is an ammunition which must be used with great care and discretion. The courts need to keep in view that under the façade of amending a public grievance PIL does not interfere upon the sphere aloof by the Constitution to the executive as well as the legislature. The Supreme Court did not stumble to intrude on policy questions but in other cases it bury behind the armor of policy questions and intervened to deal with sexual harassment as well as custodial distress and to legislate the adoption of children by foreigners, but it did not arbitrate to introduce a uniform civil code, to stop ragging in educational institutions, to accommodate the height of the Narmada dam and to administer a humane face to liberalization divesture polices..

CASEx STUDY OF PUBLIC INTEREST LITIGATION
CONSTITUTIONAL CONTRIBUTION
Vishaka & Ors. Vs State of Rajasthan & Ors The petition was filed to prevent harassment at work place, and guidelines were laid down for sexual harassment at work place. These guidelines were helpful in the formulation of sexual harassment of women at workplace (prevention, prohibition, and redressal) 2013.

D.K Basu vs state of West Bengal In this case a letter was written to the Chief justice of India stating the torture and deaths in police custody, the Chief justice considered it as a petition. After this petition guidelines for fair treatment of prisoners and arrestee were laid down.

Hussainara Khatoon v. State of Bihar This case got filed in the Supreme

125 Jain M.P., ““The Supreme Court and Fundamental Rights”” in Verma and Kusum (eds), Fifty Years of the Supreme Court of India, pp.65–76.
126 Vishaka & Ors. Vs State of Rajasthan & Ors (1997) 6 SCC 241 (India)
127 D.K Basu vs state of West Bengal (1997) 1 SCC 216 (India)
128 Hussainara Khatoon v. State of Bihar (1979) SCR(3) (India)
Court before Justice P. N. Bhagwati. This petition was filed by prisoner, Hussainara Khatoon. In this case the Supreme Court laid down that prisoners should get benefit of free legal aid and speedy trial.

**Sheela Barse vs State of Maharashtra**

In this case, it has been observed that it dealt with the issue of violence against women in the prisons. This PIL resulted in the separation of police lockups for women convicts in order to get rid of trauma and brutality.

**MISUSE OF PIL**

**Ashok Kumar Pandey vs State of West Bengal**

The court observed that the meddlesome interlopers, busybodies approach the court just for their publicity and seek the attention of general media, are a nuisance in the public and a threat on the judicial process.

**Kalyaneshwari vs Union of India**

The court cited the misuse of public-interest litigation by businessmen for the rivalry in business in the case of. Petition was filed in the Gujarat High Court for the closure of asbestos units, stating that the material was harmful to humans. Then the court dismissed its petition and stated that it was filed for their products to be used as a substitute. Of asbestos, hence it was a misuse of PIL by business persons.

**Shubhash Kumar Vs. state of Bihar**

In this case Subhash Kumar was a common laborer who was being fired by the director of the company for doing some wrong so he filed a PIL that the company is not acting well and something is wrong. So this was considered as a case of misuse of PIL which was done for personal interest.

**CONCLUSION**

Public interest litigation is a system which helps the common man to reach the remedy and is constructive for public at large which was not available before. It has opened the new window of thought. We should be thankful to our judiciary system who have formulated this new concept which is really very useful for public at large because there are many examples present before us which proves that it is beneficial in our Indian society in the field of pollution, environment, bonded labor, sexual harassment, scams corruption etc. By filing the Public Interest Litigation one is having the locus standi and can ensure the justice to the oppressed people. The court at the very first stage while taking the petition into consideration ensure that the petitioner who approaches is acting under bona fide and not for personal gain, private profit or political rivalry or other oblique motives. The court should not grant its process to be misused by politicians and others for action or to gain political objectives. Political pressure groups who are not able to achieve their aims through the political process may try to use the courts by the very means of PILs to further their personal vested interests. The PIL activists who do prefer to file frivolous

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130 Ashok Kumar Pandey vs The State Of West Bengal (2003) crL.199 of 2003(India)

131 Kalyaneshwari vs Union of India(2011) 3 SCC 287 (India)

132 Subhash Kumar vs State Of Bihar And Ors (1991) AIR 420, 1991 SCR (1)5 (India)
PILs will have to pay compensation to opposite party against whom it has been filed. PIL requires a complete building and reconstructing of it, overuse and misuse of PIL will make it ineffective or fruitless.

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Companies Bill 2016: A Scope Of Paradigm Shift In Corporate Governance

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ABSTRACT

Encompassing the alleviating controversies in the legal sector, Corporate law is now been considered as one of the most disputable arena. An attempt has been made to combat such discrepancies by passing a Companies Amendment bill, 2016 in the Lok Sabha. The main idea of the research paper is to emphasize the loopholes persisting in the current Company Act, which paved the way for amendments. This paper aims towards providing an overview of the resultants if the proposals get accepted by Rajya Sabha and to assess whether the proposals presented to restructure it have successfully filled in the incongruity.

The main objective behind this research paper is to evaluate the modifications proposed in Companies Act 2013 by the Company Law Committee (CLC) and to ascertain as to whether the outcome would run parallel to the intended resolution of the bill. It critically analyses the repugnant provisions in the act and the assistance of proposed amendments in strengthening corporate governance in India and whether they really contribute to ease of doing business. The overview of the provisions not only brings forth the discrepancies but also provides for the solution to overcome the same.

Whilst analyzing the proposals made by Ministry of Corporate Affairs it was concluded that some of the draconian provisions of the Company Act 2013 were in dire need to be modified. Where some proposals proved to be indispensable, there were certain modifications which might prove to be mundane.

INTRODUCTION

In the wake of ameliorating business standards certain scams have followed as repercussions. Combating such deterrents of development have not only become a desire but also a necessity of this era. One of such attempt is Companies (Amendment) Bill 2016, passed by Lok Sabha on 16th March 2016. With 87 modifications contained in 61 pages, this bill is all set to bring a turning point in the corporate law. Companies Act, 2013 was also an outcome of a trial to curb the scams and frauds in some large corporations.

The Companies Amendment Bill, 2016 introduced by Ministry of Corporate Affairs proposes certain changes in the provisions as recommended in the report of Company Law Committee dated 1st February 2016. This bill remains pending in Rajya Sabha after being introduced by a private member.
on 26th February 2016. This bill majorly emphasizes towards the corrective action by the government required to be taken because of phasing out of certain unreasonable and impractical provisions of Companies Act 2013, in relation to overhaul of Companies Act, 1956. So, to avoid the repetition of poor hasty decision there is a dire need to analyse the proposals recommended in this bill.

OBJECTIVES OF THE BILL

The bill in present discussion has been proposed mainly keeping in mind the following objectives:

- To facilitate the ease of doing business by making provisions for solving the problems of stakeholders.
- It aims at strengthening the corporate governance.
- It proposes to initiate strict actions against defaulters as person as well as defaulting companies.
- Addressing the obstructions faced in implementation of the provision owing to stringent compliance requirements.
- Promotion of growth and employment for the smoothening of business activities.
- Harmonizing with the current accounting standards and regulations as mentioned in the Securities and Exchange Board of India Act, 1992, the Reserve Bank of India Act, 1934.
- Correcting any kind of inconsistence in the present provisions and providing for rectification of the omissions.

AMENDMENTS PROPOSED IN THE BILL

1. Definition clause

The 2016 amendment bill proposes many changes in the definition of various words in The Companies Act, 2013. The changes include- altering the definitions of associate company, cost accountant, debentures, financial year, holding company, key managerial personnel, net worth, related party, small company, subsidiary company and turnover, and omitting the definition of interested director. The important proposals are as follows-

- Associate company-

  Present- Section 2(6) of Companies Act, 2013 gives the definition of “associate company” as-

  “Associate company”, in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

  Explanation - For the purpose of this clause, “significant influence” means control of at least twenty percent of total share capital, or of business decisions under an agreement”\(^1\)

Associate company thus means any company which exercises a ‘significant influence’ over the other company and may include a joint venture but not a subsidiary company. Control is specified here as twenty percent of the total share capital in the company.

\(^1\) Companies Act, 2013
Control is defined under Section 2(27) in the Act as,

“control shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner”¹³⁴

Proposal- the word ‘significant influence’ is proposed to be used in a wider sense so as to include control of at least twenty percent of voting power and participation in business decisions under an agreement. Moreover, the word ‘associate company’ also includes joint venture under the Act. Since the word ‘joint venture’ is nowhere defined under the Act, the bill seeks to add its definition as "joint arrangements whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement." "

Analysis- It widens the scope of the definition of ‘associate company’ and brings clarity to certain terms.

- Holding Company

Present- Section 2(46) of Companies Act defines holding company as a company which has another company under it as subsidiary company.

Proposal- the definition of ‘holding company’ is proposed to be expanded by including body corporate within the term “company”.

- Small company

Present- The concept of small company was brought in Companies Act, 2013 with a view to boost small companies and to endow them with certain benefits. The introduction of small company in the Act was aimed at enhancing business and economy. ‘Small Company’ is defined in Section 2(85) of Companies Act, 2013 as,

“Small company means a company, other than a public company -
1. Paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; and
2. Turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees: Provided that nothing in this clause shall apply to-
A) A holding company or a subsidiary company;
B) A company registered under section 8; or
C) A company or body corporate governed by any special Act.”

Proposal- The bill seeks to increase the maximum prescribed paid-up share capital from five lakhs to ten crores for the reason to determine a company as a small company. Also the turnover has been revised from two crores to maximum twenty crores.

Analysis- Increasing the number of the paid-up share capital permits many more

¹³⁴ Section 2(27) of Companies Act, 2013
companies to come under the ambit of ‘small companies’ and take the certain advantages that are provided to them.

- **Subsidiary company**

Present- Section 2(88) of the Act defines “subsidiary company” as

“Subsidiary company” or “subsidiary”, in relation to any other company (that is to say the holding company), means a company in which the holding company—

(i) controls the composition of the Board of Directors; or
(ii) exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies:

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.’

**Proposal**- The change in requirement of ‘one-half of total share capital’ to ‘one-half to the total voting power’ needed for company to be a subsidiary company has been suggested. If the holding company exercises one-half control over the ‘total voting power’ instead of ‘total share capital’ either on its own or together with one or more subsidiary company, then it will be treated as subsidiary company. Moreover, it also purports to remove the provisions pertaining to layers of company.

- **Turnover**

Present- Companies Act, 2013 in section 2(91) defined Turnover as,

“Turnover means the aggregate value of the realization of amount made from the sale, supply or distribution of goods or on account of services rendered, or both, by the company during a financial year.”

According to the provision, the turnover of the company will be ascertained by amount of realization made during the financial year, not by value of goods sold or service rendered during the financial year.

**Proposal**- The definition of ‘turnover’ is proposed to be changed in its entirety. It is recommended in the bill that the turnover be calculated on the basis of gross revenue recognized in the profit and loss account from the sale, supply, or distribution of goods or on account of services rendered, or both, by a company in a financial year.

2. **Proposal for addition of a new section, Section 3A:**

Present: Although, Section 3(1) of the Companies Bill Act provides for minimum number of persons required to form a company, it remains silent on the requirement of minimum number of persons for continuation of a company and legal penalty to be imposed on failure of the compliance of the desired number.

**Proposal**: The bill imposes the liability on the members of the company that if the business is carried on for more than six months with less than seven members in
case of public companies and less than two members in a private company, they will be severally liable for the payment of debts and will be in a position to be sued severally.

Analysis- it seeks to make the laws regarding the requirement of members more stringent to bring effectiveness in the carrying of a business.

3. Matters relating to Prospectus

Present-

- Section 26 of the Act mentions the information that is required to be stated in prospectus. It mandates a public company to mention certain things when the prospectus is issued on behalf of the company.
- Section 35 of the Act makes the director, promoter, anyone who authorized the issue of prospectus liable for any inclusion or omission in the prospectus which is misleading or had caused any damage or harm.

Proposal-

- Clause 8 of the Amendment bill proposes certain changes related to matters to be stated in prospectus. It says that the prospectus shall include the reports and information in financial statement as per the guidelines of SEBI in consultation with the Central Government instead of detailed disclosures. The rules under SEBI Act, 1992 shall apply until it specifies the information in regard to financial statement.
- Clause 9 proposes to hold the expert liable for any misleading statement and relieve the Director, promoter etc. from any civil liability if they had the reason to believe that the person making the statement had given his content and was fully qualified to give it.

4. Private placement of Securities

Present: According to Section 42 of the Act, all kinds of securities can be utilised for private placement and offer can be made in accordance with the form and terms and conditions.

“A private placement is the sale of securities to a small chosen group of investors in order to raise capital.”

It is a sale of equity share capital to selected investors as opposed to a public offering. Private placement of shares is commonly seen in banks, insurance companies etc.

Proposal: The bill seeks to amend the current section entirely, prominent among them are:

1. Money raised through private placement shall not be put into use by the company until it is allotted.
2. Return of allotment, a form filed after allotting the securities, is to be filed within fifteen days from the date of allotment instead of thirty.
3. Penalty for not filing the return of allotment within the prescribed date is proposed to be equivalent to the amount raised through private placement or two crore rupees, whichever is lower.

135 Harper Collins Dictionary
4. The offer letter of private placement cannot be subjected to renunciation.

**Analysis:** The proposed amendment intends to make the process easier by doing away with many complicated procedures, filings and separate offer letters and also by enforcing dual penalty on filing return to allotment. The process of private placement is simplified.

5. **Prohibition on issue of shares at discount**

**Present:** Companies Act, in Section 53 states that shares at a discount cannot be issued unless otherwise provided by Section 54 and that any share issued at a discounted price will be void.

**Proposal:** The proposal aims to substitute the word ‘discounted price’ with ‘discount’. It also seeks to change the law regarding prohibition to issue shares at a discount and suggests that discount should be given to creditors whose debt is converted into shares in accordance with debt restricting scheme or statutory resolution while also following the guidelines of Reserve Bank of India under the Banking Regulation Act, 1949, Reserve Bank of India Act 1934.

6. **Prohibition on acceptance of deposits from public**

**Present:** Section 73 of the Act mandates that a company shall not accept any deposits from the public but it may accept deposits from its members. At the same time banking companies or companies specified by the Government has been tackled leniently by creating an exception of the same.

**Proposal:** Clause 15 aims to eliminate the requisite of insurance of deposits and provides that the reserve of deposit repayment shall not be less than twenty percent of the amount of deposit maturing in the following financial year. If the default of repayment of deposits is made good and a period of five years have elapsed then the companies are also allowed to accept the deposit.

**Analysis:** It provides a respite to all the companies who have deposits in their account by extending the payment period.

7. **Repayment of Deposits, etc., accepted before commencement of this act**

**Present:** Presently, Section 74 clearly incorporates the provisions as per which the company is liable to pay the deposit amount or interest on that which has remained unpaid from the commencement of the Act, within the span of one year.

**Proposal:** the proposal increases the period to repay the amount to 3 years from the date of commencement or before expiration of the time period for which the deposit was taken, whichever of the both is earlier.

8. **Declaration of any beneficial interest in the share**
Beneficial interest is generally referred to a profit or advantage. It is the right to receive profit on the assets of another person. For example, trusts. Section 89 of the Act mentions registered owner and beneficial owner. According to this provision, they are required to declare to the company about those shares which are held by the registered owner but in which beneficial owner holds the beneficial interest regardless of its title. It requires the particulars of each other and nature of interest held by the beneficial owner in the prescribed form.

In case of failure to declare by the respective owners to the Company or by the Company to the Registrar of Companies, the persons defaulting will be charged with a heavy penalty apart from losing the beneficial share.

The proposal says that the beneficial interest in shares will include directly or indirectly, right of a person alone or together with another person to-

i. Exercise all the rights in relation to that share and

ii. To receive any dividend or any other distribution in respect of that share.

Present-- Companies Act, under Section 96 requires that every company shall hold an annual general meeting within 9 months from the date of closing of the first financial year.

Proposal-- If all the members of the company consent, then the Annual General meeting of unlisted companies can be held anywhere in India.

10. Declaration of dividend

Present-- ‘Dividend’ refers to the profits of a company that is distributed to the shareholders. It is paid from the distributable profits in a particular financial year. Section 123 of Companies Act, contains provisions relating to the declaration of dividend. It says that a company can declare dividend if it has made profits in a current year. If it incurs loss in a financial year, then it can also declare dividend out of the undistributed, residual profits of the previous year.

Proposal-- the proposal provides for the declaration for interim dividend of a company by the board of directors during a financial year or before the annual general meeting is held. The dividend may be distributed out of the surplus of the ‘profit and loss account’ or out of the profits in a financial year or out of the profits incurred in the financial year till the quarter preceding the date of declaration of the interim dividend. Although, if the company incurs loss in a financial year till the period preceding the declaration of dividends, the
11. Corporate Social Responsibility

Corporate Social Responsibility (CSR), as mentioned in Section 135 of the Company Act embodies a notion that tries to reach for sustainable development and better corporate governance by promoting the companies to be more vigilant of the impressions of their business on the society and environment. It encourages the companies to embody a self-regulation structure so that it can manage all aspects—social, economic and environmental in equilibrium while also looking after the interests of the shareholders.

Present- Any company which comes within the area of net worth, net profit or turnover is required to have a CSR Committee in any financial year.

Proposal- As per the suggestions of High level CSR Committee, the CSR Committee should be formulated in the preceding financial year instead of any year and the expenditure of CSR is to be calculated on the basis of the preceding financial year too. Also, in certain companies where independent directors are not mandatory to be appointed, the least of two or more directors is to be appointed.

12. Provisions related Financial Statement

- Section 129 of the Act mentions the nature and rules regarding financial statement, a statement showing records of a company’s financial affairs.
- Section 134 mandates that the financial statement should be approved by the board of directors and signed by the chairperson who is authorized by the board. The Chief Executive Officer (CEO) can also sign if he is also the director in the company.
- Section 136 of the Act says that the copy of financial statement and all the legal documents which are to be annexed or attached to the financial statement should be sent to every member of the company and also to all the trustees.
- Section 137 is that the documents mentioned in Section 136 are to be duly filed with the Registrar within 30 days of the Annual General Meeting.

Proposal

- Clause 32 of the Companies Amendment bill, 2016 seeks to amend Section 129. It purports that the consolidated financial statements of the subsidiary companies shall be prepared in accordance to the accounting standards and also that
consolidating the accounts of a joint venture is no longer a requisite.

- Clause 35 aims to amend the clause by proposing that the CEO will be authorized to sign the financial statement whether he is a director or not. It also states that the disclosures already made in the financial statement need not be mentioned in the report again.

- Clause 37 says that if ninety percent of the members entitled to vote at the meeting agree, the copies audited financial statement and other documents can be sent at an earlier notice. It also says that the accounts of the subsidiary or subsidiaries of a company may only be required if it is a listed company rather than for all the companies.

- Clause 38 proposes to enable the filing of the unaudited financial statements of a foreign company which are not required to be filed.

13. Issuance of sweat equity shares by a newly incorporated company

Present: Section 54(1)(c) of Companies Act, 2013 required that a company can issue sweat equity shares only when a year has elapsed after its incorporation. “Sweat equity shares” means such equity shares that are issued by a company to its directors or employees at a discount or for consideration, other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, whatever it may be called.

Proposal: Clause 13 of this bill proposes deletion of the aforementioned provision according to which the requirement of completion of one year as a pre-condition of issuance of sweat equity share should be removed.

Analysis: The ability of newly incorporated company to issue sweat equity share just after its incorporation will surely act as a fillip for emerging start-ups. However, the promoters have still been kept out of its range as per the guidelines of Employee Stock Ownership Plan (ESOP).

Advantages: It would help the newly formed companies to retain the employees and extract their talent. Already engaged in tussle for finances, the newly formed companies can now take a sigh of relief as this provision is cost efficient in nature and can save the salaries spent on employees.

Disadvantages: A feeling of ownership and power might pave way for laziness and inefficiency among new employees which would affect adversely the growth of company. Sweat equity shares often lead to irregularity in income of the employees which might not be taken quite well by the newly recruited employees.

14. Director Identification Number

Present: For the first time the concept of DIN was introduced with the insertion of

136Section 2(88) of the Companies Act, 2013
section 266A-266G in the Companies (Amendment) Act 2006. DIN is an identification number allotted by the Central Government to any individual, intending to be appointed as Director or to any existing director of a company for the purposes of identifying as a director of a company. 137 As per Section 153 of Companies act DIN must be obtained by filling an application in DIR-3 form along with fee prescribed.

Proposal: Clause 46 of the 2016 bill has slacked the requirement of DIN for directors by making any other such identification number, which can be recognized by Central Government as per Clause 47 and the same be made eligible in place of DIN.

Analysis: DIN helps to maintain a rich database of the directors of the companies and is also authentic source to trace back the fraudulent companies who raised capital from public and vanished.

The proposed change would certainly simplify the incorporation procedure as the procedure of availing DIN would no more be an obligation for the companies.

Yet there is a dire need to develop such a mechanism which would enable the government to trace the various companies in which a concerned person is a director and see whether the provisions of company law have been duly complied with in such companies.

15. Provision relating to directors

Present- Under Section 130 of the Companies Act, 2013, the appointment of an independent director was followed by deposition of 100,000 rupees in the company’s share capital.

An independent director is the non-executive director of the company, who helps a company to improve its credibility and does not have any personal relation with the company which would prepossess the judgments. This deposited amount is liable to be refunded on two occasions:

(a) When the proposed person gets elected as director of the company.
(b) When he receives 25% of the total valid votes.

Under Companies Act 1956, the amount was limited to 500 rupees but later on it was raised in order to avoid perversion of power and ill-intent people becoming the directors.

- Number of directorships: Section 165 of Companies act 2013 has trammeled the holding of directorships to not more than 20 companies by a person.
- Under the act a person would be disqualified to be reappointed as director on failure of repayment of deposit by company or on non-filing of financial statements or annual returns for a continuous period of three financial years 138.

137 Rule 2(d) of the Companies (Appointment and Qualification of Directors) Rules, 2014

138 Section 164(2) Companies Act, 2013
Under the Act, on account of creation of vacancy due to disqualification as mentioned in section 167(1) and yet continued holding of office would lead to imposition of fine or imprisonment or both. Section 167(2) of the act states” If a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified in subsection (1), he shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.”

A director is required to forward a copy of his resignation in form DIR-11 to the registrar.\(^\text{139}\)

Proposal: Clause 48 of the bill has exempted the independent directors recommended by nomination and remuneration committee to deposit 100000 rupees. Also Clause 49 seeks to amend section 161 of the Companies Act whereby a person would be restrained from being appointed as an additional director if he is already a director in the Company concerned.

For counting the number of directorships in the company the directors of the dormant company would also be taken into consideration as per Clause 51 of the bill and thereby the ceiling for the same would be ascertained. Also the limit of 20 companies as specified in section 165 of the act has been done away with for the dormant companies.

Section 164(2) of the act specifically disqualifies reappointment of a person as director on account of failure to file annual return etc. But with the proposal of Clause 50 of the bill a window of six months has been provided for compliance of the aforementioned provision.

Clause 53 of the bill seeks to amend section 167 in relation to vacancy created in directorship on account of disqualification under section 164. According to the proposal such a person will have to vacate his position as director in all the other companies other than the company in default.

Seeking to amend Section 168 of The Companies Act 2013, this bill under clause 53 has made filling of resignation with registrar optional.

Analysis: This exemption would certainly foster the credibility of the company. A competent person who suffers backlog due to insufficient finance may finally get an opportunity to showcase their leadership skills. The company’s governance would improve as the directors would act as the watchdogs for it. The recommended person would be selected by the committee after considering the qualities required and hence the work would be done more efficiently. Also clause 49 of the bill would avoid concentration of power in one person’s hand.

Clause 51 of the bill has clearly specified the method to be adopted to fix the ceiling for directorship and hence removed all the dubiousness existing in this regard.

\(^{139}\) Section 168 Companies Act, 2013
Clause 52 will surely act as a deterrent for the directors intending to commit any malicious or fraudulent act as they will end up losing directorships in all other companies.

Clause 53 may lead to cumbersome business activities as now the main motive of introduction of DIR-11, which was to bar unauthorized filling of DIR-12 without intimating the resigning director, gets obliterated.

16. Loans, advances etc. to the directors etc.

Present: Section 185 of the Companies Act, which imposes restriction on grant of loans and advances to subsidiary companies by holding companies has been considered as one of the draconian sections of this act. Exceptions of these restrictions are two-fold:

a. First case is of subsidiary company which is a wholly-owned subsidiary and the loan is used for its (i.e., the wholly-owned subsidiary's) principal business activities.

b. Second case is of a private limited company (subject to certain conditions) in which no body corporate has invested in the share capital of such company. Therefore, a private company with any foreign investment could not avail this benefit, which did not help the situation.140

Proposal: The 2016 bill proposes to amend section 185 by replacing these restrictions with requirement of passing special resolution for availing the benefits of loans and advances subject to the condition that such finances shall be used only for principle business activities by the subsidiaries. However there is proposal of two fold prohibition in regards to granting of loans:

- To a director of lending company, director of its holding company and partner or relative of such directors.
- Firms in which such directors or relatives are partners.

Analysis: This bill would enable a holding company to grant loan to subsidiaries, irrespective of it being a public or private holding company by just passing a special resolution.

For utilizing finances for other than ‘principal business activities’ the firms will have to resort to current practice of changing the Memorandum of Association and including ‘grant of loans to subsidiaries’, so as to label it as ‘ordinary course of business’ and hence avail the exemption under the bill by paying some specific rate of business upon it. This may act as a loophole and hence is quite speculative.

This bill might create confusion as more liberty is being provided to public company as compared to private company under the exemption. Hence there is a dire need to amend the exemption notification as well.

17. Restrictions on layers of investment companies

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140 Notification No. GSR 464 (E) dated June 05, 2015 (“Exemption Notification”)
Present: As per Section 186 of the Act there are certain thresholds that are applicable on loans and investments by company:

- An investment beyond two layers of investment companies is not permitted.
- No loan/ security/ guarantee/ acquisition may be made exceeding 60% of (paid-up share capital + free reserves + securities premium account) or 100% (free reserves + securities premium account), whichever is higher.

Proposal: Under Clause 60 of the bill proposal has been made seeking:

1. Deletion of restriction on investments up to two layers of investment companies.
2. Application of the thresholds on the grant of loans/ security/ guarantee/ acquisition on value of such transactions as well as to the sum of the value of such existing transactions and any proposed new transaction including such aspects.
3. Investment made by a banking company/ insurance company/housing finance company/ companies established with the object of and engaged in the business of financing industrial enterprises or infrastructural activities under the exemption provided under Section 186 (11) of the 2013 Companies Act has been proposed to be included under this clause.
4. Requirement of passing special resolution at general meeting is no more mandatory if a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, or acquisition is made by a holding company of the securities of its wholly owned subsidiary company.
5. The definition of "Investment Company" has been proposed to include:

   I. A company's assets in the forms of investments in shares, debentures or other securities constitute not less than 50% of its total assets; or
   II. If its income derived from investment business constitutes not less than 50% as a proportion to gross income; such company shall be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities.

Analysis: This proposal would ease the structuring of group companies and inter-co-investments. The calculation based on the proposed revised threshold limits would be restrictive in the sense, where a company may enjoy liberty to provide loans to subsidiaries (subject to certain conditions) under Section 185, would now have to apply the applicable interest rates as mandated under Section 186, upon crossing the stipulated thresholds.

This proposal would bring equity-linked debt (upon conversion to equity) and other investments made by such companies within its ambit.

18. Provisions in relation to auditors:

Present: Section 140 of the act clearly specifies that it is must that the auditor of a firm be a Chartered Accountant. Following person has been specifically disqualified from becoming auditors:
(a) a body corporate other than a limited liability partnership registered under the Limited Liability Partnership Act, 2008;

(b) an officer or employee of the company;

(c) a person who is a partner, or who is in the employment, of an officer or employee of the company;

(d) a person who, or his relative or partner.

The act also requires submission of resignation of auditor in Form ADT-3. The failure of which attracts penal provisions\textsuperscript{141}.

Proposal: Clause 41 of the bill simplifies the term relative as mentioned in Section 141, by including spouse of a person. It also includes a parent, sibling or child of such person or of the spouse, financially dependent on such person, or who consults such person in taking decisions in relation to his investments.

Through Clause 42 of this bill it has been proposed that a person will not be eligible to be appointed as auditor if he directly or indirectly, renders any service referred to in section 144 to the company or its holding company or its subsidiary company. At present this restriction is applicable on the person, his subsidiary, associate company or any other form of entity.

Also the formality of annual ratification of appointment of auditors by members has been proposed to be relaxed. Moreover the penalty to be paid in case of failure to submit resignation in Form ADT-3 has been reduced by Clause 43 of the bill.

Analysis: As per first proviso to section 139(1), the matter relating to appointment of auditor should be placed for ratification by the members in each AGM. This particular arrangement raised various concerns on ratification of auditors as it was defeating the objective of giving five year term to the auditors. Furthermore, ambiguities persisted in case the shareholders who chose not to ratify the auditor’s appointment as per Section 139 (1) or where they did not ratify any appointment during the period of five years, as this would be akin to removal of the auditor and hence Section 140(1) should be made applicable.

Explanation to Rule 3 of Companies (Audit and Auditors) Rules, 2014, mentions that in case of any aforementioned ambiguities the Board shall appoint another individual or firm as the auditor(s) after following the procedure laid down in this behalf under the Act. On critical analysis of the present scenario it can be concluded without any iota of doubt that there exists inconsistency due to the two provisions. Thereby blazing a trail to avoid the present conflict and thus proposing the omission of the provisions with respect to ratification.

CONCLUSION

Pondering over the need of the hour to overcome the rampant misuse of the current Company Act, bobbed up the requirement of reviving the process of amendment as followed in 2013. Although Companies Act 1956 was reformulated giving birth to the

\textsuperscript{141} Section 141, Companies Act 2013
Companies Act 2013, yet the persistence of certain loopholes are undeniable.

In macb ro-perspective, the bill calls for more flexibility in the business procedures while giving the companies a relaxation in various sectors. It aims to perpetuate a better field of corporate governance, accentuate business opportunities, remove obscurity and bring a state of clarity and transparency. But when critically examined, it raises several questions about the effectiveness of the proposals and whether they are potent enough to achieve the envisioned goals.

This bill certainly aims towards providing for more certain, unambiguous and corporate style of doing business. Yet can sheer justification be claimed to have been achieved by this proposal? Company Act, 2013 contains some of the provisions which are contrary to the other contents of the same act. This issue has already been taken into consideration whilst suggesting amendment but whether all such deficiencies can be tackled by such proposal? The aim of the bill indicates strengthening of corporate governance for which certain penal provisions have been made more stringent. But would it be righteous to affirmatively claim that the proposals will not act prejudicially in interest of the companies in future?

While such questions are yet to be mooted upon, the possibility of reduction in hassle of compliance and complexities cannot be neglected. Success of any law depends upon due compliance by its subjects so refusal to pass the bill basing the contentions totally on future possibilities is not fully justified.

The bill acclaims the strengthening of corporate governance and hence providing for the ease of doing business. On one hand this paper shall act against hollow acclamations made, if any and there on the other, it also applauds the effort made to bring out the discrepancies and also make provision for its removal.

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COMMERCIALISATION OF SURROGACY

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Surrogacy simply means an agreement whereby a woman agrees to carry a pregnancy for another person who will become newborn child’s parent after birth. Since commercial surrogacy is legal in India, it means that surrogacy involves medical, nutritional and overall health care for the surrogate mother. Surrogacy is a noble act as it provides happiness to the unfortunate couples. After the legalisation of surrogacy in India, India became a favourite country for those wanting a surrogate child due to the cheap availability of resources attracting commissioning parents from various other countries as well. This led to the exploitation of poor women who were ready to become the surrogate mothers for monetary benefits. The bill aimed at putting an end to the exploitation of such women and violation of their rights. The Surrogacy Bill is fulfilling the purpose of helping the
unfortunate couples as well as avoiding the exploitation of poor women.

In this abstract we have highlighted some positive impacts of the Surrogacy Bill, types of Surrogacy and the way people treat the act of Surrogacy.

COMMERCIALISATION OF SURROGACY

---------INTRODUCTION---------

Surrogacy refers to an agreement whereby a woman agrees to carry a pregnancy for another person who will become newborn child’s parent after birth. Across the globe, surrogacy is on the rise, surrogacy is a noble act as it provides happiness to the unfortunate couples. Intended parents may seek a surrogacy agreement in case of medical impossibility of pregnancy or complications leading to danger to mother or child’s health. And as the gay couple looks to start a family, the need of surrogates increases. A surrogate mother is a woman who bears a child on behalf of another woman, either from her own egg fertilized by the other woman’s partner or from the implantation in her uterus of a fertilized egg from the other woman. If the surrogate mother receives monetary benefits for surrogacy then it is termed as commercial surrogacy. After the legalisation of surrogacy in India, India became a favourite country for those wanting a surrogate child due to the cheap availability of resources attracting commissioning parents from various other countries as well.

---------TYPES OF SURROGACY--------

There are broadly two kinds of surrogacy: Traditional Surrogacy and Gestational Surrogacy. Traditional Surrogacy (also known as straight, genetic or partial surrogacy) involves natural or artificial insemination of a surrogate. The resulting child is genetically related to the intended father and the surrogate mother if the sperm of the intended father is used for the insemination. But if the sperm of a donor is used for this purpose, then the resulting child is genetically related to only the surrogate mother and not to the intended father. On the other hand, Gestational Surrogacy (also known as host or full surrogacy) when an embryo created by In Vitro Fertilisation (IVF) technology is implanted in a surrogate mother. This can be done through various combinations like, the egg and sperm of the intended parents by which the resulting child is genetically related to the intended parents, the egg of the intended mother and the donor’s sperm by which the resulting child is genetically related to the intended mother only, etc.

---------ISSUES WITH SURROGACY--------

142 Reference from https://en.wikipedia.org/wiki/Surrogacy

Since surrogacy is a complex process of giving birth to a child, it involves various legal, social and medical issues as well. Some of them are: Legal issues & Citizenship, Religious & Ethical issues, Psychological concerns & Health issues. Since commercial surrogacy is legal in India, it involves monetary benefits to the surrogate mother along with other benefits and compensations. The overall expenses of surrogacy, involving medical treatment, compensation to surrogate mother, doctor’s fee, etc is less in India as compared to some other countries because of which foreign couples come to India for surrogacy which leads to legal issues and citizenship. For instance: Jan Balaz v. Union of India\textsuperscript{144}, a case of German twins born by surrogacy in India. The question of citizenship arises as India does not offer dual citizenship. For the purpose of surrogacy, poor women are mostly targeted as they are in need of money and so they are ready to carry the child in their womb for nine months. This leads to exploitation of women leading to violation of their rights in spite of their consent causing legal issues. Some other legal issues may include the terms of contract, gay and homosexual couples planning to have a baby through surrogacy, number of times a woman can become a surrogate mother, etc. These issues are not just legal but also related to social and religious issues. For instance: the religion of the baby whose intended parents are foreigners and the surrogate mother is Indian, the impact of surrogacy on the society and people in backward areas, husband’s consent in order to become the surrogate, the impact on the family of the surrogate mother and the problems faced by them, etc. Along with these issues there comes the problem of surrogate’s health and the psychological condition of the surrogate mother and the child. It has been noticed that the surrogate mothers undergo stress or depression at the time of giving away the child and also during the time period of nine months which also includes grief and refusal to release the child as well because of lack of emotional support and therapy during surrogacy process. This also leads to the psychological harm of the child and hampers its health as well. Since poor women do this for monetary benefits, it is possible that they do not get the emotional support, care and love and affection of the family of the surrogate depending upon the family background and the thinking of the family members. For the welfare of the surrogate and the baby she is carrying, it is necessary that proper care of the mother should be taken and she should be provided with proper diet and medical assisted during those nine months as it directly affects the child. All these issues must be considered while taking the decision of surrogacy.

\hspace{1cm} \textbf{INDIA AS FERTILITY TOURISM-}\\
India has become the main destination for surrogacy due to cheap availability of resources. Indian clinics at the same time have grown and become more competitive not just in pricing but in hiring and retention of Indian female surrogates. According to studies, Indian clinics charge $10,000 to $28,000 for the entire process of surrogacy, including surrogates compensation, fertilization, medical expenses, doctor’s fee, delivery of baby at the hospital, etc. Also, laws in India are flexible. After the Manji’s

\textsuperscript{144} AIR 2010 Guj 21

\hspace{1cm} www.supremoamicus.org
case 145 (Japanese baby case), commercialisation of surrogacy became legal in India. In 2014, surrogacy was banned for homosexual couples and single parents in India. Commercial surrogacy became illegal in India after the surrogacy bill passed in August 2016.

GOVERNMENT’S ROLE IN SURROGACY------

With an aim of putting an end to the exploitation of women in India the government took a few steps for the welfare of the society and surrogate mothers. After legalisation of commercial surrogacy in India in 2002, India became an International Surrogacy destination and a leader in International surrogacy. Clinics charged patients roughly a third of the price compared with going through the procedure of UK. The Law Commission of India submitted its 228th report 146. Some of its observations are listed below:

- Surrogacy agreement will continue to be governed by contract amongst parties containing the terms and conditions like providing health and other expenses to the surrogate, etc for the benefit of the parties involved in it and ensuring that there is consent of the surrogate, the intended father and the family members.
- Sex-selective surrogacy should be prohibited.
- Surrogacy contract should necessarily take care of life insurance for surrogate mother.
- Birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
- Right of privacy of the donor as well as the surrogate mother should be protected.
- Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian, etc.

The Union Cabinet recently approved the Surrogacy (Regulation) Bill 2016, banning commercial surrogacy in India. This bill aims at trying to prohibit the exploitation of women and children born through surrogacy. According to the Surrogacy Bill 147:

- Only Indian couples, who have been married for at least 5 years can opt for surrogacy, provided at least one of them have been proven to have fertility-related issues.
- Only close relatives, not necessarily related by blood, will be able to offer altruistic surrogacy to the eligible couples.
- The new Bill has put a complete ban on commercial surrogacy.
- It also bans unmarried people, live-in couples and homosexuals from opting for altruistic surrogacy. Now, foreigners, even Overseas Indians, cannot commission surrogacy.
- A woman can become a surrogate mother only for altruistic purpose and under no circumstances she will be paid for it.

145 AIR 2009 SC 84; (2008) 13 SCC 518
146 Reference from http://surrogacylawsindia.com

www.supremoamicus.org
although payment can be made towards medical expenses.

- Surrogacy regulation board will be set-up at both Central and State-level.
- The law will be applicable to the whole of India, except for the state of Jammu and Kashmir.
- Surrogacy clinics will be allowed to charge for the services rendered in the course of surrogacy, but the surrogate mother cannot be paid.
- Under the new bill, the clinics will have to maintain records of surrogacy for 25 years.
- The surrogate child will have the same rights of as that of a biological child.

-----CONCLUSION-----

Surrogacy is a way of providing happiness to the couples and their families who are not fortunate enough to get the happiness of a child. This act should be done out of kindness and not for the purpose of earning money. It is said that a woman can only understand the situation or problems of another woman, which applies here as well. A woman who has got the blessings of god in the form of a child can understand the importance of having a child and should help another woman who has been deprived of this happiness without thinking of the monetary benefits she can get out of it. The time when a woman is carrying the baby in her woman is said to be the most beautiful time in her life. The feeling should remain pure and should not be ruined by adding feeling of greediness. Surrogacy should not become a mere hardship or source of income for women or the families of the women who are ready to become the surrogate women. The surrogacy bill is very beneficial for the society as it leads to less legal complications. Also, less people’s value will be harmed if this is done in a right way. Having a child through surrogacy is a big step and it should be taken wisely, keeping in mind all the pros and cons and thinking about the benefit of everyone. The intended parents should take the full responsibility of the surrogate’s health before and after the delivery of the child. Even the surrogate should take all the reasonable care that she would have taken if the child was her own. All the legal work should be done before starting the process of surrogacy and due care should be taken. Also the help of a legal consultant and a medical consultant should be taken for the betterment of all the parties.

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PANACEA FOR SURROGACY MISCARRIAGE

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Today, world is engulfed in the modernisation and technical advancement. Evolution of technology can be witnessed from exploring the enormous universe to discovering the minute quark of atom. One of the advancements made by people is in the discipline of biology related to Assisted Reproductive Technology (ART) which was witnessed in 1978 when first test tube baby was created by British scientists. In 1978, World’s second but India’s first In

Vitro fertile child named Durga was born in Kolkata. Medical definition of ART states “the use of technology to assist human reproduction in the treatment of infertility; especially: a procedure (such as in vitro fertilization or gamete intrallopian transfer) that involves the removal of eggs from an ovary and fertilization by sperm in vitro.” 

Draft of Assisted Reproductive Technologies (Regulation) Bill, 2010 under Section 2 (c) defined ART as all techniques that attempt to obtain a pregnancy by handling or manipulating the sperm or oocyte outside the human body, and transferring the gamete or the embryo into the reproductive tract.” In simple words ART is a novice technique which proved to revolutionise infertility treatment of people which enabled them to have their own biological child. ART technique also mitigates the risk of various genetic disorders and diseases such as AIDS, tay-sachs disease, thalassaemia, sickle cell anaemia etc.

Primary means of initiating pregnancy through the process of ART are 1) Intrauterine Insemination (IUI) 2) In Vitro Fertilization, and 3) Third Party Assisted ART. Third Party Assisted ART includes (a) Sperm Donation (b) Egg Donation (c) Surrogates and Gestational Carriers. Surrogacy is a part of ART where pregnancy is achieved through the assistance of third party. “Surrogacy means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handling over such child to the intending couple after the birth.”

In simple words surrogacy is a consensus between two parties where one party is of intended parent and other party is of surrogate mother in which surrogate mother agrees to bear the child of other party and after giving birth she gives the child born out of surrogacy to the intended parent(s).

There are 3 types of genetic surrogacy circumstances: 1) Genetic surrogacy or partial surrogacy: This is the most common type of surrogacy. Here the egg of the surrogate mother is fertilized by the commissioning male’s sperm. In this way the surrogate mother is the biological mother of the child she carries. 2) Total surrogacy: Here the surrogate mother’s egg is fertilized with the sperm of a donor - not the male part of the commissioning couple. 3) Gestatory surrogacy or full surrogacy: Here the commissioning couple’s egg and sperm have gone through in vitro fertilization and the surrogate mother is not genetically linked to the child.

There are 2 types of consensus while conducting surrogacy or procedure of surrogacy which is needed to be entered between intended couple and surrogate mother 1) Altruistic surrogacy agreement where surrogate mother promises to bear child of intended parent without any intention of gaining personal profit or benefit out of surrogacy 2) commercial surrogacy agreement which deals with the situation where surrogate mother is provided

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150[Surrogacy (Regulation) Bill, 2016; Sec 2 (ZB)].


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some remuneration or compensation for bearing the child of intended couple.

Prior to 2002 there was no law governing surrogacy in India. In 2002, commercial surrogacy was allowed in India. In 2010 Assisted Reproduction Technology (Regulation) Bill was drafted but never got through the procedure of the parliament and never became a law. This bill gave green flag to commercial surrogacy and tried to make it legal but it succumbed as the bill was never passed. This bill also constituted a central board with the nomenclature of “National Advisory Board for Assisted Reproductive Technology” with total number of members not exceeding 21 under Chapter II, Section 3(i). The drafted bill constituted an ART bank for storing gametes and eggs of donors. The bill outlined all the offences which could be committed in surrogacy and its procedures. Till 2015 no step was taken on suppressing commercial surrogacy but in 2016 Surrogacy (Regulation) Bill, 2016 was introduced in Lok Sabha and was approved by cabinet but was opposed by opposition. The bill also allowed single parents to have a biological child through commercial or altruist surrogacy.

Coming to prevalent condition of legal surrogacy in India, it is going to allow only altruistic surrogacy imposing ban on commercial surrogacy once Surrogacy (Regulation) Bill, 2016 passes through Lok Sabha, Rajya Sabha and receives assent of President and its Act is created. After implementation of this act, the age restriction which is going to be imposed for surrogate mother will be between 25-35 years. Out of UK, South Africa, Russia, Greece, Netherland and India, India is the only country which makes it mandatory for the intended couple to be married and it is the only country which imposes restriction on number of times a surrogate mother can undergo surrogacy which is “only once” whereas other countries do not provide any restriction on the number of surrogacy which a surrogate mother can undergo. In India, Greece and South Africa legal guardianship of the child born out of surrogacy would get transferred to the intended parent whereas in UK transfer of guardianship is through adoption only if the intending couple are genetically related to the surrogate baby otherwise through a court order and in Russia legal guardianship goes to surrogate mother, if she has provided her egg otherwise to intending parent if surrogate mother has not provided her egg for commercial or altruistic surrogacy. After Comparing surrogacy laws of various countries conclusion which can be derived is that there are four segments in which these countries can be divided which are 1) countries which allows only altruistic surrogacy legally like Canada, United Kingdom, Hong Kong etc. 2) countries which allow both commercial and altruistic surrogacy legally Russia 3) countries which do not allow either altruistic or commercial surrogacy like Finland, France, Iceland, Japan, Pakistan etc. and 4) countries which do not have any legal law of surrogacy in their country like Ireland.


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India has proved to become a surrogacy hub due to factors like huge population, poverty, low family income etc. Prior to the introduction of the Surrogacy (Regulation) bill, 2016 various unethical surrogacy practices were prevalent like exploitation of surrogate mother and surrogate baby, buying and selling of gametes and human embryo, encouraging commercial surrogacy. This bill imposes restrictions over all the unethical and fraudulent acts which were committed in the name of surrogacy such as commercial surrogacy. Under the bill commercial surrogacy has been defined as “commercialisation of surrogacy services or procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother.”

Surrogacy (Regulation) Bill, 2016 has covered every possible aspect of surrogacy be it altruist surrogacy, commercial surrogacy, surrogacy clinics, legislative authority, penalisation of violators of the bill, defining intended parent and surrogate mother etc. within its VIII chapters with 51 sections.

Chapter III deals with most important part of the act which is related to regulation of surrogacy and surrogacy procedures. Section 4 of the act establishes conditions and eligibility for conducting altruist surrogacy and prohibiting unethical and commercial surrogacy. Conditions which is highlighted in section 4 is that

1. The intended couple should possess a certificate of proof of satisfying their condition of being infertile which is to be obtained from District Medical Forum
2. The intended couple should possess an order from a magistrate of a first class or above concerning the parentage and judicial custody
3. There should be insurance against surrogate mother.

Section 4(b)(i),(ii),(iii) and (iv) provides eligibility criteria for surrogate mother who has been defined as “woman bearing a child who is genetically related to the intending couple, through surrogacy from the implantation of embryo in her womb and fulfils the conditions as provided in sub-clause (b) of clause (iii) of section 4”.

Criteria for being a surrogate mother

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154 Surrogacy (Regulation) Bill, 2016; Sec 2(b).
155 Surrogacy (Regulation) Bill, 2016; Sec 2 (ze).

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is that the woman should have an age of between 25-35 years on the day of implantation and should be married and should have a child of her own. Surrogate mother is to be physically and psychologically fit and should possess the certificate of the same and cannot be anyone else but a close relative of the intended couple. It prohibits the surrogate mother from providing gametes or carrying pregnancy more than once. Section 4 (c) (i), (ii), (iii) and (IV) provide eligibility criteria for intended couple who have been defined as “a couple who have been medically certified to be an infertile couple and who intend to become parents through surrogacy”\(^{156}\). The criteria which is to be fulfilled by the intended couple is that the age of the intending couple is between 23 to 50 years in case of female and between 26 to 55 years in case of male on the day of certification; they should be Indian citizens prohibiting foreigners from exploiting Indian females for commercial surrogacy; they should be married for not less than 5 years; the intending couple have not had any surviving child biologically or through adoption or through surrogacy earlier with a condition that if the surviving biological child is of physically and/ or mentally unsound then there can be another altruist surrogacy. Section 5 prohibits any person from encouraging or forcing surrogate mother to undergo surrogacy or surrogacy procedure. Section 6 provides the requirement of a written consent by surrogate mother after acquainting her of all the possible outcomings and side effects of surrogacy. Section 7 deals with one of the crucial ideology of people where people often abandon their surrogate or biological child due to sex, deformity, twins or triplets etc and it prohibits any such act which is in relation to the abandoning or exploiting the child. Section 9 prohibits abortion during surrogacy period except in condition prescribed or necessary.

Chapter IV deals with the main organ which conducts surrogacy known as “surrogacy clinic” which is defined as a “centre or laboratory, conducting assisted reproductive technology services, in vitro fertilisation services, genetic counselling centre, genetic laboratory, Assisted Reproductive Technology Banks conducting surrogacy procedure or any clinical establishment, by whatsoever name called conducting surrogacy procedures in any form.”\(^{157}\). Chapter V aims to establish a National Surrogacy Board under Section 14 of this Act.

Chapter VII renders justice to the violators of this act for practicing unethical surrogacy. It deals various offences which complicit people who could be intended couple, surrogate mother, any registered medical practitioner, gynaecologists, paediatrician, human embryologists or any person who owns a surrogacy clinic or employed with such a clinic or centre or laboratory and renders his professional or technical services to or at such clinic or centre or laboratory, whether on an honorary basis or otherwise, commit by violating provisions of this act such as advertisement of commercial surrogacy, abandoning, disowning or exploiting the surrogate child, dealing in human embryo and gametes by

\(^{156}\) Surrogacy (Regulation) Bill,2016; Sec 2(r).

\(^{157}\) Surrogacy (Regulation) Bill,2016; Sec 2(zc).
importing-exporting and buying and selling of it. Penalisation policy of this act provides imprisonment of 10 years and fine of 10 lakh when the complicit violates provision of the Section 35 (1) (a to f). In case a person commits any folly for which no specific punishment is mentioned in the act then imprisonment of not less than 3 years with the fine of 5 lakhs is awarded. Any registered medical practitioner, gynaecologists, paediatrician, human embryologists or any person who owns a surrogacy clinic or employed with such a clinic violates any provision of this act and supports commercial or unethical surrogacy or procedure of surrogacy then he may be imprisoned for a period for not less than 5 years with the fine of 10 lakhs. If the person or the clinic continues to commit offence then his registration is suspended for a period of 5 years. Punishment which has been prescribed against a person who initiates commercial surrogacy is imprisonment for not less than 5 years with the fine of 5 lakhs initially and if he continues to do it then the fine may increase up to 10 lakh rupees. Surrogate mother has been provided an advantage in this act where if any kind of commercial surrogacy will take place it would be presumed by the court of law that the surrogate mother was forced by her husband, close relative or intended couple against her will for performing the surrogacy unless it can be proved otherwise.

Chapter VIII deals with maintenance of the surrogacy records, power to search, seize records, protection of action taken in good faith, vesting power in central government to make laws and legislature regarding surrogacy and etc. Prior to the introduction of this bill people used to conduct surrogacy and surrogacy procedure in an unethical manner which would pose harm to surrogate mother, surrogate child and even society. India was considered to be a hub for surrogacy where foreigners would come and commercialise the surrogacy for their own benefit leaving the poor surrogate mother into adversity. They used to enter India on a medical visa provided to them for commercial surrogacy and if the surrogacy child was not as per their desire they would abandon and disown it. In 2008 need for surrogacy law arose in the case of Baby Manji Yamada vs. Union Of India158 where a Japanese couple came to Gujarat for commercial surrogacy as intended couple and after surrogacy a baby girl was born but by the time she was born the couple had split up and the baby was both parentless and stateless. The Apex Court directed that the National Commission for Protection of Child Rights was the apt body to deal with this issue. The Supreme Court of India held that the father was the genetic father of the child and he was given custodial rights of the child. Thus, the child was returned back to her grandmother in Japan.159 To cease such instances from happening again foreigners have been barred from entering India on the medical visa for commercial surrogacy and legally only altruist surrogacy has been allowed in India that too only for Indian citizens. Various problems were outlined during the introduction of this bill like 1) abandoning or disowning surrogate baby because of its physical or mental

158 Baby Manji Yamada vs. Union of India and Another (2008) 13 SCC 518
deformity, sex, or for some other reason 2) commercialisation of surrogacy 3) surrogate mother would be forced by husband, close relative, intended couple or any other person to enter into surrogacy agreement 4) buying and selling of gametes or embryo of human being 5) no particular guidelines were established while performing surrogacy or surrogacy procedure 6) no authority to look over various crimes committed under the pretext of commercial surrogacy.

Once the Surrogacy (Regulation) Act, 2016 comes into force then all the above mentioned adversities would fade away as the problem regarding the abandoning of surrogate child, buying and selling, importing exporting of embryo and gamete and commercial surrogacy would be made illegal under chapter III and justice would be imparted according to the sections under chapter VII which the judicial body would deem fit to be applied in the respective case. Constituting a National body as well as state body for regulating surrogacy laws in India. Constituting an appropriate authority which would look into the regulation and proper functioning of the registered surrogacy clinic and would penalise all the other unregistered surrogacy clinics which would conduct any kind of surrogacy be it altruistic or commercial under this particular act.

A change in the existing surrogacy bill that should be considered is to allow single parents to enter into altruist surrogacy agreement otherwise their legacy will come to an end. For instance if a person A who is the only son of his parents, gets married to a woman B and within 1 year of their marriage his wife dies without any child and A does not want to remarry because of emotional and sentimental attachment to his wife but he wants his family’s legacy to continue by reproducing his own biological child through surrogacy but this act of Surrogacy (Regulation) Act, 2016 would not permit him just because he is single parent and ultimately his legacy will end.

The bill was criticised by the opposition in Lok Sabha and women who were involved in commercial surrogacy business because of the fact that many of the families were earning money out of the surrogacy and this bill curbs their activity leaving them indigent. As per the miscarriage of surrogacy law is concerned there could be none if all the provisions and clauses of the Surrogacy (Regulation) Act, 2016 are followed wisely as the act has tried to overcome and suppress all kinds of malfunctions of surrogacy giving permission to only altruistic surrogacy and banning commercial surrogacy. Surrogacy has given the new hope to the intended couple who cannot reproduce their own biological child due to their infertility and Surrogacy law has given trust and confidence to everyone in society who will feel free to undertake altruist surrogacy.

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WOMEN'S RESTRICTED RIGHTS TO PLACE OF WORSHIP: LABYRINTH OF PATRIARCHY OR PROTECTING THE LORD

By Anusree Manoj
WOMEN'S RESTRICTED RIGHTS TO PLACE OF WORSHIP: LABYRINTH OF PATRIARCHY OR PROTECTING THE LORD

ABSTRACT
This article gives a brief idea of the ignominious reality that women who are being worshipped as goddesses are deprived of their fundamental right to enter into place of worship. With special reference to the recent Sabarimala case and Haji Ali Dargah case the glaring disparities which is deep rooted in the society has been analysed. Women have not been able to throw the yoke of the male dominance and are still caught in the web of culture, traditions which devoid her of the societal status which she deserves. Winds of change are blowing across countries and continents sweeping away many hallowed sanctions, customs, superstitions. It is high time that the Indian society focus on women empowerment rather than turning a blind eye towards the significance of the inevitable and utmost significant concept of “Religious Empowerment Of Women”. God has never out casted the women nor has he abandoned her. Instead she is the God’s best and beauteous creation. There is a great need to lift the veil of unrealistic and discriminating customs, moreover to explore the world behind it and thus to balance the scales of justice.

Keywords: Women’s Fundamental Rights, Human Rights, Manusmriti, CEDAW,

INTRODUCTION
"I measure the progress of a community by the degree of progress which women have achieved.”
-Dr. B R Ambedkar
In India we have hold different views regarding women and their position in society. In early times, on one hand, it was believed that woman were honoured, gods feel delighted, while on the other hand, in the times of Manu, she was considered dependent and a weak human being who is protected by her father, when young, by husband in her youth, and by son in her old age, since it was felt that woman in never fit for freedom and she was bracketed with cattle and untouchable as worthy of beating. In spite of this distressing reality, shrines, festivals and places of worship honouring women serves as a symbol of a bizarre dichotomy throughout the country.

Equality and freedom, however, evaded women as in the chequered history of mankind one finds that different and disparate cultures, however distant they may be in time and space, have a similarity and that is contempt for women. This unequal status of women being offensive to human dignity and human rights emerged as a fundamental crisis in human development, the world over. The complete development of personality of fundamental freedom and
equal participation by women in political, social, economic and cultural scenario are concomitants of national development, social and family stability. All forms of discrimination on grounds of gender breed unrest.  

At the outset, it is necessary to define certain terms such as women’s rights, women's liberation and women's movement. The term women’s rights is used to describe that branch of women’s movement which is primarily active in attempting to bring about legislative, economic and educational reforms to eradicate sex discrimination in social institutions. The phrase women’s movement is used to describe the entire spectrum of women's groups from moderate to radical.

"Until women assume the place in society which good sense and good feeling alike assign to them, human improvement must advance but feebly."  

The common thread that runs to these excuses patriarchy which is premised upon the notion of women's inferiority and impurity, which then becomes a justification for their subordination. The other connected thread is the perception that women are evil seductresses who have the power to tempt men even while they are engrossed deeply in prayer and worship. The recurring motive of Eve, who brought about the fall of the mankind by luring Adam into sin and was banished forever from the Garden of Eden, a concept rooted in Judeo-Christian tradition, becomes a theme across different civilisation and religions.

POSITION OF WOMEN

"Within the Indian subcontinent there have been infinite variations on the status of women diverging according to the cultural milieu, family structure, class, caste, property rights and morals".  

The male dominated society which existed in the earlier times outweighed the prominent role played by women in the society. The women were considered as an outcast and were deprived of their inherent rights and privileges. The women’s position during numerous eras can be classified and listed as below.

I. WOMEN IN THE VEDIC PERIOD

In India, feminine glory was at its zenith in the vedic period after which it suffered and declined. This period was characterised by the absence of Purdah system, equal rights in selecting life partners, polygamy being rare. Women participated in all spheres like men, studied in Gurukals and enjoyed equality in learning the Vedas. The respect which the men of that era enjoyed could be best illustrated by the verse “YATER NARIASYE PUYANTE, RAMTA TATER DEVITA” which explains the status of women i.e., God reside at places where women be worshipped. The religious rights and ceremonies were incomplete in the

160 Mamta Rao, "Offences against women " , in Human Rights in India: Issues and Challenges
161 Judith Hole and Ellen Levine, Rebirth of Feminism, 1975.
163 Romilla Thapar , Looking back in History, in Devika Jain, Indian Women publication division, Ministry of Information and Broadcasting, GOI, New Delhi, 1975, p.6
absence of a woman. Wife was considered as the route of Dharma, Prosperity and Enjoyment.

II. WOMEN IN POST VEDIC PERIOD
The women status in the society deteriorated and suffered a setback when restrictions and limitations were put on women’s right and privileges by Manu. It was in the late Vedic period, which witnessed the birth of Manusmriti an unlimited authority of men. The drastic and dreadful changes which took place in this era was the notion of a daughter’s birth being considered as a disgrace and disaster for a father, denial of right to education to women, following the sinister practice of pre-puberty marriages. The subservience of women is precisely summed up in the famous injunction of Manu, where it is stated that women should never be independent.

III. WOMEN IN THE MEDIEVAL PERIOD
The women suffered abominable and daunting threat to their societal status in this era of disparagement. Uneducated and bereft of any status, they were treated as chattels. The petrifying and alarming social evils like sati, child marriage, female infanticide emerged and women suffered several disabilities. Polygamy and the system of Devdasi also emerged as another puddle of social tranquillity.

IV. WOMEN IN BRITISH PERIOD
This period was marked by the radical changes which took place in the attitude, behaviour and living pattern of the society. Notable advancements were observed due to the western impact of socio-cultural life of India. Distinguished freedom fighters have vehemently criticized the custom of child marriage, temple prostitution, prohibition of widow marriage etc. By enacting progressive legislations, a social change was brought thus paving for increased women’s mobility.

V. WOMEN IN CONTEMPORARY INDIA
The most important event which took place soon after independence was drafting of Indian constitution enshrining the principles of Equality, Liberty and Social justice. In a nutshell, it can be clearly depicted that the status of Indian society which is pre-eminent for its traditions, moral values shows declining position of women; women being eclipsed by the superiority and dominance of men.

TEMPLE- THE ABODE OF SANCTITY, REVERENCE
God is omnipresent and ubiquitous. However idols and shrines portray the existence of God and serve as a means of practicing one’s own religion. It is where God is believed to dwell and includes Hindu, Buddhist, Jain temples and so on. Hindu Temple symbolizes all elements of Hindu cosmos, elements of Hindu sense of cyclic time, and the essence of life. People flock in especially during the festive seasons, offering themselves at the mercy of the God. God has never carved a degraded position for women. Instead he chose women to be the procreator which itself explains how worthy she is. One important point in understanding the value structure in Indian society is the dual concept of the

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female in Hindu Philosophy. On one hand, woman is fertile, benevolent bestower of property; on the other hand she is considered aggressive, malevolent and destructive. This dual character manifests in the goddesses also, as there are dangerous, aggressive, malevolent goddesses like Kali and Durga; there are equally important Goddesses like Laxmi, Saraswati who are benevolent.

According to Susan Wadley, there is logic in this concept. She says, "The female is first of all Shakti (energy or power), the energising principle of the Universe. The female is also Prakriti (nature), the undifferentiated matter of universe." She further observes, "uniting these two facets of femaleness, women are both energy, power and nature, and nature is uncultured...uncultured is dangerous".

Veena Das says that in Shakti form the goddess usually stands alone and is not encompassed within a higher male principle. "The principle of power finds expression in the goddesses who represent Shakti, who come to the aid of man and the gods, in the periods of cosmic darkness, by killing the demon who threatens the cosmic order".165

The women is indeed considered as relevant and worthy of all the rights and privileges. She who is deemed to be the embodiment of sacrifice, benevolence, bearer of all hardships is given neither the rights of the normal human being nor is she given the respect which she deserves. Women’s right to enter places of worship has always been a contentious and dubious issue. Their right to enter the place of worship is always subjected to limitations. India, the land of diversities marked by numerous religions, multilingual, multicultural facets also has appalling loopholes in its so called “diversity” of which it boasts about.

The people even in this modern era – the era of globalization, privatization are caught in tentacles of superstitious beliefs restrained by unrealistic, illogical views. They haven’t been able to shook off the shackles of deep-rooted, baseless culture and is a major setback for the Indian economy.

WOMAN EMPOWERMENT: It is a means of nurturing inner strength, creativity and self esteem of women in all walks of life. Women have been delivering multiple roles without any complaints from the time immemorial. They have been dispensing their duties without any hesitation, and in a flawless and gracious manner including her role as doting daughter, caring mother, highly skilled colleagues. They are however ignored and had witnessed the brunt of injustice, oppression. They have to be restored to their rightful status, for which the concept of woman empowerment was introduced. Uplifting women in all spheres of life is inevitable; however in practice still woman empowerment has not surpassed the expected level. Moreover political, economic, social empowerment of women is looked upon by the society. “Religious empowerment” is the need of the hour as women are deprived of their fundamental

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164 Susan Wadley, Women and the Hindu Tradition, In Women In India, Two perspectives, By Jacobson and Wadley, 1977 p. 144.

right to profess and practice their religion. The expression religious empowerment should be paid heed to. Religion is what that regulates the social life of a being and thus it becomes necessary for women to exercise equal rights in their religious matters. Restricting women from entering their religious space is not only against the equality principle but also proves to be hurdle to their socio-cultural development. The women are being denied of their rights namely,

1. CONSTITUTIONAL RIGHTS

"Women comprises half the world population, perform nearly two-thirds of works hour, receive one-tenth of the world's income and own less than one hundredth per cent of world's property"

-A report of the United Nations, 1980

"Half of the Indian population too are women. Women have always been discriminated against and have suffered, and are suffering discrimination in silence. Self-sacrificing and self-denial are their nobility and yet they have been subjected to all inequalities, indignities, inequities and discrimination"


The Indian Constitution adopted by the constituent Assembly on 26th November, 1949 is a comprehensive document enshrining various principles of justice, liberty, equality and fraternity. These objectives specified in the preamble and elsewhere from part of basic structure of the Indian Constitution. The Fundamental Law of the land assures the dignity of the individuals irrespective of their sex, community or place of birth.

i) The Preamble

The preamble to the Indian Constitution contains various goals including "the equality of status and opportunity" to all citizens. This particular goal has been incorporated to give equal right to the women and men in terms of status as well as opportunity".

ii) Fundamental rights:

Article 15(3) lifts that rigour and permits the state to positively discriminate in favour of women to make special provision, to ameliorate their social, economic and political justice and accords their parity.

iii) Right against exploitation:

Article 23 of the Constitution specifically prohibits traffic in human beings. In this context, traffic in human beings include "devadasi system". Trafficking in human beings has been prevalent in India for a long time in the form of prostitution and selling and purchasing human beings for a price just like vegetables.

All the provision of Constitution are equally applicable to men and women. This establishes the intention of the framers of the Constitution in a crystal clear manner to improve the social, economic, educational and political status of the women so that they can be treated with men on equal terms.

Article 25 of Indian constitution guarantees, freedom of conscience and free profession,
practice and propagation of religion. It provides that subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

On one hand, women’s rights are curbed in the name of maintaining status quo and on the other, they are looked upon as sole flag bearer of community identity, often trapped between either being loyal to religious identity or working towards their desire to claim equal rights and freedom.

In Islam although women are not prohibited from entering mosques, there is a separate space for them for prayers. On the contrary, most mosques in India do not allow women and are solely visited by men. The Haja Ali Dargh restricted entry for all women after 2012, where in the Haji Ali Trust claimed that it was necessary to manage religious affairs as explained in Article 26(b) of Constitution of India. It gives complete freedom to the religious denomination to manage its affairs in matters of religion. The only restriction imposed by the Act is that the exercise of right is subjected to public order, morality and health. The Bombay high court upholding the woman’s right to worship and to enter the mosque like her male counterpart granted them entry into the inner sanctum and thereby assisted her in disposing the religious and spiritual duties. The court ruled that it was the fundamental duty of the state to protect the fundamental right of woman. This move of Supreme Court is a blessing to those who have been striving hard for the betterment of woman’s position in the society.

This judgement was challenged after a long time, it was after fifteen years that India Young Lawyers Association received in SC through a PIL claiming that Rule 3(b) violates the Constitutional Principles of Equality, non discrimination and religious freedom. It was contended that Rule 3(b) violates Articles 14, 15 and 25 of Constitution. It was claimed that as per Article 26(b) religious denomination has the complete freedom to manage its own affairs in the matters of religion.

The term "matters of religious" has to be interpreted in a scrupulous and rightful manner. Delivery deeper, SC has over the years, developed a doctrine of "essential religious practices" to determine the religious practises, rites which enjoy constitutional protection. Essential religious practices signifies those practices which are "building blocks" or "back bone" of that religion. The alleged religious practise should have the power of changing the nature of religion fundamentally. Can the individual right to religion (Article 25) be completely eclipsed and retracted by a denominational right to manage internal affairs (Article 26(b) )? The contestable custom of bottling up women exasperates the value of non discrimination which is the central pillar of Constitutional morality. Right to enter temple is also restricted. Hindu, Buddhist, Jain temples in the pretence of the "impurity " of women during menstrual days prohibit the entry of women inside the temples. The ban on menstruating women was enforced under Rule 3(b) of the Kerala Hindu Places
of Public Worship (Authorisation of Entry) Rules 1965, which states that "women who are not by custom and usage allowed to enter a place of public worship in any place of public worship".

These rules were made under a registration, Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, which was meant to attack discrimination and promote temple entry for all. The passing of the Act proved to be futile. Kerala HC upheld the ban in S. Mahendren . V. The Secretary, Travancore Case.

According to Article 25(2)(b) state has overriding power to bring a legislation to provide for social reform/throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. This act serves as a proof that makers of Constitution were very well acquainted with unfair, discriminatory practises within religious customs. Rule 3(b) of Kerala Hindu Places of Worship (Authorisation of Entry) Rules 1965, has the odour of bad faith. Section 3 of Act provides that no Hindu, of whether section/class, shall in any manner be prevented, obstructed, discourage from entering place of worship. Rule 3(b) is contradicting to Section 3(b) of Act.

Does restraining women from entering inside the temple, to be precise 'menstruating women' qualify as discrimination under Article 15? Article 15 of the constitution says, (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. It was contended that reasonable classification of menstruating and non menstruating women was made?, it was no discrimination as only menstruating women were denied their right? They were proscribed because of two reasons:

i) Women in the banned age group between the age of 10 and 50 menstruate, thus become impure and hence are unable to observe the mandated 41 day penance before commencement of pilgrimage to Sabarimala.

ii) The diet at Sabarimala temple is 'Naishtika Brahmachari' and does not like young women over there.

CHRISTIAN VIEW
Hatred towards women and fear of their sexuality exists in Christianity and discrimination against women is apparent within religious worship and practice. Though there is evidence within early church traditions that women occupied important position as preachers, they were later barred from holding such positions. The fear of women and their sexuality still reigns, but women have challenged this notion and have succeeded in getting themselves ordained as priests and bishops within some progressive churches.

WOMEN'S IMPURITY
The Vedas refer to the menstrual blood as 'kusum' (flower), 'pushpa' (blossom) and 'jivartake' (giver of life). Mentioning has been done of women like Gargi who challenged Sagi Yagnevalkya on religious philosophy. Knitted by the web of complex traditions and so called "immemorial
customs" people fail to analyse and reason the controversy behind the issued raised. Menstruating women if considered as impure in the society then why does the society alienate the infertile women? Menstruation is the basic necessity for child birth, is the unique gift to women, she is being adorned the noun of feminity, which society mistakes to be of "impurity". in both the ways, a menstruating lady, or an infertile lady are secluded by the society in certain aspects.

Taking shelter of the claim "time immemorial", the answer is a counter query. Do we motivate, support and allow all the traditions of pasts which turned out to be arbitrary, inhuman, prejudiced traditions like sati, in the present era. The Sabari mala case represents not just the aspirations and dreams of devout women seeking entry into temple, but also highlights the woman who is awaiting to set a precedent that would firmly ensconce the Constitutional morality, in political vocabulary and literate the individual right from choke hold group rights.

Rather than focusing on female extrication the majority of government policies and practises further aggravate the situation. The record of rights violations in the 20th Century unfortunately could go on and on.

FOSTERING THE HUMAN RIGHTS AND WOMEN
The UDHR included political and civil rights common to all democratic institutions such as right to life, liberty and equality before the law. The International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights were the two most important conventions adopted by UN General Assembly in 1966. Political and Civil Rights ensure people the opportunity to draw attention forcefully to general needs and to demand appropriate public action. the Convention on the Elimination of all forms of Discrimination Against Women came into force on September 3, 1981. It outlines the purpose of doing away with discrimination against women. It impairs the enjoyment by women of Human Rights and Fundamental Freedoms in political, cultural, civil and any other field. Harmful gender stereotypes, must be dismantled and disturbed, so as to ensure that women are no longer compelled to do anything instead identified as people who are unique with their own needs and desires.

NATURAL RIGHTS
Gender equality is the most persuasive and atrocious form of discrimination as it effects the women including girls and girls who form half of the country’s population. Mockery can be made of the fact that in a country like India where women are worshipped as shakti, the atrocities are committed against her in all spheres of life. From cradle to grave women are under constant tortures and clutches of enormous social evils, which exist within her family. The nature grants equal rights on her including her right to entire place of worship with no limitations. Gods makes no demarcation as to when and who should be permitted inside the temple. In the present era of technological advancements it would be downright absurd to bar women from...
entering the temple only on the grounds of her being a woman?

Custom usage and statutory laws are so inextricably linked with personal law. Unless the personal liberty are respected and provided against religious dictates the concept of social justice would remain a myth. The restrictions has still been in force and follow to retain the patriarchal nature of society, to re emphasise the fact that male dominance runs the worlds.

" All history attests that man has subjugated women to his will, used her as a means to promote his self gratification, to minister to his sensual pleasures, to be instrumental in promoting his comfort; but never has he desired to elevate her to that rank she was created to fill."
- Sara Grimke

To usher in a just legal order and to enhance gender sensitization, it is necessary that the gender dimension is not localised to a few special branches of law. The difference between man and woman may be small but they have snowballing effects on the status of a majority of women. Gender acts as a prime factor in shaping the legal and cultural landscapes of all countries.

"This humanity is male and man defines woman not in herself, but as relative to him ;she is not regarded as an autonomous being ....She is defined and differentiated with reference to man and not he with reference to her ;she is the incidental, the in essential as opposed to the essential , he is the Subject, he is the Absolute- she is other."
- Simone de Beauvoir

The need for women is gender justice which entails end of discrimination against them promising and ensuring them equality of status, opportunity and rights, equality before law and equal protection of law. Even the trivial positive achievement of women's engagement with law is worth celebrating without overlooking the naked truth that women's accomplishments with respect to law is still marked by inalienable, integral and indivisible part of universal rights.

CONCLUSION

"Half of the Indian population too are women. Women have always been discriminated against and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequalities, indignities, inequities and discrimination"

The sense of insecurity, humiliation and helplessness always keeps her mum. Cultural beliefs and traditions that discriminate against women may be officially discredited but they continue to flourish at grass root levels. The need for women in India is gender justice which entails end of discrimination against them and ensuring them equality of status, opportunity and rights, equality before law, and equal protection of law. All human

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166 Sarah M Grimke, Letters on the equality of sexes and the condition of woman, Boston: Issac Kanapp, 1838

167 Beauvoir, S., 1948.
beings are born free and equal in dignity and rights. The history of women's equal rights has, indubitably travelled a jiggered road. But even the minuscule positive accomplishment of women's engagement with law is no doubt worth celebrating without overlooking the bare fact that the material conditions of women's existence is still marked by gross inequality. Should we wait for patriarchy with all its entourage to start changing and leave the arena of law and legal reform as far as women are concerned? Concept of gender is, therefore, a socio-politico-cultural construct. The human rights of women are an inalienable, integral and indivisible part of universal human rights.

Custom, usage and statutory law are so inextricably mixed in personal law. Unless the personal liberty are respected and provided against religious dictates the concept of social justice will remain a myth. Unless the women irrespective of their religious affiliations have been conferred equal rights on par with men in personal matters the constitutional mandate of right to equality of status and opportunity cannot be a success.

In ancient Greek religion, there were women priestesses who presided over festivals and religious rituals. women priestesses served as Oracles, the most famous of them was the Oracle of Delphi. Feminist anthropologists and historians subscribe to the belief that patriarchy introduced the idea of women's impurity to reinforce male supremacy. Gradually as patriarchy took root, women were chastised for their power of healing and prophesying, and during medieval ages, many healers and midwives were burned as witches.

Our past is a palimpsest. Our traditions are layered and our stories multiple. we should be careful when we talk about honouring traditions, steeped as they have been in medieval darkness and discrimination. Women have always been discriminated against men and have suffered denial and are suffering discrimination in silence, self sacrifice, and self denied are their nobility and fortitude and yet have been subjected to all kinds of inequities, indignities, incongruities and discrimination. The personal laws are discriminatory and after coming into force of the constitution a question arises as to how these laws enjoy immunity?

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decades during the civil wars in Africa and the Middle East a large number of civilian populations have died in an attempt to escape the clutches of brutality, hostility and oppression in those war torn nations. Some of the most horrifying and appalling instances that reiterate the aforesaid circumstances and have been highlighted in the paper are that of Syria, Rwanda and Yemen. The significance contribution made through the 1951 refugee convention, treaties like the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights for the protection of these refugees have been enumerated in the paper.

I. INTRODUCTION

In an endeavour to flee to Europe a Syrian tot took his last breath in the Turkish sea where the boat carrying him along with his family capsized. Amidst the fear that families will be locked up in sinister sounding "camps", they left no stone unturned to escape with their children sleeping on floors and sidewalks. Continuous war, persecution and oppression have rendered these innocent people helpless and subsequently homeless. Presently, more than 19 million people have left their home due to the above reason an estimate of 42,500 people join them on a daily basis. As indicated in the paper, what causes the paradigm shift in the lives and subsequent approach to life of these citizens is the spark that catches fire due to the altercation between institutes that are ideally construed as bodies for peace and law making among these citizens themselves.

The greed and selfish agendas of the oppressors instigated them to commit a series of atrocities on innocent civilians who aimed nothing but to lead a simple life, a life which included playing in the gardens, sharing laughter and love with their families and building innumerable memories worth cherishing. The notions of morality and compassion towards humans have been completely obliterated by the greedy and people are left with a devastated surrounding to endure with no other option but to cry for help, which most of the times has been in vain. When humans themselves have contributed, or in certain cases, initiated misery and hardship for the innocents, Law steps in to ensure that the basic rights as human beings as well as particular rights pertaining to refugees do not become subservient to any show of power, no matter how mighty it may be.

II. THE 1951 REFUGEE CONVENTION, OTHER RIGHTS AND CASE LAWS

A refugee is someone who has been forced to flee his or her country because of persecution, war, or violence. A refugee has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group.

As mentioned above, the cruelty and atrocities faced by the people as a result of

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169 Amanda Taub, Europe’s refugee crisis, explained (Sep 5, 2015, 11:40am EDT) [https://www.vox.com/2015/9/5/9265501/refugee-crisis-europe-syria]

170 UN Refugees, http://www.unrefugees.org/what-is-a-refugee/
the wars are beyond any scope of imagination and no amount of sympathy can compensate for the loss. An insight of specific crisis and its aftermath shall be dealt in the latter part of the paper. Our primary concern is how the law brings back peace and order in these war-ridden countries. More importantly, how it extends help to ensure that justice is done to the victims and sense of security is instilled in them by the means of rules, rights and norms.

A. RIGHTS OF THE REFUGEES ENVISAGED IN VARIOUS LAWS

The refugees enjoy several rights consisting of important civil, political, economic and social ones by the virtue of application of the refugee definition which grants a limited right to remain. A biased application of the definition wherein persons of one nationality are denied the refugee rights and status while the same of another nationality in similar circumstances are granted the rights and status are precluded in one level of the application of definition highlighting the non-discrimination doctrine.

Another level of potential discrimination entails of the level of due process available to the refugees in comparison with that of the citizens of that nation. In a case where the courts and independent tribunal make up the norms for adjudicating rights, usage of administrative decision-making for the determination of the status of refugees can result in discrimination and hence, a human right treaty body is advisable in examining and comparing the rights of the citizens with that of the refugees.171

The benefits of rights that are enjoyed by the refugees beyond the purview of The 1951 Refugee Convention are envisaged in Article 5 of the said Convention. Article 5 also provides for refugees to have equal access to benefits under other treaties for a major part of the Geneva Convention rights. Various other treaties especially the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), an universal instrument, provides for a detailed elaboration of economic and social rights like that of health and General Comments for implementation of the treaty.

Article 6 provides for comparison of refugees with citizen or non-citizens by defining 'in the same circumstances' on the basis of rights in issue and subsequently in the application of human right treaties to refugee situation.

Article 12 of the International Covenant on Civil and Political Rights ("ICCPR") which states the right to leave and return to one's country has been interpreted as giving right to leave and enter to certain non-citizens like a stateless person.

In Stewart v Canada172, the Human Right Committee stated the prohibition of expulsion and therefore refoulement in certain cases especially where the person is stateless. It further held that the rights of a

registered refugee are same as that of a stateless one.

Certain provisions of the Refugee convention provide for necessary affirmative measures to facilitate the right to travel out of and return to the same country. These are administrative assistance (Article 25), identity papers (Article 27) and travel documents (Article 28).

Article 31 of the Refugee Convention is another affirmative measure in favour of the refugees i.e. they cannot be penalized for illegal entry. This provision enables the Human Rights Committee to interpret Article 12 and Article 13 of ICCPR as to who is 'lawfully within the territory of a State' which further helps them in determining who is entitled to the ICCPR rights.

However, the exclusion of such Article in the ICCPR and ICESCR does not indicate a denial of such rights to other non-citizens on the account of illegal entry. The 1990 International Convention on the Protection of All Migrant Workers and Members of Their Families grants right to the possible extent to migrant workers who do not enjoy regular rights.

The case of Anumeeruddy-Cziffra et al v Mauritius 175 highlighted the competence of the Human Rights Committee to deal with rights of entry and in General Comment 15 (The position of aliens under the Covenant) in congruence with Article 13 ICCPR establishes the right of a non-citizen to a hearing in an expulsion procedure. 176

Further under the Customary International Humanitarian Law, Rule 55 states that in case of international armed conflict, the Fourth Geneva Convention requires the States to "allow the free passage of all consignments of medical and hospital stores" intended only for civilians and "the free passage of all consignments of essential commodities for children under 15, pregnant woman and maternal cases." And in case of Non International Armed Conflict the Article 33 of the Convention consists of the

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173 (1) Everyone lawfully within the territory of a State shall, within that territory, have the rights to liberty of movement and freedom to choose his residence.
(2) Everyone shall be free to leave any country, including his own.
(3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by the law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedom to others, and are consistent with the other rights recognized in the present Covenant.
(4) No one shall be arbitrarily deprived of the right to enter his own country.

174 An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Additional Protocol II which allows and provides access for humanitarian relief to civilians in need. Further it also states that without the consent of the parties concerned the protocols cannot be implemented. The operation of any humanitarian organization is not possible without prior permission of the states involved. The passage of humanitarian relief can be provided by any party to protocol and need not necessarily be limited to the stated involved.  

Refugee Convention grant rights to refugee keeping in mind the rights of citizens and other classes of non-citizens. Rights in congruence with citizens are laid in Articles pertaining to religion (Article 4), artistic rights (Article 14), court access (Article 16), education (Article 22(1)), public relief (Article 23), labour legislation (Article 24) and fiscal charges (Article 29).

Rights in comparison with that of other non-citizens are included in articles exemption from reciprocity (Article 7(1)), property (Article 13), association (Article 15), employment (Article 17(1)), self employment (Article 18), profession (Article 19), housing (Article 21), post elementary education (Article 22(2)) and freedom of movement (Article 26).

B. CASE LAWS

In Gonzalez v. Canada (Minister of Employment and Immigration) the quality of persecution which a claimant might suffer if returned could not be weighed against the gravity of what had been done to engage the exclusion clause. A private soldier in action against armed enemy was not guilty of war crime or crime against humanity within Convention refugee definition. However, each individual case will depend on its own particular facts and circumstances. It may be that in a given situation, while the death of innocent civilians occurred at the time of or during an action against an armed enemy, such deaths were not the unfortunate and inevitable casualties of war as contended, but resulted from intentional, deliberate and unjustifiable acts of killing and slaughtering.

In another case the test of “serious reasons for considering” that an individual has been guilty of crimes against humanity is a lower standard of proof than the balance of probabilities. That standard of proof only comes into play, however, when the decision-maker is considering determinations of fact. Membership of an organization which from time to time commits international offences would not normally be sufficient to exclude a person from refugee status. However, where an organization is principally directed to a limited, brutal purpose, such as secret police activity, mere membership may by necessity involve personal and knowing participation.
in prosecutorial acts. Frequent participation in such acts is unnecessary as Article 1F(a) of the 1951 Convention only speaks of a crime against humanity in the singular.

The “reasonable grounds to believe” standard was elaborated in Mugesera v. Canada (Minister of Citizenship and Immigration) wherein the Supreme Court stated that it required something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities. Reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information. This standard of proof applies to questions of fact. Whether the facts meet the requirements of a crime against humanity is a question of law. The facts, as found on the “reasonable grounds to believe” standard, must show that the “hate” speech did constitute a crime against humanity in law.

III. MAJOR CRISIS regions

A. THE SYRIAN CIVIL WAR

"The Syrian civil war is the deadliest conflict the 21st century has witnessed so far”

- Al Jazeera

After the success of the pro-democratic protests in the Tunisia and Egypt, it inspired and led to the protests by a large section of the Syrian pro-democratic activities. These protests did not go down well with the government of Bashar - Al -Assad and there was a heavy crackdown on the protestors. This fuelled more anger amongst the rebels of the government watching their freedom rights being plagued. Even a large section of the Islamists were against the regime. Going back in history, in 1982 Assad's father had ordered a military crackdown on the Muslim Brotherhood in Hama, which killed between 10,000-40,000 people and flattened much of the city. In 2011, glimpse of a sectarian divide in the nation started to emerge and the gap between the Sunni majority and Shia majority of which Assad is a member widened. Economic as well as the environmental issues like the 4 year drought from 2007-2010, leading to poverty and migration also added to the social unrest amongst the citizens of Syria. The aforesaid episodes eventually led to the commencement of one of the world's largest humanitarian crisis in recent years.

The crisis has torn the country into shreds with almost 6.3 million Syrians being internally displaced and more than 4.3 million fleeing to neighbouring countries. the crisis has not only affected the lives of millions but has also exposed the country's cultural heritage to various threats and there has been rampant destruction of important sites and monuments. A huge proportion of this population include children and youth and approximately 8.1 millions of them are in dire need of education. It has resulted in catastrophic consequences rendering two-thirds of the citizens unable to secure basic food and essentials and at least 6% of the population subjected to brutality which has eventually killed, maimed or wounded them.

181 [2005] 2 S.C.R. 100, 2005 SCC 40, 28 June 2005 (Supreme Court of Canada)
UNESCO has been active in responding to this crisis, particularly by assisting Syrian refugees and host communities in Iraq, Jordan, and Lebanon, and safeguarding Syria’s cultural heritage. Education and particularly post primary education remains the gap area when it comes to humanitarian response to the Syria crisis. Capitalizing on the achievements made so far and further consolidating its efforts, UNESCO has scaled up its response by addressing learning gaps of youth in Syria, Jordan, Lebanon and Iraq. In February 2015 UNESCO launched “Bridging Learning Gaps for youth”, a programme that will enable access to secondary and higher education, improve its quality, and build resilient education systems for the affected youth, between ages of 15 to 30, both within Syria and in the region.182

“We felt maybe it’s our turn to die. But we didn’t want to die. So we made up our minds to leave.”

- Sahar, 25, Syrian refugee in Lebanon

UNHCR is providing life-saving humanitarian aid for Syrian refugees, helping the most vulnerable with cash for medicine and food, stoves and fuel for heating, insulation for tents, thermal blankets and winter clothing. In early 2017, with Syria’s war heading into its seventh year and with no end to the fighting in sight, we joined forces with other United Nations humanitarian and development agencies to appeal for US$8 billion in vital new funding to help millions of people in Syria and across the region. The first aspect of the appeal is the Regional Refugee and Resilience Plan (3RP), led by UNHCR, which calls for US$4.63 billion to support 4.7 million refugees in neighbouring countries and over four million in the communities hosting them. The second aspect is the 2017 Syria Humanitarian Response Plan, which seeks nearly US$3.2 billion to provide humanitarian support and protection to 13.5 million people inside Syria.183

UNESCO’s Action Plan for emergency safeguarding measures and post-recovery actions was launched and in the light of this plan a three-year “Emergency Safeguarding of the Syrian Heritage project”, which focused on ways to reduce destruction and loss of cultural heritage in order to bring back normalcy and social cohesion in the country. An approximate of € 9.4 billion has been channelized for humanitarian and resilience purposes by the European Union and its Member as an act of extending help and support to Syrians inside the country and in countries like Lebanon, Jordan and Iraq.

As a result of the efforts of EU around 2 million people have access to safe water, sanitation and hygiene items, more than 850 000 have received food, 1 million have received non-food items and shelter, and 350 000 children have been covered by child protection programmes, thousands out of school children are supported with education in emergency programmes. The EU along


with various UN agencies, the International Committee of the Red Cross and the International non-governmental organisations have provided humanitarian assistance. The EU has undertaken advocating steps for the access and protection of Syrians. In March 2017 The European Commission and the High Representative of the Union for Foreign Affairs and Security Policy have adopted a Joint Communication proposing a forward-looking EU strategy for Syria. During the year 2016, approximately 4 million non-food items were distributed across Syria, nutrition items were made available to some 3 million, and shelter was provided to nearly 300,000 people. With the commencement of cross-border operations in July 2014, after the adoption of UNSCR 2165 (2014), the UN has conducted around 467 cross-border convoys, which has facilitated UN partners in delivery of medical supplies for 9 million treatments, which includes two million people to be vaccinated. Apart from this, the UN has completed 294 airlifts to Qamishly, making available 10,000 metric tons of food, Water, Sanitation and Hygiene ("Wash"), nutrition, education, shelter and NFI assistance on behalf of humanitarian actors, including 120,000 full food rations.184

B. THE YEMEN CRISIS

Another country which is in the grips of a sectarian conflict is Yemen - one of Arab world's poorest countries. The devastated state of the country is a result of the combat between the Shia Houthi rebels and the forces loyal to the then President Abdrahu Mansour Hadi who belonged from the Sunni community.

UNHRC provides life-saving aid to displaced Yemenis, as well as to refugees and asylum-seekers, across the country. Under the humanitarian coordination system in Yemen, they provided emergency shelter, mattresses, blankets, sleeping mats, kitchen sets, buckets and more to help those displaced and most vulnerable. These aids assist families in repairing their destroyed homes and also restructured public buildings and settlements to provide the displaced families with shelter and protection. Their aid also entered into the sphere of health facilities and undertook steps to prevent and control the spread of cholera, which was a subsequent result of the conflict. Approximately 29,300 cholera cases across 18 of Yemen's 22 governorates were suspected with over 300 deaths. UNHRC extend their support to approximately 278,000 refugees and asylum-seekers, mainly from the Horn of Africa, who remain in Yemen despite the conflict and are particularly at risk.

The European Commission had undertaken steps to protect those who suffered from malnutrition or faced food insecurity and armed clashes as a result of the conflict. Most of humanitarian funding was directed towards providing food, water and sanitation, basic health care, shelter and household items to the internally displaced people, the refugees from the Horn of Africa and the communities who are hosting these uprooted people. A portion of the fund was also allocated to humanitarian agencies who looked after children suffering from acute

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malnutrition and provided them with appropriate treatment and relief. Since the commencement of the conflict in 2015, the European Commission has provided €171 million in humanitarian assistance, inclusive of €51 million announced by Commission Christos Stylianides during a conference in Geneva in April 2017. The Commission also ensured monitoring of the rapidly evolving humanitarian situation and security and coordination among humanitarian actors and donors. Advocacy work such as circulation of information about the humanitarian principles also took place.

UNICEF has also initiated steps for the improvement of maternal health and nutrition and increased access to clean water and achievement of basic rights for children, including addressing child marriage and preventing children from being victims of grave violations and advocating against the recruitment and use of children by armed forces and armed groups.

Various factors were taken into consideration for coming to Djibouti in order to escape the horrific conditions in Yemen such as the proximity between the two places, close cultural, social and linguistic links, and open door policy of the Djiboutian Government. Certain factors, however, restricted some Yemenis like harsh weather conditions, particularly in Obock and Markazi refugee camp, and expensive living conditions. Of the population the gender breakdown was 36 per cent were men above 18 years old, 25 per cent were women and 38 per cent were children. Fleeing for security reasons, avoiding forced recruitment and new income opportunity in Djibouti in order to support their family in Yemen constituted as some of the reasons for fleeing to the country. At present, approximately 2,800 individuals live in Markazi camp and an increase in the number is anticipated not only with Yemeni refugees coming from Yemen, but also with Yemeni refugees presently living in the city of Obock, who cannot sustain themselves in the city. The Government of Djibouti recently adopted a new policy to allow Yemenis to reside in urban areas. The needs for both urban and camp refugees are considerable ranging from health, nutrition, shelter, self-reliance, non-food items and protection. Majority of the Somalis who fled Yemen and were recognized as refugees in Yemen, arrived in Somalia. Prior to the crisis there were 257,645 recognized refugees under international protection in Yemen. Currently these refugees are living in hazardous conditions. Since the worsening of the conflict in Yemen an approximate of 29,505 individuals (89 per cent Somalis, ten per cent Yemenis, and one per cent other nationalities) fleeing the area have become arrivals in Somalia. Reintegration of Somali returnees further added challenges as the widespread conflict and political strife had crippled essential infrastructure and more than three quarters of the population in Somalia lack access to healthcare, proper sanitation and safe drinking water. In Ethiopia, the Government recognized Yemenis as prima facie refugees after the nationality screening procedures and registration. The arrivals through Jijiga, at the border with Somalia, were refused assistance from UNHCR until they are registered by the Administration for Refugee and Returnee Affairs (ARRA.) Constant
delays contributed to the hardship of the living conditions.

The open door policy and the policy of the Government of Sudan to treat Yemenis as brothers and sisters allow Yemenis to work and to move freely, but might deny them assistance granted to refugees of other nationalities.  

C. THE RWANDAN GENOCIDE

Another instance where morality and human life became subservient to the hunger for power and authority was the Rwandan genocide in the year 1994.

It was a result of a longstanding history of tension between the Tutsi and Hutu ethnic groups in Rwanda. Ethnic tensions existed in Rwanda for centuries, growing even more extreme after Rwanda gained independence from Belgium in 1962. In the 1990’s, the Hutu political elite blamed the Tutsi population for increasing political, social, and economic problems in the country. They also associated Tutsi civilians with the Rwandan Patriotic Front (RPF) rebel group. A Hutu revolution in 1959, supported by the colonized power, the Belgians, forced as many as 300,000 Tutsis to flee Rwanda.

Within three months from the commencement of the crisis as an estimated five to eight hundred thousand people lost their lives due to civil war and genocide in Rwanda. Large numbers were physically and psychologically afflicted for life through maiming, rape and other trauma; over two million fled to neighbouring countries and maybe half as many became internally displaced within Rwanda. As the RPF units aimed to seize power in mid-July, there was massive flow of civilian refugees across the border to Tanzania and Zaire. Among them were some 30,000 government soldiers, militia members, local officials and former national leaders. As the level of violence became clear, groups of Tutsi—and Hutu who feared they might be targeted—fled to places that in previous times of turmoil had provided safety: churches, schools, and government buildings. Many of these refugees became the sites of major massacres. For example, during the first days of the genocide, more than 2,500 Tutsis sought refuge at a school, the Ecole Technique Officielle (ETO) in Kigali, where Belgian UN troops were stationed. Around 1.2 million refugees fled into Zaire who established themselves in a corner of Zaire remote from central authority. In addition to a large external refugee population, war and genocide had created a large number of internally displaced persons, especially in the French “safe zone” where an estimated 1.2–1.5 million people had fled towards the end of the war. For the new Rwandese government, the concentrations of internally displaced represented an internalized version of the problems posed by the camps across the border.

During the nine months of the emergency in 1994, April to December, international assistance for emergency relief to Rwandese refugees and displaced persons is estimated to have cost in the order of US$ 1.4 billion.

185 UNHCR, Yemen Situation Regional Refugee And Migrant Response Plan, January-December(2016)
of which about one-third was spent in Rwanda and two-thirds in asylum countries.

According to the Statutes of UNHCR and subsequent UN authorizations, as well as the OAU Refugee Convention, all refugees from war are prima facie entitled to protection, but the exclusion clause of the 1951 Refugee Convention applies if there is reason to believe that a person has committed serious war crimes or crimes against humanity. Registration is necessary to determine eligibility, but the rapid influx and vast numbers involved made it impossible to register the refugees upon arrival. An agreement was reached between UNHCR and the Tanzanian government that recognized the legal fact that the formal authority and ultimate responsibility for policing refugee populations lies with the host state.

As the lead agency in refugee matters, UNHCR early on raised the issue of camp security with the Zairian government. In September 1994, a joint mission from UNHCR and the government of Zaire considered the feasibility of separating the militia from the rest of the population. The mission estimated that around 100,000 persons, consisting of militia members and their families, would have to be moved. The costs and problems of identifying, separating and relocating this group – by force if necessary – were considered prohibitive. UNHCR fell back on a more modest proposal to police the camp with a security contingent drawn from Zaire’s elite forces, backed by international technical expertise.

Two principles of refugee policy are generally recognized in the international community: refugees have the right to return, and those who cannot return should be given asylum or resettlement elsewhere. Failure to observe such principles typically creates festering refugee problems, and in many cases militant communities who seek to escape from their dilemma by force. The phases of the Rwandese conflict considered here started and ended with festering refugee problems. While cognizant of the problems preceding the 1990 invasion, UNHCR could rely only on its good offices to promote a solution.

A more serious factor was the failure of the international community to invest adequate resources in Opération Retour to initiate the information campaign in both the camps and the home areas as well as rehabilitate the justice system and the home communes in preparation for the returnees, particularly in the winter phase of the plan when the operation was still a voluntary one. There was also a failure to act sooner and use the not-so-gentle persuasion of promising to withhold food when the incentives to return home to take advantage of the January crop season were stronger, before the extremists could organize the resistance, and when the IDPs were not subject to the dismal feedback by returnees and new IDPs about the perilous conditions at home.

The Rwanda case demonstrated the need for greater policy coherence, but equally the need for principled coherence. With respect to the latter, at least two major standards of international conduct were
violated at various times: the sanctity of borders and the rights of refugees. The refugee issue was central to the Rwanda crisis and remained a critical factor to later developments. To deal effectively with the refugee issue before the 1990 invasion, UNHCR would have needed a plan of action to settle the problems within a reasonable time-frame, and support from states and financial institutions with leverage that could be brought to bear on the situation.

IV. PICTORIAL REPRESENTATION OF EMPIRICAL DATA

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186 UN Organization,

V. CONCLUSION
Despite all the endeavours made by various international bodies, the situation is far from being solved owing to the absence of an organized and systematic structure pertaining to a valid immigration policy.

Countries face a constant dilemma in deciding on the number of refugees to be accepted. Recently, Germany agreed to take in 800,000 refugees and needed approximately $5 billion for the same which the officials believed to be manageable. According to a survey by the Pew Research Center, The fear of terrorists entering the lands for their own outrageous agendas serves also add as one of the a reasons for countries to refuse refugees; Kingdom of Denmark, being an example.

On September 3rd 2016, photos of two drowned Syrian children carried by Turkish police flooded the world’s media; story of a Kurdish family fleeing from Turkey to Europe in a rubber boat, of whom the father was the only survivor, shocked the conscience of the society. As a result of this, countries like the UK have opened doors to the affected and extended humanitarian aid and support to them.

The 1951 UN Refugee Convention and the EU Charter of Fundamental Rights cast a duty upon European countries to provide asylum to those who seek it. The underlying rationale behind this is to provide a shield to basic human rights as one's life and the lives of the loved ones are of utmost importance and no act can rip a person off from his life. A fight for humanity and standing together to provide them with helping hands is the need of the hour.

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**Manoeuvring Science and Law to improve Agriculture when “Climate Changes”**

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**Abstract:**

This essay provides an analysis on how Science and Law can reshape the outlook of Agriculture focusing the recent developments of the farmer’s perception and adaptation of climate change affecting their livelihood which remains to be the most formidable challenge facing humanity. It is concerned with both ecological and economic risk. As the basis of comprehending anthropogenic activities, public opinion has provided a new perspective to verify the farmer’s adaptation mechanism and processes about climate change. The essay glances through alternative policies that one could implement and educate oneself and others about the changing climate and its effect on the agriculture which is a vital source of feeding the population. The reference from this essay would help the farmers to plan effective adaptation strategies for a eco-friendly livelihood, both at the local and international levels.

**Keywords:** Farmer’s Livelihood Challenges, Climate Change, Sustainable Agriculture, Strategies & Legal Policies, Environmental Philosophy, Ecology Refugees
Introduction
Science, Law and Agriculture
Science is knowledge. Science is the synergized human endeavor to understand, or to understand finer, the history of the natural world and how the natural works, with observable physical evidence as the basis of understanding.

Law is the set of rules and regulations enforced by the controlled authority to watch over the society and shield them from any disruption.

Agriculture is the science, art or occupation related with growing and raising of crops through toiling of soil with skilled, labour and efficient technology, feeding, breeding and raising live stock for the purpose of consumption which sustains and enhances human life.

Analysing all the three aspects Science, Law and Agriculture, the common ground among them is the focus on the development of human kind. If science, law and agriculture are brought together, they can work marvelously on the betterment of the world.

Environment a focus of attention
“Each one of us is a cause of global warming, but each one of us can make choices to bring our individual carbon emissions to zero. The solutions are in our hands, we just have to have the determination to make it happen”

-Al Gore, Former Vice President of the United States & Environmentalist

Environment is comprehensive name of cosmos. It is a specific habitat, location, or site that is suitable or adequate for given purposes of foraging, resting, hunting, breeding, nesting, grooming for the livelihood and survival of the human beings. This environment bounds the influences of all living species, climate, weather and natural resources that affect the human survival.

World today is confronted by a host of problems and challenges such as life-dispelling, life-eclipsing, life-depressing and life-teasing processes that led to socio-economic collapse and on the other hand socio-economic progress and social happiness can be achieved with life-embracing, life-enhancing, life-supporting and life-sustaining processes going on in an ecosystem that are linked with our very own thoughts and ideas on our own sustainability.

Climate change occurs when the long term weather patterns are altered through anthropogenic activities. Global warming is one measure of climate change and is a rise in the average global temperature. The population today has released so much of carbon dioxide and other greenhouse gases that our planet’s atmosphere is a thick, heat trapping blanket which has resulted in the climate change and threat to our very own existence.

Livelihood challenges faced by the farmers by the virtue of climate change
Given the current estimation of the human population, agriculture is a vital source of the livelihood. Most of the farmers in rural are below par due to their low purchasing power and large household to support.
It is certain that agriculture provides us with the food we all eat every day. But do we know how those agricultural practices impact global warming? Agriculture and climate change are inextricably linked, not only does climate change affect agricultural crop production, but agriculture is one of the sources of several greenhouse gasses.

Agriculture dominates the planet, yet it has certain environmental coststhat aren’t sustainable, especially as the food demand rises due to the population explosion. This poses a fundamental challenge to the natural environment, which requires access to many of the same resources as the agricultural producers do and therefore environment is harmed by agriculture’s external impacts such as climate change, deforestation, genetic engineering, soil degradation, pollutants, irrigation projects and wastes.

It is not agriculture that has affected the change in climate to the greater extent , but it’s also the Multi National Companies (MNC’s) lack of corporate social responsibility and the lack of regulation and implementation of better policies on the part of sovereign authorities and other anthropogenic activities (habits such as dumping of non-biodegradable wastes, smoking, burning of rubbers, fossil fuels and so on) that has depleted the natural resources and has added to the climate change which infact has affected the agriculture on a greater scale.

Source: IPCC (2014); based on global emissions from 2010.

As per the global studies, unseasonal rain and volatile weather have affected Indian farmers, agriculture, economy, and politics, is no more an anomaly. According to the Former Union Agriculture Minister Sompal Shastri, “Around 62% of India’s people depend on agriculture. Until the problems of farmers are addressed, the economy will not boom.” Shastri said one of the biggest blows to farmers in recent times was unpredictable rainfall and other weather events.

Over 58% of the rural households depend on agriculture as their principal means of livelihood. Agricultureis one of the largest contributors to the Gross Domestic Product (GDP). India is one of the largest producer, consumer and exporter of the agricultural food products. India's fruit production has grown faster than vegetables, making it the second largest fruit producer in the world. India's horticulture output is estimated to be
287.3 million tons (MT) in 2016-17 after the first advance estimate. It ranks third in farm and agriculture outputs. Agricultural export constitutes 10 per cent of the country’s exports and is the fourth-largest exported principal commodity.\(^{187}\)

As per the report of 2012 The Third Assessment Report (TAR), 270 million i.e., 22% of the population of India is below its official poverty limit. The Third Assessment Report(TAR) of the intergovernmental panel on climate change (IPCC) reaffirms that the climate is changing in ways that cannot be accounted for by natural variability and that ‘global warming’ is happening.\(^{188}\)

Climate change which has emerged as one of the world’s biggest security threats, given that the competition for local resources and risks to food and livelihoods caused by extreme weather trigger migration and conflicts has given rise to the problem of “Ecology Refugees”.\(^{189}\)

The problem of being an ecology refugee may arise when the farmers or the poor have access to fewer financial and technical resources, poverty is closely related to vulnerability to climate change. The farmers in India are heavily dependent on climate-sensitive sectors like agriculture and forestry. This is accurate for a developing country like India where agriculture remains the major occupation of the economy, contributing nearly 27% of the total Gross Domestic Product (GDP) and employing nearly two-thirds of the country’s population. Agriculture exports account for 13-18% of the total annual exports of the country. However, given that 62% of the cropped area is still dependent on rainfall, Indian agriculture continues to be fundamentally dependent on the weather.

Climate change will, in many parts of the country, adversely affect socio-economic sectors, including water resources, agriculture, forestry, fisheries and human settlements, ecological systems and human health, especially in developing country like India due to their vulnerability. Since 2009, many regions of India received scanty rainfall and faced severe droughts. In the year 2013, hailstorms and unseasonal rains destroyed large yields of rabi crop. The farmers again suffered with the freak weather events in the year 2014-2015. Most farmers in the region of Central India’s Bundelkhand, who solely depend upon agriculture alone and hence grew only one crop a year suffered from inclement weather. Around forty farmers committed suicide or plunged to their death from the stress related issues arising from the inexplicable change in monsoon in the state of Madhya Pradesh. In accordance to the figures stated by the Madhya Pradesh government, over 570,000 hectares (1.4 million acres) of rabi crops were damaged, the state was among the worst hit in the year 2015.\(^{190}\)

Since agriculture in India is completely dependent on the climate therefore climate

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\(^{187}\) India in Business Ministry of External affairs, Government of India, Economic Diplomacy Division, Agriculture Sector, February 2017

\(^{188}\) The Third Assessment Report (TAR), 2012

\(^{189}\) State of Environment Report (MoEF), Government of India, 2009- Executive Summery.

\(^{190}\) Centre for Science and Environment (CSE) Report, 2015
change has a strong impact on the economy of the agriculture, including changes in the farm profitability, prices, supply, demand and trade. The magnitude and geographical distribution of such climate induced changes that may affect our ability to expand the food production as required to feed the populace.

Agriculture is sensitive to short-term changes in weather and to seasonal, annual and long term variations in climate. Hence the burgeoning population, along with human induced climate change and environmental problems are increasingly proving to be a limiting factor for enhancing farm productivity and ensuring food security for the poor.

The productivity of agriculture is negatively influenced by the climate change in two different ways: first, directly, due to variations in the temperature, precipitation and Carbon dioxide levels and second indirectly, through changes in soil, distribution and frequency of infestation by pests, insects, diseases or weeds. Acute water shortage conditions and thermal stress together could gravely affect wheat and, more severely, rice productivity in India even under the positive effects of elevated Carbon dioxide in the future. At the same time there is an increased prospect of climate extremes, such as the timing of onset of monsoon and intensities and frequencies of droughts and floods.

A drought is a natural impact due to the prolonged period of dry weather especially an extended one i.e., injurious to crops and it results in prolonged shortages in its water supply, surface water or ground water. A drought can last for months or years and it can have considerable impact on the agriculture of the affected area and harm the livelihood of the farmers.

Case study:
Six taluks of Karnataka have been declared drought-affected. With the district suffering drought for the second straight year, the zilla panchayat has identified 1,634 human habitats as vulnerable to drinking water crisis during the summer and 352 human habitats as critically-problematic areas. The district received 1,410 mm of rain in 2016-2017 against the average of 2,230 mm.

The zilla panchayat has taken up 765 new drinking water works in vulnerable places that includes drilling new borewells and laying distribution pipelines of which 633 works have been already completed 191. These new projects have enhanced the conditions of the framers and the other habitants.

Drought in severe cases leads to drier soil conditions which will suppress both root growth and causes the decomposition of organic matter and will increase the vulnerability to erosion which eventually will pave way to “Desertification”. Damage to the environment by human activities is probably one of the reasons for desertification 192. Increased evaporation from the soil and accelerated transpiration from the plants themselves will cause soil

191 The Hindu, Karnataka, February 24th, 2017
moisture stress. This is merely due to climate change and its impact on the soil would be catastrophic which in turn would deplete the crop yield.

**Case study:**
Kanem (an empire that was located in the present countries of Chad, Nigeria and Libya) covers 115,000 km² and has a population of 280,000 people. The natural environments of Kanem has suffered degradation in the past few decades, due to the prolonged drought periods that have ruthlessly affected the country since the 1960s, and continue to affect it. Currently it threatens the livelihood of 14% of the population of the Chad.

But it has been largely due to the government mobilization and then assistance of NGOs that a number of villages and certain wadis have been saved from being engulfed by sand. The successful actions implemented by the Kanem Agro-Forestry Pastoral Development Project can be used as a model for future interventions against drought.

The strategy used to fight desterification in Kanem hinges on the following four imperatives:
- The protection of threatened sights and the regeneration of ecological resources.
- The improvement of production systems.
- The reinforcement of institutional capacity.
- The development of national scheme of land plant.

It is within the framework of this combat strategy that the Agro-Forestry Pastoral Development Project in operation in Kanem from 1993-1998 contributed to saving the environment and its habitants. Thus for this reason the regions of Kanem were successful in reversing desertification.

The occupation of agriculture is least acknowledged and therefore whatever efforts put by the government in support of the farmers is not feasible as the efforts are not communicated to the farmers in a right manner. Hence the non-recognition of the social status of the farmers is one of the demotivating factors.

Since India is the largest producer, consumer and exporter of agricultural produce it is the duty of the government to address the issues related to the field of agriculture and protect the interests of the farmers and work for their wellbeing.

**Strategies for combating the challenges:**

‘A sustainable Agriculture is a system of agriculture that is committed to maintain and preserve the agriculture base of soil, water , and atmosphere ensuring future generations the capacity to feed themselves with an adequate supply of safe and wholesome food’

-Gracet, 1990

Sustainable development of agriculture refers to a wide range of strategies for addressing the issues effecting the agriculture. Prima facie, in order to mitigate and reduce the impacts of climate change, the first priority must be a swift and

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significant reduction in Green House Gas (GHG) emissions. Conversion of more land to organic farming or conventional mixed farming systems can assist in the reduction of the usage of inorganic nitrogen fertilizers. The alternative method would be by implementing judicious applications of fertilizer based on “Nitrogen Budgets”. Biodiversity and water quality will also eventually be benefitted. In accordance to the World Agriculture Report, International Assesment of Agricultural Knowledge, Science and Technology for Development (IAASTD), both the traditional and local knowledge network and innovative technologies enhance the capacity to respond to environmental stresses. “Sustainable agricultural practices are part of the solution to current environmental change”, resolves IAASTD

Efficient strategies to improve the strength of the agriculture to meet its diverse demands and varied pressures:

- The population dependent on the agriculture must undergo improvised training and specialized education.

- Standard of living of the agriculture dependents must be improved through provisions by facilitating better infrastructure like transportation, distribution and market needs.

- Research on new variety development (Credible alternative/Renewable energy sources: solar energy, wind energy, tide energy, green building, carbon credit, biomass, hydropower, geothermal) must be given prime importance.

- Insuring of crops would ensure protection to the farmer interest during unfortunate natural calamities and uncertainties. Few of the schemes introduced by the government of India are: Pradhan Mantri Fasal Bima Yojana, Comprehensive Crop Insurance Scheme (CCIS), Experimental Crop Insurance, Farm Insurance Scheme and National Insurance Scheme (NAIS).

- Using of cooperatives to spread awareness:

  Cooperative membership has a high impact compared to other socio-economic factors. Farmer’s cooperatives should be expanded for better diffusion and for intensifying the innovations with regard to the conservation of environment and development of sustainable agriculture.

New avenues in irrigation:

Micro Irrigation system should be adopted so that there is efficient and judicious use of scarce water resources. A study was conducted by the National Mission for Sustainable Agriculture on micro irrigation in 64 districts of 13 states (Andhra Pradesh, Bihar, Chhattisgarh, Gujarat, Haryana, Karnataka, Maharashtra, Odisha, Rajasthan, Tamil Nadu, Sikkim, Uttar Pradesh and Uttarakhand), revealed that there were significant reductions in the use of water and fertiliser but the yield of crops increased up to 45% in wheat, 20% in gram and 40% in soybean. However, high initial costs deter farmers to adopt this technology. While big
farmers can easily avail this technology, the government should consider giving subsidies to small farmers to boost the adoption of this technology\textsuperscript{195}.

- **Promotion of sustainable farmers** by organizing trekking events or educational projects to the farmers to operate both as an awareness raiser and a fundraiser. The farmers could be sent to the significant location and made to meet other farmers to educate and analyse their pertaining issues and its solutions and raise their own awareness. This way it could influence and support more sustainable farmers and farming practices. Since agriculture is at the behest of the weather, the farmers are facing new challenges with the changing climate driving floods, droughts and fires. Therefore sustainable farming offers these deprived farmers a positive future. A step forward sustainable farming practices or methodology not just cultivates amazing, healthy, clean food, it also directs and benefits the farmers towards a more sustainable and resilient environment or business.

- **Approach of Carbon Sequestration:**

Carbon Farming: it is a technique of cultivation that takes carbon dioxide out of the atmosphere which causes global warming and converts it into carbon-based compounds in the soil that aid plant growth. It has long been touted as a way to enlist farmers in the fight against climate change. The growing market for carbon sequestration could enable the farmers to profit from such good deeds. If the farmers resort to these techniques, then they will be paid by the polluting corporations which purchases the “carbon credits” to offset their carbon emissions.

- **One of the efficient method of sustainable development is through “green buildings”**. Green building is both the construction and the usage of eco-friendly processes that are environmentally responsible and resource-efficient throughout the lifecycle of a building. It efficiently utilizes energy, water and other resources, it protects the occupants health and reduces waste, pollution and environmental degradation. The green building architects seek out environmentally responsible supplies for all of the materials that they use in the construction process which facilitates natural ventilation, natural lighting and more greener farms. Construction of green buildings would facilitate the utilization of given land and reduce the emission of the carbon dioxide into the atmosphere. It makes it simpler for the farmers to monitor the growing of the crops.

- **Reversing desertification is an expensive procedure for the developing countries. Hence desertification can be avoided by turning to alternative livelihoods that do not depend on traditional land uses, are less demanding on local land and natural resource use, yet provide sustainable income.** Such livelihoods include dry land aqua culture or production of fish, crustaceans and industrial compounds produced by microalgae, greenhouse agriculture, and tourism-related activities. They generate

\textsuperscript{195} National Mission on Micro Irrigation Impact study prepared for the Government of India, 2015
relatively high income per land and water unit in some places.

**Regulations that government can implement to help farmers (Successes associated with different policy approaches)

1) Strict regulations, such as limits on pesticide use or abstracting water, which can be enforced through penalties.

Integrated Pest Management (IPM): It is a sustainable method to manage pests with the combination of biological, cultural, physical and chemical tools in a manner that minimizes the economic, health and environmental risks.

2) Conditions are to be placed in such a way that it encourages the farmers through the provisions of financial support and to carry on new and ecofriendly farming methods.

3) Community-based approaches, which support farmers and local stakeholders to work collectively in addressing environmental impacts.

4) Conservation and Protection of Biodiversity by optimizing the use of natural resources.

5) Creating public awareness about the benefits and implications of environment.


7) Development of waste land by adopting afforestation projects.

8) Development of suitable biotechnology to clean hazardous wastes in the environment.

9) Choices of suitable techniques to treat the pollutants before their discharge into environment.

10) The Maharashtra government has decided to provide an accident policy insurance cover to 1.35 crore farmers in the state wherein their kin will be entitled to an amount of Rs 2 lakhs. The policy will safeguard the farmers against death or accident. This policy has to be adopted all over the country to secure the lives of farmers.

11) Policy must be formulated by the Government of India to promote environmental education amongst farmer’s children regarding new farming technologies as well the impact of the farming methods from the past. These children could positively make a difference through environmental education and help their illiterate parents whose occupation is agriculture. Curriculum or the course work must contain chapters and practical assessment on these aspects which would benefit the children and the farmers to adapt to the changing environment and take initiatives to protect themselves from the loss of livelihood.

12) The government can also implement such policies where in the farmers are motivated to accept one or more of these approaches where they incur small socioeconomic costs relative to the benefits that they receive from achieving environmental objective.
The government of India has imposed Clean Environment Cess which is a kind of carbon tax and is levied in India as a duty of Excise under section 83 (3) of the Finance Act, 2010 on Coal, Lignite and Peat (goods specified in the Tenth Schedule to the Finance Act, 2010) in order to finance and promote clean environment initiatives, funding research in this area of clean environment or for any such related purposes regarding environment assessment which could benefit the climate change in a good way.

Agriculture is an anthropocentric approach, no soul can live without food therefore, agriculture has the potential to make the earth greener and its judicious development can conserve the natural resources and reduce the carbon dioxide level in the atmosphere. Therefore the policies and practices which regulates the use of the inputs and conserve nature must be encouraged.

**Conclusion**

In conclusion, all the citizens of earth need to join in and try to cease global warming and other repercussions on climate change that effect the livelihood of people. If the earth’s temperatures continue to intensify in the future, living things would become extinct due to the high-reaching temperatures.Refining the words of Abraham Lincoln, “We will be remembered in spite of ourselves. The fiery trial through which we pass will light us down, in honour or dishonour, to the last generation…we shall nobly save, or meanly lose, the last best hope of earth.” This our aspiration now-we are the last faith of Earth. We should cherish – are history. The harmony between the nature and human beings should be nurtured. Science along with Law can help resolve these intricacies and can be made valuable to agriculture. Happiness, welfare and prosperity becomes synonymous with science and law.

“**RURAL AWAKENING TODAY, WILL LIBERATE A BETTER TOMORROW.”**

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Education Qualification: A Challenge to Panchayati Raj (Abstract)

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Mahatma Gandhi said, “My idea of village swaraj is that it is a complete republic independent of its neighbours for its own vital wants…” 196 Indeed villages have a great potential to be individual units of successful self-governance whereby the institutions of the Gram Panchayat and the Gram Sabha can pave a way for self-sufficiency. The concept of Self Help Groups is a novelty of the Gram Panchayats which has enabled the villagers especially the womenfolk to be financially independent.

The Constituent Assembly was however divided in its opinion about empowering the villages through panchayats. Dr. B.R. Ambedkar, himself, was staunchly opposed to this whole idea of empowering the village. Hence until 1993, the Constitution of India did not provide for the Panchayati Raj system of self-government. The 73rd Constitutional Amendment, 1992 was passed to enable grass root level democracy and develop the villages where it was not possible for the Centre or the States to cover. However of late there have been certain legislations like the Haryana Panchayati Raj (Amendment) Act, 2015 which has sought to curb the participation of the people by mandating the fulfillment of certain educational qualification for the purpose of contesting panchayat elections in Haryana.

Through this paper an attempt would be made by the authors to look into the objectives and features of the 73rd Constitutional Amendment and whether legislations like the recently passed Haryana Panchayati Raj (Amendment) Act, 2015 sync with the objectives set in Part IX of the Constitution. The Constituent Assembly debates will be studied to find out the pulse of the founding fathers about the Panchayati Raj system and try to analyze the same. Finally an observation would be made about whether such legislations that try to restrict the citizens’ participation in the decision making process be justified at all.

**Education Qualification: A Challenge to Panchayati Raj**

**Introduction**

Gandhiji once stated that for making a country run like a true democracy, it would not be good to centralize power into the hands of few. He was one of the persons who advocated for the shift from the centralized to decentralized governance in India. Considering the current population of India (1.25 billion), the view of Bapu turns out to be true. He emphasized on the development of the villages in order to make it self-sufficient and encourage them to participate in the decision-making process of the country. Gandhiji emphasized on the Panchayati Raj system in the villages in order to promote good governance. Panchayats and Municipalities are the institutions of the government which works as a liaison between the common people and the government. It has the duty to cater to the local needs of the people. One more important feature that Gandhiji focused upon is the role ability of the Panchayats to impart equitable justice to the people of village. He not only realized the importance of Panchayats in the administration of the village but also on its legislative functions.

In this paper, the authors will mainly concentrate on the aspects of the Panchayat Raj

In tandem with the Gandhian principles, the Panchayats and Municipalities were recognized under the Constitution after the passing of 73rd and 74th Constitutional Amendments in 1992. Earlier the State Governments were the only designated authority to conduct the functions of the local government. Schedule VII of the Indian Constitution has given different lists:

1. Union list contains subjects to be dealt by the Union Government
2. State list contains subjects to be dealt by the State Government
3. Concurrent list contains subjects to be dealt by both the Union and the State government.

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198 Id.

199 Id.

200 Id.

201 Constitution (Amendment) Act, 73rd and 74th, 1992.

202 Constitution of India, 1950, Schedule VII.
The origin of the recognition of the local bodies can be traced back to the 64th Amendment Bill, July 1989. This bill was welcomed for its objective of rejuvenating the rural local government but it was criticized for conferring on the State very less discretion in the reformation of the local governments.

The 73rd Amendment and 74th Amendment of the Constitution was introduced by the P.V.Narashima Government in the year 1991 through two separate bills. The first bill was the 72nd Amendment Bill for the rural local government and 73rd Amendment Bill for the Municipalities. Ultimately the Constitution (73rd Amendment) Act, 1992 (commonly referred to as the Panchayati Raj Act) came into effect on April 24, 1993 and the Constitution (74th Amendment) Act, 1992 (the Nagarpalika Act), on June 1, 1993. As the local government is under the State List of Seventh Schedule, it was the duty of the state governments to amend or modify their respective (local government’s) Acts in conformity with the amendments. The amendments contain both the binding and amenable provisions which were to be taken into account by the State governments.

The establishment of Panchayats is to ensure participation of the people at the grass root level in the governance of the country.

Article 40.-Organisation of village Panchayats-The State shall take steps to organize village Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self government.

Features of the Amendment
The 73rd Amendment introduced Part IX in the Constitution of India along with Schedule XI containing subjects on which Panchayats can legislate. The importance of this Amendment need not be overemphasized. It restored the concept of Gram Sabha in the villages in the manner that it will be responsible for the promotion of democracy in villages. Secondly, it stated about the three-tier government system i.e. at the village, intermediate and district levels. Thirdly it provided for the reservation of the Scheduled Castes and Scheduled Tribes as well as for the women in the Panchayats. The provision for the direct election from the territorial constituencies of the members to the Panchayats is also a distinguishing feature of

205 Supra Note 5.
207 Supra Note 5.
209 Supra Note 5, Article 40.
211 Id.
212 Id.
the amendment. The duration of the Panchayats will be 5 years. 213 Lastly it also provided for the establishment of Finance Commission in every state to coordinate the distribution of funds among the Panchayats for activities divided into five categories i.e. Economic Development, Education, Health, Welfare and Infrastructure Development.214

Analysis on Haryana Panchayati Raj (Amendment) Act, 2015215
The passage of the above Act, paved the way for a historic step which introduced for the first time a qualifying criteria in the form of meeting a specific educational qualification to be eligible to contest election. Alongside questions also arose as to whether such qualifications can be imposed on the exercise of a right that is constitutionally guaranteed. Owing to this Amendment Act, the percentage of people eligible for contesting Panchayati elections has reduced to 57 percent.216 Nearly more than half of the total population of women of Haryana will be ineligible for the same.217 Above this, sixty-eight percent of scheduled caste women and forty one percent of scheduled caste men will not be ineligible to contest the panchayat elections of Haryana.218 All the above statistics are the result of the criteria specified under Section 175 of the Amendment Act, 2015 especially clauses t,u,v,w which states as follows:

t) Pay arrears of any kind due to Primary Agricultural Co-operative Society, District;
u) Pay arrears of electricity bills;
v) Pass matriculation examination or its equivalent examination from any recognized institution/board;
And the requirement to
w) Submit self-declaration to the effect that he has a functional toilet at his place of residence.219
The constitutionality of the above clauses were challenged in the case of Rajbala v. State of Haryana.220 The Division Bench of the Supreme Court upheld the constitutionality of the above provisions. This paper will analyse the ratio decidendi of this judgment and try to explore as to whether such amendments are in tandem with the objects sought to be achieved under Article 243 of the Constitution of India and whether it can be permitted.
The Court dwelled upon various cases to come to its conclusion. It relied on the PUCL. V. Union of India221 and Javed and Ors. V. State of Haryana222, where the Supreme Court held that the right to vote and right to contest election are not fundamental rights but are constitutional rights. The Court also observed that these rights are not merely statutory rights. The

213 Id.
214 Supra Note 14.
217 Id.
218 Id.
219 Supra Note 19, Section 175, clause t,u,v,w.
221 People Union For Civil Liberties V. Union of India, (2003) 4 SCC 399.
222 Javed and Ors. V. State of Haryana,(2003) 8 SCC 369.
appropriate legislatures have been given power by the Constitution to introduce limits in the rights to contest elections.\(^{223}\)

Then the Court went to observe that it is beyond its judicial competence to invalidate a law merely on the basis of arbitrariness, unreasonableness. If it does, it is questioning the legislative wisdom which is not a part of principles of democracy.\(^{224}\) The case of State of Andhra Pradesh v. Mcdowell\(^{225}\) was relied on by the Court that the principle of the ‘substantive due process of law is not applicable to the Indian scenario.

Lastly, the power of the Apex Court is to decide on whether there is ‘reasonable nexus’ between the discrimination imposed by the Amendment and the objective sought to be achieved by the Act and whether it is in conformity with the Art. 14 of the Constitution of India. Whether the objective of the Panchayati Raj will be achieved if there is discrimination between the people on the basis of the above four criteria?\(^{226}\)

The objective of the Act is to model representatives for local self-government for better administrative efficiency which is the sole object of the 73rd constitutional amendment.\(^{227}\)

The Court observed that education is essential for the human beings to differentiate between the wrong and the right. Therefore the prescription of the education qualification for the contestants in the Panchayati elections will help in the better administration of the village resources. There is intelligible differentia and rational nexus between the classification and the aims it sought to achieve.\(^{228}\)

Ronald Dworkin described the ambit of the functioning of the judiciary and the legislature. He stated that the duty of the legislature is make laws and lay down the goals or objectives of the same.\(^{229}\) The judiciary has the duty to check whether during the process of achieving those aims, the rights of the people are infringed upon by the authorities.\(^{230}\) In Javed v. State of Haryana\(^{231}\) case, the Court sacrificed the right to contest election for the implementing the family planning objectives. On the same ratio, the Court in the current case sacrificed the right to participate in the democracy for the sake for education.\(^{232}\)

The Court emphasized on the point that it is the education that teaches people to differentiate between the right and wrongs. But according to the authors, there are other prevailing conditions as well which makes a person educated. Simply matriculation pass i.e. classroom coaching will not ensure proper governance.\(^{233}\) The surroundings, morals etc. play a vital role in the development of human beings. For example- in the earlier days, our forefathers were not

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\(^{223}\) Supra Note 21.

\(^{224}\) Supra Note 21.


\(^{226}\) Supra Note 21.

\(^{227}\) Supra Note 21.

\(^{228}\) Supra Note 21.

\(^{229}\) Supra Note 21.

\(^{230}\) Supra Note 21.


\(^{232}\) Supra Note 21.

\(^{233}\) Supra note 21.
edicated yet they were adjudicating issues between the villagers.\footnote{Krishnaswamy, K., and Saikumar, R. ‘Restoring Legitimacy to PILs, 2014’. (The Hindu, 3 May 2014), http://www.thehindu.com/opinion/lead/restoring-legitimacy-to-pils/article5970631.ece, accessed on 18 October, 2016.}

It seems to different philosophers that the Supreme Court is taking a ‘conservative turn’.\footnote{Editorial., ‘Only for the rich?’, (The Hindu, 30 December, 2015), <http://www.thehindu.com/opinion/editorial/only-for-the-rich/article8042338.ece>, accessed on 18 October, 2016.} In 1980s, there was judicial activism when the Court evolved the principles of the Public Interests Litigations. It emphasized on the participative democracy giving the socio-economic backward classes an opportunity to come forward and help in the governance of the country. It loosened its substantive and procedural rules in order to accommodate the aims and objectives of a democracy. But after 1990s the things have undergone a big radical change.\footnote{Supra note 21.} From 1991, there is still no single political party who has won elections. So only the coalition government is ruling the country. The inter-party conflict of ideologies has led to the increase of the power of the judiciary. The judiciary has been asked to fill the gaps prevailing in the governance of the country. It has been mainly protecting the interests of a rich class and the indirect mala fide political objectives.\footnote{OgochukwuOkpala, ‘Plato’s Republic vs. Democracy’, NBRJ 2009 (1) 1, <http://www.neumann.edu/about/publications/Neuma} For example in one of the recent judgement of the Supreme Court it upheld the ban on liquors in the state of Kerala excepting the five star hotels. It is really difficult as to understand as to why the Court is protecting the rich people.\footnote{Supra Note 21.} With the help of the above judgement, the author will analyse the jurisprudential aspect of the same in the next paragraph.

**Jurisprudence**

Democracy means will of the people. Whether the people is willing to elect an educated or uneducated person, it should be left to the judgement of the people. The Court seems unwilling to pass any kind of value judgments to the legislative wisdom but this judgment is not less than a valued one.\footnote{Supra Note 21.} The people really willing to contest election are not given the tickets as they are ineligible. What is the guarantee that the educated minister will represent the interests of the local people?

The Courtseems to rely on the doctrines propounded by Plato in Plato’s Republic. Plato showed no inclination towards democracy because according to him, all the members of the society are not capable of making wise decisions. He emphasized that those people who strive for truth and wisdom are the appropriate person to govern the just society with the just rules. They will not have any oblique motives and these characteristic is mainly found in the philosophers who should be allowed to govern the state.\footnote{Supra note 21.}
Leaders who are not motivated to contribute towards justice in the society will find ways to meet their selfish ends. He took into consideration the tendency of people to be lured into money making by resorting to corruption, so they should not be appointed as ‘guardians’ of the society. The morality should prevail over the money and wealth to bring justice in the society.241

According to Plato, the king has to undergo different tests in order to be designated at the post. The main basis was the ‘form of the good’. The person’s moral will be strengthened in order to acquire more and more knowledge and then he will be appointed as the ruler. He will be followed by auxiliaries and then the producing class. If this hierarchy prevails, then justice will be ensured to the people.242

The weakness of the above theory is that Plato assumes those people who chose occupations according to their desires (their rational soul), they would be behaving in a just manner. This means there is concentration of power in the hands of a few. Where there is democratic state, the will of the people should prevail. Different people have different ideologies and goals to achieve. Therefore letting a few people contest for the post of king will not be helpful in any manner.243

Like Plato, the judges in the Rajbala v. State of Haryana244 case emphasized on the knowledge and wisdom of the persons contesting elections. They emphasized on the importance of education in today’s scenario. But they did not analyse the essence of true democracy that is the will of the people. The Court stuck with the positive impacts of the amended provisions of the Act but failed to appreciate the need to first establish a system that ensures that the mandatory educational qualification acts as an incentive for those who choose to contest.245

This judgment seems to trace back to the case of AK Gopalan v. State of Madras246, where the Court upheld procedure established by law. The ‘due process of law’ which imbibes principles of natural justice will not be taken into consideration if there is any procedure implemented through law. Later inManeka Gandhi v. Union of India case247 the principles of natural justice was held to be imperative for the examination of procedures enacted by the legislature. Again the shift from the Naz Foundation case to the Suresh Kumar Koshal Case248 where the Court criminalized Sec.377 of the Indian Penal Code 249 cannot be forgotten. The ApexCourt, which is considered as the protector of the civil rights, is not caring enough about the same and is merely

241 Id at 53.
242 Id at 55.
243 Supra Note 45 at 56.
244 Supra Note 25.
245 Supra Note 19.
247 ManekaGandhi v. Union of India, 1978 SCR (2) 621.
248 Suresh Kumar Koushal&Anr vs Naz Foundation &Ors, Civil Appeal No.. 10972 of 2013.
249 Indian Penal Code, No.45, Acts of Parliament, 1860 (India), Section 377.
limiting its wisdom to the limited provisions of the Amendment Act. According to the authors, the Court might have ignored the statistics cited by the petitioners about the percentage of ineligible people who will be ineligible from contesting elections. Given the situation of India, where the education level have not been sufficient, this amendment would have worked well when the states have achieved their aims in the sanitation, literacy etc. The judgment emphasizes more on the administrative work of the member of the Panchayat and ignored that the member represents the interests of the rural as well.\textsuperscript{250} It went onto express that until a person is a good administrator, he cannot be a representative of the interests of the common people.

The Court did not express anything about what constitutes ‘education’ in the Amendment. It only states about the importance of education in administrative functions. How can it be ensured that matriculation pass or fifth standard pass is enough qualification for the administrative works? Whether the education level prescribed in the legislation is enough or technical, moral, linguistic background are also required?\textsuperscript{251}

It is seen from the history that education has always been a cup of tea for the rich section of the society. It is the privilege given by the people of the society to themselves. After the criterion given by the Amendment Act for educational qualification, the legislatures have proven the above point. Another point to be taken into account is the effect of the legislation on the women. Already rural women are on the disadvantaged position as compared to other sections, over that imposition of educational qualifications will not relieve but will add to the burden on women and the government as well.\textsuperscript{252}

In the Constituent Assembly Debates, MahavirTyagi, the freedom fighter raised question on educational qualification to contest election. He relied on the historical facts the Shivaji and Akbar were not literate but they were efficient enough to govern their respective states. Why should Art, Industry etc. be not chosen as a criteria? Therefore education should not be the sole criterion for contesting elections.\textsuperscript{253} Like him, there were many eminent persons who opined about the qualifications of the members of the panchayat, which the authors are going to discuss in next paragraphs.

Constitutional Assembly Debates on Panchayats


\textsuperscript{251} Id.


The drafting of the Constitution involved a long process which can be divided into as many as ten stages. The Constituent Assembly formally began its task of framing the Constitution of India on the 13th of December, 1946 with Jawaharlal Nehru moving the Objectives Resolution. Since then the Constituent Assembly began to function with the aid of many committees and sub-committees who provided the assembly with many necessary information through well researched reports based on which the debates were based.

The assembly had its fair share of debates with regards to the status of villages and the position of the village Panchayats under the Constitution. It may be noted that there was nothing significant about the status of villages or the ancient institution of Panchayats until 1992 when the relevant Amendments were made for this purpose. The Chairman of the Drafting Committee, Dr. B.R. Ambedkar was particularly opposed to this institution and saw the villages in very bad light as being unprogressive.

Following are a few of the relevant debates by the honorable members of the Assembly with regards to villages and the provision of Village Panchayats.

It can be found that there were strong opinions both for and against the provision of village Panchayats. While Dr. Ambedkar believed that villages are not worthy of being given any right to self-govern as they are harbors of prejudice and inequality, there were others like Shri. Ayyangar felt that Centralization is necessary to control the villages as its people were not literate enough to make their own decisions. He believed that until free and compulsory education is achieved up to the age of 14, much freedom and powers shall not be given to the panchayat. Further Shri. Monomohan Das felt that Panchayats will only aggravate the backwardness and narrowmindedness of the villages if it is introduced without the villagers being educated or aware of their political, civil rights and responsibilities. He based his statement on the previous experiences wherein the Panchayats failed to contribute to the social, political and economic upliftment of the country.

On the other hand there were members like Shri G.D. Bhatt who felt that it is sad that the Indian Constitution doesn’t provide anything for establishing Panchayat Raj. He

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believed that the Panchayats have sustained and lifted the villages so far and it is unfair to omit such an institution. Mr. Balkrishna Sharma on the other hand believes that the Constitution should not be blamed for not expressly containing any provisions for the Panchayats. There is no restrictions imposed upon it and it can be facilitated whenever the Government wills it. Likewise, Mr. Loknath Mishra had suggested as to how the Panchayat system can be effectively utilized to help the country run swiftly and efficiently and aid the higher decision making bodies in discharge of their functions. Mr. T.J.M Wilson believes that it is experience of life that makes people wise to choose and make decisions rather than mere education or intellect. A government is bound to function according to the realities of life which is made of actual conditions and needs of people. Adult suffrage is an essential in democracy and bridges the gap between thought and action.

The legislators took a balanced view during the drafting of the Constitution depending on the prevailing circumstances of that time. But the authors will next try to explore the same in the light of the current scenario in their final conclusion of the paper.

**CONCLUSION**

Panchayats are the lifelines of democracy. These bodies ensure that people at the lowest level have a say in the decision making process and are stakeholders in the progress of the country in their own little village. The Gram Sabhas can play a very important role in modernizing the villages by spreading awareness about various social evils like child marriage, dowry, gender bias, superstitions etc. It can utilize the funds to build schools for both the old and the young, establish health centers, open village markets, maintain public grounds, wells; ensure proper sanitation facilities and thereby maintain hygiene. The village Panchayats also have the onus of creating awareness about the importance of girl child and pregnant mother. Indeed Panchayats can pave the way for development of the villages even in cases the administration cannot effectively communicate.

The Haryana Panchayati Raj (Amendment) Act, 2015 is definitely a positive step to ensure that those who are the representatives of the people should themselves be an example for others especially considering the comparatively high literacy rate in Haryana which stands at 75.55% as per 2011...
The conditions set under Section 175 of the Act like clearance of any dues to any cooperative society, pending electricity bills or have a functional toilet are reasonable and necessary. However, the necessary requirement to meet a fixed educational qualification is questionable. Like Mr. T.J.M. Wilson who believes that education or intellect alone cannot run a Government, but it is experience and the realization of the realities and requirements of life that gives a man the wisdom to choose wisely. Therefore at a level where the villages are yet at a transitional stage where things are getting better, the imposition of such conditions would prevent much wise yet formally uneducated man from contesting. It is especially disadvantageous to the women who lose out in this race, they being historically underprivileged. Such a condition actually acts counter to the whole provision of reservation of seats for different posts in the Panchayats at different stages for women and SC/ST as provided under Article 243D, to ensure their greater participation and representation. The clause 2 expressly provides that not less than one third of the total number of seats reserved, shall be reserved for women belonging to SC or ST. Further Clause 3 provides that not less than one third (including the number of seats reserved for women belonging to Scheduled caste and Scheduled tribes) of the total number of seats to be filled by direct election in every panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in the Parliament. Clause 4 again provides for the reservation of the offices of the Chairpersons in the Panchayats in the village or any other level in favor of the Scheduled Castes, Scheduled Tribes and women. The deprivation of more than half of the women of Haryana and especially sixty eight percent of the Scheduled Caste women and forty percent of the Scheduled Caste men from contesting by the Haryana Amendment Act, 2015 defeats the very purpose for which the 73rd Constitutional Amendment was brought into picture. The purpose was to strengthen grass root level democracy. However, the impugned Amendment Act seems only to hinder the objective. Though it can very well be observed that Part IX of the Constitution provides for “Disqualification of Membership” under Article 243F, which empowers the Legislatures of the State to make any law to disqualify a person for being chosen as, and for being, a member of a Panchayat, such laws should have a reasonable nexus with the object sought to be achieved by the 73rd Constitutional Amendment which is to strengthen local self-government and decentralization. Setting educational qualification as a criterion is not desirable at the present time keeping in mind such objectives.

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263 Supra Note 19, Section 175.
264 Supra Note 65.
265 Supra Note 6, Art. 243D.
266 Supra Note 69, Cl.2.
267 Supra Note 69, Cl.3.
268 Supra Note 69, Cl.4.
269 Supra Note 19.
270 Supra Note 6, Part IX.
271 Supra Note 6, Art. 243F.
272 Supra Note 5.

www.supremoamicus.org
The Constitution of India does not prescribe any educational qualifications to either vote or contest for the elections to the Union Parliament or the State Legislatures. The reason was that the founding fathers wanted to ensure that no citizen is deprived of his constitutional right to vote or to contest election. Moreover it was not feasible considering the status of the country back then set such conditions. However we have come a long way since that day and the literacy rate had increased especially in urban and industrial areas. Therefore, the authors feel that any educational qualification if needed to be set as eligibility to contest elections should be implemented in the top down order rather than bottom top. The institutions such as the Lok Sabha, the Rajya Sabha and the State Legislative Assemblies have more important decisions to make and have a much wider ambit and responsibility than the Gram Panchayats. Therefore it can now be reasonably expected that the people aspiring to contest for such coveted positions meet the criteria of having a reasonable educational qualification as may be deemed fit for that purpose. Because law making in areas like defence, nuclear and atomic energy, foreign affairs and even agriculture and animal husbandry require that the law makers are at least capable of appreciating the nuances involved and the reasons behind the policy formations. Once that objective is achieved, even the village Panchayats depending upon the progress made to facilitate compulsory education, may be bound by such criteria. Until then, the Panchayats should be subjected to minimum restrictions so that they can facilitate the growth of the villages without any obstructions.

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THE COLLECTION WITHOUT PERMISSION
Whatsapp’s data sharing policy

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ABSTRACT

In this research paper we will widely focus on the current perspective over the recent issue of the Whatsapp’s data sharing policy with Facebook. The recent acquisition of Whatsapp by Facebook has allowed Facebook to access Whatsapp’s user data and user base. Whatsapp accounts for over 1 billion users who make over 500 million phone call, share 700 million photos, 100 million videos and 1 million messages a day. India with over 160 million active user is Whatsapp’s biggest market and conceivably contributes significantly to above valuation. Whatsapp will become the owner of photos, text and information that Indians exchange on the app and if it decides, Whatsapp may share the personal information of its Indian users with Facebook. Other countries including European Union have taken initiative to prevent such kind of sharing of data. We will look into global as well as Indian perspective on the privacy issues with the help of Indian as well as international laws and talk about the encroachment of privacy by whatsapp’s new data sharing policy to its parent company facebook.
This research paper covers two major research issues in this paper. Firstly, Whatsapp’s data sharing policy is against Right to Privacy under Article 21. Secondly, Whatsapp’s free calling and messaging policy gives it a liberty to share the data with facebook.

Dealing with this question we will establish how data sharing policy of whatsapp with facebook is against right to privacy and personal liberty of a person. We are going to also establish that Supreme Courts argument that the free messaging and calling facility gives whatsapp liberty to share the data as users don’t pay for the same , with the help of Europian Union’s and other Europian country laws regarding data privacy. We will also show how major the effect of this encroachment of privacy by whatsapp over the Indian citizens.

- **Introduction**
  
  In 21st century is it at all possible for us to argue that privacy is a fundamental right? Privacy is the subset of liberty. In this day and age only those political and moral orders that are given universal acceptance are human rights. Right to privacy comes under basic human rights given to each and every individual. If Right to privacy, Right to reputation or Right to Dignity is not at the core of the fundamental rights then no other right will be. Right to privacy comes under Right to life (Article21). In Maneka Gandhi v. UOI case Supreme Court of India said that Art 19, Art 21, Art 14 cannot be read separately, they are the part and spirit of the constitution. Right to privacy is intrinsic to Right to dignity.

The recent acquisition of Whatsapp by Facebook has allowed Facebook to access Whatsapp’s user data and user base. Whatsapp accounts for over 1 billion users who make over 500 million phone call, share 700 million photos, 100 million videos and 1 million messages a day. India with over 160 million active user in Whatsapp’s biggest market and conceivably contributed significantly to above valuation. Whatsapp will become the owner of photos, text and information that Indians exchange on the app and if it decides, Whatsapp may share the personal information of its Indian users with Facebook. Other countries including European Union have taken initiative to prevent such kind of sharing of data.

- **Research Question**
  
  1. Is Whatsapp’s data sharing policy against Right to Privacy under Article 21?
  2. Does Whatsapp’s free calling and messaging policy gives it a liberty to share the data with facebook?

- **Hypothesis**
  
  In this research paper I want to throw some light over the issue that whatsapp’s new data sharing policy is against article 19 and article 21 of the Indian constitution. I will also draw a comparative study between the privacy laws in and around the world.

- **Research Methodology**
  
  This research paper is based on doctrinal research. It talks about the current case of whatsapp sharing its data with facebook. The research will be based on direct criticism.
and the suggestive measures to be taken by the government.

- **Scope of Research**
  In this research paper, we shall be primarily focusing upon international laws on privacy and laws in India Constitution along with the general perspective on the current issue in nationally as well as internationally. It Act will also come in the picture.

- **Significance**
  Through this research I want to draw the attention towards understanding the basic nature of data privacy in the modern digital economy. This research paper is crucial to interpret article 19, article 21 which are at stake.

**CHAPTER 1 - WHATSPAPP’S DATA SHARING POLICY VS RIGHT TO PRIVACY**

Facebook paid $22 billion (Rs.1,472.79 crore) – or, just about 2.5 times Facebook’s 2013 gross incomes – to purchase WhatsApp, an organization with net loss of over $138 million at the time. Why? One clear reason, obviously, was to fight off potential rivalry and begin its way towards turning into an online networking combination.

WhatsApp accounts for over 1 billion users who make over 500 million phone calls, share 700 million photos, 100 million videos and 1 billion messages a day. India, with over 160 million active users, is WhatsApp’s biggest market and conceivably contributed significantly to the above valuation.

WhatsApp may turn into the owner of the photographs, writings and data that Indians trade on the application, and in the event that it chooses, WhatsApp would have shared the individual data of its Indian clients with Facebook, outsiders or scamsters.

Supreme Court in its latest decision upheld that-

Right to privacy as a fundamental right and extending it to include informational privacy, may impact the collection and sharing of data by technology giants such as Google, Facebook, Apple and WhatsApp in India. The decision arms natives with the privilege to address or question how famous websites and apps utilize and share user data.

The nine-judge bench in its decision talked about the issue in detail and perceived use security as a part of the right to privacy. It highlighted the threats of sharing data utilizing the different technology means available to us.

The judgment gives individuals the privilege to specifically approach the court if their right to privacy is under danger. It could give legal backing to petitions in courts on how popular social networking sites and administrations are handling, saving and sharing user data.

Recognizing the importance of informational privacy, Chief Justice J.S. Khehar and Justices D.Y. Chandrachud, R.K. Agrawal, S. Abdul Nazeer said, “Informational privacy is a facet of the right to privacy. The dangers to privacy in an age
of information can originate not only from the state but from non-state actors as well.”

CHAPTER 2-
RIGHT TO PRIVACY UNDER RIGHT TO LIFE

In spite of the fact that no particular reference in the Constitution, the right to privacy is viewed as a 'pnumbral right' under the Constitution, i.e. a right that has been proclaimed by the Supreme Court as basic to the right to life and freedom. Right to Privacy has been culled by Supreme Court from Art. 21 and a few different arrangements of the constitution read with the Directive Principles of State Policy. Although no single statute gives a crosscutting to right to privacy; different statutes contain arrangements that either verifiably or unequivocally protect this right. For the first time in Kharak Singh v. State of U.P 273 question whether the right to privacy could be implied from the existing fundamental rights such as Art. 21 came before the court, it was held that –

Although the majority found that the Constitution contained no explicit guarantee of a “right to privacy”, it read the right to personal liberty expansively to include a right to dignity. It held that “an unauthorized intrusion into a person’s home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man -an ultimate essential of ordered liberty, if not of the very concept of civilization”274

In the case PUCL v. Union of India275 Supreme Court held that

We have; therefore, no hesitation in holding that right to privacy is a part of the right to “life” and “personal liberty” enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy; Article 21 is attracted. The said right cannot be curtailed “except according to procedure established by law”.

In the latest Supreme Court judgment recognizing the importance of informational privacy, Chief Justice J.S. Khehar and Justices D.Y. Chandrachud, R.K. Agrawal, S. Abdul Nazeer said, “Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well.”

CHAPTER 3
NO WAY TO OPT OUT

WhatsApp gave users a chance to opt-out of the data sharing with Facebook. But, here is the catch -- as an existing user, you have just 30 days to change your preferences. A new user will get to change this on the agreements page during installation.

Another catch is that even if you opt out of the data-sharing, WhatsApp will share some of your data with Facebook for product

273 AIR 1963 SC 1295
275 AIR 1997 SC 568

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improvement, usage behaviour, fighting spam, abuse, or infringement activities.

CHAPTER 4 - FREE SERVICE OBJECTION BY SUPREME COURT

The court's greatest objection to decision that WhatsApp violated individual's privacy was that individuals did not "pay" for the service as they would for a customary telecom benefit. Internet commerce has however overturned traditional business model. In the web age, buyers help WhatsApp (and numerous other web based organizations) procure from income streams, regardless of the possibility that user don't give a physical check specifically to WhatsApp.

In this case, Facebook paid WhatsApp more than 20 times its annual revenue even though WhatsApp was actually making loss. So, the question that consumers did not pay WhatsApp directly is not required to determine whether or not WhatsApp is profiting from the users, which it clearly is. For example, in the physical world, I made a street over "poromboke" or open land, and many individuals utilize the street thus it turns into a highway. On that premise, would I be able to guarantee I now claim the highway? Will the court say, since individuals did not pay to clear the street, the street is presently mine?

By a similar logic, WhatsApp had already accepted more than sufficient remuneration from Facebook (and possibly, the market). Thus there is no support or legal basis required by the Supreme Court to prioritize WhatsApp's claim over the person who created the texts and content and have rights to transfer information to WhatsApp.

CHAPTER 5 - EUROPEAN UNION’S VIEWPOINT OVER DATA TRANSFER

European Union privacy chiefs said Facebook must stop processing user data from its WhatsApp messaging service while they are still investigating the new privacy policy changes related to the data collection of users.

The Article 29 Working Party, made up of privacy chiefs from across the 28-nation EU, said that for Facebook it had genuine worries about the sharing of WhatsApp clients' information for purposes that were not included in the terms of service and privacy policy when existing users joined Whatsapp.

The group is not the first one in Europe to condemn WhatsApp’s new data sharing policy. Regulators in Germany also ordered Facebook to stop collecting WhatsApp users’ data and delete any information already transferred.

European privacy protection watchdogs don't shy away from focusing on enormous US technological firms, as prior investigation concerning Facebook, Alphabet's Google or Microsoft have appeared. Just their fining powers still needs teeth, which will change under new EU decides that will produce results over the coalition in 2018 with punishments conceivable of as much as 4 percent of an organization's worldwide yearly deals.
The EFF noted that unlike some other tech companies, "WhatsApp does not explicitly state that it prohibits third-party access to its user data, nor does it say that third parties are prohibited from allowing WhatsApp user data to be used for surveillance purposes".\textsuperscript{276} Elizabeth Denham, the Information Commissioner of UK said that if Facebook is found to share data without any proper consent, it may “face enforcement action from my office”. The ICO has the power to fine companies up to £500,000 for the breach of Data Protection Act.

German regulators had earlier banned WhatsApp's data sharing over its privacy issues. European countries are stringent regarding protection of its user data. The EU is also pondering over an E-Privacy Directive to protect its citizens and imposing regulations on internet communications companies similar to traditional telecom companies.

CHAPTER 6- TRADITIONAL PRIVACY ARGUMENT WON’T WORK

If the WhatsApp issue is tarred by the Aadhaar brush, Chief Justice Khehar is unlikely to pass an order in favor of the petitioners, who have asked for a ruling preventing WhatsApp from merging the data with Facebook. In multiple orders from 2010-2015, the Supreme Court repeatedly held it was not striking down Aadhaar as unconstitutional based on the government assurance that participation in the program was voluntary (and not mandatory). But Chief Justice Khehar has markedly departed from this position. On February 7, Chief Justice Khehar (along with Justice N. V. Ramana) tacitly approved the idea of linking all mobile phones (via the sim cards) to the owners’ Aadhaar cards in the interest of national security (because it was feared unverified mobile numbers could be used for terrorist and criminal activity).

This even though Attorney General Mukul Rohatgi had pointed out how vital mobile payments were to citizens in the aftermath of demonetisation. The Supreme Court’s change in position from asking that participation in Aadhaar be voluntary to implicitly allowing the government to implement mandatory participation clearly demonstrates that the present chief justice places more importance on national security arguments rather than privacy objections.

Chief Justice Khehar and Justice Chandrachud have already alluded to their doubt that users can scarcely demand free speech rights in a “free” service that they do not pay for. If the issue is with regard to privacy, the constitutional bench in the Aadhaar case is already considering whether there is a the right to privacy in the Indian constitution. On the whole, the court has not found the right to privacy objection persuasive in the Aadhaar context\textsuperscript{277}

CHAPTER 7- THE BIG BLOW TO INDIAN USERS

\footnotesize{\textsuperscript{276}http://www.telegraph.co.uk/technology/2017/07/11/whatsapp-not-enough-defend-users-against-governments/}

\footnotesize{\textsuperscript{277}https://thewire.in/120714/chief-justice-khehar-shouldnt-allow-whatsapp-share-indian-user-data-facebook/}
India, has over 160 million active users, and is WhatsApp’s biggest market and conceivably contributed significantly to the above valuation. Other countries have taken initiatives to prevent the data sharing policy of WhatsApp. In the European Union, data regulators have already warned WhatsApp about their data sharing policy of European citizens with Facebook, with the social network firm agreeing last November to temporarily stop sharing data. Contrary to European Union, India has made no move to prevent Facebook and WhatsApp from mixing their user information databases. Chief Justice Khehar and Justice Chandrachud nearly declined to admit public interest litigation on this matter in January. The court said that users can opt out and expressed doubts on whether users can claim a right to privacy or free speech in a “free” communication program like WhatsApp messenger.

It may be important to point to the court that if it fails to intervene in the matter, WhatsApp will have access to and have the right to share only Indians data whereas user data of other countries will belong to its citizens only and WhatsApp and Facebook will not be able to merge and/or sell the information of European citizens. The data of India’s citizens – texts, photos, usage data, names and mobile numbers of all contacts in their address book (irrespective of whether those people use and consented to WhatsApp’s policies) would not be protected.

Today India is among the fastest growing economies but a sizable portion of its population continues to struggle to earn enough to pay for basic needs, medical costs and education. Judges too are mainly focused upon cases deciding people’s access to basic necessities of life and in this context, worries about privacy and personal information often seems out of touch. Insisting the court intervene in the WhatsApp case based upon fears of potential privacy violation is therefore an uphill battle and an unnecessary one by failing to intervene, the Supreme Court will be helping the corporations to claim property rights in Indian citizens data and information in a way they cannot do with any other country’s citizen’s data and information.

Thus, when other countries are so assiduously and ardently protecting its citizen’s data, if the Supreme Court looks the other way and allows Indians’ data alone to deal with the private social media companies, the court will be doing a disservice to its people.

CHAPTER 8-
INTERNATIONAL PRIVACY POLICY
V/S INDIAN PRIVACY POLICY
No separate laws like EU-
Unlike the European Union, India does not have any separate law which is designed exclusively for the data protection. However, the courts on several occasions have interpreted "data protection" within the ambit of "Right to Privacy" as implicit in Article 19 and 21 of the Constitution of India.

Europe has been on the forefront of privacy legislation and recently the EU came out with draft ‘Digital Single Market’ plan that
has a default ‘opt-out’ for data sharing by
users, instead of a default ‘opt-in’ as is the
case today. Similarly, Indian users should be
given the option to opt out of specific
features instead of a singular ‘I Agree’
button.

**Information Technology Act**
The strongest legal protection provided to
personal information in India is through
section 43A of the Information Technology
Act and the Information Technology Rules,
2011 developed under this section.

The provision requires a body corporate who
'receives, possesses, stores, deals, or handles'
any ‘sensitive personal data’ to implement
and maintain ‘reasonable security practices’,
failing which they are held liable to
compensate those affected.

**Penalty**
Any corporates who fail to observe data
protection norms may be liable to pay
compensation if they are negligent in
implementing and maintaining reasonable
security practices and thereby cause
wrongful loss or wrongful gain to any
person.

Body corporates may be exposed to criminal
liability under Section 72A of the IT Act if
they disclose personal information with the
intent of causing wrongful loss or obtaining
a wrongful gain. This Act includes the
disclosure of personal information given in
confidence as an unfair trade practice (as
defined under section 2 (r)) and includes
mental or emotional harm resulting from

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**CONCLUSION**
In October 2015 we saw a billion mobile
phone users, with an active base of 902
million. Among these, there are about 300
million smart phone users that utilize their
phones for tasks such as shopping, calling
cabs, ordering food as well as taking online
diploma courses and making payments for
various items.

It then becomes clear that the ‘product’ is
not the app but the data that the user is
generating while using the app, using
complex algorithms, the patterns and
preferences of the user are identified. The
primary use of this processed data is for
targeted advertisements. However, the user
has little or no knowledge of what happens
to this data beyond advertisements. It may
be sold to the highest bidder for use in
development of other apps or it may even be
shared with law enforcement agencies for
threat-profiling.

It’s not just the matter of what can be done
with the collected data, but also about what
kind of data is collected, how much of it is
collected, for how long it can be held, and
who owns the data. The application owners
have incentives here, so, it’s in their best
interest to get as much information as they
can. The incentives come from the potential
of data, which drives innovation in the
market.

Recently, the Supreme Court issued notices
to WhatsApp over an appeal against the
instant messaging service for not ensuring
the privacy of its users and to the Centre for seeking regulations to protect personal information. This response of our courts is in stark difference with that of Germany’s Commissioner for Data Protection and Freedom of Information, who ordered Facebook to cease collecting information of German WhatsApp users and asked it to delete all data that has been shared previously. It went on to state that Facebook and WhatsApp should act as independent companies and process user’s data on separate terms and conditions. If we were to highlight main difference in the way the same issue was tackled by two different institutions, then it is clear that the order of the German authority is primarily focused on the entity that will be collecting the data, in this case, Facebook and protects the end user’s interests. On the other hand, the last option for an Indian user who does not wish to share his personal information is to not use WhatsApp’s service.

It is this differentiating treatment towards the same solution that warrants a close look at the data privacy laws in our country. In their present form, provisions in the Information Technology Act (2000) and subsequent amendments that try to address privacy concerns are piecemeal in nature. We cannot apply the principles of ‘notice’ and ‘consent’ in an era where smart devices are monitoring heart beats. In the current data collection practices consent system is broken, and pointless. Legal jargon often entangles and confuses users. There is a dire need for new privacy policy in the modern digital era. Privacy laws will only work better if we clearly differential who they will regulate and what they will protect.

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DEVELOPMENT OF THE ESSENTIAL FACILITIES DOCTRINE IN INDIA

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ABSTRACT
The term “Essential Facilities” originated in the United States vs. Terminal Railroad Association. Now it has multiple meanings. Among countries, the variance is even larger. An Essential Facilities Doctrine (EFD) specifies when the owner of an “essential” or “bottleneck” facility is mandated to provide access to that facility at a “reasonable” price to that facility at a “reasonable” price. The concept of Essential Facilities requires there to be two markets, an upstream market as well as downstream market. The Competition Commission of India (CCI) in the last three years has proactively adjudicated a large number of matters and has made the industry sit up and take notice of huge penalties imposed. The political, economic and social environment of India has been very distinct from the western countries and this remains a very important parameter when a doctrine that has its origin in the western countries has to be applied in our context. The industries could develop only in accordance with the dictates of the Government, their development and regulation was significantly kept under control by New Delhi Government also gave special momentum to Public Sector Enterprises to grow and serve the dual role of free enterprise and welfare state.

INTRODUCTION
The term "Essential Facilities Doctrine" originated in commentary In United States vs. Terminal Railroad Association, the court imposed a duty upon firms controlling an essential facility to make that facility available to their rivals. And now has multiple meanings, each having to do with mandating access to something by those who do not otherwise get access. The variance in definitions is great. Indeed, commentators cannot even agree on which U.S. cases come within the purview of "essential facilities." Among countries, the variance is even larger. The variance in this doctrine itself is another topic.

Essential facilities doctrine affects the market where some form own important inputs protected by copyright, patent or trade secret. An "essential facilities doctrine" (EFD) specifies when the owner of an "essential" or "bottleneck" facility is mandated to provide access to that facility at a "reasonable" price. For example, such a doctrine may specify when a railroad must be made available on "reasonable" terms to a rival rail company or an electricity transmission grid to a rival electricity generator. The concept of "essential facilities" requires there to be two markets, often expressed as an upstream market and a downstream market. Typically, one firm is

active in both markets and other firms are active or wish to become active in the downstream market. A downstream competitor wishes to buy an input from the integrated firm, but is refused. An EFD defines those conditions under which the integrated firm will be mandated to supply.\textsuperscript{282}

While essential facilities issues do arise out of purely private, unregulated contexts, there is a tendency for them to arise more commonly in contexts where the owner/controller of the essential facility is subject to economic regulation or is State-owned or otherwise State-related.\textsuperscript{283} Hence, there is often a public policy choice to be made between the extension of economic regulation and an EFD under the competition laws. Further, the fact of regulation of pricing through economic regulation, State-control, or a prohibition against "excessive pricing" in the competition law, has implications for the nature of an EFD.

I. APPLICATION OF THE DOCTRINE
The concept of “Essential Facilities” requires there to be two markets, an upstream market as well as downstream market. Typically, active or wish to become active in the downstream market. The downstream market competitor wishes to buy an input form the integrated firm, but is refused. Thus, essential facilities doctrine comes in a way to rescue the firm and restrains such refusals.

In United States Vs Terminal Railroad Association,\textsuperscript{284} a joint venture between railroad companies to buy and run rail terminals. The joint venture denied non-members the ability to use the terminals. Another bridge was a very expensive project as not only in river broad, its course shifts and there was only the one site where such a bridge was technically feasible for many miles. Access was vital to the railroads that had arrived after the bridge was built and the development of the rail roads an important activity in the country. The Supreme Court ordered that new railroads be given access to the bridge on terms similar to those agreed between the original railroads. The court based its decision on a finding that the non-members could not compete effectively without access to these “essential facilities”. Supreme Court of United States further gave “intent to monopolize” test In Aspen Skiing Company Vs. Aspen Highlands Skiing Corporation\textsuperscript{285} and supplemented the essential facilities doctrine. Court held that monopoly firms are generally not obliged to engage in joint marketing programmes with competitors, but the general rule can change if the monopolist’s refusals to allow the competitor to participate in co-operative venture “makes an important change in a patterns of distribution” of goods.


\textsuperscript{284} \textit{Id.} at 01.

The essential Facilities doctrine refers to a situation where a dominant firm owns or controls a facility that is indispensable to its competitors and refuses to grant access to that facility. Essential facilities doctrine often overlaps with “monopoly leveraging doctrine” which refers to those situations where a company uses its monopoly power in or attempts to monopolize another market. Though both the doctrine aims at restraining abuse of dominant position, plaintiff in an essential facility lawsuit must objectively prove that access to the facility is “indispensable” in order to compete in the market with the firm that controls the facility which id not so in case of asserting monopoly leveraging doctrine.

II. THE ESSENTIAL FACILITY DOCTRINE IN INDIA

The Competition Commission of India (CCI) in the last three years has pro-actively adjudicated a large number of matters and has made the industry sit up and take notice of the huge penalties it has imposed. The role of CCI in the days to come may have an impact not only on the competitors that are the subject of an antitrust scrutiny but may well pave the way for a change in the manner of operations of enterprises, the structures of different ‘markets’ and inevitably influence the market forces in our economy. Time will determine the role it will play. It will be interesting to see how the CCI will address several key policies and regulatory issues that it will face in the days to come. There are numerous issues that it will have to face but a leader in the pack of these issues would be its treatment of the vexed and often litigious issue of ‘essential facilities’. This issue go righted down to the theoretical underpinnings of the free market system as it will decisively pave the way for not only antitrust jurisprudence in our country but also shapes the market system.

The political, economic and social environment of India has been very distinct from the western countries and this remains a very important parameter when a doctrine that has its genesis in the western world has to be applied in our context. Since independence in 1947 till the early 1990s India remained under the License Raj and the industries were regulated and tied down by various government policies. The industries could develop only in accordance with the dictates of the Government and their development and regulation was significantly kept under control by New Delhi. Furthermore, the Government also gave special impetus to Public Sector Enterprises to grow and serve the dual role of free enterprise and welfare state. During this time the Government through the Public Sector Enterprises has developed infrastructure and various facilities. Post the liberalisation era, the industries were de-regulated and private participation and investment has vastly increased. However, a natural distortion existed on the level playing field as the Public Sector Enterprises had access to their own resources and which

were not immediately available to the new private entrants. It will also be worthwhile to mention that since the early days of privatisation various private players have also made significant investments in various facilities. At this juncture, various entities operating or looking to enter into a market may want to have access to the various facilities and infrastructures developed by PSUs and various private enterprises who had invested in infrastructure. The question would be whether the essential facilities doctrine should be applicable in India? This is an interesting question that CCI will face.

The issues will range from the applicability of the doctrine itself in the first case, Section 4 of the Competition Act provides that limiting markets, practices resulting in denial of market access and leverage to protect another market is specific instances of abuse of dominant position. Whether essential facilities will be covered with any of these categories will be at the forefront of the applicability of the doctrine in India. The US Supreme Court has already felt the need not to recognise the doctrine. The US Supreme Court in Verizon has also identified that there are uncertain virtues in forced sharing. Therefore, the principle question would be whether the doctrine should actually be applied in India. Furthermore, the Courts in India have time and again cautioned from applying principles that have been developed outside India to be applied in the Indian context. Furthermore, regard should be having to the fact that the courts in Europe have applied the essential facilities doctrine in the background of the Special Responsibility of the Dominant Undertaking, a concept that is alien to Indian jurisprudence and in the light of teleological interpretation adopted to protect the common market in Europe and the overall purpose of integration of Europe. Should the infrastructure be a public utility or be of great public importance for the development of commerce and trade in India. Furthermore, the more important question would be on the determination of 'essentiality'. Should the facility be indispensable or should it be viable for competition. This would be a key factor and it is necessary before arriving at such a decision to balance the interest in the innovators and the investors of infrastructure else free riders may take undue advantage. Last but not the least would be to check after determining ‘essentiality’ when can the doctrine be applied – is it in a situation when the conduct is likely to eliminate all competition or it is likely to eliminate all effective competition in the market. In addition, crucial to the determination of this issue would be the determination of the relevant market and whether the features of essentiality and applicability of other conditions are applicable in that particular relevant market. A key ingredient of determining the abuse of dominant position under Section 4 is the relevant market. Economic tools and data will have to be clearly adduced to suggest in determining the relevant market and further it has to be used in determining the viability or essentiality of a facility.

III. CONCLUSION
This essay has made known the various approaches that have been taken to the issue of when a monopolist or dominant firm can be mandated to provide access to a facility.
The economic analysis suggests that, where there is no price regulation, the static welfare effects of mandating access can be positive or negative. On the other hand, private investment is discouraged when there is a threat from mandatory access. Where there is price regulation, there appear to be more circumstances in which mandating access would have positive effects. Hence, the relationship between an essential facilities doctrine and economic regulation is important to an efficient formulation. Finally, the objectives of competition laws and the incidence of dual regulator/commercial actor roles, greatly influence the nature of an essential facilities doctrine.

It will also not be out of place to mention that the Indian legislators or policy makers too have, whenever felt necessary mandated access to information or resources like in the case of the interconnection agreements for telecom and open access in the case of the electricity distribution. Therefore, the CCI in this circumstance when it seeks to apply the essential facilities doctrine would not only be donning the role of adjudging the illegal practices on the market but may also have to wear the cap of a policy maker. It will be interesting to see how the CCI applies this doctrine and instead of applying the doctrine in the form developed in the western jurisdictions, the Indian economic, social and market conditions should be taken into consideration while adjudging upon the access to ‘essential facilities’ for this is where the destiny of the essential infrastructure in India lies.

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HUMAN TRAFFICKING AND THE PROCESS OF REVICTIMISATION

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ABSTRACT

The time has come when Human beings should also become commodities capable of being bought and sold in the international...
market. In the recent years human trafficking has become the third largest source of transitional illegal activities after arms and drugs. Trafficking is not confined to the commercial sexual exploitation of women and children alone but also has myriad of forms like slavery, bonded or forced labour, begging and drug peddling. The present article focus on the growing trade of human trafficking, purposes for which human trafficking is committed, methods adopted by traffickers to accomplish their goals, factors responsible for trafficking, the process of rescue and rehabilitation of victims, and how again they fall in hands of traffickers even after rescue. The article attempts to analysis present legislations, states & reports presented by various domestic and international authorities and judicial response towards human trafficking. In addition to discuss on the Rights of victims, witness protection protocols, reasons of growth of human trafficking and failure of state to control it, this article also suggests the way forwarding to deal with this issue concretely. Hence, through this article author try to throw light on the hidden aspects of human trafficking.

INTRODUCTION

“In their eyes there’s pain, because they are held by an invisible chain”. The victims of human trafficking are caught by an invisible chain of traffickers who employ all kinds of means to satisfy their own ends. Victims are given different offers to trap them under the net spin by human traffickers and once they are trapped under this they are forced to live in inhumane conditions and to work irresistibly to satisfy their greed. If they are rescued from their workplace, they are treated as criminals with no dignity and respect and due to the failure of state, pressure of traffickers, lack of alternatives left to live livelihood and without proper counselling they have remain no option other than to end their journey of rescue by going back to similar workplaces. Policemen throughout the country have a warm relationship with traffickers and brothels holders, visiting them regular and are paid bribes as protection money. The legal system is so utterly useless that not even they protect the traffickers but also when prosecution was initiated they instruct the public prosecutor in such a way that the accused was granted bail and ultimately acquitted.

We have no legal definition of trafficking at the national level, but trafficking is illegal act and is prohibited under Art. 23 of the constitution of India. Being a signatory to the “International Convention for the prevention of Immoral Traffic (1950)”, India developed a specific act against trafficking;


290 Prohibition of traffic in human beings and forced labour: (1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
(2) Nothing in this article shall prevent the state from imposing compulsory services for public purposes, and in imposing such services the state shall not make any discrimination on grounds only of religion, race, caste or class or any of them.
The immoral Trafficking Prevention Act, 1956(ITP Act). However, even in this act the definition of trafficking is vague and only deals with the commercial sexual exploitation of women and children. The ITP Act, 1956 is also criticise because of being more against sexual exploitation rather than human trafficking. The most accepted definition of Human Trafficking at the world level is one which is given in Palermo Protocol. According to United Nation Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children(2000), Trafficking in person is defined as:

(a) “Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion or abduction or fraud or deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation. Exploitation shall include at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) shall be irrelevant where any of the means set forth are used.

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a).\(^{291}\)

Looking down into the definition of trafficking given in Palermo Protocol (2000), the question arose about the women who voluntarily enter into this profession by their own choice. And the women who want to remain within the profession. What about the rights of those women? Did you asked to have sex with all those men? Did you ask to be sold as sex slave? No, no one is like to be sold herself as sex slave. The issue is not whether adult women are coerced or deceived into prostitution, but even if they are voluntarily into prostitution it is abhorrent. Prostitution in itself is a violation of human rights of women. The trapped victims are physically and emotionally abuses, they have to face mental trauma and immense stigma and are also economically exploited. Since prostitutes are victims, the right they have concern the right to be rescued and rehabilitated.

According to GAATW (Global Alliance for Trafficking in Women), 1994 a large number of women do enter or continue in the profession out of choice and it is crucial that what they do is recognised as work and it is important to help them in getting better and non abusive working conditions and other rights within prostitution like right to safe work environment, access to health care and


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social security need to be protected. Because of complete emphasis of the present discourse on rescue and rehabilitation (which rarely happens) the issue of rights of sex workers who want to remain within the profession are totally ignored.

**PURPOSES OF TRAFFICKING**

There are various purposes for which women and children are trafficked, some of the more common forms that trafficking has grown to include are discussed below.

(i) **Commercial sex work/ forced sexual exploitation**

This is the most common destination of the victims of trafficking. The children and women who are trafficked often found themselves in forced or commercial sex trade. This can result through two different ways. Firstly, the victims are directly sold through a chain of criminal activities. Here owners further sell their services to the clients. Along with girls boys are equally vulnerable. Depending on their age, look and likeability the price is fixed. One of the modern avenues for trafficking is ‘Sex tourism’. According to World Tourism Organisation, a specialised agency of the United Nations ‘sex tourism’ is defined as “trips organised from within the tourism sector, or from outside this sector but using its structure and networks, with the primary purpose of effecting a commercial sexual relationship by the tourist with residents at the destination”.

(ii) **Forced exploitative labour**

Trafficking is also takes place for the purpose of forced labour. The trafficked people are employed in domestic work, circuses, camel jockeys, brick industries etc. They are forced to do work in sub-human conditions at the risk of their health and life. These people are forced to do work irresistibly in lack of basic amenities. Some Bangladeshi and Nepali are also subject to forced labour in India through recruitment fraud and debt bondage. In short, these trafficked victims live and died as brutally exploited slaves.

(iii) **Marriage**

The demand of male child over the years has resulted in a situation where entire villages in states like Haryana, Rajasthan etc. where there is very low sex ratio do not have any women of marriageable age. This has created a highly lucrative market for traffickers who supply women to meet the growing demand for brides. Another form of trafficking for marriage is also gaining prominence. Girls from poor villages are
married off to wealthy sheikhs from the gulf countries in a temporary form marriage sanctioned by the Shariat called a ‘mutah’ marriage. It is a temporary marriage lasting for an indefinite period from 24 hours to 99 years. In most of the cases family of girl has given a lump sum as a ‘mehr’ and middlemen play an active role in getting the girls. In most cases, after the marriage has been consummated, the girl is either sold into commercial sex work or abandoned. Numerous instances are there in which women either abused physically and sexually or abandoned at their own consequences.

(iv) Organ transplantation
People are also trafficked for organ transplantation. When families or individuals are tired of spending years on a medical waiting list, they sometimes purchase body parts – kidneys, eyes, lungs, heart, limbs and more. The demand for organs is just so high in the United States, according to the United States Department for Health and Human Services, there were, as of 6 January 2014, 120,999 candidates waiting for organs but only 10587 donors registered in the U.S. as of March that year.²⁹² As a result, there is a huge scramble to find organs, legitimate or otherwise. The WHO estimated in 2007 that organ trafficking accounts for 5-10% of kidney transplants performed annually across the globe, and that in India, around 2,000 Indians sell a kidney every year.²⁹³ In most of the cases victims are unaware of what is in store for them. In some cases they give their consent for some pressing needs. Many of sold their organ by giving consent for paying off debts.

(v) Drug peddling
Every years hundreds of women and children are abducted or brought from open markets for the purpose of drug smuggling to various destinations around the world. The women and children are threatened, beaten, starved and even warned with the death of family members if they hesitate in any way. The victims are made to swallow balloons containing illicit drugs and are then transported across borders. The balloons are made with multi-layered condoms and are often force fed to the victim. The traffickers use a special machine to open the condom and put drugs into it.

On many occasions, the drug mules are first given a soup laced with drugs to numb their throats. The soup is very oily and makes the balloons slide down their throat. The victim’s mouth can also be sprayed with anaesthesia, enabling them to swallow up to 120 balloons²⁹⁴. Once they have reached their destination, they are fed laxatives and the balloons pass through their bodies. This medically dangerous way of transporting drugs can lead and has led to the death of persons, if and when balloons rupture within the body. Stomach acids can


sometimes cause the rupture of the balloons and death is very quick. The women are paired with men and their false passport indicates that they are married and the children they are with as their biological children. Even after full cooperation and delivery of drugs, they are likely to be sold for commercial sex work and slave labour. If caught, they face prison and in some countries, the death sentence.

According to NCRB (National Crime Record Bureau) report “Crime in India, 2015 statistics” released by Ministry of Home Affairs, Union of India human trafficking in India increased by 25% in 2015 compared to the previous year, with more than 40% of cases involving children being bought, sold and exploited as modern day slaves. The NCRB said there were 6,877 cases across the country related to human trafficking last year against 5,466 in 2014, with the highest number of cases reported in northeast state of Assam, followed by the eastern state of West Bengal. The data released on 30th Aug. 2016 showed 43% of the 9,127 victims were below the age of 18 years, crimes included inducing a minor girl with intent of sexual intercourse, buying or selling a minor girl for prostitution, and keeping a person as a slave. The NCRB data showed there were 19,717 cases related to human trafficking awaiting trial in 2015, of which 15,144 were cases from the previous year. Only 2,075 trials were completed resulting in 1,251 acquittals and 824 convictions. The statistics revealed that total 17612 cases were still pending trial at the end of 2015. The conviction rate accounts of 39.7% while pendency rate is of 89.3%

FACTORS RESPONSIBLE FOR HUMAN TRAFFICKING

While it is true that the causes and effects of the issue are multifarious, there are some common factors that lead women/children to become victims of this inhuman act. There are series of social, economic or political conditions which create a situation of vulnerability for the women and children that they unknowingly or knowingly get trapped into trafficking. The traffickers take full advantage of these situations for their own benefit. While it is not possible to point out causes of trafficking concretely, some push and pull factors have been discussed below.

The Push Factors

In many instances, though the trafficked victims would not want to leave the place of origin and move to other places, the undesirable living conditions makes it impossible for them to remain in the present situation. In the hope of better future, the women get easily trapped in trafficking.

(a) POVERTY - Though this is not the only reason for trafficking, it holds a huge potential in making the victims vulnerable. Poverty leads to deprivation of basic needs and difficult living conditions leading them to look for better options elsewhere. Traffickers may offer fraudulent job training or educational opportunities to the people who are desperate enough to try anything for a better life for themselves or for their families. Due to poverty, some parents sell

their children. Parents may feel forced to sell one child so that the others may eat. The greater the degree of impoverishment, the higher is the risk of falling prey to trafficking.

(b) DYSFUNCTIONAL HOME ENVIRONMENT – Breakup of the family, physical abuse, sexual abuse, drug abuse and discrimination within the family also increases the vulnerability to trafficking. Feeling misunderstood by parents, and seeking romantic relationships with a person older than them can increase girls’ susceptibility to the recruitment tactics of sex traffickers or pimps. An abusive family environment encourages the family members to leave home, thus putting them at risk of being trafficked.

(c) DOMESTIC VIOLENCE – The vulnerability of women and children gets accelerated also due to high prevalence of domestic violence. Women feel pressured to escape from the existing conditions to free them from physical, psychological and mental torture. The situation gets more aggravated if the women is single, divorced, widowed or sexually abused. The social stigma makes them getting unaccepted in the society leading to frustration, isolation and with no support system to provide them security, they fall an easy prey to traffickers.

(d) MARRIAGE – It is one of the main reason in the grab of which trafficking takes place. Parents are more than eager to ‘dispose off’ girls for marriage if the groom is not demanding high dowry and instead ready to bear the cost involved, it becomes a great deal. Parents are in too hurry that not even they bother to give second thought to their decision. The children thus easily trafficked under the guise of marriage.

The Pull Factors

Lack of informed choice regarding the place and occupation makes them vulnerable. Limited access to education and information aggravates these situations.

(a) COMMERCIAL SEX WORK – It is the most common pulling factor for trafficking. The nature of this industry necessitates regular fresh supply of women, which keeps trafficking profitable. In addition, growing demand of commercial sex work due to increased trend of migration and separated family also contributes equally in pulling out the women for trafficking.

(b) URBANISATION AND GLOBALISATION – It has increased the demand for cheap labour. People trafficked from rural areas to urban areas for providing labour flow. Many middlemen also reach the place of origin in search of potential labour.

Along with these pull and push factors, insufficient or inadequate laws and their poor implementation, ineffective penalties, minimum chances of prosecution, corruption and complacency, invisibility of the issue, the failure of government to implement policies and provide adequate services for
victims— all play a role in perpetuating trafficking.

METHODS USED FOR TRAFFICKING

Traffickers use a wide range of methods to move their victims from the place of origin to the place of destination. Instead of using physical violence or restraints, traffickers, some of whom are women, often use psychology to keep their victims enslaved. Traffickers can be friends, family members or neighbours. Some of the tactics used for trafficking are discussed below.

(i) Deceit/ False Promises
The traffickers befriends the victim and persuades her to accompany them. The traffickers uses the bait of false promises and lure of job/ marriage/ love to trap the victim. The victim who is already in a difficult situation, where she doesn’t have an appropriate option for the victim.

(ii) Material Inducements
Usually, the traffickers are the people who seem to be prosperous and well connected. They display a lot of wealth and become a symbol of success. They often offer some kind of monetary support as advance to the victim family. The trafficker convinces the victim that it will lead to high material gain and prosperity. The trafficker also gifts to the victims so as to make it appear real. After this ‘grooming’ process, the victims are easily taken from one place to another.

(iii) Bleak Hope Regarding Future
The trafficker uses the strategy wherein she/he makes the victim to believe that there is a very bleak hope regarding the future. They make the victim to believe that they are helpless, without the help of trafficker they can’t do anything. By thinking all this victim easily get ready to accompany them. The victim usually believes that she/he has no viable alternative but to perform the work, service or activity, whether that is objectively correct or not. Therefore, the option that is being offered is the most appropriate option for the victim.

(iv) Debt Bondage
An extortionate extension of credit and debt bondage is also used in entrapment of the victim for trafficking. When the person finds himself/herself in a situation where it is difficult for the person to run away from the intent of the trafficker. Thus the victim knowingly get into it. In some cases, due to inefficiency to pay the debt families sell their children to traffickers. In rare cases, parents sell a child out of greed and receive a monthly income. These families often build relationships with traffickers and will misrepresent the nature of the work to entice other families to sell their children.

(v) Force or Coercion
The victim is posed in front of a very difficult situation, where she doesn’t have
any option but to give in to the traffickers, knowingly or unknowingly. This also includes forceful methods like use of drugs, kidnapping and abduction.

According to the U.S. Department of state “Trafficking in person report -2017” India is placed under TIER -2 which includes those countries whose governments do not fully meet the Trafficking Victims Protection Act’s( TVPA) minimum standards, but are making significant efforts to meet those standards.In this order, the Ministry of Home Affairs (MHA) revised its strategy guiding Anti-Human Trafficking Units (AHTUs), to ensure more effective identification and investigation of trafficking cases and coordination with other agencies to refer victims to rehabilitation services. The government of India has also signed various MOU’s with other countries for better coordination.

**PROCESS OF REVICTIMISATION**

The provisions for rescue and rehabilitation is clearly spelt out in Immoral Trafficking Prevention Act. According to this act, if a Magistrate has reason to believe that any person is living or is carrying, prostitution in a brothel he may direct a police officer to remove such person from there and produce before it(section 16). Also, S.19 of this act a person who is carrying on, or is being made to carry on prostitution to apply to the Magistrate for an order that she may be kept in protective home or provided care and protection by the court. The petition- “Prajwala V. Union of India” filed in Supreme Court of India deals extensively on the issue of rescue and rehabilitation. The rescue of the trafficked victims has acquired the form of ‘mass raids’ on the brothels carried out by the police. The rescued women and girls are treated like criminals, with no dignity and respect. Their need for information, counselling or any other medical assistance is completely overlooked and are housed in sub-human conditions. Most of the girls were on alcohol or drugs and had withdrawal symptoms but no counselling was provided, many of them were HIV positive and had sexually transmitted diseases or were pregnant and needed medical attention. But their requirement of medical assistance is totally ignored and they are forced to live in inhumane conditions. The lack of confidentiality makes them more vulnerable to the threats, blackmails and luring by the same traffickers to the same brothels. There is no understanding of the fact that the victims of trafficking undergo an immense trauma and no support whatsoever is provided for the emotional, mental, physical or social healing and recovery. Rescue without these reintegration is incomplete. As a result, the rescued children/women end up going back to the same or similar workplace. Most of the cases land up in more exploited conditions, sometimes to be rescued again and to undergo the same cycle of revictimisation.

The UNIFEM- ISS- NHRC study clearly indicates that ‘re-trafficking’ of the victim was of a common occurrence. 24.2% of the respondents of the study said that they had been rescued earlier

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296 https://www.state.gov/documents/organization/271339.pdf

297 2003, NHRC-UNIFEM-ISS. A report of Trafficking in women and children in India, p 97.
also. The vast majority of the survivors said that even after returned to their community, they had no alternatives source of income of livelihood options. The basic reason which leads to this vicious cycle is clear, since they is no component of ‘victim protection’ in the present methodology of raids, rescue and rehabilitation. Their access to justice and right to legal redressal must be addressed so as to ensure that the opportunities for securing justice are not denied and their human rights get protected. The legal redressal should include the issue like obtaining compensation and conviction of the traffickers.

WITNESS/VICTIM PROTECTION PROTOCOL

The role of victim/witness to combat trafficking is also very critical. Unless the witness feel protected, the attempt to break the silence will always be curbed by threat to victim. This means protection is provided to witness/victim to reach the traffickers. In terms of giving evidence at trial, countries need to ensure that they are able to give evidence safely and make efforts to reduce the secondary trauma that victims often face in the courtroom. At present India does not have a comprehensive law on witness protection. The supreme court has observed that in case of serious criminal offences ‘witness anonymity’ and ‘witness protection programs’ are necessary wherever the life and property of the victim and his or her family are in danger. Under the present circumstances, if a raid happens in the night, the girls are taken to the police station and are kept there throughout the night. The facilities for victim protection and recovery in these police station is low and substandard. The victims are huddled together in the small room and in these hostile environment are forced to give their initial statement. A landmark judgement ‘Delhi Domestic Working Women’s Fourm V. UOI and others’\(^\text{298}\) has been made in the context of victim protection. It makes the following directions for legal representation of the victim.

- Right to representation: the police should be under a duty to inform the victim of her right to representation before any question were asked of her and that the police report should state that the victim was so informed. A list of advocates willing to act in these cases should be kept at the police station for victim who did not have a particular lawyer in mind or whose own lawyer was unavailable. The advocate shall be appointed by the court upon the application by the police at the earliest convenient moment but in order to ensure that victims were questioned without undue delay, advocate would be authorised to act at the police station before leave of the court was sought or obtained.

- Compensation for victims: Compensation for victims shall be awarded by the court on conviction of the offender and by the criminal injuries compensation board whether or not a conviction has taken place. The board will take into account pain, suffering and shock as well as loss of earnings due to

\(^{298}\) 1995 SCC (1) 14
pregnancy and the expenses of child birth if this occurred as a result of the rape.

**NATIONAL LEGISLATIONS ON TRAFFICKING**

The constitution of India has recognised the right to freedom from forced labour and trafficking as a fundamental right under article 23. The Immoral Trafficking Prevention Act, 1956 was also in response to the ratification of the International Convention on suppression of Immoral Trafficking and Exploitation of Prostitution in 1950 by India. ITP Act although is the only act dealing specifically with the issue of Trafficking but it fails to define the term trafficking. The section 2 of the Act provides definitions in which ‘Brothel’ is defined as “any house, room, conveyance or place, or any portion of any house, room, conveyance or place, which is used for purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes. This definition of a brothel as a place for the mutual benefit of two or more prostitute’ converts commercial sex workers who work voluntarily into criminals who have to be penalised. This act has also criticized for being against prostitution than against trafficking, it completely neglects the various purposes of tracking other than the prostitution. Although prostitution per se has not been declared as offence. One of the amendment in ITP Act is addition of S.5C that punishes clients of prostitutes for the first time. It penalise person ‘who visits or is found in a brothel for the purpose of sexual exploitation of any victim of trafficking in persons’ with a term of imprisonment and/or fine.

Section 370 of the IPC\(^{299}\) prohibits slavery, servitude, and most forms of sex trafficking, and prescribes sufficiently stringent penalties ranging from seven years’ to life imprisonment, which are commensurate with those prescribed for other serious crimes, such as rape. But Section 370 does not define the prostitution of children younger than age 18 as an act of human trafficking in the absence of coercive means—the standard of the 2000 UN TIP Protocol—although other statutes criminalize the prostitution of children. S.7 of the Child Labour (Prohibition and Regulation) Act, 2016 also specifies the hours and period of work for adolescent(a person who has completed his fourteenth year of age but has not completed his eighteenth year).

**THE WAY FORWARD**

There is no doubt that the gravity of the issue of trafficking is intensifying every passing day. There is a need of a legislation which clearly sets out a criminal offence of trafficking which covers trafficking for all purposes. Along with the legislation there is great requirement of effective administrative body and judicial system which helps in the implementation of the laws made. There is a need of acquiring holistic approach towards

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\(^{299}\)Buying or disposing of any person as a slave.-
Whoever imports, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
the victims of trafficking and their family. Segregating the children of prostitutes by locating separate schools and providing separate hostels would not be in the interest of the children and the society at large. The rescued victims who are send to protective homes shall not be treated like criminals, they shall not be forced to wear uniforms and shall not always be trap within the surrounding of four walls. They shall be allowed to mingle with others and become a part of the society. Because in author view the victims are send to these rehabilitation centre for the purpose to make them recover from their present vulnerable conditions by assisting them with medical, emotional and physical support and not for to trap them within four walls like prisoners and to separate them from society. If they are to be treated as different then the objective of any legislation made to curb trafficking will never be achieved and the victims who already passing through mental stigma will never recover from that.So at last the author would like to conclude from this thought of Helen Keller “If I am only one, but still I am one, I cannot do everything, but still I can do something; and because I cannot do everything, I will not refused to do something that can I do”. If we all raise voice against human trafficking, we can save many life’s. The moment you decided to care, it’s the moment this world becomes a better place to live in.

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RIGHTS OF HINDU WOMEN IN ANCESTRAL PROPERTY: A REVIEW OF SUCCESSION LAWS

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ABSTRACT

India is primarily a patriarchal society. In earlier times, a Hindu woman had rights of a minimal nature in her family; she had no independent rights, she was dependent on the male counterparts of her family, and had no absolute right in the ancestral family property. The legislative saga on women’s rights to ancestral property has witnessed turbulent twists and turns, and is often considered to be unsettled even today. Ushering remarkable amendments in the Hindu Succession Act, 1956, the Hindu Succession (Amendment) Act, 2005 has elevated the status of Hindu women in terms of inheritance; however, whether the law eliminates gender bias still remains unanswerable.

This paper attempts to analyse the right of Hindu women to inherit ancestral property, the extent and nature of the right, the legislative sojourn and judicial interpretation of the right and whether or not such right conferred under the Indian law brings women at a position of parity and equality with men.

Keywords: Ancestral property, karta, stridhan, discrimination, gender equality

INTRODUCTION

“Of all evils for which man has made himself responsible, none is so disregarding,
so shocking, or so brutal as his abuse of the better half of humanity; the female sex.”

- Mahatma Gandhi

It has been found that women, who constitute nearly half of the world’s population, work nearly two-thirds more as compared to men, but receive only one-tenth of the world’s income and less than one-hundredth of the world’s property.\(^{300}\)

For a very long time, women in India have not only ignored their right to property, but also believed that they are not entitled to hold property because of the convoluted laws of inheritance and customs. It was believed that women exercising rights were the offshoots of patriarchy.\(^{301}\) Even after acquiring rights in ancestral property, it has been found that women often voluntarily deny their right, under the belief that property is a matter regarding men of the family,\(^{302}\) thus depicting the flawed conception, which has developed as a result of centuries of male domination.

Over the years, the law has witnessed a remarkable transformation in Hindu women’s right to ancestral property, from women not having rights in their own natal ancestral property, to holding rights to property in two families after marriage. However, the laws of succession continue to be confounding, not presenting a coherent view on Hindu women’s rights in ancestral property.

**ANCIENT HINDU LAW**

Females all over the globe have been believed to have an inferior status, which is reflected in the rights and privileges they have been conferred with since time immemorial. Before enactment of legislation on the right to inheritance and succession of Hindu women, such matters were governed by customary laws of the *Mitakshara* and *Dayabhaga* systems.

India’s discriminatory property rights can be traced back to the *Vedic* texts.\(^{303}\) Under ancient Hindu law, women enjoyed a respectable social status, though they did not possess any proprietary rights.\(^{304}\) They could not even claim a share in the property till a male heir moved for partition of the same.\(^{305}\) The only property that women could possess was called *stridhan*, i.e. movable assets received at the time of marriage, such as jewellery, clothes, utensils, etc.\(^{306}\) However,


\(^{303}\) MULLA SIR DINSHAH FARDUNJI, *PRINCIPLES OF HINDU LAW* 803 (17th ed. 2010)

\(^{304}\) R. Kumari, *Women’s right to property under Hindu law: A Socio-Legal Study*, 1 (2013)

\(^{305}\) SheoDyal v. Juddoonath, (1868) 9 WR 61

she was never the absolute owner of stridhan, as the teaching was that a wife, along with her property, is the possession of her husband.\footnote{307}

According to Vijyaneshwara, women were incompetent to celebrate sacrificial rights; hence, they were not entitled to participate in the devolution of property, but they were considered to be entitled to “food and raiment”.\footnote{308} However, Yajnavalkya admitted women to the order of succession.\footnote{309} Brihaspati also states that similar to sons, since daughters are reproduced from a man’s body, she ought to have the right to inherit her father’s property while she lives.\footnote{310} However, the Manusmriti changed the status of women by declaring her as dependent, and incompetent to perform religious ceremonies; thus limiting her proprietary rights.\footnote{311}

Under the Mitakshara law, though women were included as heirs to separately owned property, they were not considered coparceners, unlike males, who acquired interest in the family property upon birth.\footnote{312} Neither the wife,\footnote{313} widow,\footnote{314} or mother\footnote{315} of a man were regarded as coparceners. However, Dayabhagalalaw recognised the equal share of daughters in the father’s property, enabling them to be coparceners as well as Kartas.\footnote{316}

Due to the multiplicity of diverse succession laws, women’s right to ancestral property remained a complex question, and led to widespread discrimination against women.

**MEDIEVAL PERIOD – DARKEST AGE**

With invasion by the Muslim between the 11th to the 17th centuries, male dominance over succession rights of Hindu women became more prominent.\footnote{317} Stridhan started losing its character of “women’s property” and was regarded as a matrimonial gift.\footnote{318}

It is interesting to note that during this period, the concept of “women’s estate” gained considerable importance, subject to the conditions that she could not alienate the property and that on her death, the property would devolve upon the heirs of her husband or father.\footnote{319} However, the main reason for devolving limited ownership of property upon women was to protect the property from being forcefully seized by Muslim rulers in case the full owner died intestate,\footnote{320} thus reducing her position to that of a caretaker of the property.

\footnote{316}{Supra note 11}
\footnote{317}{V.D. MAHAJAN, HISTORY OF MEDIEVAL INDIA(Chand ed.2004)}
\footnote{318}{Halder, Jaishankar, supra note 7, at 671}
\footnote{319}{Arvind Sharma, Sati: Historical and Phenomenological Essays (1988)}
\footnote{320}{Halder, Jaishankar, supra note 7, at 672}
MODERN HINDU LAW – LEGISLATIVE EVOLUTION

The initial efforts made to impart property rights to Hindu women were obstructed by many who believed it was outrageous for women to avail a share in their ancestral property. Hence, the Indian Succession Act, 1865 and Married Women’s Property Act, 1874, which recognised the right of women to property to an extent, did not extend to married women belonging to the Hindu, Muslim, Sikh and Jain communities.

However, the first step in furtherance of Hindu women’s right to property was witnessed in the Hindu Law of Inheritance (Amendment) Act, 1929, which recognised the right of women over distant male relatives with respect to separate property of Hindu males dying intestate. Subsequently, the Hindu Women’s Right to Property Act, 1937 conferred widows with the right to inheritance of property even if a man had male descendants. Pressure for such social reformation was instigated by a number of European and Indian social reformers such as Raja Ram Mohan Roy.

Concerned with the growing number of legislations, but the lack of one adequately recognizing the inheritance rights of women, the government appointed a Hindu Law Committee headed by B.N. Rau, which aimed to muster a uniform code of intestate succession for Hindu’s. Though the Hindu Code Bill framed by the Committee introduced in the Legislative Assembly was initially opposed due to resistance from the orthodox sections of society, it eventually led to the enforcement of the Hindu Succession Act, 1956, which was subsequently amended in 2005 to provide absolute proprietary rights to Hindu women.

CONSTITUTIONAL FRAMEWORK PROPAGATING GENDER EQUALITY

The validation for equal rights of men and women is found under the Constitution of India. Not only does the Constitution of India enshrine the principle of gender equality, but it also empowers the State to adopt laws in favour of women and obliges citizens to renounce practices derogatory to the dignity of women.

HINDU SUCCESSION ACT, 1956 – PRIOR TO 2005

The Hindu Succession Act (HSA), 1956, which resulted from the efforts of the B.N. Rau Committee, was welcomed with much praise and applause that dwindled shortly after enactment as the provisions were a mere facade in the name of gender equality. The Act came under much criticism for the continued gender inequality due to a number of provisions.

Firstly, Section 6 of the Act recognised the rule of devolution by survivorship, retaining the Mitakshara coparcenary system, which constituted only males of a joint Hindu family, thus leading ancestral property to be governed by a completely patriarchal regime, wherein property devolved only through the male lineage. Though the

321 Report of the Hindu Law Committee (1947)
322 Article 14, Constitution of India, 1950
323 Article 15(3), Constitution of India, 1950
324 Article 51A(e), Constitution of India, 1950
proviso to the Section provided that the interest of the deceased would devolve by testamentary or intestate succession if he was survived by a female relative classified as a Class I heir, the direct interest in the coparcenary of male members remained unaffected, as it only affected the interest held by them in the share of the deceased. The implication of Section 6 was the women could not inherit ancestral property as men, and got a share of the interest of the coparcener to whom she was a Class I heir only upon his death. The Madras High Court even held that a gift of immovable ancestral property made by the karta of a family in favour of his wife would be void.325

Secondly, though female heirs had the right of residence in dwelling houses wholly occupied by their family, they could not claim partition of the dwelling house unless the male heirs opted to divide their respective shares.326 Even if there was only one male heir of an intestate in a Hindu joint family, the female heirs could not claim partition of the dwelling house.327

Thirdly, the right to residence in her paternal home was denied to women unless they were unmarried, widowed or separated from their husbands;328 thus, bereaving them of shelter and protection during emergencies, such as incidents of spousal violence or temporary separations.

Fourthly, the legislature gave kartaunrestrained power to disinherit his female heirs by way of a will329, thus, giving men a weapon to further deprive women of their rights.

**REASONS FOR DENYING RIGHTS IN ANCESTRAL PROPERTY TO WOMEN**

During the process of drafting the Hindu Succession Act in the 1950’s, and even subsequently, the parliamentarians and the judiciary have provided a number of reasons for denying women rights in their ancestral property. Firstly, it was contended that allowing women a share in their ancestral property would result in the introduction of strangers in the house, as it was a stereotypical notion that the families of men women got married into would “pounce” upon the property of their father-in-law, and since women were uneducated, they would not be able to seek an effective remedy for the same.330 It was believed that if women are allowed to have a share in ancestral property, it would result in new elements entering the family,331 thus disrupting the family set-up as the son-in-law would, by default, become a co-sharer in the family property.332

The second argument in favour of denying women rights in ancestral property was that if daughters were granted the same rights as

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325 *Kandammal v. KandishKhevar*, AIR 1997 NoC (Mad) 220
326 *Section 23, Hindu Succession Act, 1956*
327 *JanabaiAmmalGunabooshni v. TAS PataniMudaliar*, AIR 1981 Mad. 62
328 *Proviso*, Section 23, Hindu Succession Act, 1956
329 Section 30, Hindu Succession Act, 1956
330 *Shri Bogawat, Lok Sabha Debates, Part II 8211-8212 (1955)*
331 *Shri Lakshmayya, Lok Sabha Debates, Part II 8209 (1955)*
332 *Shri Sadhan Gupta, Lok Sabha Debates, Part II 8139 (1955)*
sons, it would lead to uneasiness and tension in the country and “every family will be ruined by litigation”. It was also believed that allowing women rights in ancestral property would shatter the bond between a brother and sister, thus leaving a woman helpless in situations where she would need to be protected by her family. Hence, the parliamentarians believed that women should be deprived of their just claims in order to avoid displeasure to the men of the family.

Thirdly, the social phenomenon prevalent was that the son continues to live in the family home with his parents even after marriage, but the daughter leaves her father’s house once married; hence, she is considered a temporary resident of her father’s house. However, this argument was futile in light of the fact that even the mother or widow of an intestate did not have a right in the ancestral property.

Fourthly, the ancestral home was believed to be an asset that should not be fragmented at the instance of women in order to preserve the memory of the parents. The basis for this argument is itself flawed, as it follows on the presumption that the ancestral property would be destroyed if partition of the same is asked by women of the family, but it would still be preserved if sons ask for partition.

Another incoherent justification for denying women rights in their ancestral property was that if the brother was denied the use of his sister’s share for no consideration, it would cause gross injustice to him. However, the researcher respectfully submits the opinion that the Honourable Supreme Court, in the case of Narsinhamoorthy v. Sushilabai failed to take cognizance of the fact that what was being advocated was a share of the sister in her ancestral property, and not that the brother’s share should also devolve upon the sister.

Some Courts have even drawn the conclusion that if women were entitled to a share in their ancestral property, on partition of the same, she would be encouraged to desert her husband and live separately from her husband.

The researcher would like to highlight the grave observation that from the period of drafting of the Hindu Succession Act till the late 1990’s, not only ordinary citizens, but even the Courts held a negative opinion on the right of women to their ancestral property, depicting the high degree of gender discrimination prevalent before the 21st century.

STATE AMENDMENTS
Due to the apparent gender-biasness, in order to expedite gender equality, a number of States, such as Andhra Pradesh, 

333 Shri Thakur Das Bhargava, Lok Sabha Debates, Part II 8045 (1955)
334 S.S Johl, Daughters at a disadvantage; Hindu Succession Act change doesn’t help them, The Tribune, March 20, 2006
335 Khare, supra note 2
336 Narasimhamoorthy v. Sushilabai, AIR 1996 SC 1826
337 Id.
338 Kalamma v. Veeramma, AIR 1992 Kant. 362
339 Hindu Succession (Andhra Pradesh Amendment) Act, 1986

www.supremoamicus.org
Karnataka, Tamil Nadu and Maharashtra amended Section 6 of the HSA by including daughters as coparceners by birth in a joint Hindu family. However, even these amendments extended the right of coparcenary only to unmarried daughters, and daughters married prior to the amendment were explicitly excluded from the application of the amendment, thus leading to an unfair distinction.

Prior to the amendment, the State of Kerala completely abolished the joint Hindu family system, and provided that members of a Mitaksharacoparcenary would hold property as tenants-in-common of the joint family property and become full owners of their respective shares.

**HINDU SUCCESSION (AMENDMENT) ACT, 2005**

As the State amendments improved the position of law on the right of Hindu women to ancestral property, a need was felt to amend the Central legislation to bring it in line. The Law Commission of India initiated a suomotustudy on Sections 6 and 23 of the HSA and submitted its Report to the Government of India in May, 2000, providing recommendations in the form of the Hindu Succession (Amendment) Bill, 2000, which came into force on September 9, 2005. The Amendment has modified and introduced a number of provisions that are conducive to promote the rights of women in ancestral property.

**Daughters made coparceners:**
A daughter was made a coparcener by birth, given the same rights and liabilities as a son. It also empowered women to become Karta of Joint Hindu families. Thus, the amendment does not change the position of the son in the coparcenary, but makes an addition of daughters to have rights in the ancestral property. The Courts have also clarified that though the Amendment has prospective effect, the Act in no way indicates that the rights in coparcenary property will be available only to daughters born on or after the commencement of the amendment; it would be available to all daughters, born before or after the commencement of the Act, from the date of commencement.

**Incidents of coparcenary:**
A woman was made capable of holding property with all incidents of ownership and disposition.

**Survivorship:**
The doctrine of succession replaced the doctrine of survivorship. In the event of

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340 Hindu Succession (Karnataka Amendment) Act, 1994
341 Hindu Succession (Tamil Nadu Amendment) Act, 1990
342 Hindu Succession (Maharashtra Amendment) Act, 1986
343 Kerala Joint Family System (Abolition) Act, 1975
344 Law Commission of India, supra note 10
345 Section 6(1), Hindu Succession Act, 1956 as amended by Hindu Succession (Amendment) Act, 2005
346 Pravat Chandra Pattnaik v. Sarat Chandra Pattnaik, AIR 2008 Ori. 133
347 Sugalabai v. Gundappa A. Maradi&Ors., 2008 (2) Kar. LJ 406
348 Section 6(2), Hindu Succession Act, 1956 as amended by Hindu Succession (Amendment) Act, 2005
partition of the property, the daughter would be allotted a share equal to the son, so would her children and grandchildren.

**Pious obligations:**
Under ancient Hindu law, the son was under a religious mandate to pay the debts contracted by his father, which has been discontinued post the amendment in 2005. Along with the sons, daughters are also liable for the debts of the joint family.

**Deletion of Section 23:**
Section 23 has been deleted, thus empowering women to ask for partition in their ancestral property as well as reside in the same, irrespective of the marital status.

**Right to make testamentary dispositions:**
Since daughters came to be regarded as members of the coparcenary by birth, it gave them the right to absolute testamentary dispositions under Section 30.

**EFFECT OF HINDU SUCCESSION (AMENDMENT) ACT, 2005 ON STATE AMENDMENTS**
The preliminary steps towards securing rights of women in ancestral property were taken by certain States, which eventually resulted in the introduction of similar amendments in the Central law. However, there were certain contradictions in the Central law and State laws. Firstly, the States had introduced only unmarried daughters as coparceners, while as per the amendment in 2005, all daughters were made coparceners irrespective of their marital status. However, since State law is inoperative to the extent it is inconsistent with the Central law, all daughters, irrespective of marital status, would be coparceners in the States as well. The Karnataka High Court has held that a distinction between son and daughter on the ground of marital status would violate Article 14 of the Constitution of India.

Secondly, the amendment in 2005 provided that a daughter could not challenge alienations or partition of property effected before December 20, 2004; however, under the State Amendments, an unmarried daughter could challenge alienations effected after the State Amendments came into force, which was before the Central Amendment. Thus, the effect was that while a woman did have the power to question partition affected post the State Amendment, this right was expressly taken away by the Central Amendment. Hence, the Karnataka High Court held that depriving a woman of her right to challenge alienations prior to December 20, 2004 as inoperative and ultra vires the constitutional principle of gender equality. The Karnataka High Court also held that daughters would be entitled to equal share even if the father died prior to

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349 Section 6(3), Hindu Succession Act, 1956 as amended by Hindu Succession (Amendment) Act, 2005
350 Section 6(4), Hindu Succession Act, 1956 as amended by Hindu Succession (Amendment) Act, 2005
351 Article 254(1), Constitution of India, 1950
352 Pushpalatha N. V. v. V. Padma, AIR 2010 Karn. 124
353 R. Kantha v. Union of India, AIR 2010 Karn. 27

www.supremoamicus.org
September 9, 2005; however, the Supreme Court of India has reversed the judgments and held that the Act applies only prospectively, and only those daughters can avail the rights in ancestral property whose fathers were alive on and after September 9, 2005.

ANALYSIS OF EXISTING LEGAL FRAMEWORK
The HSA Amendment Act is considered a landmark legislation for promoting the rights of women. It has postulated all new spheres of rights of women, making an attempt to bring them at parity with men. The ancient tradition of devolving the entire property of an intestate only on male heirs finally came to an end. The effect of the amendment is two folds; firstly, women became active members of coparcenary property and now have the right of partition of ancestral dwelling house, and secondly, women became entitled to absolute enjoyment of property inherited by her parents as well as her in-laws.

However, the researcher is of the opinion that even after the enforcement of the Act, neither has discrimination against women in matters of succession been fully wiped out, nor has the law promoted gender equality in the true sense. The law consists of a number of lacunae, which makes it difficult to achieve gender equality.

Discrimination between female family members:

The law creates a difference between the rights of different female members. Though daughters have been included as coparceners, mothers and widows are still not admitted as the same. Unequal primacy has been assigned to different female members, thus not truly consistent with Article 14 of the Constitution. Furthermore, it makes a distinction between married and unmarried daughters by stating “on and from the commencement of the Hindu Succession (Amendment) Act, 2005”, implying that the benefits of the provision would be given to only those daughters married after the commencement of the law.

The Bombay High Court, followed by the Supreme Court of India, have also held that the amended Section would not have retrospective effect; the father would have to be alive on September 9, 2005 if the daughter is willing to become a co-sharer in ancestral property along with male siblings.

This ruling clearly discriminates against women, as it adds another disqualification for women regarding their right of inheritance; in addition to not having a right in ancestral property alienated or partitioned before December 20, 2004, it makes it imperative for the father to be alive when the amendment came into force.

Discrimination against men:
The law discriminates against the position of the father, as he is placed in the category of Class II heirs; however, a mother is considered a Class I heir. This is not an

354 Prulavati v. Prakash, AIR 2011 Kar. 78
356 Badrinarayan Shankar Bhandari & Ors. v. Omprakash Shankar Bhandari, AIR 2014 Bom. 151
357 Prakash v. Phulavati, (2016) 2 SCC 36
358 Section 8, Hindu Succession Act, 1956
equitable provision as there is no legal basis for giving priority to one parent over the other when both have equally contributed to the upbringing of the child, and subsequently, both would equally need support, security and protection by the child.

Furthermore, a woman not only gets a share in the property of the family in which she is born, but she also gets a share in the property of the family into which she is married. However, the Schedule of heirs does not include the husbands of pre-deceased daughters or other men who become members of a family by virtue of marriage with daughters of a family. This provision has triggered discrimination against men, as they are not entitled to a share in their wife’s ancestral property, which is a form of gender discrimination not envisaged under the constitutional principles of gender equality.

Discrimination in devolution of property of issueless widow:
The law has created an unfair shift in favour of males as when a childless Hindu widow dies intestate, her husband’s heirs alone inherit her estate. In the absence of heirs of her husband, the property would first devolve on the heirs of her father, and in their absence, on the heirs of her mother, thus depicting bias even between parents based on their gender.

Severance from joint family:
Lastly, under the Special Marriage Act, where a Hindu belonging to an undivided joint family marries under the Act, it leads to his severance from the joint family, thus, imposing a statutory sanction from inheriting ancestral wealth on a Hindu who resorts to civil marriage, which is an option available to those who wish to avoid religious rituals or marrying outside their community without converting the spouse.

ANALYSIS OF IMPLEMENTATION OF THE LAW
Though the amendment to the HSA has attempted to provide equal rights to daughters in their ancestral property as the male counterparts, the Act has failed to fully wipe out gender discrimination due to the sociological and historical reasons.

Resistance against the law:
Many Hindu families where women were severely discriminated against are likely to resist the application of the new law.

Status of daughters:
Though women do have rights in ancestral property under the current law, even today, the practice largely followed is to give daughters gifts in marriage and absolve her of any future rights; however, seldom are these gifts equivalent to the value of inheritance.

Child marriage:
Though laws prevent child marriage, such acts are still widely prevalent in India. The Census conducted in 2011 found that 31.3% Hindu women were married before they

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359 Id.
360 Section 15(1)(b), Hindu Succession Act, 1956
361 Section 15(1)(d), Hindu Succession Act, 1956
362 Section 15(1)(e), Hindu Succession Act, 1956
363 Section 18, Special Marriage Act, 1954
attained 18 years of age.\textsuperscript{364} The same Census found that 10.9% Sikh women, 27.8% Buddhist women and 16.2% Jain women were married before the age of 18. Usually, once a girl is married as a child, she never returns to her paternal family to ask for her share in the ancestral property, nor would her family entertain such demands.

**Lack of awareness:**
Unlike in cases of other laws enforcing rights, such as the Right to Information Act, 2005, the government has not made any noticeable attempt to spread awareness about the change in property rights, nor have civil society groups been vigilant in monitoring the enforcement of the law.

**Dowry harassment:**
The HSA gives daughters a right in their ancestral property; however, this has increased the scope of dowry harassment. In-laws often force women to sell their share of ancestral property and render the same to them in the form of dowry. Between 2012-2015, 24,771 cases of dowry deaths were reported in India.\textsuperscript{365}

**CONCLUSION**

\textquote{I raise up my voice, not so I can shout, but so that those without a voice can be heard, we cannot succeed when half of us are held back\textquote}{- Malala Yousufzai

The aim of every society is to eradicate biasness against any of its segments. The duty of a rational and ideal State is to establish an environment of equal rights to all its citizens. The position of women in comparison to men assumes great importance where the questions of rights arise in family property. Though it has often been argued that the roots of gender gap lie in societal norms and beliefs, the government cannot evade its responsibility of creating a balanced paradigm for parity-based existence of males and females in the society.

It is undisputable that laws have to be amended at regular intervals to respond to the needs of dynamic social systems. The HSA Amendment of 2005 has definitely proven to be a progressive legislation, bestowing upon women, the title of coparcener, giving them rights in ancestral property, and providing them with shelter in their ancestral homes. What is even more commendable about the Act is that it has preserved the values of coparcenary established under the Mitakshara School, while at the same time, it rectifies gender discrimination to eliminate unconstitutional principles, thus, tending to the religious sentiments of the people while progressively developing a neutral law.

However, the existing legal framework and its interpretation are not devoid of anomalies. From discriminating against married daughters, mothers and widows, to extending the right only to those women whose fathers died after 2005, to providing dual inheritance to women as compared to men, the amendment has failed to cure

\textsuperscript{364}Sagnik Chowdhury, 30% women married under age 18, THE INDIAN EXPRESS, May 31, 2016
\textsuperscript{365}24,771 dowry deaths reported in the last 3 years: Govt., THE INDIAN EXPRESS, July 31, 2015
gender discrimination prevalent in the society.

Furthermore, new legislation would be ineffective unless properly implemented. Lack of creating awareness, stereotyping women as a burden on their parents, child marriage, dowry, etc. are all sociological factors which hinder the smooth implementation of law and enforcement of rights.

RECOMMENDATIONS
In the opinion of the researcher, further steps need to be taken at a legislative as well as societal level in order to ensure gender equality. Though the prevalent practices in society, in general, are not in favour of women, the law needs to be amended and implemented, not only for enforcement of rights of women, but also for the rights of men.

Amendment to remove discrimination against classes of female family members:
Firstly, Section 6 of the HSA ought to be amended to include all classes of women as coparceners, irrespective of whether they are mothers, widows or daughters. All women of a Hindu family should be made coparceners, irrespective of whether they are daughters who married before or after 2005 and irrespective of whether their father died before or after 2005.

Amendment to remove discrimination against male family members:
In the opinion of the researcher, the current law discriminates against fathers and widowers. Hence, the Schedule of Class I heirs should be amended to include fathers and husbands of pre-deceased daughters as Class I heirs under Section 8.

Devolution of property of childless widow:
When a childless Hindu widow dies intestate, it would only be fair if her property would devolve equally upon the heirs of her husband and her parents, without even making any distinction between the heirs of her mother and father.

Amendment of Section 19 of Special Marriage Act:
Section 19 of the Special Marriage Act should be amended to the effect that Hindu’s marrying under the Act should not be severed from their undivided joint family, as in the opinion of the researcher, where the constitutional principles propagate secularism, the law ought not to discriminate against persons who choose to resort to civil marriages or marriages outside their community.

Awareness about women’s rights and implementation:
It is incumbent upon the appropriate authorities to create awareness on property rights of women, from big cities to smaller towns and villages. Furthermore, we need efficient moral policing to strengthen the human rights situation for women. In cases of alienation of property, transfer of property rights, etc. the appropriate authorities should establish a mechanism to verify the number of relevant heirs of the property, ensure each one of them is aware of their rights, and has given consent to transfers only in the state of awareness of laws.
Steps for prohibition of dowry:
The HSA should include a separate provision for the prevention of dowry harassment, categorically stating that property in the nature of stridhanis solely the woman’s property and any kind of capture or attempt to capture such property by any person would be entailed with penal consequences.

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CRITICAL ISSUES IN HANDLING JUVENILE DELINQUENTS IN TANZANIA: AN APPRAISAL

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Abstract
This paper is about the critical issues in handling juvenile delinquents in Tanzania. The paper sought to explore the critical issues which usually arise during the children’s deprivation of liberty and incarceration in various detentions within the country. These issues relate to the separation of juvenile delinquents from adult detainees and their treatment while in detentions. It has been noted that Tanzania has ratified international and regional instruments such as the United Nations Convention on the Rights of the Child, 1989 and the African Charter on the Rights and Welfare of the Child, 1990. Thus, the
country has undertaken a legal obligation to take all necessary steps, legislative, administrative and other measures to implement the rights contained in those instruments, but various studies indicate that Tanzania is not yet fully implementing the international legal instruments relating to the protection of children in conflict with the law.

The paper contains data from library research which lays a theoretical framework of the problem and field data that supports the theoretical work. Through library research, books, legislation, articles, international conventions, government notices, various reports and periodicals were reviewed while in field research data were collected from juvenile justice stakeholders in Tanzania. The study revealed that in Tanzania there is no total separation of children from adult offenders in detentions, and that children in police stations and prisons are overcrowded, they face beatings and inhuman treatments from adult detainees and the detention staff, they do not get a balanced diet three times per day, they lack clothes and sleeping materials.

1.0 Introduction

As far as the rights of prisoners are concerned, it is commonly agreed that a prisoner does not become a non-human only for the mere reason of imprisonment, and aggravating the suffering of a prisoner beyond that pronounced by the court is unjustifiable. When it comes to persons of young age, this consideration becomes of paramount importance. It is common knowledge that dealing with juvenile delinquents in Tanzania has been one of the obligations that consumes the law enforcement organs’ attention, apprehension, arrest, charge, and prosecution. This situation has unfolded in the context of child rights, as embodied in the Law of the Child Act, 2009 numerous critical issues that need intervention by juvenile justice stakeholders. It is the fact that Tanzania has in the past seven years searched constantly for new ways of dealing with juvenile delinquents, but this search has resulted in new measures of punitive handling of children delinquents, which has given rise to critical issues that merit a close review.

It is clear that children indulge in wrongful activities which, if committed by adults in the same circumstances, they amount to the commission of an offence, but on the part of children, these activities or omissions are regarded as mere delinquent acts and the concerned children are considered as juvenile delinquents or children in conflict with the law. Delinquent acts bring children in contact with the police, courts or find themselves in detentions where they may be confined. Both the international and Tanzanian laws do not prohibit the confinement of children, but they require the same to be done in a way that respects children’s rights, humanity and dignity.\textsuperscript{366}


By doing so, the country has undertaken a legal obligation to take all necessary steps, legislative, administrative and other measures to implement the rights contained in those instruments. Such measures should necessarily ensure that children in detentions are afforded and have access to their rights. There is no doubt that Tanzania has, and still is showing substantial efforts in strengthening the criminal justice system generally, but the general criminal justice system cannot be perfect while the juvenile justice system is ineffective. Juvenile justice generally and the rights of detained juvenile delinquents in particular, are part of the national criminal justice system. Fortunately, the Law of the Child Act, 2009 of Tanzania enshrines a number of key international juvenile justice standards, but many of them are not being upheld in practice. In their review of Tanzania’s implementation of the above legal instruments, while recognising the efforts made by the Government in the field of justice, both the United Nations Committee on the Rights of the Child and the African Committee of Experts for the Rights and Welfare of the Child concluded that Tanzania is not yet fully implementing the international legal instruments relating to the rights and welfare of the child. Furthermore, when Tanzania appeared before the United Nations Human Rights Council during the Universal Periodic Review process in December 2011, members raised concerns relating to both juvenile justice and the access to justice system.

This paper aims at exploring the critical issues in handling juvenile delinquents in Mainland Tanzania especially those issues which arise during the children’s deprivation of liberty and incarceration in various detentions within the country. The critical issues which will be addressed in this paper are the separation of juvenile delinquents from adult detainees in detentions and treatment of children in conflict with the law while in detentions. To achieve the objective of this work, the theoretical review of literature relevant to the topic will be inducted and presented. Further, the international and Tanzanian laws for the protection of juvenile delinquents will be analysed while the empirical data collected from the field will be used to support the theoretical part of this paper and find a conclusion based on the research findings.

2.0 Research Methods
This paper consists of mainly qualitative data, with limited quantitative inquiries. It

attempts to evaluate the extent to which rights of detained juvenile delinquents are protected in Tanzania compared with the international standards that the country has domesticated. The researcher has undertaken library research to broaden a theoretical understanding of the problem, to lay a foundation for assessment of the legal framework for the protection of juvenile delinquents in Tanzania and get some light on how the problem has been dealt with by previous researchers. Through library research, the researcher accessed works of other researchers relevant to the problem and identified the knowledge gap that this paper sought to cover. Field research was also conducted to support the theoretical work. In this regard, the researcher collected empirical data from selected institutions charged with the administration of juvenile justice in the country.

One Hundred Seventy Five respondents participated in this study. In the detention facilities the researcher conducted interviews with detention staff, reviewed the admission books and conducted focus group discussions with detained children. Also the researcher used a set of prepared guidelines according to the international standards to observe the infrastructure, material conditions such as the provision of food, accommodation, hygienic facilities and social service provisions that were available for juvenile delinquents in those detentions. Apart from the detention facilities, data were also collected from interviews with key juvenile justice stakeholders such as parents of detained children, Resident magistrates, non-governmental organisation officials, lecturers of law, the Commissioner of Human Rights and Good Governance of Tanzania, officials from the Law Reform Commission of Tanzania, public prosecutors and private advocates.

3.0 Results and Analysis
3.1 Separation of Detained Children from Adult Offenders in the Visited Detentions

Children in Tanzania are detained in police stations, Retention Homes, Approved School and prisons during both pre-trial and post trials. At twenty two (22) visited detentions, a total of three hundred sixty three (363) children below the age of eighteen years were found incarcerated. Concerning separation of detained children from adult offenders, it was revealed that out of 363 detained children, Seventy One (71) children (19.6%) were detained in detention facilities which are special for children only; hence, juvenile delinquents do not associate with adult offenders. Three (03) children (0.8%) who were held in Urafiki Police Station were totally separated from adults as they were held in a room which is usually used as an office. However, a boy was held in the same room with his two sisters. Out of Nine (09) visited prisons, in Six (06) prisons there were Two Hundred Forty Seven (247) children (68%) who were held in separate sleeping areas, but they work together with adult offenders during the day and share all other facilities such as dinning and washing areas. Forty Two (42) children (11.6%) were held in the same detention cells or wards with adult criminals.

The percentage of children in detentions who were not completely separated from adults surpasses the percentage of those who were totally separated from adults.
Moreover, even in the facilities where boys were separated from the girls, there was no further separation according to the status of the detainees, age of children or the categories of offences committed or alleged to have been committed. Children who were detained for committing murder, rape, armed robbery, simple theft, illegal immigration and the baggers were held together. Irambo Approved School was an exception on this aspect as it was found that there was a separation of detained children according to the age.

The international standards for the protection of detained juvenile delinquents require that juvenile detainees waiting for trial should be separated from convicted ones.\(^{371}\) The United Nations Convention on the Rights of the Child, 1989 stipulates that every child deprived of liberty has the right to be separated from adults unless it is considered in the child’s best interests not to separate him or her.\(^{372}\) Likewise, the Beijing Rules, 1985 provide that juveniles in institutions shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.\(^{373}\) The African Charter on the Rights and Welfare of the Child, 1990 provides that States must ensure that children are separated from adults in their place of detention or imprisonment, and that every child accused of infringing the penal law is presumed innocent until duly recognized guilty.\(^{374}\) The principle of separation of juvenile delinquents from adult offenders has two purposes, namely, to protect children from exploitation, abuse and negative influences by adults, and to ensure that the detention of juvenile delinquents is implemented in the facilities that cater for their special needs.\(^{375}\)

The Law of the Child Act, 2009 complies with the international standards in this aspect by urging the police officers to make arrangements for preventing as far as practicable, a child while in custody, from associating with an adult charged with an offence unless he is a relative.\(^{376}\) However, in all visited police stations, there were no special cells for children. Children were held in the same cells with adults or in vacancies available within the offices. As illustrated above, this is the contravention of the international, regional and national laws. Worse enough, there has been no judicial intervention to remedy this situation.

In the case of Lucien Ikili Rashid v. Mussa Ruganda Leki & Others,\(^{377}\) the plaintiff, a citizen of the Democratic Republic of Congo, sued the defendants for maliciously having reported him, his wife and two children to the Immigration Department of Tanzania, leading to their arrest and detention in Segerea Prison. In Segerea Prison, the plaintiff was detained for thirteen


\(^{373}\) Rule 26 (2), Beijing Rules, 1985.


days in the same cell together with his children. He contended in evidence, *inter alia*, that while in prison, when the prison officers were in search of opium and money, they undressed the plaintiff in the presence of his two children. Unfortunately, the case was about the claim for compensation for unlawful arrest and detention; therefore, the court did not address the question of separation of children from adults in the detentions.

3.2 Treatments of Juvenile Delinquents in Studied Detention Facilities

In respect of treatment of detained children, the researcher investigated aspects such as the hygienic condition of detentions, quality and quantity of food offered to children per day, children’s clothing and sleeping materials, as well as sexual abuse and other inhuman treatments. Numerous questions were posed to the respondents to ascertain treatment of children in the visited detentions. These questions were answered by all respondents who participated in this study, and their answers were coupled with the researcher’s observation during the visit in detention facilities.

In the first place, in all detention facilities the researcher inquired about the actual number of inmates per detention cell compared with the capacity of each cell. The purpose was to establish the relationship between overcrowding and poor standard of hygiene in detentions. Except in detentions where children were mixed with adult offenders, all visited detentions had fewer detained children compared with the capacity of each detention facility and therefore, the standard of hygiene was satisfactory. For example, Irambo Approved School, which can accommodate 300 boys, had 23 boys only while Tanga Retention Home which can accommodate 40 children had no children at the time of the visit. Wami Prison for Young Offenders has the capacity to accommodate 255 young male offenders, but it had 82 inmates only. Mbeya Retention Home’s capacity is to accommodate 50 children, but there were 12 children only.

Likewise, Upanga Retention Home can accommodate 60 children, but there were 28 children only while Arusha Retention Home can accommodate 50 children but there were only 8 children. This is a commendable condition, but there could be more improvement if there was an effective coordination between the Ministry of Home Affairs and the Ministry of Health, Community Development, Gender, Elderly, and Children, to transfer children detained in police stations and prisons to the Retention Homes and the Approved School, at any time whenever there are vacancies. It is difficult to justify for instance, the reasons for holding 38 children in Butimba prison while there are vacancies at Irambo Approved School. Likewise, 18 children were held in Maweni prison in Tanga while there was no child in Tanga Retention Home, 52 children were detained in Segerea prison while there were vacancies in Upanga Retention Home, and 8 children were incarcerated in Arusha Central police station while Arusha Retention Home which is just close to the police station had vacancies.
The respondents in Retention Homes said this situation is caused by reluctance on the part of the police officers to send children to the Retention Homes. The police and prison officers on their part contended that always there is a lack of information about the vacancies available in Retention Homes. In addition, they said the transfer of children from police stations or prisons to the Retention Homes pose numerous administrative challenges such as financial and security issues. In this regard, the international standards require that the inter-ministerial and interdepartmental cooperation should be fostered in handling juvenile delinquents in order to consider the needs and best interests of the child.

Children detained in prisons face the problem of overcrowding just as adult prisoners. The problem is more acute with male prisoners than females. Most of visited prisons were found accommodating inmates, nearly twice than their actual capacity. For example, Isanga prison can accommodate 784 prisoners, but there were 1080 inmates at the time of the visit. In Kasulu District Prison, there were 323 prisoners during the visit, but the prison’s capacity is to accommodate only 180 inmates. Butimba prison can accommodate 934 prisoners, but the researcher found 2,212 inmates during the visit. During the interview, one prison officer revealed that one prison cell can accommodate 20 prisoners, but there are instances in which 53 inmates are held in one cell and share one toilet.

The United Nations Convention on the Rights of the Child, 1989 directs that every child deprived of liberty should be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. Furthermore, the Beijing Rules stipulate that juveniles in institutions should be kept separate from adults and must be detained in a separate institution or in a separate part of an institution also holding adults. This serves the avoidance of negative influences through adult offenders and the safeguarding of the wellbeing of juveniles in an institutional setting. Juveniles often suffer more human rights abuses when they are incarcerated with adults. It has been said that juveniles incarcerated in adult facilities are eight times more likely to be attacked with a weapon or beaten by prison staff than adults in the same facilities.

### 3.3 Quality and Quantity of Food Offered to Detained Juveniles

Regarding the quality and quantity of food offered to detained children, the researcher found that children in Retention Homes and Approved School are served with meals three times a day. The meals constitute a balanced diet and there was consensus among the respondents that the food is adequate. In prisons, children are offered meals twice per day, that is, porridge in the morning and evening.

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morning and meals at 2:00 pm in the afternoon. The dominant type of food is stiff porridge served with beans or meat stew in few occasions. Most of the respondents indicated that food is usually sufficient. There were a few disagreements in Segerera prison where children contended that they are offered enough main dishes but served with very little sauce.

In Isanga Prison, detained children complained that meal is offered too early, that is, on 2:00 pm, causing them hungry during the night. The prison authority explained that according to the prison Rules, inmates must be locked in on 5:00 pm, so meal is offered early in order to have enough time for checking security and records of the inmates before locking them in. In all visited police stations, there was no food offered to detained children. They solely rely on food brought to them by relatives, if any. For detained children who have no relatives to offer them food, they are assisted by police officers to get shares from their colleagues. The police officers explained this situation as being caused by the Government’s delay in paying the suppliers of food to police stations, hence; they stop supplying food until they are paid.

3.4 Detained Children’s Clothing and Sleeping Materials

Children detained in police stations, Retention Homes and the Approved School, do not wear uniforms. They wear home dresses brought to them by parents or donated by the well-wishers such as religious groups, members of the Non Governmental Organisations and university students. Apart from home dresses, children in the Approved School wear school uniforms supplied to them by the Government. The researcher was informed that sometimes the Government does not supply uniforms in time, hence; children wear torn uniforms or go to school with home dresses. In all studied Retention Homes and the Approved School, sleeping materials were enough and clean. However, in all visited police stations, there were no sleeping materials. Detained children sleep on the bare floor with no covering materials. This situation is considered normal, being part and parcel of the effects of conflicting with the law. One juvenile delinquent explained during focus group discussions that he requested for a blanket in the police station, but he was replied that “… there is no luxury in the police station, so he better shut up and stop disturbing.”

On this aspect, the Beijing Rules stipulate that juveniles under detention pending trial shall be entitled to all rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners, 2015 adopted by the United Nations. 382 While in custody, juveniles shall receive care, protection and all necessary individual assistance-social, educational, vocational, psychological, medical and physical, that they may require in view of their age, sex and personality. 383 Commentary to Rule 13.5 of the Beijing Rules explains that juveniles under detention pending trial are entitled to all the rights and guarantees of the Standard Minimum Rules for the Treatment of Prisoners, 2015 as well as the International Covenant on Civil and

383 Ibid, Rule 13.5.
Political Rights, 1966. Concerning clothes for children detained in the prisons, these are categorised into two groups, namely, pretrial and post trial juvenile delinquents. Those who are under trial wear home dresses while the post trial children wear prison uniforms. There were no beds in studied prisons. Children sleep on mattresses placed on the floor.

In one prison, the researcher was informed that overcrowding and lack of prison uniforms forces some detained juveniles to wear home dresses and share sleeping materials while in the prison. The Prisons Act, 1967 stipulates that while in the prison every prisoner is entitled to food in a prescribed dietary scale and must be supplied with and should wear such prison clothing as may be determined by the Commissioner General of Prisons. In addition, every prisoner has the right to be provided with separate bedding adequate for warmth and health as may be determined by the medical officer and be prescribed by the Regulations. However, in studied detentions, there were no facilities to cater for the needs of detained children as per the requirements of national and international laws.

These findings resemble what was presented in the 2016 Tanzania National Report of Human Rights Institution in which it was revealed that eighty percent (80%) of children held in prisons and police cells are not separated from adults, have limited access to legal representation, and there are few children’s facilities including transportation to and from the courts. There are inadequate social workers to handle children in conflict with the law. It has been argued that where conditions within a prison are such that inmates incarcerated therein will inevitably and necessarily become more socio-pathetic than they were prior to the sentence, the court’s punitive purpose, charged with healing hope is stultified by the prison authorities. This means the treatment of detained children which does not conform to their rights amounts to punishing them more than their sentences as pronounced by the courts.

3.5 Sexual Abuse and Inhuman Treatments of Detained Children
Children detained in Retention Homes and the Approved School face corporal punishment if one commits a serious misconduct such as use of abusive language, bullying, attempt to escape and sexual violence. Corporal punishment is usually administered in accordance with the Retention Homes or Approved School Rules. In case of less serious misconduct, children are given alternative punishments, which may include cleaning the dormitory, gardening or washing cooking utensils. Children detained in Retention Homes and prisons complained to have been tortured

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385 Ibid, S. 65 (2).
387 Ibid.
when in police stations in order to confess to the offences or sign the statements given to them by the police officers. Sixty Eight (68) respondents answered the question relating to the acts of torture, sexual abuse and inhuman treatments to detained children. Corporal punishment is one of the complained treatments of detained juvenile delinquents.

Out of five respondents who answered a question relating to corporal punishment, four (4) respondents (5.9%) said that children in detentions are caned for breaching detention Rules, while one (1) respondent (1.5%) said there is no caning of children in detentions. Twenty Eight (28) respondents (7.7%) replied that children are beaten when they are detained in police stations, on the other hand, Nine (9) respondents (2.4%) said it is true that children are beaten by prison officers when in police stations. Another respondent in Butimba prison complained of being threatened in police stations to be shot with guns if they refuse to confess, others said they were burnt with an electric iron on the thighs, others narrated to have been put on electric shock when they refused to confess, while others complained that they were badly insulted outside the court in the presence of the relatives. It is a requirement of the law that a person who is under restraint must be treated with humanity and with respect for human dignity. 389 Like international laws, Tanzanian laws prohibit to subject a person who is under restraint to cruel, inhuman or degrading treatment. 390 Another respondent in Butimba prison explained that when he was in the police station, he saw other boys being beaten heavily by police officers; then he decided to confess to the offence so as to save his life. He was charged with theft. He said the complainant never came to court to testify,

Fifteen (15) respondents responded to the question about inhuman treatments of detained children. Fourteen (14) of these respondents (20.6%) said it is true that in some situations, detained children are treated in an inhuman manner. One (1) respondent (1.5%) stated that children in detentions are not maltreated because people tend to sympathise with these children.

A large number of respondents who answered questions relating to the treatment of detained juvenile delinquents have confirmed that children in detentions are ill-treated. For example, respondents detained in Babati prison complained of being threatened in police stations to be shot with guns if they refuse to confess, others said they were burnt with an electric iron on the thighs, others narrated to have been put on electric shock when they refused to confess, while others complained that they were badly insulted outside the court in the presence of the relatives. It is a requirement of the law that a person who is under restraint must be treated with humanity and with respect for human dignity. 389 Like international laws, Tanzanian laws prohibit to subject a person who is under restraint to cruel, inhuman or degrading treatment. 390

Four (4) respondents mentioned sexual abuse as one of the problems faced by children in prisons. Out of these four respondents, Three (3) respondents (4.4%) said it is true that such acts exist in prisons. One (1) respondent (1.5%) replied that there is no sexual abuse of children in detentions. A large number of respondents who answered questions relating to the treatment of detained juvenile delinquents have confirmed that children in detentions are ill-treated. For example, respondents detained in Babati prison complained of being threatened in police stations to be shot with guns if they refuse to confess, others said they were burnt with an electric iron on the thighs, others narrated to have been put on electric shock when they refused to confess, while others complained that they were badly insulted outside the court in the presence of the relatives. It is a requirement of the law that a person who is under restraint must be treated with humanity and with respect for human dignity. 389 Like international laws, Tanzanian laws prohibit to subject a person who is under restraint to cruel, inhuman or degrading treatment. 390

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390 Ibid, S. 55 (2).
but the boy was convicted and sentenced to six months imprisonment. It is important to observe here that the standard of proof in criminal cases is beyond any reasonable doubt and the prosecution must discharge this duty, except in a few cases where the burden of proof usually shifts to the accused person.\footnote{391} Theft offence is not one of such exceptions.

Concerning inhuman treatment of children by police officers, during the interview one police officer explained the incidents of torture by police officers in the following words: “We do not have the investigation tools. We conduct investigations by using too much energy, brain, psychology and sometimes torture. In our circumstances, torture is unavoidable. We depend so much on the use of force to obtain evidence. If police officers refrain totally from torturing in gathering evidence, no criminal case will ever go to the court. Evidence will always be wanting. However, in the case of children, they confess easily, no need of torture.” Therefore, the police officers use torture as a means to enhance crime investigations. This has been so despite numerous complaints from the general public as well as the international and national laws prohibiting torture of the detained persons. The Constitution, for example, provides that, “…no person should be subjected to torture, inhuman or degrading punishment or treatment.”\footnote{392}

Moreover, the Law of the Child Act, 209 prohibits any person to subject a child to torture or other cruel, inhuman punishment or degrading treatment, including any cultural practice which dehumanizes or is injurious to the physical and mental well being of a child.\footnote{393} Still, the police officers resort to torture as a short cut to proper investigation, perhaps because they know for sure that there will be no repercussions for their actions. The Criminal Procedure Act, 1985 stipulates that where a police officer contravenes or fails to comply with the provisions relating to the arrest, restraint of the accused person and investigation of the offence, the contravention or failure should not be punishable as an offence against the Criminal Procedure Act, 1985, unless a penalty is expressly provided in respect of the contravention or failure.\footnote{394}

Worse still, in certain circumstances torture is permitted in Tanzania if it leads to the confession. The Court of Appeal of Tanzania once held that if despite torture or undue influence, the truth of the confession is not affected; mere allegations of torture will not render the confession automatically inadmissible. But, the admissibility of such confession requires two tests, first the court has to satisfy itself that the confession was voluntary in which case admissibility of the same causes no problem, and secondly, if there are allegations of torture, the same court has to be satisfied that notwithstanding the torture, the truth of the confession was

\footnote{391} S. 3 (2) (a) Evidence Act, 1967, [Cap. 6 R.E. 2002].
\footnote{392} Art. 13 (6) (e), the Constitution of United Republic of Tanzania, 1977, [Cap. 2 R.E. 2002].
\footnote{393} S. 13 (1), Law of the Child Act, 2009, [Cap. 13].
\footnote{394} S. 6 (2), Criminal Procedure Act, 1985, [Cap. 20 R.E. 2002].
not affected. In this situation, the confession is an outcome of torture, but the Court of Appeal did not provide for remedy that the accused person has if torture does not result into a confession.

4.0 Conclusion

Analysis of the national legal framework for the protection of juvenile delinquents has indicated that there is weak protection of detained juvenile delinquents under the laws of Tanzania. The examination of Tanzanian practice regarding the protection of detained juvenile delinquents has shown that there is no total separation of children from adult offenders in detentions, children in police stations and prisons are overcrowded, detained children face beatings and inhuman treatments from adult detainees and the detention staff, they do not get a balanced diet and they lack clothes and sleeping materials while in detentions.

SEXUAL HARASSMENT OF WOMEN IN THE WORKPLACE: A BRIEF ANALYSIS

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ABSTRACT

Even with the increasing focus on gender equality, sexual harassment of women at the workplace is commonplace, and as such seriously threatens to undermine our efforts made towards combating gender discrimination. This review aims to define sexual harassment, outline the various natures of sexual harassment, and briefly discussed some of the international conventions and measures aimed at combating sexual harassment. It starts by analyzing the historical use of the term ‘sexual harassment’, and then goes on to discuss some of the theories regarding the origin of sexual harassment, and follows it by discussing the various forms that sexual harassment in the workplace can take and the myriad adverse effects it has on the victims. Further, it takes up the cases of three individual countries, namely United States of America, United Kingdom and India, and briefly discusses the historical development and present status of laws with regard to sexual harassment.

SEXUAL HARASSMENT

The idea and concept of sexual harassment in the workplace is not new, however has seemed relatively new due to the common trend of silence and ignorance. It is been a failure on the part of individuals and to some extent an unfortunately large number of the society, in encouraging and felicitating the openness of this grave and delicate negativity present amongst our day to day lives. Sexual harassment has a serious and often tragic impacts on its victims. It has a tendency to subjugate, degrade and discourage women. This attitude, in turn, encourages the stereotypical notion that women are inadequate and ineligible for success. It also leads a disturbing
psychological, physical, and mental damage to the victim as well as her other social relationship.

Though sexual harassment "has been a fact of life since humans first inhabited the earth", it has only recently been acknowledged to a serious and a real problem, particularly at the place of work. It seems that the term 'sexual harassment' came to be used in public media only from the year 1975 onwards.396 Till then, no term existed to describe what is now universally called 'sexual harassment', though the phenomenon itself was well-known to women.397 The origins of this dilemma lie in the political history of these issues. Sexual Harassment and other forms of gender-based employment and academic discrimination are not a new phenomenon. Historical accounts of discriminatory behavior towards working women date back to colonial times. Foner (1947) cites a notice published in the New York Weekly Journal in 1734 by a group of female domestic servants protesting their employment conditions. Bularzik (1970) and Fitzgerald (1993) cite many examples from the Industrial Revolution. A popular account of what now would be termed as Sexual Harassment even appeared in Harper's Bazaar in 1908 (Bratton, 1987).398 Speaking generally, sexual harassment is "behavior with a sexual connotation that is abusive, injurious and unwelcome". For the victim, sexual harassment has direct consequences for the maintenance and improvement of his or her living conditions and/or places his or her in an atmosphere of intimidation, humiliation or hostility. 399 ‘Sexual harassment’ is both sexual and unwelcome. It may be constituted by many or simple act and, broadly speaking, the intention of the harasser is not relevant.400


Other studies though say that sexual harassment in the workplace is said to be a by-product of the Industrial Revolution. Siegel cites how Helen Campbell (Women Wage Workers, 1887) and Upton Sinclair


397 Foster and Woolworth Limited,(2000) NSWIRC 208 (27th October, 2000), New South Wales Industrial Relations Commission. The Commission was referring to Professor Cynthia Bowman’s article titled “STREET HARASSMENT AND THE INFORMAL GHETTOIZATION OF WOMEN” in the January 1993 edition of the Harvard Law Review, Vol. 106, p. 517. Also see the ILO publication, “SEXUAL HARASSMENT - AN ILO SURVEY OF COMPANY PRACTICE”, by Ariane Reinhart, p.vii, which says that until the mid-1970s there was no commonly recognised term for 'Sexual Harassment'.

398 Sharyn Ann Lenhart, M.D.: CLINICAL ASPECTS OF SEXUAL HARASSMENT AND GENDER DISCRIMINATION, Ch. 1, p.2

399 Quebec (Commission des droits de la personne) v. Habachi, (Date of decision: 29-3-1992; Docket: 500-53-000002-913, Canada Human Right Tribunal, Province of Quebec, District of Montreal), 1992 Canlii 1 (QCT DP)

400 Jones v Armans Nominees (P) Ltd., 59 IR 61, per Judicial Registrar, Millane, quoted in FOSTER AND WOOLWORTH LTD., (2000) NSWIRC 208, Location: www.austlii.org
(The Jungle, 1905) documented how women were victimized by sexual harassers in household services and factories, particularly those working in the garments and meat-packing industries.

“More and more companies”, says an ILO survey, “are realizing that sexual harassment is a significant problem from the perspective of working conditions and human resources and are therefore taking action against it”. According to the ILO, “Throughout Asia and around the world, governments, employers’ and workers’ organizations and NGOs are increasingly advocating the sexual harassment be addressed through workplace policies and complaint procedures. This trend reflects the recognition that workplace policies can be the most effective tool for preventing sexual harassment. It has become increasingly apparent over recent to be accomplished by preventive mechanisms introduced at the workplace level.” The ILO made certain specific recommendations to national governments, employers’ organizations and trade union of workers to adopt definite policies and campaign to rid the workplace from all forms of gender discrimination including sexual harassment. In December 1984 the Council of Ministers of European Communities adopted a “recommendation on the promotion of positive action for women”. This recommendation, inter alia, recommended the member states:

“To adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a

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401 “SEXUAL HARASSMENT, AN ILO SURVEY OF COMPANY PRACTICE” by Ariane Reinhart, published by the International Labour Office, ILO, 1999, Foreword by Goran Hultin, Executive Director, Employment Sector, ILO


better balance between the sexes in employment. To take steps to ensure that positive action includes as far as possible actions having a bearing on the following aspects:

- To respect for the dignity of women at the workplace.
- To encourage both sides of the industry, whenever possible, to promote positive action within their own organizations and the workplace, for example by suggesting guidelines, principles, codes of good conduct or good practice or other formula for implementation of such action”.  

In 1985, the International Labour Conference passed a “resolution on equal opportunity and equal treatment for men and women in employment”. This resolution also emphasized, “sexual harassment at the workplace is detrimental to employees’ working conditions and to employment and promotion aspects. Policies for the advancement of equality should therefore include measures to combat and prevent sexual harassment.”

We claim to be evolving into a modernized and liberal society. However, despite this continuous evolution, we have faltered in one of the key aspects of a functional society: the guarantee of the basic human rights of all. This failure to recognise and guarantee basic human rights may manifest itself in many forms, with one of the common aspects being Sexual Harassment of Women in the workplace by the male members of the society. Working women across the globe are subjected to this vile and unfortunate form of harassment, and are significantly discouraged from entering the working environment. This, in turn, leads to a gender disparity in the office environment, which is, therefore a sign of an underdeveloped nation. It is important to understand that sexual harassment at the workplace doesn’t only include physical forms of abuse it has several aspects and dimensions to it. However, the basic ingredient of identifying sexual harassment at workplace is the feeling of being uncomfortable and unhealthy work situation. The apprehension of repeated and slightly violent or extremely violent acts leads to the eventual fall in the number of working women in our society. There have been two major identifications of Sexual Harassment of Women in the workplace: Quid Pro Quo and Hostile Environment.

‘Quid Pro Quo’ is a form of sexual harassment where there is active denial or promise of benefits and /or remunerations for the prey (the victim) by the predator (the perpetrator). Such a situation is created by the predator, in order to obtain a series gratifying and pleasure activities, by the victim. The continuance of such an act prevails primarily because the victim is in the compromising situation, and is often helpless. ‘Hostile Environment’, on the other hand, refers to the inconvenience that an individual faces due to various uncomfortable and unhealthy work situation. Such a situation might include verbal,
Sexual, pictorial, mental, etc., and several other forms of sexual harassment. A hostile environment is the more common type of sexual harassment, but more difficult to prove. This exists when an employee is made to feel uncomfortable and suffers emotional and/or mental strain due to frequent exposure to offensive sexual talk and jokes, pornographic images and repeated unwelcome sexual advances, although there is no threat to the employee’s advancement in the workplace or continued employment. This type of sexual harassment is that which is continually being interpreted and re-interpreted by case law and legislative actions.

In the present times, it is necessary to accept the atrocities that our female counterparts in the society are compelled are often forced to undergo. It is understood in today’s world that a women is capable of work, self-preservation and independence; and somehow this concept of women being capable of achieving her dreams and goals is often disliked and discouraged by the male counterparts of our society. Why else would a rational and able human being strike on a woman’s confidence and pride?

Sexual harassment has a serious and often tragic impacts on its victims. It frequently leads to a disturbing psychological, physical, and mental damage to the victim as well as her other social relationships. A victim of sexual harassment is often deliberately made to feel guilty for a crime that she played no part in. She is made to feel responsible for the situation rather than recognizing the fact that the harasser had a greater control over her. Due to this attitude of victim shaming, the popularity of reporting an act of sexual harassment at workplace is nearly negligible. This, in turn, felicitates and encourages the harasser to continue with the atrocities rather then correct it.

USA, UK AND INDIA ON SEXUAL HARASSMENT OF WOMEN AT WORKPLACE

Sexual harassment of women is in itself a devastating and traumatizing incident that a women might have to go through; the inclusion of sexual harassment in the workplace is the step further into felicitating the already prevalent and negative form of discrimination that women across the globe are subjected to. What is even more distressing is that there is lack of sensitivity, awareness and cooperation available in the society with respect to the said problems. It is been observed that several countries including the United States, Great Britain and India have attempted to eradicate this problem.

A. THE UNITED STATES OF AMERICA:

The practice of sexual harassment, is centuries old. Instances of men forcing women into providing sexual favors, is a extremely well known situation. What is crucial to understand is that the idea and practice of attaching a women’ pride and dignity to the presence or absence of her virginity is rather common one. From slavery to the modern day world the presence of sexual harassment has been a constant. In earlier times when women were
considered as slaves and brought and sold in the market like commodities, there were several instances of the rich (the buyer of slaves) repeatedly raping or sexually harassing the slave girl. In those times, it was baffling to ever question the superiority of the white race, and the normality of a girl getting raped nearly everyday was acceptable. While those slaves were meant to please their master, it was never considered to be a violation of human dignity, and was wildly believed that women themselves were responsible for the rapes that occur, and that big breast were a provocation to men. However, it was seen that irrespective of what body shape slave girls were raped in brutal manners. It was also observed that the media reported such inhumane sexual relation between master and slaves and that such news was a matter of achievement in some societies. Several of the slave masters would gather and discuss about the latest conquest had regular frequencies. Over the decades though the concept of slavery gradually declined, sexual harassment remained intact. As society progressed further it was alarming to notice that the idea of sexual harassment remained unchanged. In short, the laws, governments and peoples forever is assumed that women themselves were desperate to sexually harass and assaulted. And that these ‘complaints’ that they filled were a revenge that they sought to achieve.

Rape laws were previously cast, class and race oriented. In other words, an accused raping higher caste or class women, would face behavior charges provide that the lady white. On the other hand, lower caste, lower class, and colored women would generally be considered as liars, especially if the accused was a white man. Previously, tort law was a much more effective weapon against sexual harassment in the workplace. Initially, there was no right of the women to recover damages for sexual assault. At common law, sexual assault gave rise to a rather surprising claim by the master since he was the owner of the women assaulted he was entitled to a claim against the rapist as trespass to the man’s property. A father was also entitled to bring a seduction action against an employer who impregnated or otherwise defiled his daughter.

Sexual harassment is a form of discrimination that is generally women centric and often is derogatory and discouraging to the female counterparts of a country. One of the most significant incident in the US history in the development of the idea of sexual harassment was that of the popular story of Anita Hill, and the scandal involving Senator Thomas. The term sexual harassment in the US was first coined and popularized by Lin Farley in 1975 based on a pattern that she recognized during a class she taught on women and work at Cornell University in 1974. In the USA, the Civil Rights Act of 1964, vehemently prohibits any form any form of employment discrimination base on either race, sex, colour, rationality, or religion. The aim to prohibit sex determination was meant to cover both men and women. US courts including the US Supreme Court have approvingly referred to the EEOC guidelines while deciding complaints of discrimination on the ground of sex under Title VII. The

406 Thomas R. R. Cobb, An Inquiry into the Law of Negro Slavery in the United States of America (1858)

www.supremoamicus.org
EEOC guidelines have been quoted with approval even by courts and human rights tribunals in Canada. The Equal Employment Opportunity Commission (EEOC) is the federal agency responsible for establishing and administering guidelines and regulation addressing sexual harassment by way of Title-VII of the Civil Rights Act. Additionally, several states have enacted the Fair Employment Practice (FEP) laws, which address and regulate sexual harassment on a state level. However, most of these statutes failed to provide for recovery of personal injury damages in a sexual harassment claim. In 1980 the EEOC issued a regulation that defined sexual harassment and stated it as a form of sex discrimination prohibited by Civil Rights Act of 1964. In the case of Meritor Savings Bank v Vinson (1986)\(^{407}\), the Supreme Court first recognized sexual harassment as a violation of title VII, and established the standard for analyzing the whether the conduct was welcome and the levels of employer liability, and that speech of conduct in itself can create a hostile environment. This landmark decision enabled victims of sexual harassment to sue their employers for monetary damages. In 1991 Jenson v Eveleth Taconite co.\(^{408}\) became the first sexual harassment case to be given class action status thus paving the way for others. In Burlington Industries, Inc. v. Ellerth\(^{409}\), and Faragher v. City of Boca Raton\(^{410}\), the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability set forth in these decisions is premised on two principles: 1) an employer is responsible for the acts of its supervisors, and 2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment. In order to accommodate these principles, the Court held that an employer is always liable for a supervisor’s harassment if it culminates in a tangible employment action.

B. UNITED KINGDOM:

The idea of Sexual harassment in the UK, is not specifically defined. One of the most prominent laws that prevail in the UK, is the Sex Determination Act, 1975, which prohibits an act of Sexual Harassment. It is held that sexual harassment is a conduct prohibited by Sex Determination Act, 1975. However, the term ‘sexual harassment’ is not found in the 1975 Act; nor is such conduct expressly dealt with therein. The 1975 Act is essentially designed to deal with the mischief of discrimination “on the ground of sex”, i.e. Gender specific determination. Cases of sexual harassment has been defined by the European Union as “where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.” The Courts have defined ‘sexual harassment’ in cases arising out of the Sex Determination Act, 1975. They have held that a “detriment” means a disadvantage suffered by the complainant and encompasses both tangible economic loss (quid pro quo sexual harassment) and deterioration of the working environment to
the point where harassment, being severe or pervasive, detrimentally effects the complainant (hostile working environment sexual harassment). \(^{411}\)

Sexual harassment can be extremely damaging to the victim, both in relating to the loss of dignity, defamation, and mental stress, but also with regard to employment and income opportunities. In particular, sexual harassment of women in workplaces can be particularly damaging with regard to achieving goals of gender equality, with a poll showing that more than half of women in the United Kingdom has suffered sexual harassment in workplace.

C. INDIA:

When an employee felt violated it should be the responsibility of the superiors to look into the matter. However, it becomes an unfortunate when they themselves turn into the harasser. In a country like India, it is an accepted act to remain silent or voluntarily choose to resign, in order to maintain a “good image” in front of our unfortunately large, judgmental society. It is believed in India that a women who is harassed in the workplace should choose to give up her job and be tied into matrimony at the earliest convenience. Further on, the victims family is cautious into not letting their other female, children or relative work in the future, an end up aiming for marriage rather than success in the field of work. Indian families also vehemently believe that it is best to conceal and act of harassment in the workplace, due to the sole reason that concealment would negate a negative reaction of shaming the victim for being, or attempting to be independent and self satisfied.

Though it takes pride in being one of the greatest cultures of the world, India ceases to act on its own. It is the trend of every Indian government and our ministers to repeatedly and consistently demean women. India believes itself to be a culture where women are confines to the four walls of their homes and are highly discourages from working outside and creating a career for themselves. This archaic mentality of Indian men and unfortunately women is an indication of a backward and patriarchal form of society. It is unfortunate that Indians choose to shame the victim over shaming the culprits, in cases of sexual harassment, rape, and other forms of violence against women. In the recent past it has been a common trend that a women, due to the excessively unfortunate situations of rape and unwelcome sexual advances, has been barred from leaving sanity of her household in the workplace due to the sole reason. The idea of women vulnerable and the idea of having to save and protect them leads to the suppression of women.

According to a survey conducted by the Indian National Bar Association in 2017, a study with 6,047 respondents, and an unfortunate 70% of women claimed that they did not report sexual harassment by their superiors because they feared the repercussion. Between 2014-2015 the National Crime Records Bureau claims a

more than double case of sexual within the office premises from 57 to 119. There has also been a 51% rise in sexual harassment cases at other places related to work- from 469 in 2014 to 714 in 2015. in the year before, between 2013-2014 National Commission for Women reported a 35% increase in complaints from 249-336, according to a December 2014 reply filled in the Lok Sabha.

SEXUAL HARASSMENT LAWS IN INDIA

The inception of Sexual Harassment of Women in the Workplace, dates back to the landmark judgment of Vishakha and others v. State of Rajasthan 412, where the Supreme Court of India had laid down guidelines, due to the lack of any presence of laws prohibiting sexual harassment of women at workplace, in the year 1997. These guidelines provided a standard for events of sexual harassment of women at the workplace, until a legislation that dealt with the same was implemented. Prior to 1997, a woman facing sexual harassment in the workplace, had to lodge a complaint under sec 354 of Indian Penal Code,1860, and the punishment of the accused was provided under sec 509. Unfortunately, and rather surprisingly, it took the legislative 16 years, to enact and frame the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, and subsequently suspended the pre-existing Vishakha guidelines. Although it took sixteen years for the legislation to come up with a law that prevented and addressed the issue of sexual harassment of women in the Workplace. The act passed was indeed an extensively well drafted piece of legislation. According to the Press Information Bureau of the Government of India:

“ The Act will ensure that women are protected against sexual harassment at all the work places, be it in public or private. This will contribute to the realisation of their right to gender equality, life and liberty and equality in working conditions everywhere. The sense of security at the workplace will improve woman’s participation in work, resulting in their economic empowerment and inclusive growth.”

The legislative progress of this act has been a lengthy one. The bill was first introduced in 2007 by women and child development minister, Krishna Tirath, and was approved by the union cabinet in January 2010. It reached the Lok Sabha in December 2010 and was referred to the parliamentary standing committee on human resource development. On 30th November 2011, the committee published its report. In may 2012 the union cabinet approved an amendment to include domestic workers. The amended bill was finally passed by the Lok Sabha on September 3rd 2012. Further, the Rajya Sabha passed the bill on February 26th 2013. The president of India assented to the bill and was published in the gazette of India, Extraordinary part-II, section- 1 dated 23rd April 2013 as act number 14 of 2013.

412(1997) 6 SCC241

Salient Features of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013:

The act used a definition of sexual harassment which finds its inception in the original definition laid down by the Supreme Court of India in the Vishakha case. The act, defines the concept of sexual harassment on workplace and creates a suitable mechanism for the redressal of the complaint. Interestingly enough, it also provides a safeguard against malicious charges. It covers the concept Quid Pro Harassment and Hostile work environment as two forms of sexual harassment, provide that it occurs in connection with an act or behavior leading to sexual harassment. Furthermore, it has widened the definition of an “aggrieved women”, as well as “workplace”. It further mandates the implementation of an internal complaint committee (ICC) and a local complaint committee(LCC), and requires the committee to complete the preliminary inquiry within a time frame of 90 days. On very the completion of the said inquiry, it is mandatory for the report to be sent to the employer or the district officer as the case may be, who in turn is mandated by the act to take action based on the report within a period of 60 days. The act also promises confidentiality and lays down a penalty of Rs. 5,000 on the person who fails to maintain confidentiality. Furthermore, employer is mandated to constitute an internal complaint committee at every office or branch that constitutes of 10 or more employees. It also requires the district officer to constitute a local compliant committee in each district, and if necessary even at the block level. A non-compliance of the said rules would lead to the imposition of a fine of upto Rs 50,000. Repeatedly violating the provisions, may lead to higher penalties and the cancellation of license of registration to conduct business. The government reserves the authority to order any officer to inspect the workplace and records related to sexual harassment in any organization.

Recommendations for the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013:

1. The definition of ‘Workplace’ as per sec2(o) of the Sexual Harassment in the Workplace (Prevention, Prohibition and Redressal) Act, 2013 should include and accommodate women in the armed forces and police, government institutions , all public bodies and panchayats, all establishment covered under the Factories act, 1948 and the Industrial Disputes Act, 1947 and all the employees on private sector, agricultural workers and women students of schools and educational institution.

2. The act fails to establish who should take the responsibility if the organization fails to have Internal Complaint Committee. There is a need for better definition and structure of with regard to Sexual Harassment in the Workplace (Prevention, Prohibition and Redressal) Act, 2013.

3. The Sexual Harassment in the Workplace (Prevention, Prohibition and Redressal) Act, 2013 also fails to cover a situation for the benefit of the past employees who faced
sexual harassment at workplace.

4. Section 9(1) of Sexual Harassment in the Workplace (Prevention, Prohibition and Redressal) Act, 2013 provide a limitation of three months for the compliant to be made. However, it is essential to understand that such a situation is not always possible.

5. The act fails to include domestic workers and agricultural labours and fails to understand that most of them are unaware of the laws provided to them due to illiteracy. It is an evident fact that Sexual Harassment in the Workplace (Prevention, Prohibition and Redressal) Act, 2013 is urban centric and this must be amended.

6. Though there is a punishment for the unimplementation of Internal Complaints Committee (ICC) there fails to be a set punishment for the unimplementation for the Local Complaints Committee (LCC). Thereby, freeing the state from any form of punishment or liability. Such a discrimination between private and government official should be highly discouraged as it promotes negligence amongst government officials.

7. The act fails to include men. Though, it may seem bizarre most people, it is essential to understand that even men are subjected to sexual harassment in the workplace. The act should try to incorporate certain section for the benefit of the male victim.

8. Due to a lack of witness protection and societal shaming, witnesses choose to remain in the shadows rather than provide testimonies infront of concerned authorities.

There should be a scheme or law to ensure the confidentiality of the he testifying and come forward with their grievances.

9. There should be awareness in the form of events, or social media communication, as to to what constitutes sexual harassment in the workplace. Such sensitization programme should primarily focus rural areas and members of the lowest stratas of societies.

10. It is important and essential to encourage women to share their grievances rather than conceal it. The act of shaming the victim should be aimed at eradication, as it acts as a barrier in the communications between the aggrieved party and the remedy she deserves.

CONCLUSION

Throughout history, Patriarchy has played a strongly significant role in most countries of the world. As a result of this practice, it is been difficult to determine the intensity and grievousness of what we know today of sexual harassment. With evolve in time, women were provided with a chance to look beyond their household chores, and enter the workforce. This resulted in an entirely different and unfortunate practice of sexual harassment in workplace.

Undoubtedly, prior to the Sexual Harassment of Women at Workplace (Prohibition, Protection and Redressal), 2013, the were guidelines laid down to deal with the incidents of sexual harassment of women at the workplace. However, with passing time, the need for a strong legislation was realized and the said act was
enacted in 2013. However, in a country like India, it has been difficult to implement the laws that are designed to curb sexual harassment at workplace. On of the most primary reasons behind the inevitable unfortunate lack of protective measures for the victim. It is the common trend for Indian victims to either conceal, the act or fear the repercussions of speaking up. Such an attitude of victimizing the victim has lead to lesser number of reported cases than expected.

The Sexual Harassment of Women at Workplace (Prohibition, Protection and Redressal), 2013, though a brilliantly drafted act has failed to establish itself as law enforcement agencies and the expected implementers and the targeted audience of the victim, have failed to understand the reason behind the very implementation of this act. Victims have often been mistreated and further been the victims of malpractice, thereby failing to reap benefits from the said act. There is also a significant amount of ignorance amongst those who are expected to know about the said act. Several factors have played a major role in the failure of the implementation of this act. It would be unfair and unjust to blame anyone entity, when it is the failure of a collective bunch.

Sexual Harassment is an extremely damaging and traumatizing to the victim, both in relation to loss of dignity, defamation and mental stress, and also with regard to the loss of employment and income opportunities. Particularly, sexual harassment of women in the workplace, is damaging to the aim of achieving a gender equal society.

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STATEHOOD OF PALESTINE

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INTRODUCTION

The recognition of Palestine as an independent state is a notion that is popular in the international sphere. While most states have already recognized the state as such, Israel and United states continue to deny the state this critical status. Over time, various measures have been undertaken by the country as an individual to restore its sovereignty. Since the fall of the Ottoman Empire, Palestine has struggled to attain recognition as a state. Notably, these efforts have been fruitful and currently, more than one hundred states already recognize it as a state. In addition, a significant number of states share diplomatic relations with it.

Notably, the country has satisfied the prerequisite qualifications that were set since historical times. It cannot be disputed that it has faced various challenges in an effort to acquire the status but nonetheless, it can be contended that it has fully satisfied the required provisions. Furthermore, it also fully satisfies the theoretical provisions that basically accredit the qualifications. It is against this background that this research paper seeks to acknowledge the fact that Palestine is a sovereign and independent state. In order to enhance a harmonic consideration, this paper provides an explicit analysis of various arguments that have been put forward by credible sources in affirmation of this fact. In addition, it reviews the theoretical bases that support this status.
Palestine has struggled with its state recognition since independence. While most states affirm that it really is an independent state and therefore should be accorded the necessary recognition, some are reluctant while the US and Israel completely disregards the position. In his review, Hillgruber\textsuperscript{414} indicates that Palestine attained its independence in 1988, amid controversies and opposition from a small percentage of the global nations. Further, Boyle\textsuperscript{415} postulates that the four traditional elements of defined territory, government, permanent population and the ability to relate in various ways and levels with other states need to be at the center stage of statehood. These are the elemental qualifications that were provided for by the Montevideo Convention\textsuperscript{416} of 1933. Notably, Palestine has satisfied these provisions and therefore qualifies to be a state.

With regard to the notion of a defined territory, Boyle\textsuperscript{417} argues that this does not need to be determinate and fixed. Indeed, this has applied to other states like Egypt and Israel that are fully recognized as independent states by the international law, yet there territories are not yet fully determined. Nevertheless, Cassese\textsuperscript{418} ascertains that control of a territory is imperative for state's sovereignty. Essentially, this gives the particular state the power to take various legal as well as factual measures within the territory and prohibit external governments from exercising such power within the same territory without its consent. Accordingly, Stefan ascertains that Palestinian territorial land mask encompass the Gaza strip and the West bank. In addition, it has various cities that include Bethlehem, Hebron, Ramallah, Nablus and Gaza. Furthermore, the international law does not require that a state delineates its borders prior to attainment of statehood. The borders are negotiated within the neighboring states, just like other peace negotiations.

The need for a government is also considered a prerequisite for statehood. Indeed, governance is critical for effective functioning of a state. In particular, governments maintain legal order within the state and enhance constitutional autonomy of a given state. On a larger scale, it enables the state to act autonomously and avoid entire dependence on other states for critical decision making. In her analysis, Martha\textsuperscript{419} affirms that Palestine fully satisfies this provision. In this respect, it is worth acknowledging that by assuming critical governmental roles in 1994, the Yasser Arafat's leadership went a long way in providing Palestine with a definite form of governance. In addition, Stefan indicates that presently, the PLO is collaborating with

\textsuperscript{414}Hillgruber, C. ACCORDING STATEHOOD TO NEW STATES. International Law, 9 (1993), 490-510
\textsuperscript{415}Boyle, F. PALESTINE & INTERNATIONAL LAW. Clarity Press, UK, 2003
\textsuperscript{416}Montevideo Convention, 1933; Also see, https://www.ilsa.org/jessup/jessup15/Montevideo%20Convention.pdf and http://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml
\textsuperscript{417}see, Boyle, F. STATE OF PALESTINE. http://www.ejil.org/pdfs/1/1/1136.pdf
\textsuperscript{419}Martha, P. RECOGNITION OF GOVERNMENTS. American Journal of International Law, 76(1983), 30-51.
the Intifadah to provide provisional governance. Indeed, they are providing critical social services for the Palestinian populace as well as assuming various administrative functions. Of great reference in this regard is the provision of the post of the prime minister since 2003. The office of the PM in Palestine has significant powers that are recognized and appreciated both on the local and international scale.

Permanent population is also considered critical in the existence of a state. The determination of such a population is undertaken by individual states and governed by the internal law of such states. In his study, John\textsuperscript{420} ascertains that Palestine satisfies this criterion as it can readily identify a population that has resided within its territory since time immemorial. It is argued that this population comprises the original inhabitants of the region. Furthermore, the population can be easily distinguished due to the fact that they are fixed and determinate. It is in this consideration that it is argued that since they have often possessed the land, they need to be allowed create a state. Statistical evidence indicates that the estimated Palestinian population stands at seven million, with three million inhabitants living in Gaza strip and West Bank. The remaining four million were supposedly forced out of their traditional territory and in some cases forced to become Israelis. This is attributable to the implications of involuntary inclusion. Irrespective of their geographic location, it is contended that a Palestinians across the globe enjoy their national sovereignty.

Furthermore, cultural studies ascertain that the inhabitants of Palestine share similar cultural and traditional practices. These are exemplified through a single language that is spoken, similar mode of dressing as well as food consumed. Notably, these are core indicators of a shared culture, ethic and tradition. Furthermore, they practice a similar mode of production that differs in different ways from that of Israelites. Coupled with the fact that the population inhabits a defined geographic area, it can be ascertained that indeed, they are original inhabitants of the region. Therefore, they need to be accorded statehood that would then boost their determination and enable them to pursue and improve their social and economic development.

Finally, the ability to enter into various relations with other nations is also a criterion for statehood. According to Crawford\textsuperscript{421}, this is a clear indication of independence. In this regard, statistical records ascertains that currently, 114 states recognize Palestine as an independent state. In addition, Boyle notes that Palestine is accorded state recognition by all the neighbouring states apart from Israel. Furthermore, the Resolution 43/177\textsuperscript{422} that was adopted by the UN General Assembly in 1988 recognizes Palestine as an Independent State. The Resolution accorded it the critical position of observer state within the United Nations Organization. It is indicated that 104 states voted in favour of


\textsuperscript{422}A/RES/43/117of 8 December 1988.
the resolution, forty four abstained and only two rejected. According to Malcolm, this strong vote was a clear indication that Palestine was regarded by a great percentage of the nations as a state. In addition, it is posited that the position of the international community in this respect concurred with the majority of states because of the lack of opposition, as was in the case of Turkish Republic of Northern Cyprus. Furthermore, Boyle demonstrates that this recognition by the general assembly of Palestine as a state is definitive, constitutive and universally determinative.

The ability of Palestine to relate with other nations is also exemplified by its being party to a host of treaties even before its independence. For instance, Quigley ascertains that this state was party to the multilateral treaty in 1926 that established an agency address the problem of locusts. In this, it assumed the position of a contracting state. Another agreement that it was party to was the Reciprocal Enforcement of Judgments. Of great reference was its agreement about its post office and that of Great Britain. Notably, this was registered by the League of Nations and was therefore legal and recognized. In this consideration therefore, it can be contended that Palestine maintained viable relations with other countries in the capacity of a sovereign state.

In addition to the traditional criterion, Evans affirms that Palestine satisfies the emergent criteria that reflects inherent global dynamism. Indeed, it is notable that additional criteria has been proposed over time and is widely recognized as being a prerequisite for statehood. Despite global dynamism, Evans asserts that this condition is attributable to the varying positions that individual states have increasingly assumed in the recent past. The need to incorporate these concerns in the traditional criterion has prompted the international community to accord the same equal consideration.

To begin with, states agree that in order to be accorded recognition, a state should not arise out of illegality. In this respect, it is certain that Palestine qualifies as a state. Ti-Chang points out that as back as in 1919; Palestine was provisionally recognized by the League of Nations as a nation. He asserts that the conservative clause in article 80 (1) found in the UN Charter effects the continuation of this recognition.

In addition, it is widely contended that the state needs to be willing as well as able to abide by the laws of the international community for it to be accorded statehood. This provision according to Ti-Chang is also upheld by international organizations and policy of states. Again, the position of Palestine in this respect is affirmative. In particular, its commitment to the peace process in the Middle East is in line with this provision. The provisional government asserted that it would employ negotiation in resolving outstanding concerns of the

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In a letter sent to the Prime Minister in 1994, the chairman asserted that Palestine would not assume a particular status while negotiations regarding the Gaza strip are pending.

Further, the emergent criteria require an assessment of sustainability and viability to ensure that the given state would continue to uphold the criteria after it has been accorded statehood. Palestine in this regard is considered a viable state and therefore its recognition needs to be upheld. Notably, since the peace process began in 1993, most of the central state institutions in the region have been established on behalf of Palestine. In addition, the state controls the Gaza strip and a portion of the West Bank. In addition, it has vital state institutions like the police, the president, government and a judicial system. Of great importance is the fact that its passport is recognized by twenty nine countries.

In addition, legal studies indicate that a persons need to have a legal right to self-determination. This right then gives them a leeway to freely pursue their cultural, economic and/or social development as well as determine their political wellbeing. Notably, this has been a bone of contention in the international arena. However, Palestinians and states that recognize the as an independent state perceive this a critical aspiration. This solid determination according to Collin has made Palestine to be recognized as a state by the international community irrespective of its failure to control its territory.

The criterion of effective control has in the recent past raised various concerns as most states maintained that Palestine was unable to exercise this. This was because of the realization that a great percentage of the state was under military occupation of another state. Currently, Dixon and McCorquadale affirm that the executive and legislature of Palestine that was elected democratically and have the approval of the international community has countered the situation. This has also been aided by the presence of an effective judicial system, ministries and substantial security forces. Indeed, 'effective control' has once more been restored in a significant percentage of the territory that is presently occupied by the Palestinians. Notably, these efforts have been recognized by various states like US, irrespective of the denial to extend diplomatic relations to Palestine.

A BRIEF HISTORY OF PALESTINIAN STATEHOOD

Although they have not yet been given full-membership in the U.N. (and would not have gained membership through Abbas’ proposal), the body has affirmed Palestinian statehood numerous times, most recently with a 2012’s UN General Assembly (UNGA) resolution 67/19\footnote{A/RES/67/19 of 4 December 2012}, which passed with 138 votes in favor, 9 votes opposed and 41 abstentions, recognizing Palestine as a non-member observer state. This vote built on Palestine’s 1988 Declaration of Independence, which was recognized by UNGA resolution 43/117\footnote{Infra 9}, mandating a mutual recognition of sovereignty between Israel and Palestine.
(The two sides formally achieved this milestone in 1993). The 1989 resolution also called on Israel to vacate all territories captured in 1967, and return to the borders detailed in the 1947 Partition Plan for Palestine. It was approved with 104 in favor, 2 against, and 36 abstentions.

1989’s measure reiterated the terms of 1967’s UNSC resolution 242 which demanded Israel withdraw from the lands it seizing in the Six-Day War and guarantee Palestine access to the seas and waterways—which Israel’s ongoing blockade of Gaza flagrantly violates.

Commensurate with these resolutions, 135 of the UN’s 193 member states (70%) already recognize Palestine; the only holdouts are Canada, Australia, the United States and most of Western Europe—although Europeans are increasingly coming around as well. The international consensus is beyond doubt, the UN statutes are similarly clear: Palestine is a state.

In contrast to this overwhelming support for Palestinian statehood, the resolutions partitioning the British mandate into two countries, and later recognizing Israel, barely achieved the required two-thirds threshold in the General Assembly.

UNGA resolution 181 (II) which divided the British mandate was narrowly approved with 33 voting in favor, 13 opposed and 10 abstentions. UNGA resolution 273 which granted Israel membership in the United Nations similarly squeaked by with 37 in favor, 12 opposed, and 9 abstaining—albeit under the conditions that it return all territories not accorded them by UNGA resolution 181 (II), provide the right to return for Palestinians displaced by the war, guarantee equal rights to all citizens regardless of race or religion and abide by subsequent U.N. resolutions. Needless to say Israel has and continues to unapologetically violate every single one of these precepts, thereby voiding the terms of their membership in United Nations.

Moreover, unlike the votes recognizing Palestine, the resolutions establishing Israel were passed prior to de-colonization, when the Assembly was about one-fourth of its current size, comprised primarily of the United States, Western Europe and their client states in Latin America. This makes the notion that the vote represented an international will or consensus extremely problematic—even if the measures had won by large majorities instead of their historical reality of barely making it through.

Neither resolution could have passed if the rest of the world had a say. Post-decolonization Israel has emerged as the world’s #1 violator of U.N. resolutions—be they from the General Assembly or even the Security Council: pursuing nuclear weapons, illegally seizing land and resources, carrying out devastating attacks on civilian populations and infrastructure, as well as institutionalizing discrimination of Palestinians both within its legal borders and in the occupied territories.

But despite this contemptuous disregard for international rules and norms, the United

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429 S/RES/242 of 22 November 1967
430 A/RES/181(II) of 29 November 1947
Nations has been prevented from any kind of substantive response by the U.S. veto—exercised 41 times on Israel’s behalf since 1972.

LEGAL STATUS OF THE STATE OF PALESTINE
The legal status of Palestine has raised various concerns at different levels in the past. Nevertheless, it is certain that most states recognize Palestine as an independent state. In addition, the decisions made by the national and international tribunals affirm Palestine as a state. In this respect, Hersch cites the principle of succession of states to ‘A’ Mandates as prescribed by the Treaty of Lausanne431. Also, the relevant post war treaties widely concur that Palestine was actually a newly created state. In addition, the permanent Court of International Justice recognized the state of Palestine during its judgment regarding concessions provided by Ottoman authorities. In this respect, it is noteworthy that the courts of Britain and Palestine arrived at a decision that the government of Palestine was the successor-state and therefore needed to be accorded the properties listed on the Ottoman civil list.

The issue of state succession has also contributed significantly to the recognition of Palestine as a state. In this respect, Hersch 432 affirms that the legal evaluation that was undertaken by the international court of justice indicated that the agreement of the League of Nations provisionally recognized Palestinians as a nation. According to the court, the distinct guarantee concerning the access to holy sites and freedom of movement that were contained in the Berlin treaty of 1878 were preserved under Palestinian mandate. Furthermore, the court required that these be acknowledged accordingly in a declaration and embodied in basic laws and constitutions of affected states. Additionally, the partition plans had provisions that supposedly bound new states to various international conventions and agreements. At this point in time, Cattanascertains that Palestine had become party to these and even held them accountable for its financial responsibilities.

With regard to international recognition, Pappe 433 affirms that Palestine is recognized by the United Nations as a sovereign state. Indeed, the Palestinians are duly recognized as the permanent inhabitants of the Palestine territory, as well as East Jerusalem. The General Assembly Resolution 64/185 of 2009 that was adopted had 165 in favour, 7 abstentions and 8 against it. In addition, Palestine was accorded a right to sovereignty over natural resources. Notably, this is inclined in the international law and it is an essential and vital component of state sovereignty. In this consideration therefore, it can be argued that legally, Palestine is indeed a sovereign state.

Legal studies also indicate that Palestine maintains an elevated niche in the international arena. To begin with, it has a special status in the United Nations. Despite the resolution 43/177 of the General

431 Treaty of Lausanne in 1923. Also See https://ecf.org.il/issues/issue/1094
433 Pappe, I. PALESTINE. Cambridge, UK 2004
Assembly of 1988\textsuperscript{434} that accorded Palestine an observer status, the new resolution 52/250 conferred Palestine more rights and privileges. Of great reference in this regard was the right to actively participate in the debate that was held at the beginning of each session of the General Assembly. In addition, Palestine was given the right to raise and discuss issues that affected the entire Middle East during the General assembly sessions.

In addition, Jennings and Watts indicate that despite the opposition from Israel and United Stated, Palestine has been in position to obtain membership in renowned international organizations such as the World Health Organizations and UNESCO. This is a clear demonstration of its ability to discharge critical conventional and international obligations as prescribed by the international law. In addition, it indicates that Palestine has the ability to initiate and maintain viable international relations with other countries. This is fundamental at the core of the international law.

With regard to the customary international law, Brownie \textsuperscript{435} indicates that the Palestinian Territories that were occupied since 1967, with an exception of the expanded East Jerusalem, are not contested. Despite the fact that the state of Israel occupies a part of Palestine, Palestine remains a sovereign state. This is due to the fact that the resultant conflict between Israel and Palestine has increasingly gained international recognition and viable measures are being undertaken by the international government to resolve the same.

Indeed, the 1917 Balfour Declaration deprived Palestine its sovereignty. To begin with, it is certain that this declaration did not reflect the independence pledges that were accorded to the Arabs prior to and after its issuance. In addition, the mere prove that Palestine was collaborating with an institution that sought to settle non Palestinians in their original land imply that the institution undermined the autonomy and sovereignty of Palestine. In this respect, ICJ argues that this move ignored the interests of the Palestinians. Furthermore, it is posited that it violated its fundamental rights. In addition, the declaration in itself was controversial. Essentially, it can be contended that the British committed the land of Palestine at a time when it was still under the administration of Ottoman Empire. This implies that the natives of Palestine were lowly regarded and that their opinions in this declaration were not considered important. In this consideration, it can be contended that the Balfour Declaration did deprive Palestine of its sovereignty.

Quigley\textsuperscript{436} argues that the declaration of statehood in 1988 by the Palestine National Council is a continuation rather than beginning of statehood. This contention seeks to strengthen Palestine's claim for its statehood. This presumption is true, especially considering the fact that Palestine enjoyed state sovereignty since time immemorial. In addition, since it was

\begin{thebibliography}{10}
\bibitem{434}Infra 9
\bibitem{436}Infra 11
\end{thebibliography}
inclined in the Ottoman Empire, it should be acknowledged that Palestine is a succession state that should be accorded sovereignty accordingly.

Of great reference is the fact that in the preceding years, the nation engaged in state activities and related with other states at different levels in a sustainable manner. In addition, the self determination that characterizes the Palestinians needs to be furthered in order to enhance its sovereignty. Past efforts indicate that the natives have the will and determination to attain this desirable status. Therefore, rather than condemn and discourage these activities, the international community needs to help it restore its sovereignty. It is because Palestine's sovereignty was compromised by the same international community whose decisions and actions contributed significantly to the fall of the Ottoman Empire.

The continuation of the sovereignty of the Palestinians is also reflected through continued citizenship. Quigley argues that since they lost the citizenship of the Ottoman Empire after its fall, it follows that there needed to be a transition to another form of citizenship. In this regard, the emergent Palestine offers the best option because of the fact that its territory was a constituent of Ottoman Empire. In this consideration, it can be argued that the statehood of Palestine is indeed justified. Citizenship is critical to statehood as it is an indication of a permanent population. In addition, citizenship enables the nation to be recognized by the international community because of the implications of passports and other forms of identification. At this juncture, it can be affirmed that since Palestinians have their own citizenship, they should be accorded statehood.

Additionally, it can be argued that the 1947 UN partition plan (Resolution 181 (II)) played an instrumental role in separating Palestine from Israel. Essentially, this resolution proposed the partitioning of Palestine in to two independent states. Notably, one state that was envisaged in the partitioning plan declared its independence in 1948 as Israel. After this, it engaged in to war and as a result, it expanded its territory and ultimately occupied seventy seven percent of the remaining Palestine. Legal studies affirm that close to half of the indigenous populations were either expelled or fled their original homes. The remaining thirty three percent of the territory that was initially assigned to the other states was occupied by Jordan and Egypt.

The 1967 war later gave Israel a chance to occupy the remaining parts of Palestine that were supposedly under Egypt and Jordan. These are the present day West Bank and Gaza Strip. In his review, Brownie indicates that again, this war led to an increased exodus of the Palestinians from their original land. However, the Security Council resolution 242 of 1967 called upon Israel to withdraw from the West Bank and Gaza strip regions that it had occupied in the latter conflict. In 1974, studies indicate that the General Assembly reinforced the inalienable rights of the Palestinian population. Once again, Palestine had a right to self-determination, sovereignty, and national

438 Supra 17
439 Supra 16
independence and could comfortably return to their original lands. After a struggle through time, Palestine finally declared its independence in 1988.

Following the above strongly pronounced developments, it can be ascertained that Palestine's claim of statehood is indeed justified. Seemingly, the emergent opposing views are geared towards denying the country its rightful position. Since the fall of the Ottoman Empire, Palestine maintained its independence all through. Notably, Israel is the one that tampered with the Palestinian territory. The implications of the same to the Palestine population are massive. At this point in time, it can be proposed that rather than undermining its efforts, the international community needs to take practical measures to help Palestine regain its position as a state.

The legal status of Palestine can be considered to be sui generis because of the fact that the relative mandate is not geared towards preparing the populace for self-governance; rather it seeks to maintain the situation as it is until Palestine has amassed enough population to attain the desirable status through self-determination.

THEORETICAL AND CONCEPTUAL CONSTRUCT

The constitutive theory presumes a state to be one that is accorded recognition by other states. Fundamentally, international law does not propose that a given state does not exist if it is not recognized; rather it notices it before its recognition. The constitutive theory asserts that through recognition, a state can become an international entity that is bound by international law. Palestine has been accorded this recognition by over one hundred states. However, Crawford argues that despite this, Palestine does not command quasi unanimous support that is a prerequisite for establishment of a certain rule of international law. According to him, this is a prerequisite for complete recognition of a state.

Emerging theories have also rejected the constitutive theory on the premise that it enhances subjectivity with regard to the concept of a state. Of particular concern is the fact that recognition at any level is not legally recognized by the international law that governs third states. This theory also gives powers to the states that do not recognize the particular state as one to refrain from giving it such treatment. This partly explains the reactions of US and Israel towards Palestine. Notably, the constitutive theory asserts that recognition supplemen the provisions of the Montevideo Convention in instances where a state does not meet the same. However, this does not apply to Palestine as it meets the required qualifications that are prescribed by the Montevideo convention.

The declarative theory on the other hand perceives a state to be one if it meets particular structural criteria, irrespective of the fact that it could be accorded recognition by other states. Essential, the provisions of the Montevideo convention provide the basis for these criteria. In addition, it is worth noting that the modern criteria, as discussed in the preceding section have been widely employed in this respect. Article

440/Infra 3

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three of the Montevideo convention\textsuperscript{441} states that statehood is not dependent on recognition by other states. Other provisions that qualify a state to be one are also put forward by the European Economic Community. According to this, a state is fundamentally defined by having a population, territory and political authority. Under this consideration, it can not be disputed that Palestine qualifies to statehood because of the fact that it satisfies the provisions set forth by various institutions.

\textbf{Concept of state:-}

It is significant that though some sort of political organization has existed since ancient times, such as Greek city-state and the Roman empire, yet the concept of the ‘state’ as such is comparatively modern. The contemporary concept of the state owes its origin to Machiavelli (1469-1527) who expressed this idea in early 16\textsuperscript{th} century as ‘the power which has authority over men’.\textsuperscript{442}

Geoffrey K. Roberts (\textit{A Dictionary of Political Analysis; 1971}) gave the definition of State as-

“A territorial area in which a population is governed by a set of political authorities, and which successfully claims the compliance of the citizenry for its laws, and is able to secure such compliance by its monopolistic control of legitimate force.”

The elements which are relevant for a state to be called a state are-

- Population: the state is a human institution. The population is there for an essential element of the state, which requires the condition of individual’s interdependence, consciousness of common interest, and general regard for a set of common rules of behavior and institutions.
- Territory: territory is another essential element of a state. The state must possess a territory where its authority is accepted without dispute or challenge. A state comes into existence only when its population is settled in a fixed territory.
- Government: it is another essential element of the state. It is the agency or machinery through which common policies are determined and by which common affairs are regulated and common interests promoted. Government is responsible for maintenance of law and order and for the provision of common services like- defense, foreign relations, roads, bridges, communication system, health and education, etc.
- Sovereignty: it denotes the supreme or the ultimate power of the state to make laws or take political decisions. It is the final authority of the state over its population and its territory.it is by the virtue of its sovereignty that a state declares- through the agency of the government- its laws and decisions and issues, commands which are binding on the all citizens claiming obedience thereto, and punishes the offenders. It is because of the sovereignty that the state deals independently with the other state.

A state continues to exist so long as it is armed with sovereignty. If a state loses its sovereignty because of internal revolt or external aggression, the result disappearance of the state as such. Some writers regard ‘international recognition’ as an essential

\textsuperscript{441}Id.

\textsuperscript{442}O.P. GAUBA, \textit{AN INTRODUCTION TO POLITICAL THEORY} (5\textsuperscript{th}ed; pg. no.-133)
element of state. This denotes formal recognition of the sovereignty of the state over a given territory and population, by other states.

CONCLUSION
To sum up it is certain that Palestine qualifies for statehood and therefore, it needs to be accorded this right. As it has come out from the review, Palestine satisfies the criteria that have been put forth by the customary and international law. Indeed, it has a clear territory, permanent populace, a government and has the ability to relate well with other nations at different levels. In addition, it is notable that since historical times, Palestine has continuously been accorded this status. It is for this reason that some of the authors perceive its 1988 declaration as a continuation of statehood. Furthermore, the efforts undertaken by Palestine to satisfy the emergent criteria have been enormous. To date, it can be contended that the state satisfies all the provisions of both the modern and traditional criteria. Legally, it is also certain that courts and international organizations perceive Palestine as a sovereign state.

With regard to the theoretical construct, it is clear that Palestine qualifies to statehood due to the fact that it fully satisfies the requirements proposed by the vital statehood recognition theories. Indeed, the provisions of both the declarative and constitutive theories have been satisfied by Palestine. Considering the influence of the two theories to the customary and international law, it is argued that satisfying its requirements is imperative. At this juncture, it is important to acknowledge that the Palestine problem in this respect has been perpetuated by the indifference that the US and Israel accords the state. The fact that the nation has been enjoying this status since 1919 gives it a right to be fully recognized as a state by the entire globe. It is in this consideration that this paper concludes by affirming that Palestine is indeed a state and there is an urgent need to recognize it as such. This would be instrumental in helping it to pursue its social economic and cultural development accordingly.

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STATELESSNESS AND NATIONALITY: A PRIMITIVE PUNISHMENT FOR INVISIBLE POPULATION

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From: DME, Noida

ABSTRACT
The predicament of statelessness is being faced by more the 10 million people around the globe. As a result of which they frequently aren’t permitted to go to school or any institution, see a specialist, hold a job, cast their vote, open a financial account, purchase a house or even get married. In short, complete social exclusion. The need of international action was seen post-second world war, population growth, migration, trafficking, gender inequality and ethnocentric policies and climate change.

Forthwith, 1954 convention remained the sole and imperative authority in addressing the issue of statelessness. There is no region in the world which is free from statelessness.
Though, not politically affirmed but scientifically certain. A setback in curbing this melancholy portrays the hollowness of international human rights.

The author intends to exhaustively highlight the entire plight, sufferings faced by such ousted and unseen population. And measures adopted by international community, authorities and natural bodies to curb such issue. The paper exhaustively deals with crucial international judicial pronouncement in regard to questionable ends of statelessness. The paper with its last objective attempts, to contribute towards futuristic, credible and reasonable measures which may be adopted by UN in order dilute the present helter-skelter situation.

“Citizenship is man’s basic right for it is nothing less than the right to have rights”

Key Words: Citizenship; Nationality; Statelessness; Quantification.

II. LIST OF ACRONYMS

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<tr>
<td>CTD</td>
<td>Common Technical Document</td>
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<td>FMR</td>
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<td>Inter-American Court of Human Rights</td>
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<td>International Court of Justice</td>
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<td>MEA</td>
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III. TABLE OF CASES

- Yean and Bosico Children v. The Dominican Republic Inter-American Court of Human Rights (IACrtHR), 8 September 2005.
- Kuric and Others v. Slovenia [GC], no. 26828/06, Judgment of 13 July 2010.

IV. INTRODUCTION

'For many of us, citizenship only really matters when we travel abroad, when the Olympic Games are on, or when we vote in national elections. We do not think about our citizenship on a daily basis. For others, citizenship is an ever present issue, and often an obstacle. Because recognition of nationality serves as a key to a host of other rights, such as education, healthcare, employment, and equality before the law, people without citizenship- those who are

---

'stateless'-are some of the most vulnerable in the world.\textsuperscript{444}

After completion 6 decades Human Rights are still one of the essential bedrock for human race and is duly weighted in the international community. After 1954 Convention on Status of Stateless Persons\textsuperscript{445} to which eighty states are party to it, 1961 Convention on Reduction of Statelessness and other international instrument it is now clear that granting nationality stems out of human rights. But in practice, statelessness remains un-discussed and with snow ball effect has turned into one of the most devastating anomaly. Being ‘invisible’ mean that it is difficult to quantify such stateless population. And a huge number is still being unreported and outside the purview of UNHCR or other UN agency.

The topic has been linked, through a common link that person is out to greater risk. Without issuance of citizenship a person cannot apply for travelling document or registration of marriage, limited healthcare, ownership of the property, freedom movement, holding of public offices, contesting election. Whereas, grant of citizenship has wider benefits both material and immaterial such as concrete identification proof, entrance to the labour market, political and personal change is of high considerable value. Having nationality is a gateway for rights to have rights and other fundamental rights.


\textsuperscript{445} Infra note 8.

V. EXECUTIVE SUMMARY

There are different shades and lenses to the problem of statelessness present around the world. The international community commits to prevent statelessness is firm and evident from the Universal Declaration of Human Rights (UDHR), namely, Article 15 that “everyone has the right to nationality”. In addition to this major declaration, there was leap of development in this subject in the middle of the 20\textsuperscript{th} century with advent of 1954 Convention on Status of Stateless Persons and 1961 Convention on Reduction of Statelessness. Persons become stateless by falling into the loop of the inconsistency, gaps, un-mapping of the issue in hand.

The problem of statelessness

As per 1954 convention, a stateless person is one “who is not considered as national by any state under the operation of the law”. The problem arises where there is wider and destructive interpretation of such definition in relation to the domestic law. Such regional incoherence, leads to deprivation of the relevant rights attached to the acquisition of citizenship such as human rights, prevention from child abuse, economy, healthcare, democratic participation. Such issue requires more effective, collective, and integrated steps from UN and its agency. The paper in its following research objective deals more exhaustively.

De jure v. De facto statelessness

The definition of a stateless individual in the 1954 Statelessness Convention – “a person who is not considered a national by any State under operation of its law” – depicts the
categorize the de jure statelessness and impose obligations on the state for de jure stateless persons. Although, the Final Act\textsuperscript{446} includes de facto stateless persons as well. On the other hand, de facto persons are those who are unable to demonstrate their de jure statelessness and for innumerable reasons don’t enjoy all the benefits or rights.

 Stateless person as refugee

It was intended by the drafters of the 1954 convention to exclude de facto stateless persons outside the ambit of the stateless persons. It was presumed that such persons, being deprived of the nationality and rights associated with it are refugees. Also, such stateless person doesn’t signify persecution which is sole criteria in 1951 Convention on the Status of the Refugees.

 The problem of quantification

The step towards mapping of statelessness is cumbersome process. Though, state has the primary duty to resolve and effective measure, but it is now essential that there are concrete steps from the side of civic society. But unfortunately, there several states as discussed in the paper which takes deliberate and politically driven steps to deny identification and prevalence of such population. On the top of it, there is evidentiary material of self-identification of statelessness forming a non-accurate data. From a more practical perspective, around 75 countries doesn’t provide with cogent data leaving 50% of world’s stateless population unmapped.


Recommendations and Conclusion

The research confirms and offers a number of recommendation, that states should adopt credible measure to quantify the stateless persons, promote the inclusion of definition of the ‘stateless persons’ with more consistency, a more unified approach to curb the issue, and societal measures inclines towards awareness of benefits attached to the citizenship. The report concludes that there is quest and a huge demand for more clarity on the present subject with the involvement of international and national organization.

VI. RESEARCH OBJECTIVES

Research Objective No. 1: To understand and identify the cause and impact of Statelessness in present scenario.

Research Objective No. 2: To analyse the gaps in the International legal framework relating to the protection of Stateless persons.

Research Objective No. 3: To know the challenge in mapping measures adopted by UN agency to have quantitative and qualitative data on stateless population.

Research Objective No. 4: To decipher the judicial trends and the approach towards the statelessness.

Research Objective No. 5: List of recommendations to curb future statelessness.

Research Objective No. 1: To understand and identify the cause and impact of Statelessness in present scenario.

A closer scrutiny to the abovementioned objective has multifarious spur attached to it. For instance state succession; discrimination or the arbitrary deprivation of
nationality; technical and administrative gaps; and causes linked to climate change. 447

1.1. STATE SUCCESSION
At the point when part of a state withdraws and gets to be distinctly free, or when it breaks down into numerous new expresses and a conundrum develops in the matter of nationality of influenced. The changed nationality laws of the successor shall leave individuals with stateless; also redefinition of who is now a national of that parent state may likewise render individuals as stateless and vulnerable to the reinterpretation new laws, new citizenship and new administrative procedures prevailing at that point of time 448.

The analogy can be rightly being drawn out from the experiences embedded in territorial demarcation through colonisation and consequent nation building. And in recent period, countries of the former Soviet Union and Yugoslavia 449 and South Sudan from Sudan 450, brings clear picture of the abovementioned object. Such a change in political and geographical move leads to unique challenges with regard to Statelessness and nationality.

1.2. DISCRIMINATION AND THE ARBITRARY DEPRIVATION OF NATIONALITY
In practice arbitrary act involves large-scale discrimination leading to collective withdrawal or denial of nationality of particular state despite well knit relation to that particular state. Discrimination involves grounds such as race, colour, descent, or national or ethnic origin in the determination of nationality and exclusion of civic criteria. 451 Security can also be a ground for arbitrary deprivation nationality if due process of law has not been followed. Such form of predicament can be seen widely in 25 countries around the world. 452 Most people are considered as national by the principle of blood origin or where the person’s parents were nationals i.e. (jus sanguinis) and another category involves birth on the territory (jus soli) 453. Such mode of acquisition is known as automatic acquisition of citizenship. But in many countries where nationality based on jus sanguinis has left children of many migrants in difficult times for instance Cote d’Ivoire to the Dominican Republic to the former Soviet Union to Germany and Italy 454.

Historically, world has witnessed various arbitrary acts of states, apart from abovementioned states, which has lead to segregation and failure to reintegrate the minorities and their deprivation of nationality. The Bihari community in

447 For a good discussion on causes of statelessness, see: Inter-Parliamentary Union (2005).
448 Id.
449 See sections 3.IV and 3.V on statelessness statistics in Asia and Europe.
450 See section 3.II on statelessness statistics in Africa.
452 See for more details on this issue UNHCR, Background Note on Gender Equality, Nationality Laws and Statelessness 2014, 8 March 2014. See also the Global Campaign for Equal Nationality Rights (Feb. 26, 2017, 6.10 PM) http://www.equalnationalityrights.org/.
Bangladesh has been ostracised from the majority Bengali population on the evasive ground of disloyalty by the former community and were inclined to the regime of Islamabad during 1971 war. Gender based discrimination in several Arab states is widely evident as source of statelessness.455

1.3. TECHNICAL AND ADMINISTRATIVE GAPS
Surprisingly, documentation regarding nationality designed to act as helping hand in the process can become a snake in the grass, as an inevitable barrier for nomadic, poor and minority population. There are innumerable administrative and logistic ostracism steps that may end up in the loss of the nationality. Excessive fees, red tape, documentary proof, peripheral challenges for the poor. In nations of the erstwhile Yugoslavia and somewhere else in Europe is a reasonable case of where absence of documentation and registration can rise into an issue of statelessness.456

1.4. CLIMATE CHANGE
Notably, at UN Conference on Climate Change, the Intergovornmental Panel on Climate Change (IPCC) recognised Netherlands, south eastern Asian-oceanic states like Bangladesh and some other states as being threatened by the rising sea level. The reports guarantee that 600 million individuals could be affected by such an ascent in the sea water level, proposing that statelessness may emerge out of such a jibe before the the end of the twenty-first century.457 Conclusively, UNHCR while addressing the issue remarked that population of the affected state may be considered as de facto stateless.458

1.1.1 IMPACT OF STATELESSNESS
In order to extrapolate the anomaly and untoward subject, it reports to impact 10 million (only mapped countries) as stateless. By all virtues Human rights are to be enjoyed by human race, but due to statelessness, are left high and dry. Being ousted from not only their country but also from all the countries can make stateless as an easy prey for bureaucracy. They can indeed be treated with exploitative practices; forced labour or different means of extortion; persecution; purchasing or acquiring a land; acquiring a birth declaration; registration of car; driving permit; arbitrary detainment; marriage authentication; opening a bank account or even death testament; or getting an advance; getting a travel permit or surely being issued any type of personality documentation is to a great degree troublesome in the event that you are not the national of any country, to such a degree, to the point that various stateless individuals have no proof that they exist and no techniques by which to separate themselves in their ordinary communications with the state or with private components. Overall travel is unpragmatic, unless by illicit means. In a

455 Southwick and Lynch (2009).
457 Supra note 11.
458 UNHCR (2009a).
459 For example the plight and holocaust of the Rohingya community of Myanmar – see sections 3.IV on statelessness statistics on Asia and 3.VII on statelessness refugees.
few circumstances, statelessness really turns into a course or impetus for human rights infringement. Stateless people might be subjected to particular directions or practices that don’t have any significant bearing to different inhabitants in a state. In outrageous cases, additionally crippling and dehumanizing confinements may likewise be forced, for example, on marriage or conceptive rights. Disenfranchisement is an inevitable and universal problem evidently present all over the world.460

“In Kenya, if you do not have an ID card, you don’t exist. Technically you cannot even leave your house, because if you leave your house and you are challenged ‘Where is your ID?’ That is considered a crime. Now, if you cannot leave your house, how do you live? How do you look for a job? You can’t even open a bank account, you can’t transact business, you cannot own anything, because you don’t exist.”461

The truth is stateless person face distinctive challenges in all spheres of their life from birth to their death.

Research Objective No. 2: To analyse the gaps in the International legal framework relating to the protection of Stateless persons.

Presently, it is essential to analyse whether 1954 Convention relating to the Status of Stateless Persons is fulfilling the need of the hour or whether there scope of any relevant development. In order to achieve pre-determined objectives, UNHCR is sole authority which deals with drafting legislation, training of government officials, cooperating with regional bodies or Non-governmental organizations, Inter-Parliamentary Union (IPU) and implementation of national legislation. In the period of 2003-05 it has worked with not less than 40 states to enact, comment and revise nationality related laws within such states.462

Firstly, access and enjoyment to political rights or holding a public office is a hot potato whenever there was a discussion in drafting 1954 convention. However, rather than protecting and safeguarding the rights of the nationality deprived persons, the delegates deliberately chose to exclude such vital rights in 1954 convention. Such rights aren’t subjected to possession of nationality. Abrogation of such rights could not be a legitimate in the eyes of International law and may take a destructive form.463

Secondly, there is further betrayal and weakness in the 1954 instrument as it fails to settle questions with regard to right to enter the state on the basis of CTD.464 Moreover, there is little clarification on ‘State responsibility’ in the convention when it

460 An exception to this rule is present in the Estonia, wherein, it allows stateless population to vote only in municipal elections. But such set ups are not exception in stricter sense, as they are not privilege and can be revoked at any time.


462 Supra note 7, See (See Annex 4 of Handbook for Parliamentarians for a list of UNHCR offices around the world)

463 Note that article 2 of the 1954 Convention relating to the Status of Stateless Persons- where the primary obligation of stateless persons is enshrined- were of the view to curtail the political activities of such individual. See Walker (1981) and Skoloff (2005)

comes to statelessness due to
denationalization. The 1954 relating to the
Status of Stateless Persons differs
significantly from its sister convention, 1951
Convention relating to the status of the
Refugees, with regard to wage-earning
employment. The latter lifted the restriction
on the same subject. The 1954 convention
skirts out on many of the essential and
difficult questions leaving behind several
normative gaps.

The UN ought to increment endeavours to
elevate approval or promotion to the 1954
Convention which had just 65 States parties
as on 1 January 2011. Notably, reference
might be extracted from applicable
resolutions of the General Assembly which
persuaded and encouraged states to ponder
and give consideration to acceding. Besides,
States ought to be urged to agree to
enhance usage of global and provincial
human rights recognised instruments that
upgrade the insurance of the privileges of
stateless people.

It is essential to develop the national legal
framework and bring in to the International
legal framework consonance. UN should
irrespective of whether a state is a party to
the 1954 Convention must promote the
i. definitional clauses;
ii. entry to the state;
iii. supporting institutional responses;
iv. residence to non-citizens in specific
situation;
v. respect of regional and international
human rights and
vi. legal assistance and integration
programmes for the stateless persons.

Research Objective No. 3: To know the
challenge in mapping measures adopted
by UN agency to have quantitative and
qualitative data on stateless population.

As emphatically mentioned in the title of
this paper, that statelessness is often
regarded as the invisible phenomenon. The
main problem to such matter is the difficulty
in adopting the methodology to quantify
statelessness itself. It must be acknowledged
that quantifying such a problem is one of the
most intricate job. Since 2004, UNHCR
has announced, on a nation by-nation basis,
the quantity of people who fairly and
squarely fall under its statelessness order,
and remains the main association which
methodically gathers and consistently gives
an account of the quantity of stateless
people. Most one other organisation has ever
attempted a survey at such a global level that
is Refugees International. The report, titled
‘Lives on Hold’, was published in February
2005 and includes a ‘Global Review of
Statelessness’. The report included a
narrative section for an extrapolation of
the stateless population present in 80 countries.
The then global stateless survey was over 11
million. A subsequent and updated survey
namely, ‘Nationality Rights for All’ rests

465 See General Assembly Resolution 62/124,
64/127, 63/148, 50/152 and 49/169. also numerous
Conclusions of UNHCR’s Executive Committee
including Nos. 78, 85, 87, 90, 95, 99, 102, and 106.
Human Rights Council resolutions on human rights
and arbitrary deprivation of nationality 13/2, 10/13
and 7/10.

466 See UNHCR, Guidance document on measuring
stateless populations, May 2011.
467 Refugees International. Lives on Hold. The
Human Cost of Statelessness, 2005.
468 Id. p. 7.
469 Refugees International, Nationality Rights for All.
A progress Report and Global Survey on
Statelessness, 2009.

www.supremoamicus.org
the number on 12 million people all over the world. Such reports and UN statistics are the only concrete and up-to-date source of data. There several issues attached to these survey and methodologies in determining the actual number of stateless persons.

The definition of statelessness “not considered as national...under the operation of its law” doesn’t hold a stricter but authoritative interpretation on the basis of facts and law. The ambit of interpretation gets wider as it excludes those who are stateless as per the competent authorities and those who don’t feel connected to the mass of the relevant state due to distinctive political and personal beliefs. Whereas, in many states there is no definition of stateless person in their national laws.

Again, many state authorities with their own deliberate political agenda deny the existence of stateless population in their state causing hardship to the hidden persons thereon. Going statistically, out of 142 national censuses conducted between 2005-14 for which UN possesses questionnaires, carrying 112 questions on nationality of which only 25% i.e. 28 provide for statelessness to be recorded. UNHCR has data for number of stateless persons in 75 countries covering only 50% of the world population. The reliability of such data is still a benchmark question for the UN agency as different countries compiled their data with different data sets. And thereby, no real or complete picture is revealed with such cumbersome statistical practice. To avoid falling into the pit of conundrum, UN practices the indication of asterisk (*) where no reliable or precise data is available for a state and drop them from including into the Global statistics. Hence, with the adoption separate programming and budget system, namely “Pillar-2” exclusively involves stateless population under the UNHCR statelessness protection mandate and are thereafter, reported in its final statelessness statistics. UNHCR estimates the actual total global stateless population today to be “at least 10 million persons”. In order surpass the present data UNHCR as a part of ‘Action 10’ campaign to curb statelessness, strives to achieve credible data coverage for 150 states by 2024.

Research Objective No. 4: To decipher the judicial trends and the approach towards the statelessness.

4.1. Declaring a Person Stateless

In a motion to declare a person stateless, Delhi High Court addressed this question in *Shekh Abdul Aziz v. NCT of Delhi* 478 wherein, the petitioner was ‘foreigner’ 479 and was detined in Kashmir. After serving for one year of imprisonment, the petitioner was then shifted to Tihar Jail in Delhi in order to proceed with initiation of the deportation mechanism. But the procedure didn’t take the pace which was required. Delhi High Court directed the Central Authority to determine the nationality of the person within 2 weeks. Thereafter, MEA declared the petitioner as stateless but facilitating the whole dispute MEA stated that the person could attain long term visa expeditiously. 480

4.2. Arbitrary deprivation of nationality

In the case of *Yean and Bosico Children v. The Dominican Republic* 481 the Inter-American Court of Human Rights concluded that the Dominican Republic has violated various articles of the *American Convention on Human Rights*. Particularly, when it refused to issue birth authentications to, children born in the Dominican Republic to guardians of Haitian descent. The Court held that the interpretation of "in transit" in Dominican Republic’s migration and citizenship laws ousted particularly Haitians born in the Dominican Republic from obtaining citizenship and that this treatment of ethnic group was arbitrary and prejudicial.

*John K. Modise v. Botswana* 482 The African Commission on Human and Peoples’ Rights while deciding on merits held that Modise had born within the territory South Africa and to British Protected Person. And in this way he was a native of Botswana by birth. The Court held that the state had abused Modise’s rights under the African Charter on Human and Peoples’ Rights by not recognizing him as a resident of their state and by extraditing him from Botswana, and consequently made him live in vicious poverty. The Court held that unstable living conditions while being stateless added up to an infringement of his right to respect for dignity. The Court additionally noticed that registered citizenship granted by the state authority to Modise was insufficient on the grounds that it was not at par with the citizenship by birth in toto.

In some cases, where the states hold the procedure for re-registration of permanent residence of those erased from the registry and non-compliance of such procedure

478 W.P. (CRL) 1426/2013. This case is under trial as of date.  
479 Clause (a) of Section 2(3) of the Foreigners Act, 1946.  
during the prescribed period would render them stateless. The court held such registration procedure as arbitrary and unlawful.\textsuperscript{483}

4.3. Equal access to the nationality

Also, at the domestic level, the Court of Appeal of Botswana held in Attorney-General v. Dow\textsuperscript{484} the Citizenship Act of 1984, which allowed citizenship to the children of a native father that is Botswanan father and to children born out with a native mother that is Botswanan mother, infringed the guarantees provided by the grundnorm. This includes freedom from movement and liberty. Since in the present case, the children of a Botswanan lady wedded to a foreign national, could confront ostracism and in this way law discouraged marriage between native ladies and non-resident men.

4.4. Effective nationality

\textit{(Liechtenstein v. Guatemala), Second Phase Nottebohm Case}\textsuperscript{485}

In spite of the fact that Nottebohm does not particularly address statelessness, has much of the time been referred to in statelessness in regard to major principle of ‘effective nationality’. The International Court of Justice in Nottebohm considered the administrative move of Guatemalan such as extradition and seizure of property, a former German national who later on naturalized as a resident of Liechtenstein soon after the set about of World War II.

The ICJ held that Liechtenstein's claim was inadmissible as Nottebohm had no real ties to Liechtenstein since he didn't reside there or conducted any kind of business in Guatemala, and it overtly appeared to just have turned into a native of Liechtenstein with the sole purpose that he certainly be recorded as a native of a nonpartisan nation amid of the World War.

\textbf{Research Objective No. 5: List of recommendations to curb future statelessness.}

The right to nationality in the contemporary context is an essential and indispensable human right. Statelessness is a stage where the person has no nationality due several reasons as discussed in the paper. The report discussed in particular as to how statelessness is caused, what do the statistics shows, international legal framework lacuna, incomplete mapping and judicial mindset to the issue. The major focus of the research was to determine and examine, quantify the rate at which the citizenship was granted. A comparative review articulates that there has not been much progress and in addition to that poor living standards, underdevelopment and corruption has undermined the potential benefits of obtaining nationality as evident in the states like Bangladesh, Kenya, Sri Lanka, and Republic of Crimea. In order to dilute a far stretched responsibility following recommendation has been made in order to bring conduciveness in the curbing future statelessness.

The necessary positive steps in tune with Indian political, administrative and judicial mechanisms are to accede to the 1954 and

\textsuperscript{483} Kurić and Others v. Slovenia [GC], no. 26828/06, Judgment of 13 July 2010.
\textsuperscript{484} (2001) AHRLR 99 (BwCA 1992).
\textsuperscript{485} International Court of Justice (ICJ), 6 April 1955, (Mar. 2, 2017, 6.00 PM)
http://www.refworld.org/cases,ICJ,3ae6b7248.html
1961 Conventions on statelessness. Such an accession would be fruitful to India and will be attached with positive obligation (protecting stateless children). Presently the lacuna is being fulfilled through judicial activism. Consequently, legislative reformation shall prevent future statelessness.

i. States should adopt credible measure to quantify the stateless persons. This can be done through dedicated mapping exercise and utilisation of more accurate administrative databases.

ii. State should promote the inclusion of definition of the ‘stateless persons’ in their national laws and consistently interpreting the same.

iii. State with major problem of statelessness should revisit their promulgation, procedures and percentage of coherence of their national laws to international status of stateless persons related legal framework.

iv. In pursuance to the commitment to curb statelessness, state should completely co-operate with UNHCR and paying due diligence on the developments brought in by such UN agency.

v. Regional and International funding will enhance the knowledge towards this issue with more brevity by introducing more cogent material in this regard. Eventually, making the state less dependent upon unreliable data and deceitful move of the authorities.

vi. It is required that UNHCR to come up with unified approach to define statelessness and effective measures to quantify such population.\(^{486}\)

vii. UNHCR and UN Regional Commissions can engage themselves during the national census by providing technical support.

viii. Society should persistently be inclined towards awareness of the plight caused due to statelessness among general public and enthusiastic measures in regard to mapping of stateless population.

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Extortion under IPC 1860
By: Kirti Dwivedi
From: University institute of legal studies, Chandigarh University, Gharuan

Extortion under IPC 1860

Introduction -
In Extortion, victim is forced or induced to deliver the property, which can be movable or immovable property, to the offender or any other person. Here, the consent of the victim is obtained in fear of injury. And, here, element of force is present.

Definition -
Extortion is defined under section 383 of the Indian penal code, 1860. This section
says that the offender must intentionally puts any person, in fear of any injury, this fear of injury to that person or any other person. The offender must thereby intentionally puts any person in fear of any injury dishonestly and the offender must induced the victim - to deliver any property or valuable security or anything signed or sealed which may be converted into valuable security. In Extortion, it is not clearly defined that what consists of valuable security - which means it may be movable or immovable property. Now the question arises that what may be converted into valuable security? Taking signatures of any particular person on a blank paper, is known as an incomplete deeds. If any person used - to take signatures of any particular person on a blank paper i.e. "incomplete deed" and then, after that, if such a person writes something particular on that paper, like - "A" is transfering his property in favour of "B". Then, in such type of cases incomplete deeds can be converted into "valuable security". In Extortion, the offender dishonestly, induced the victim to give the property, that can be valuable security or incomplete deeds or movable or immovable property, etc., to any person - that can be a giver of the threat or receiver of the property. It may be same or different person. Two persons must be there in extortion that are - offender and the victim. The word Injury - is defined under section 44 of the Indian penal code, 1860. Injury means any harm, caused to any person in body, mind, reputation or property. In Extortion, the term "Injury" is used in the broader sense, here, it includes - injury of body, mind, reputation or property, as compared to section 299, and section 300 of the Indian penal code, 1860. In section 299 of the Indian penal code, I.e. of culpable homicide and in section 300 of the Indian penal code I.e. of murder, the term "injury" means "injury of the body."

Here, in section 44 of this code, any harm must be caused illigally. Section 30 of the Indian penal code, 1860, says that any document which creates any legal right of any particular person, is known as a "valuable security". This document can be already created or going to be or proposed to be created. This document can create, restrict or extend the legal right of any person, can create liability of any person, etc.

Case 1- Labhshankar vs. State of Saurashtra, AIR 1955 sau 42 and in Vena Ram vs. State of Raj. 2002 WLC (Raj.) 291, it was held that charge under Section 384 IPC, is not sustainable if the property is not delivered by the person extorted.

Case 2- Venkatappa vs. Jalayya, AIR(6) 1919 Mad 954, the accused, who was the proprietor of a certain estate, stopped complainant, a cooly, whom he suspected of smuggling Arrack from the Nizam's Dominions into British Territory, on the way... threatened to report the matter to the police unless he paid something. He was charged with... threat of injury to commit extortion... & was sentenced to a... fine... Held... that the conviction under Section 385 was bad, as complainant was not put in fear of any injury within the meaning of Section 44, Penal Code and the accused only threatened to do what he was bound by law to do.
Case 3 - Biram Lal vs. State, RLW 2007(1) Raj.713, it was held that in order to complete the act of extortion the person who was put in fear, must have been induced to deliver the property. If the act of inducement caused by the wrong doer should bring forth its result at least by the victim consenting to deliver property even if actual delivery does not take place due to any fortuitous circumstances which would constitute extortion, but if it falls to produce the requisite effect, the act would remain only at the stage of attempt to commit extortion. In the instant case, even if the offence of extortion is held to be not made out for want of delivery of the property at least, the offence of attempt to commit extortion is clearly made out.

Case 4 - A.R Antulay vs. R.S. Nayak, AIR 1986 SC 2045, the accused was Chief Minister at the relevant time and the Sugar Co-operatives had some of the grievances pending consideration before the Government. The pressure was brought about on the Sugar Co-operatives to make the donations with a promise that their grievances shall be consider. Held, that the ingredients of the offence of extortion not made out. There was no evidence at all that the management of the Sugar Co-operatives had been put in any fear and the contributions had been paid in response to threat.

Legal Provisions for Extortion-
For attempt to extortion, there are separate sections that are - section 385,387 and 389. And, the offences, for which there is no separate sections provided for their attempt, that offences are covered under the section 511 of the Indian penal code, 1860. Like - for attempt to theft, there is section 511 of the Indian penal code, 1860. Punishments in case of Extortion are as follows -
1. Section 384 of the Indian penal code, 1860, provided that for committing the offence of extortion, there is an imprisonment which may extend to the period of 3 years or fine or both.
2. Section 385 of the Indian penal code, 1860, provided that if the extortion has not been committed but, there is an attempt to extortion, then, there is an imprisonment which may extends to the period of 2 years or fine or both.
3. Section 386 of the Indian penal code, 1860, provided that if the Extortion commits by putting a person in fear of death or grievous hurt then, there is an imprisonment of 10 years and fine.
4. Section 387 of the Indian penal code, 1860, provided that if the extortion has not been committed but, there is an attempt to extortion by putting the person in fear of death or grievous hurt, then, there is an imprisonment of 7 years and fine. There is an attempt to do the extortion.
5. Section 388 of the Indian Penal Code 1860, provided that Extortion commits by putting a person in fear of acquisition against that person or any other, of having committed or attempted to any offence punishable with death or life imprisonment or imprisonment which extend to 10 years or Extortion committed or having attempted to induce any other person to commit such offence then, there is a punishment for 10 years and fine or there is an acquisition for an offence, If the
offence punishable under section 377 then, there is punishment for Life imprisonment.

Conclusion -
In Extortion, victim is forced or induced to deliver the property, which can be movable or immovable property, to the offender or any other person. Here, consent of the victim is obtained in fear of injury.

*****
A Human Right: Everyone Connected

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ABSTRACT

This paper addresses the perplexity regarding recognizing “Internet as a basic human right”. By the word ‘internet’ we mean a source to connect to the world by means of world wide web and also other electronic services like mailing, video-calling and many more and by ‘human right’ we mean a basic right of every individual so that he can sustain himself in the society or rather in the world. People may strongly oppose to recognize internet as a human right especially in a country like India where thousands of people are living below the poverty line and struggle to get two proper meals of the day. But, we fail to see that without the internet the world will be at a standstill position. The number of internet users at a particular time as seen in the Internet Wire Status at a single time is 3,697,565,745 and the numbers keep on increasing. College forms, school admissions, filing of voter Id, seeing results of various examinations and many others things which are so common is actually done with the help of the internet.

The paper further focuses imperatively on recognizing internet as a human right in India after a comparative analysis of the possible advantages and disadvantages of doing the above mentioned. This paper shall also look into the current scenario of India and answer the questions that whether India is really ready to recognize internet as a human right? And if it is ready then how to implement it in an effective way so that nobody can take the advantage of the right in a negative way.

The paper also examines the scenario in different countries’ status with regard to recognizing internet as a human right and the existing scenario regarding the same of these countries.

INTRODUCTION

Bill Gate said, “The internet is becoming the town square for the global village of tomorrow.”

The buzz word “internet” is on everyone’s mouth. The school going children, teenagers, professors, everyone is using the internet to make their work uncomplicated. The government is on a mission to move towards a cashless economy and is promoting e-governance and digitization.

www.supremoamicus.org
For all this access to the internet is absolutely essential. But this access is not available to all sections of the society. This difference of availability has to be bridged. It can be done only by recognizing internet as a human right.

Martin Luther King Junior said- “our lives begin to end the day we become silent about things that matter”.

This is what is exactly happening in our country. We all know the importance of the internet but are doing nothing to make it available to all.

To recognize the need to make internet as a human right we need to first understand the two main words, what is internet and what is human right?

➤ **MEANING OF INTERNET:**
In most technical sense, the net(internet) is a global system of integrated computer networks that use the net protocol suite (TCP/IP). This enables billions and billions of devices to be connected worldwide through this network. The internet delivers a range of services including inter linked hyper text document, electronic mail, the world wide web, telephony and file sharing networks.

➤ **IMPORTANCE OF INTERNET TO HUMAN LIVES:**
The web is an increasing important resource in many aspect of life: education, employment, government, commerce, fields of health care, fields of business, connecting third world etc. The web offers the expectation of unprecedented access to information and interaction for many people. Internet accession is ability of individualistic and organizations to connect to the internet using computer terminals and to access services such as email. It’s important to increase access to the internet, as it “supportinnumerable opportunities for affordable and including education worldwide,” or provides other resources for education, especially across the digital split up. In accordance with the 2030 Agenda for Sustainable Development, the organization also acknowledged that the spread of technology has the “great potential to accelerate human progress.”

➤ **MEANING OF HUMAN RIGHT:**
By human right we generally mean the rights which are inherent to all human beings, whatever may be our religion, language, ethnic origin or any other status. Former Justice of India, J.S Verma has stated, “human dignity is the quintessence of human rights”. Former U.S President has also said “Today high speed is not a luxury, it is a necessity”.

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487 www.tibetangeeks.com

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www.supremoamicus.org
The bench led by Deepak Misra was hearing arguments related to the on-going case of pre-natal sex determination advertisements, which appear on search engines in India. The bench said that right to Internet Access is a part of Fundamental right of expression. As per their oral statements related to an on-going case, the bench said that all Indian citizen has the right to be informed and the right to know and the feeling of protection of expansive connectivity.\textsuperscript{488}

In the case of Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal\textsuperscript{489}, it was held that every citizen was a fundamental right to impart as well as receive information through the electronic media. A broad interpretation of electronic media could be Internet.

Also, in the case of Maneka Gandhi V Union of India\textsuperscript{490}, it was held that the freedom of speech and expression under article 19(1)(a) has no geographical restriction and it carries with it the right of a citizen to assembling information and to exchange thought with others not only in India but abroad as well. This was at the time when no one had ever thought internet will become a border less phenomena.

\textbf{INDIA AND INDUSTRIAL TECHNOLOGY REVOLUTION}

India's IT Services industry was born in Mumbai in 1967 with the commencement of the Tata Group in partnership with Burroughs.

The Indian economy underwent major economic reforms in 1991, leading to a new era of globalization and international economic integration, and annual economic growth of over 6% from 1993–2002. The new governance under Atal Bihari Vajpayee (who was Prime Minister from 1998–2004) placed the evolution of Information Technology among its top five priorities and formed the Indian National Task Force on Information Technology and Software Development, Videsh Sanchar Nigam Limited (VSNL) introduced Gateway Electronic Mail Service in 1991, and in 1992 the 64 kbit/s leased line servicewas introduced, and commercialized Internet access on a visible scale in 1992. Election results were shown via National Informatics Centre's NICNET. \textsuperscript{491} "The New Telecommunications Policy, 1999" (NTP 1999) aid further liberalize India's telecommunications sector. The Information Technology Act, 2000 created legal procedures for electronic transactions and e-commercialism.

India and the IT Revolution explores the contemporary outgrowth of cosmopolitan, high-tech India as marking the arrival of a truly global cybertulture. It does not agrees against that globalization is a procedure of 'Westernization', which emerges out unilaterally from the core, imposing itself upon a passive, backward boundary. Instead, it conceives of global culture as a impulsive, innovative network, which proceeds primarily from

\textsuperscript{488} 14\textsuperscript{th} April, track.in
\textsuperscript{489} 1995 AIR 1236
\textsuperscript{490} AIR 1978 SC 597

\textsuperscript{491} www.jstor.org
its edges. In fact, a number of policy initiatives including liberalization of policies for computer and electronics sector, rural digital telephone exchange, software technology parks and data central processor of railways, which are linked with Rajiv’s era, were set in motion by Indira Gandhi after she came to power in 1980.

➢ CONS OF USING INTERNET:

1. Ground For Illegal Activity
The ease of information has given perception for burglaries, terrorist attacks, kidnappings, and many other types of crimes. It also flickered a crime of a different sort, but on a monumental level. Piracy is a crime, which involves downloading or distributing materials such as movies or music, without the consent of the person who owns it. It is possibly the most committed crime in today’s society, because people simply do not prospect it as a true trouble.

2. Dependency
All of our information is not stored with the use of the cyberspace. This means our medical records, criminal records, educational records, and finance records are all entirely dependent on the security of the sites that they shack on. Computer viruses are very common and are becoming more and more combative. They are transferred through the communication access of the internet and if one was designed well enough, it could shut down the economic system.

3. Personal Information is hampered
Any secure information we put voluntarily into the cyber world, like bank information and social security number racket etc, can beaccessed by hackers easily and by using this information can commit fraud and identity felony.

4. Bad Exposure for children
There is no means to truly verify age on the net, this is a big concern because there is an abundance of content that should not be accessed by kids. Pornographic material is the most prominent, and children can very easily stumble upon these types of websites and be exposed to things that they should not be. Children are also at a great peril because of how easy it is to communicate with masses. Children every day are persuaded by online “friends” to meet them or do things for them that put them at great risk.

➢ PROS OF USING INTERNET:

1. In central electricity Regulartory Commission v National Hydroelectric Power Corporation, the Supreme Court of India held that court notices should be sent by email in order to avoid delays and observed that such practice should be followed in all commercial litigation wherein urgent relief is sought in the Supreme court. Thus, internet helps in speedy process.

2. Internet is a platform which helps many people to find jobs. It helps many people especially students and housewives to work from home as freelancers just to get enough pocket money.

3. Technology and information is shared and exchanged by people from various parts of the world through internet.

492 Lane v Facebook, Inc
493 2010 SCC 280-B

www.supremoamicus.org
Academicians use internet for references.

4. Internet helps to speed up the process. For example most of the banks have e-banking system which saves time and people do not have to stay in line for hours and hours.

5. It provides platform for products like SKYPE and other features, which allow for holding a video conference with anyone in the world who has access.

6. News of all kinds is available almost instantaneously with people putting up their different view points.

7. The marketing of different products is done through the internet.

The benefits of using the internet is endless. A PWC report commissioned by Facebook states that India’s GDP would rise by 6.7 lakh crore by 2020, if 100% Indians had access to the Internet.

**SCENARIO IN OTHER COUNTRIES AND IN THE UN**

Is the internet so embedded in the lives of so many people, acting as the main way for information exchange, that to deny access to everyone in the world is a breach of human right? The United Nations thinks so.494

Due to the lack of access and curtailment tactics by certain governments of the world, the UN has declared ‘online freedom’ is a basic human right and one that must be protected at any cost. This was in the form of resolution. In 2016 July, the United Nations issued a declaration in agreement with this view. The resolution failed, as it did not receive universal backing, with several countries rejecting the resolution. Notably these were Russia, China and South Africa.495 Thomas Hughes, Executive Director of Civil Liberties Groups said Article 19 of the UN resolution: ‘the resolution is a much needed response to increased pressure on freedom of expression in all parts of the world’.

Countries like France, Costa Rica, Greece, Finland and Spain has already declared Internet as a human right.

A poll of 27,973 adults in across twenty six countries including 14,306 Internet users, participated for BBC World service and found that almost four in five internet users and non-users around the world felt that access to Internet was a fundamental right.

**INDIA’S POSITION**

79 percent of people believe that access to the Internet is a fundamental right as per a BBC survey across 26 countries.496 In India it is expected that the number of internet users will reach four hundred fifty-four four hundred sixty five million by June, that is up 4-8% from four hundred thirty two million in December 2016, as per a report from the Internet and Mobile Association of India and market research firm confirmed the fact.497 The report said the total Internet penetration in India is currently around 31%.“an estimated population of four hundred forty million already has two hundred sixty nine million (60%) using the Internet in urban India and Rural India, with

494 Business insider, July 22, 2016
495 A/HRC/32/L.20
496 www.theatlantic.com
497 www.livemint.com
an estimated population of nine hundred and six million as per 2011 census, has only one hundred sixty three million (17%) Internet users. Thus, there are potential approximately seven hundred fifty million users still in rural India who are yet to become Internet users; if only they can be reached out in the right way.”

In India the launching of Reliance JIO made a great impact upon the people of India by providing free data for few months and then charging a very nominal rate. The consumption of data through mobile broadband grew over six times in less than a year, and stood at 1.3 billion GB a month by the end of March 2017. This shows a very sharp rise from the 200 million GB monthly consumption figure that was reported in June 2016. Due to this effect, India has grown to become the second-largest internet user base in the world with 355 million users – second only to China – by March 2017. According to the report’s findings, this represents a 28 per cent increase over the June 2016 figure of 277 million users. The report is indicative of the sweeping effects of Reliance Jio on the mobile broadband market in India which underwent an overhaul after the cash-rich company jumped head-on into the telecom sector. Reliance Jio has also helped the industry add new customers after it added more than hundred million customers in a matter of months.

Recognizing the need of Internet Kerela becomes the first Indian state to declare internet a basic human right in March 2017. The state budget of Kerela has unveiled a project, which aims to provide internet connections free of cost to 20 lakh poor families and at subsidized and nominal rate to others.

Hence, we can see that the word internet is not new and it has become a necessity for a large number of population.

- **RECOMMENDATION:**

  India is still a developing country and it does not have enough resources to spend on providing internet to people, where many people do not have basic amenities. To tackle this problem India can take the following steps:

  1. The Facebook is planning to develop solar powered plan to beam down the network. India can ask Facebook to help India with innovative ideas to make internet available to all.

  2. Mozilla’s partnership with Grameenphones in Bangladesh with orange in multiple African countries, are both examples of joint effort to provide non-tired access to the open internet through advertising. The idea of Grameenphone in Bangladesh is that users can receive 200 MB of unrestricted data per day after watching a short add in the phone’s market place. This idea can be introduced to India as well.

  3. Google is working on many things, and that includes balloons that fly high in the sky to bring internet infrastructure to locations that can’t be wired for it easily. Today, Sri Lanka is the first country to get universal internet access from google’s project loon. India can too borrow this idea for the development of rural area.
4. India should encourage the entrepreneurship to come up with new idea which will provide internet access at low rates.

➢ CONCLUSION

Itsevident that the Internet provides incomparable chances for the promotion and furtherance of human rights, most centrally the right to seek, receive and impart information. The Special Rapporteur on that right has represented the Internet as ‘one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies. Hence, we can claim internet as a human right keeping aside the demerits of it.

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RIGHT TO INFORMATION-A COMPARATIVE STUDY

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INTRODUCTION

So, this paper basically talks about the concept of Right to Information at large. It talks about the Right to Information in India, United Kingdom and the United States of America.

When the public has the right and freedom to ask for the work of the government with no costs involved, the government comes directly under the control of the public and in democracies where the governments are supposed to be for the people, by the people and of the people, this is very vital in the functioning of the country. The government therefore, is not in a position to exercise autonomy or autonomous rule and exercise undue influence of their powers over the people by claiming that they have the power. The right to information also serves as the preventive measure for the government to be in the limits of their power and not go beyond because anytime anyone can raise a question as to the policy or the other decision taken by the government, therefore if theoretically the government is an institution of the people their work ought to have been public in order to maintain the transparency of their work and in order to actually frame the meaning of the term democracy.

India has been the largest democracy of the world, and no doubt it takes pride in that too. But prior to the commencement of the Right to Information act, things were quite different, although we were democratic but there was no accountability created on the part of the legislature, and that we could not have contacted them as frequently as we do in the modern world. It was with the commencement of the Right to information Act in 2005 that the government became accountable, interactive and participatory democracy. Which means that the government was now directly answerable to the public at large and the interaction between the government and the citizens became more often than rare. Therefore, it increased the amount of trust and interaction between the citizen and the state, therefore
diminishing the level of secrecy and status quo between the government and the citizen.

So, the Freedom of Information like the right to information gives the right to access all the information that you want regarding various subject matters by the government and the public authorities. Therefore, like the right to information in India, freedom of information in the United Kingdom serves as the role legislation of the country and the state.

No provision in the U.S. Constitution expressly establishes a procedure for public access to executive branch records or meetings. Congress, however, has legislated various public access laws. We will see in the upcoming chapters as to how the right to information in the United States function.

LITERATURE REVIEW

For the first Chapter i.e. Introduction to Right to Information, Right to Information by Dr. S. B. M. Marume, Dr. A. S. Chikasha and Dr. T. M. Chiunye has been used. This article consistently talks about the introduction to the right to information and discusses the extent of the right to information.

For the Second chapter, i.e. Introduction to Right to Information In India, we referred to The Right to Information in India: Implementation and Impact by Prof. Smita Srivastava. This article consistently talks about the effect of Right to Information in India and how is the system of Right to Information in India organized and also discusses about the various problems faced by the Indian Right to Information.

For the third chapter i.e. the Right to Information in India and Its Impact, we majorly relied onto the article of the Right to Information Act 2005: Operational Issues and Major Concerns by Manish Kumar Khunger. It basically describes in detail the procedures involved and that how is the Right to Information not that successful in India and how it is more of a hippocracy.

For the fourth chapter, i.e. the Freedom of Information in the United Kingdom, we relied majorly on the campaign for the Freedom of Information a short guide to the United Kingdom Freedom of Information. This helped us understand in a comprehensive manner the nature of Right to Information in the United kingdom and how it is different from the Indian context.

For the fifth chapter, i.e. the Freedom of Information in the United States, I have majorly relied on the article by Wendy Ginsberg Analyst in American National Government who clearly defines the relationship between the citizen and government through the freedom of information in the United states and that also says that there is no particular one law but four statutes that govern the right to information in the States.

STATEMENT OF THE RESEARCH PROBLEM

This paper primarily focuses on the concept of Right to Information and the Freedom of Information and the issue that it deals with majorly is the nature of Right to Information.
that binds the relationship between the government and the citizen of the country. The paper begins with the introduction to concept as a whole and then moves further to the introduction of the Right to Information and discusses how and what it means. It then talks about the concept of Right to Information in the light of Indian context and what all problems that India faces and how it is of utmost importance. As we further move towards the motive, we talk about how the Right to Information attains growth through the Global administrative law describing the details in the European continent especially the United Kingdom and then relating with the Indian context. Then it also discusses about the Right to Information in the United States and it also discusses about the extent of freedom available to access the information in comparison with India. It then also compares about the nature of relationship between the government and the citizen through the right to information in India, USA and UK and how they are similar in their motive and just the methods are different. Last but not the least, it concludes with the synopsis of the same and analyses the various points discussed.

OBJECTIVES AND RESEARCH QUESTIONS

I To determine the meaning and scope of Right to Information.

Questions

(1) What do you mean by the term Right to Information and what is the scope of Right to Information ?

(2) To whom is the Right to Information available and to what extent can it be used ?

II To determine the meaning and scope of Right To Information in the Indian Context

Questions

(1) Whether the Right to Information in India, makes the administrative process anyway transparent ?

(2) Whether the introduction of Right to Information in India has led to accountability of the legislature or the administrative process that has gone against the biased rules of the administrators ?

III To determine the nature of Freedom of Information or Right to Information in the United Kingdom

Questions

(1) Whether the nature of freedom of Information in the United Kingdom same as the nature of Right to Information in India ?

(2) Whether it helps in enhancing the advent of transparency in the United Kingdom and gives a role model kind of a picture to the world ?

IV To determine the nature of Freedom of Information in Australia

Questions

(1) Whether there exists a Freedom of Information which is similar to that of the Right to Information In India ?

(2) Whether the information given to the individuals in the state anyway discusses the
problems that the individuals face overall in the development of the concept of Freedom of Information?

DISCUSSION AND DIVISION OF CHAPTERS

As we have already seen in the introduction part, that this paper will be discussing about the Right to Information in detail and analysing its context in the objective of its introduction, i.e. whether the amount of transparency that was aimed to be sculpted in the administrative system really achieved. We will now further discuss part by part or chapter by chapter, that how Right to Information is a global concept and is derived from the Global Administrative Law and has led to the introduction of transparency in the system to a whole new level. This project will be discussing that how the process of RTI has affected the administrators at the large and the dilemmas the nation state is facing as a whole. This project also discusses how the RTI has become an integral part of our lives and that how there is no alternative to it and also discusses the concept of the RTI or Freedom of Information in other countries such as the United Kingdom and Australia. Whole discussion of the project is divided into chapters so that the process of learning becomes more easy. Chapterization has been done in order to make sure that the concepts are clear enough to move forward in the approach of fulfilling the purpose of the project.

(i) Chapter 1 - Introduction to Right to Information

(ii) Chapter 2 - Introduction to Right to Information in India

(iii) Chapter 3 - Right to Information in India and Its effects and Problems

(iv) Chapter 4 - Freedom of information in United Kingdom

(v) Chapter 5 - Freedom of Information in USA

(vi) Chapter 6 - Conclusion

CH-I INTRODUCTION TO RIGHT TO INFORMATION

So, this chapter basically talks about the concept of the right to information like what is right to information and where did the concept of right to information evolved from, what is its purpose and what is the need for having a right to information especially in a country like India and other democratic countries.

Right to information can be defined in the manner that it means the freedom of the people of the region or the country to have access to the information of the government or in other words, when a person has the right to seek information regarding the policy of the government and raise question as to transparency, this is what right to information means. It implies that the citizens and the non-governmental organisations should enjoy reasonably free access to all files and documents pertaining to the governmental decisions, operations and performance. Sri Keshabananda Borah. on the Right to

498  Sri Keshabananda Borah. on the Right to
openness and transparency in the functioning of the government. Thus it is antithetical to secrecy in public administration.

When the public has the right and freedom to ask for the work of the government with no costs involved, the government comes directly under the control of the public and in democracies where the governments are supposed to be for the people, by the people and of the people, this is very vital in the functioning of the country. The government therefore, is not in a position to exercise autonomy or autonomous rule and exercise undue influence of their powers over the people by claiming that they have the power. The right to information also serves as the preventive measure for the government to be in the limits of their power and not go beyond because anytime anyone can raise a question as to the policy or the other decision taken by the government, therefore if theoretically the government is an institution of the people their work right to have been public in order to maintain the transparency of their work and in order to actually frame the meaning of the term democracy.

When we talk about secrecy as a component of executive privilege or transparency through right to information which of the two be adopted as a paradigm for the governance. Both offer public interest as rationale. Which in fact serves the public interest. Therefore be it the secrecy as a component of the executive privilege or the transparency through right to information both are an ingredient of the public policy and serve the interest of the public. When we talk about the public interest we also mean that the public at large is benefitted of such provisions in the foreplay. The public should undoubtedly be at the beneficial side and they may be able to access the information at no cost so that no matter what the economic and financial position of the person, considering the economic disparities prevailing especially in the Indian society, the information can be accessed by anyone and everyone. This is where the public interest will deemed to be served. When the public can access whatever it suspects, the concept of suspicion for the government disappears and as a result of the same the confidence for the government arises and it builds trust in the public that the representatives that they have chosen through their votes actually stood up to their expectations or are capable of the trust that public confides in them. Therefore, right to information also serves as a trust building process for the government and decreases the state of suspicion and ill feelings for the government. Also, it is significant to note that in 1922, the World Bank released a document entitled Governance and Development. The document has mentioned seven aspects or elements of governance and one of them being the transparency aspect and information. So, this clearly indicates that the right to information is not a new concept rather

Information Act: a key to good governance

499 Dr. A. S. Chikasha and Dr. T. M. Chiunye on the Introduction to Right to Information, Right to Information by Dr. S. B. M. Marume.
people believed in this concept in the 20th century too.

All this that we have seen till now is not the constructed definition of what right to information is although we have had enough idea as to what the right to information in general is but we need to have a construed definition for the same. The definition of right to information therefore, turns out to be "the freedom of permanent responsible citizens and registered or well known non-governmental organisations to have a reasonably free access to all files and documents pertaining to the governmental decisions, operations and performance with a clear view to enhancing the principles of openness and transparency, on the one hand and on the other hand, respecting the factor of confidentiality as a component of the executive privilege in the modern democratic government."

Therefore, in order to compile the elements of the Right to Information, let us relook at the definition of the right to Information provided above. It says :-

(a) Freedom of Permanent Responsible Citizens,
(b) Registered or a well known non-governmental organisations.
(c) Reasonably free access
(d) All files and documents
(e) Governmental Decisions, operations and performance
(f) Enhancing principle of openness and transparency
(g) Respecting the factor of confidentiality as a necessary componential part of the executive privilege and
(h) Modern Government and Administration.

To understand the definition, what is more important is the understanding of its components. So, the first component that says freedom of permanent responsible citizens means that the citizens of the country first need to be permanent as in they should not be NRI's or people who travel from place to place and take any other country's citizenship, they should be a permanent citizen of one country in which they reside and earn. They should be responsible enough to be able to ask relevant questions in order to see whether the government is taking appropriate policies or not. They should be responsible enough to understand that the legislature is not just answerable to them through Right to Information but also has other works especially the legislative procedures, therefore no stupid questions should be asked and the policies should be dealt with thoroughly before asking a question or raising a right to information.

The second element talks about the registered or well known non-governmental organisations. The question that arises is that why does it want the institution to be registered and it needs to be a well known


\[502\] Dr. A. S. Chikasha and Dr. T. M. Chiunye on the Introduction to Right to Information, Right to Information by Dr. S. B. M. Marume.
non-governmental organisation? The answer to this is that well known non-government organisations are non state actors that help to represent the country in the international forums apart from the government itself. Therefore, the answers given to these type of organisations will be much more attention and accuracy than to any other non registered organisation. But the fact still remains that the answer to each of the right to information is given correctly, the difference arises only in the fact that the answer to these organisations can also be published and also the media coverage can be given to the answers by the non-governmental organisations, therefore in order to maintain a healthy reputation in the country the respected ministers or departments of the ministry needs to respond to the non-governmental organisations more effectively. Also, these organisations are a better way to enforce the right to information or ask for the answer if not provided with. They can initiate protests and other democratic activities which otherwise if conducted by an individual would not have a much larger effect.

The third element of the definition talks about the reasonably free access which means that the free access to information is not an absolute right it also comes with exceptions and restrictions. The reasonable restrictions imposed are for the benefit of the larger public and not for the purpose of concealing itself. Mere concealing is not allowed in the right to information but the likelihood to conceal the information is provided in the restrictions to the right to information which means that the information which is restricted to asked about in the Act, is the one which is necessary to be concealed and therefore, the access to such information becomes reasonably restricted and the right to access information becomes limited and not absolute.

The next element talks about the all files and documents which means that subjected to the limitations on the right to information, the other files which are available for free access, can be accessed by anyone and everyone on demand through the right to information. Therefore, the restrictions that are reasonable are limited to its scope only and not to the other files which are not within the scope of restriction or restricted subject. Therefore, all the files and the documents can be accessed which are not restricted for the public to access.

The another element of the definition talks about the governmental decisions, operations, and performance, which means that the information can be accessed relating to all the governmental policies, operations and decisions. They can also be asked to present the performance scale and the performance parameter which also helps the public analyse the scale of the growth of the government as well as the country through their performance. The public can also analyse the importance of the vote which they have casted through which their representatives have found a place in the parliament.

Another important element is the element of enhancing the principle of openness and transparency which basically is enshrined in the definition so as to ensure the sole and the main motive of the right to information is served through the transparent functioning
of the government and their policies. Transparency in the policy enhances the scope of trust and reliability on the government and diminishes the chances of being suspicious regarding the government. Therefore, ensuring the open and transparent functioning of the government this provision becomes extremely important in its nature.

The definition also contains an element of respecting the factor of confidentiality as a necessary part of the executive privilege which means that the concealment of the important information by the legislature as discussed above as well, is a part of the executive privilege that they have. Which also means that it is a part of their duty to disclose the certain facts which can be disclosed but at the same time it is their duty in the larger interest of the public to hide some of the information which is not supposed to be revealed or showed before the public such as in the cases of defence ministry not everything related to the defence of the country need to be shared because it can prove to be fatal in the case of revealing the information. Therefore, when they hide certain things, it is not because they are corrupt or immoral politicians but because it is a part of their duty to take care of the public as parens patriae and a part of their duty to consider the welfare of the country and its citizens. Therefore, the general public should consider these facts and respect the duty of the legislature.

The last element of the definition is the modern government and the administration, which means that the government should not be outdated. It should be equipped with the problems of the modern world and be able to come up with the laws that solve these modern problems. Thereby, ensuring the better administration of the country. The right to information is a great example of the modern administration because it brings accountability to the public.

Now, that we have dealt with the definition of the same, another important question that arises is that we talk about the principle of openness and transparency while on the other hand we say to to maintain the confidentiality of the information as a necessary componental part of the executive privilege in the modern government and administration. Thereby, contradicting the definition itself.

Well, as discussed above the right to information is not absolute therefore, when even the right to life and liberty is excepted by the provisions of the law, then even the right to information cannot be absolute in its nature.

So, basically this chapter talks about the right to information in India. As we have seen in the previous chapter that what right to information is, this chapter will be dealing more with the Right to Information in India and how does it impact the nation or what impact does it have on the nation as a whole. We will also see that how with the coming up of the right to information how the scenario has changed so much so that the democracy has actually come into being since the inception of this act.
India has been the largest democracy of the world, and no doubt it takes pride in that too. But prior to the commencement of the Right to Information act, things were quite different, although we were democratic but there was no accountability created on the part of the legislature, and that we could not have contacted them as frequently as we do in the modern world. It was with the commencement of the Right to information Act in 2005 that the government became accountable, interactive and participatory democracy. Which means that the government was now directly answerable to the public at large and the interaction between the government and the citizens became more often than rare. Therefore, it increased the amount of trust and interaction between the citizen and the state, therefore diminishing the level of secrecy and status quo between the government and the citizen. Earlier it was the scenario that the government was not accountable to the general public though in theory it was and the elections were done according to the procedure, but the public could not have done the direct interaction as it is possible in today's era due to the existence of the Right to information.

The right to Information has catapulted the Indian citizen on a pedestal from where he can take stock of administrative decisions and actions and make sure that his interests are protected and promoted by the Government. This means that the right to information has served as a step forward for the general public and has allowed the Indian citizen to be accessible to the administrative decisions, be it policies, operations or documents anything, which is not restricted for the interest of the public. This has made the Indian public raise questions regarding anything they found susceptible to the autonomy of the legislature which has indeed given a rise to the practical democracy in the country except for the voting and the electoral system in the country. It has also ensured, that the general public is never deprived of its rights and legal and constitutional bindings. Which means that the citizen can even give a demand to the government this way and ensure that his interests which are inherently the interest of the general public, can be fulfilled without delay and the government is able to answer and fulfil and understand the needs of the general public in order to be more accountable and available to the service of the public.

The Right to Information, thus is an important landmark in the Indian history which has served the main purpose for the Indian democracy. By this act, the citizen of India has been empowered like never before, because he has been given the power to question whatever he feels wring or right. He can now question the audit system, review, examine and assess the government acts and decisions to ensure that these are consistent with the principles of the public interest, good governance and justice. This act promotes the transparency and accountability in administration by making the government more open to public scrutiny. This means that the citizen now has the power to raise obligations, questions and the inconsistency of the government.

504 Ibid.
policies, decisions, operational orders and laws, if they are not in compliance with the public interest and moreover vitally, the principles of the natural justice which ensures the highest level of public interest. It has also made the government of the country more responsible in a manner that they have become more sensible to the needs of the general public than to the need of the autocratic governments. This has also made the governance easy and transparent raising to another level of democracy in India. This way it is also seen to be dispensing justice in an appropriate manner and the level of the satisfaction that the individual gets on the answer received to the right to information also determines the level of satisfaction the individual has from the existing government. Thereby, increasing the scope of government being open to the public scrutiny.

The right to information act was enacted by the National Parliament to dismantle the culture of secrecy and to change the mindsets of the bureaucrats and political leaders to create conditions for taking informed citizens. The right to information provides for a framework for the promotion of the citizen government relationship and partnership in carrying out the programmes for the welfare of the people. the principle of the partnership is derived from the fact that the people are not only the ultimate beneficiaries of the development but also the agents of the development. Therefore, the process of development of the country becomes two fold: one the accountability of the government is increased giving rise to the people or the common masses being more powerful than the government itself, but it is for sure that there are certain restrictions which come within the framework of their duty to conceal and hide from the general public for the welfare of the general public itself, that is the reason why even if the restrictions are being imposed on the right to information in certain aspects, it is for the ultimate benefit of the people and not the government.

The stakeholders participation in the decision making and the enhancing of the accountability of the government, leads to a better project and more dynamic development. The author here, compares


507 Ansari MM in a lecture entitled, “Impact of Right to Information on Development: A Perspective on India’s Recent Experiences”,

505 Smita Srivastava on The Right to Information in India: Implementation and Impact
the right to information act as a stock in the market and the stakeholders are the general public. He means to say it is because of the participation of the stockholders that lead to the more efficient raise or decline in the market, similarly it is the participation of the general public which leads to the better and efficient functioning of the government through the right to Information.

The idea of the Right to Information started taking shape in the 1970 itself and is not a new concept. It started with the liberal interpretation by the judiciary of the various fundamental rights specifically the right to freedom of speech and expression. The Supreme Court in a case held the 'freedom of speech and expression includes within its compass the right of all the citizens to read and to be informed'. Which means that the court indirectly said that the right to information is included within the ambit of Article 19 of the Indian Constitution, which is a fundamental right of the citizen and the citizen cannot be deprived of this right except according to the procedure established by law.

In another judgement of the Supreme Court, it was reaffirmed by the Court that the basic purpose of the freedom of speech and expression is that all the members of the country should be able to form their beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know. In this judgement the court definitely meant that the Freedom of Speech and expression cannot arise when people are not given the right to know and therefore, within the meaning of the constitution when the rights cannot be taken back except according to the procedure establishment of law, the right to know cannot be alienated due to the fact that it has not been expressly mentioned in the constitution.

There have been numerous cases favouring the disclosure of the information of the government and making the government more accountable and transparent in its approach, as a result of lack of clear legislation on this, then people had to knock at the doors of the courts every time they wanted to enforce this right. The courts have almost always responded positively. But this was not the solution to the problem in common they all had, because after the resolution of their problem they would only stick to the solution while the information regarding the judgement was not made public therefore, the Right to Information could not been brought earlier than 2005. the common citizen had neither the means nor the time and inclination to get into the process of never ending litigation process and even the public interest litigation was a tool which could reach only a few and not all because of the prevalence of illiteracy in our country. The movement for the Right to Information was fresh and received impetus from a courageous and a grass root struggle for the rural poor for the right to information to combat the rampant corruption in famine relief works. This meant that the problems existed as to corruption and unaccountable government that the rural poor suffered to the extent of death and famine. The struggle


508 Bennett Coleman and Co. v. Union of India.

509 Manubhai D. Shah. v. Life Insurance Corporation of India.
of the Right to Information was lead by an organisation of the people, Mazdoor Kisan Shakti Sangathan that literally means the organisation for the empowerment of the workers and peasants. The reverberations of this struggle led to the nation wide demand for the law to guarantee the right to Information to every citizen, with wide spread support from the social activists, professionals, lawyers and media who are committed to the transparent and accountable governance and people's empowerment. Growing public concern about the callousness and corruption in the government resulted in a clamour for greater transparency culminating in a demand for the right to Information act. The consumer protection law created and strengthened the notion of citizens as consumers of government services. The Mazdoor Kisan Shakti Sangathan movement in Rajasthan was a turning point in the Right to Information in India and showed that even though these poeple were not educated they were civilised enough.

**CH-III RIGHT TO INFORMATION IN INDIA AND ITS IMPACT**

So, this project basically talks about the Right to Information in India and its impact and other issues that it is facing. Since in the previous chapter we have dealt with the introduction to the right to information in India, now let us deal with the impact of right to information in India. Right to Information has been seen as the most path breaking and historic legislation of our country where the power of the people was supported rather than the power of the politicians. It has generated tremendous impact in the matters of the citizen's democratic right monitoring the public good, curtailling corruption and improving governance. With increasing levels of education and awareness among the rural and urban public, RTI act has proved to be a potent weapon for solving a number of problems. citizens are now using their statutory right to be informed and to get any kind of information which lies in the public domain. This clearly means that the information which is accessible to the public can only be accessed by them due to the various security and secrecy reasons which lie within the scope of the legislative administrative authority. The various subjects on which the Right to Information can be filed are the utilisation of the public funds, progress in ongoing projects, state of civic services, distribution under public distribution system, access to answer sheets, disclosure of cut off, disclosure of question wise marks, patient's right to his treatment records, for obtaining driving license and passport and the list never ends. Moreover, the Right to Information act is very potential tool for strengthening democracy.

This new law empowers Indian citizens to seek any accessible information from a Public Authority and makes the government and its functionaries more accessible and responsible. Logically, therefore, the right to information has helped to increase transparency in the government and public dealings. So, what basically happens is that the Right to Information when gives access to the information which public is anyway authorised to have, claims to be diminishing

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510 Sri Keshabananda Borah. on the Right to Information Act: a key to good governance
the secret veil of the government, to a certain extent which is possible but what if the veil of the information given or provided are actually not true and claimed to be true. How will the citizen know that the information given is substantial in nature.

Practically, however it is difficult to comment on it because of the so many reasons of rampant corruption and the so called dedicated ministers of their legislative seat. Therefore, whether practically it has helped to increase transparency or not is a thought to be pondered upon and a contagious issue to be looked at.

There are certain challenges that the implementation of the Right to Information is facing since its inception in the country. Some of the major concerns in relation to implementation of Right to Information Act as expressed from various quarters may be considered. They are as follows :-

(1) Revealing of File notings

One of the most detectable and important concerns raised in respect of the Right to information act from the very beginning is regarding the disclosure of the file notings. the government and the bureaucracy are concerned over the exposure of the file notings to the public that it will act adversely against the requirement of free and frank opinion by the public officials in the decision making process. Which means that the government is tensed as to the application of the Right to Information in the context that if it reveals the public notings then it will not be able to give as well as receive the free and frank public opinion on various legislations and policies.

In this context, therefore, it will be appropriate to mention that the file notings are ad hoc written notes added to file by the officials and thus can give a critical insight into the decision making process which is the part of the legislature's duty to be performed with the help of the right to information. The exclusion of the file notings would undermine the spirit of the bureaucratic openness and accountability which the law embodies. The purpose of the act is to open and transparent government's decision making process to public scrutiny as discussed in the previous chapter. In this context then it would be appropriate to consider the records which says that according to Section 2(i)(a) of the right to information act defines 'record' as any document, manuscript and file to cover notes and appendices to notes. Further under public record rules, 1997 'file means a collection of the papers relating to the public records on aspecific subject matter consisting of the correspondence, notes and appendices to the notes thereto.

Thus from a legal and technical point of view the term file as understood in the aforementioned section includes file notings and it can legally be disclosed as per the requirement of law. In addition the disclosure of the notings will certainly ensure the application of mind of the decision maker to the issues involved and thereby enhance the quality of the decisional process. Thus it practically, ensures that the government worker or the legislature has fulfilled his duty of applying the mind in

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511 Manish Kumar Khunger on the Right to Information Act 2005: Operational Issues and Major Concerns.
making the laws and the policy which in the form of notices and appendices to notices will be made accessible to the general public.

(2) The second problem that they face is the cost of implementation of the right to information\textsuperscript{512}.

Such concerns keeping in plea the actual facts, the savings of the government through the reduction in the level of corruption and maladministration by implementation of the act would be more than the cost on its implementation. Additionally, it may also be noted that the total cost on the administration of the nation certainly comes from the taxes which eventually the citizen have to pay to the government and the cost of implementation of the right to information would be negligible as compared to the total cost on administration. This may also be said that the other way round that the taxpayers have all the right to know that how their government is making expenditure of their money. That the concern relating to the cost of implementation of the right to information act has been blown out of the proportion and ill founded. Which also means that if we see, the information regarding the cost of implementation of the right to information is less provided therefore, when we talk about the transparent procedures and accountability of the government to the citizens of the nation, we also see, that though the citizens pay the tax and everything, but the information at the end has to be given by the government officials only and not the individual body therefore, the answers can be simply manipulated and the citizens can be subject to deceit by the government.

(3) The third and the foremost problem of the right to information is the Misuse of the information\textsuperscript{513}.

With the passing of the right to information act, 2005 any citizen of India can access the information required by him, from the public authority, any information about the public servant etc. This is a marvelous step in the direction of transparency. However, what to do of a dummy right to information applications, i.e. after filing the applications and all correspondence are returning undelivered than what could be the rational of the act. Therefore a good law like right to information was being misused to ask the irrelevant and intrusive questions seriously impending the working of the concerned authorities. There has also been the apprehension that the information sought under the right to information Act would be misused or used to blackmail the officials and the organisations involved. In this context it is a threat to the security of the officials and the people involved. In this context it should be remembered that the this law can be used to access the truth and therefore it may be said that how can someone blackmail the officials on the basis of the true information received and it is not against the law as well. The situation of blackmailing would arise when the official is placed in a privilege position to maintain the secrecy of the sensitive information. It is the situation of the secrecy coupled with the

\textsuperscript{512} Manish Kumar Khunger on the Right to Information Act 2005: Operational Issues and Major Concerns.

\textsuperscript{513} Ibid.
unguided discretion of the authority which creates a situation of the blackmailing in favour of the official person and not the other way round which means that it is the official which is supposed to answer the query of the citizen under the right to information act, therefore, why would it dispense nay information which can be used against him to blackmail him or other authorities involved. Therefore, again raising the question of misuse of the information.

(4) Another important issue that the Act faces is the choice of information commissioners. This is because the information commissioners appointed at both the centre and the state levels have been retired high ranking members of the bureaucracy. One of the major concerns is that it is they who were part of the secrecy regime in the functioning of the public administration system for a long period of time, therefore, their mindset may not be in favour of promoting transparency which again is against the motive of their job itself. Yet another strong reason, which may go against such appointments is the requirement of the act itself. The act requires the commissioners may be appointed from the category of the persons having "eminence in public life with wide knowledge and experience in law, science and technology, social science, management, journalism, mass media and administration and governance. In the view of this appointment of retired bureaucrats in majority may not be justified rather goes against the express provision of the act. In addition, this may also give an impression that all those who are responsible for the administrative culture of secrecy are now trying to ensure transparency.

So, these were the problems that the Right to Information in India broadly faces and encounters whereas other countries right to information may be looked at in the following chapters.

CH-IV FREEDOM OF INFORMATION IN THE UNITED KINGDOM

So, this chapter basically talks about the Right to Information or otherwise known as the Freedom of Information in the United Kingdom itself. till now, we have seen the introduction to the right to information and the various problems that it faces for implementation with reference to India, now we will be dealing with the right to information in the United Kingdom and comparing them as to what they actually possess in nature that is similar to or different from the Right to Information in India.

So, the Freedom of Information like the right to information gives the right to access all the information that you want regarding various subject matters by the government and the public authorities. Therefore, like the right to information in India, freedom of information in the United Kingdom serves as the role legislation of the country and the state.

Any citizen can use the Act to find out about a problem affecting the community and check whether an authority is doing enough to deal with it. Also, to see how effective a policy has been made and what are its kinds of effects on the society. It is also to find out about the authority's spending and the rational of paying the tax to the extent of the expenditure of the authorities on the public property and not their own properties, it is also to check whether the authorities is doing what it is claiming to do and to learn more about the real reasons for decisions.\(^{515}\)

The point to be noted here is that the notices and the appendices to notices however, has not been specifically mentioned as in the case of the Indian Right to Information which means that the government of the United Kingdom is reluctant to give the reasoning for the laws that they have made which is quite unusual in its very nature.

Another provision of the Freedom to Information which matches that of the right to information is that the right to conceal any kind of information is allowed until and unless it falls within the purview of the authority of the legislature. Even exempt information may have to be disclosed in public interest in the United Kingdom unlike the Indian Right to Information. If any citizen thinks that the information has been withheld improperly, then the complain can be filed with the Information Commissioner, who can order the disclosure of the information required by the general public.

\(^{515}\)A Short Guide to the Freedom of Information Act and Other New Access Rights
not dealt by a particular section relating to the issue, it is a bit unorganised than the Freedom of Information in the United Kingdom\(^{516}\).

Personal information can also be received through the Freedom of Information in United Kingdom. Here, the personal information refers to the information of the public authorities. The Data Protection Act,199 already entitles any citizen of the country to access many kinds of personal information about himself, whether held by public or private bodies. This law has been amended by the Freedom of Information act to improvise on the rights to see personal information held by the public bodies\(^{517}\). The right to information held by private bodies has not been affected. The United Kingdom Information Commissioner enforces the right across the whole of the United Kingdom. So, the right to information in India does not have such a provision especially regarding the information held by the private authorities which definitely serve as a loophole when compared to the Freedom of Information of the United Kingdom.

The UK Freedom of Information Act applies to public authorities at all levels: central government departments and agencies; local authorities; NHS bodies including individual GPs, dentists, opticians and pharmacists; schools, colleges and universities; the police, the armed forces, quangos, regulators, advisory bodies, publicly owned companies and the BBC and Channel 4 (though not in relation to journalistic materials). The Houses of Parliament, the Welsh Assembly and, if reconvened, the Northern Ireland Assembly are all also covered. UK authorities which operate in Scotland are covered by the UK Act\(^{518}\).

Before requesting information under the FOI Act or EIRs it is usually worth checking what information the authority has already published. In particular, have a look at the authority’s ‘publication scheme’.

The Act requires every authority to have a publication scheme describing the classes of information that it publishes or intends to publish and saying whether there is any charge for it. These should be available on the authority’s website and in hard copy on request. The schemes must be approved by the Information Commissioner and are then legally binding. Where an authority’s scheme commits the authority to publishing all information of a particular description it is obliged to publish all that information (unless the definition itself excludes certain information). The information should be supplied to you within a few days of you asking for it or be available for download on its website. The Information Commissioner can if necessary take enforcement action against an authority which fails to publish information specified in its publication scheme. At the moment many authorities’ schemes are made up mainly of information that they

\(^{516}\) Ibid.

\(^{517}\) Ibid.

\(^{518}\) For the full list of bodies covered see: http://www.foi.gov.uk/coverage.htm
had already been publishing and add relatively little that it new, though there are some notable exceptions.

**CH-V FREEDOM OF INFORMATION IN THE UNITED STATES OF AMERICA**

So, this chapter basically talks about the right to Information in Australia. Till now, we have discussed about the Right to Information in India and the Freedom of Information in United Kingdom. Now in this chapter we will be analysing the Freedom of Information in the USA with that of India.

No provision in the U.S. Constitution expressly establishes a procedure for public access to executive branch records or meetings. Congress, however, has legislated various public access laws. Among these laws are two records access statutes,

- the Freedom of Information Act \(^{519}\)
- the Privacy Act \(^{520}\) and two meetings access statutes,
- the Federal Advisory Committee Act \(^{521}\), and
- the Government in the Sunshine Act \(^{522}\)

These four laws provide the foundation for access to executive branch information in the American federal government. The records-access statutes provide the public with a variety of methods to examine how executive branch departments and agencies execute their missions. The meeting-access statutes provide the public the opportunity to participate in and inform the policy process. These four laws are also among the most used and most litigated federal access laws. So, unlike India, the United States of America does not have a right to Information specifically but they have four different statutes that give access to the information the general public is in need of.

FOIA established, for any person—corporate or individual, citizen or otherwise—presumptive access to existing, unpublished agency records on any topic. \(^{523}\) The law specifies nine categories of records that may be exempted from the rule of disclosure. Agencies within the federal intelligence community are prohibited from making any record available to a foreign government or a representative of same pursuant to a FOIA request. Disputes over the accessibility of requested records may be settled, according to the provisions of the act, in federal court or may be mediated in the Office of Government Information Services (OGIS). \(^{524}\) Fees for search, review, or copying of materials may be imposed, 

\(^{519}\) (FOIA; 5 U.S.C. §552),
\(^{520}\) (5 U.S.C. §552a),
\(^{521}\) (FACA; 5 U.S.C. App.)
\(^{522}\) (5 U.S.C. §552b).

\(^{523}\) For more detail on FOIA, see CRS Report R41933, The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues, by Wendy Ginsberg

while certain types of requesters may be granted fee waivers or reductions. \textsuperscript{525} FOIA was amended in 1996 to provide for public access to information in an electronic form or format. These amendments are often referred to as e-FOIA.

In 2007, FOIA was further amended to:

- redefine qualifications for fee waivers for those seeking records,
- require the National Archives and Records Administration to establish OGIS to act as a centralized FOIA oversight office and FOIA dispute mediator, and
- require agencies to create tracking systems that allow requesters to determine the status of their information requests, among other modifications. \textsuperscript{526}

So, unlike the Indian Right to Information, the Freedom of Information Act that the United States of America has does not face a problem of the fees or the costs of implementation that India faces. They have waived their fees and the public can have access to the information free of cost and the various organisations have been set up to handle disputes between the public and the government as in the United Kingdom as well, but unlike the Indian context.

Individuals, groups, and organizations all possess a right to access some government information. Both government and private groups publish guides to the information acts in paper and on the Internet as well. The U.S. House of Representatives Committee on Government Reform has published several editions of its report, A Citizen’s Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records—most recently in September 2012. \textsuperscript{527} In addition to the text of the acts, the Citizen’s Guide contains descriptions and explanations, sample document request forms, and bibliographies of related congressional and non-congressional material.

Among many nongovernmental groups that publish information about freedom of information are Public Citizen and the National Security Archive. Public Citizen, a non-profit organization that represents a variety of citizen interests, maintains a website that provides FOIA resources and information. \textsuperscript{528} The National Security Archive, a collective of journalists and scholars who “check rising government secrecy,” \textsuperscript{529} maintains a website that contains a number of FOIA guides, including “Effective FOIA Requesting for Everyone: A National Security Archive

\textsuperscript{525} 5 U.S.C. §552(h)(3).
\textsuperscript{526} P.L. 110-175; 121 Stat. 2524.
\textsuperscript{529} The National Security Archives, “About the National Security Archive,” at http://nsarchive.gwu.edu/hsa/the_archive.html.
Guide,” which was published in January 2008. 530

So, Even in India we have a website for Right to Information which provides the citizens with all the information that has been solved and has been dealt with, till date. This means that it makes the information more accessible and accountability of the legislature increases when the right to information is actually published. sometimes, even the newspapers and the news channels give coverage to the information revealed from the right to information.

CH-VI CONCLUSION

So, in this research paper we have seen till now that we have dealt with the right to information in India, the freedom of Information in United Kingdom and the Freedom of Information and other acts in the United States of America. So, after analysing each and every point in the paper, we have come to a conclusion that the main objective of the right to information is that it wants to raise accountability of the government officials so as to make the system of governance transparent and efficient but sometimes it does not seem to be possible.

Right to Information Act, 2005 was enacted on 15 June 2005 and was come into force from 12 Oct.2005. In India the act is implemented in just 4 months, which is low as compared to the similar acts in other countries. The awareness of the people has increased about the act and the request for the information is increasing in various departments. Due to the increase in request for the information and the lack of preparedness for the act different types of organizations are facing difficulties due to the implementation of RTI Act, 2005. Organizations are divided in three categories on the basis of the use of information technology, which is as follows:

- **Low use of information technology:** In these organizations minimum level of information technology is used and these organizations are facing a lot of difficulties in collecting the information from the concerned department. Thus these organizations are facing many difficulties due to the implementation of RTI Act, 2005.

- **Medium use of information technology:** In these types of organizations information technology is used in different departments but these departments are not integrated to share the information through the common platform. These organizations are facing fewer problems due the implementation of the RTI Act.

- **High use of information technology:** In these organizations information technology is highly used in different department and these

The organizations of high use of information technology are not facing any problem due to the implementation of RTI Act, 2005 where as the organizations with low or medium use of information technology are facing problems in collecting and disseminating the information due to the implementation of RTI Act, 2005. It is also suggested by the Public Information Officers that fully dedicated executive should be there for the smooth disseminations of information as per RTI Act, 2005.

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Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

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Abstract

In India the Government has the power to acquire land for a public purpose. The legislation that was enacted to govern the same was very old and there were no provisions for compensation or rehabilitation on acquiring land. This led to the passing of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 which replaces the old Act. The Government of India believed there was a heightened public concern on land acquisition issues in India. Of particular concern was that despite many amendments to India’s Land Acquisition Act of 1894, there was an absence of a cohesive national law that addressed fair compensation when private land is acquired for public use, and fair rehabilitation of land owners and those directly affected from loss of livelihoods. The Government of India believed that a combined law was necessary that legally requires rehabilitation and resettlement necessary and simultaneously follow government acquisition of land for public purposes.

Land acquisition refers to the process by which government forcibly acquires private property for public purpose without the concurrent of the land owner. The land owner is not a willing seller, therefore, compensation and the way in which compensation were payable, is to be fair and reasonable. TRTFCAT in LARR Act 2013 (The LARR Act) provides for land acquisition as well as rehabilitation and resettlement (R & R) and replaces the Land Acquisition Act 1894. For the last two years, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 has been in the eye of debate and discussed for the controversial changes. The Act soon faced resistance from the industry due to the impact of clauses like social impact assessment, compensation to land owners, rehabilitation and resettlement, and consent requirements on projects done in public interest.
This paper captures the overall progression of the land laws starting from the Land Acquisition Act 1894 to Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (RFCTLARR) Ordinance, 2014. It maps the role and the influence of the three primary stakeholders - Government, industry and landowners - at various stages of the evolution of the land acquisition law in India. Further the paper aims at bringing about a critical review of the 2013 Act and 2014 ordinance. It also ensures a comparative analysis of the provisions of the earlier 1894 Act and the LARR Act of 2013.

**Introduction**

The majority of the Indian population is dependent on lands. Most of them are on agricultural lands, while some on urban properties. In view of ever increasing demand and rising prices of land, a person/family affected by land acquisition will suffer heavily as it will be impossible for him/them to purchase similar extent of land lost in the acquisition. Therefore, the Parliamentarians’ enacted The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 and replaces the Land Acquisition Act of 1984 which was a pre-Constitutional Act. The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 would be operative from a notified date within 3 months from the date it received the assent of the President of India. It aims to acquire the land in consultation with institution of local self-government and gram sabhas established under the Constitution. Humane, participative, informed and transparent process of Land Acquisition for industrialization, development of essential infrastructure facilities and urbanization with lease disturbance to the owners of the land and other affected families and provide just and fair compensation to the affected family and whose land has been acquired or proposed to be acquired on affected persons by such acquisition. And make adequate provisions for such affected persons for their rehabilitation and resettlement and for ensuring that the cumulative outcome of compulsory acquisition should be that affected persons become partners in development leading to an improvement in their post-acquisition social and economic status.

**History**

In India, the Land Acquisition Act 1894 had served as the basis for all government acquisition of land for public purposes. The first land acquisition law was enacted during the British Raj in 1824, which underwent several modifications and was finally replaced by the Land Acquisition Act, 1894. The Government of India in 1947 adopted the Land Acquisition Act, 1894. The land acquisition process as per the Land Acquisition Act, 1894 is given in Exhibit 2. The Constitution of India placed ‘Acquisition and requisitioning of property’ as Entry 42 in the Concurrent List. This meant that both the Centre and States could make laws governing land acquisition. However, in case of a conflict between the central and state law, the central legislation would prevail.
The Act was reviewed by various committees appointed by the Government of India. In 1967, a committee was appointed by the Government of India to study, consult and recommend principles to amend the 1894 Act. As a result of such reviews, the LAA 1894 was amended 17 times, after independence in 1947, by various elected governments. The major amendments to LAA 1894 are described in Exhibit 3. Various State Governments also amended the Act in order to respond to the local demands, like in the case of Land Acquisition (Amendment and Validation) Act of 1967 by the state of Karnataka.

The Standing Committee on Rural Development (SCRD), in its report on the Land Acquisition, Rehabilitation and Resettlement (LARR) Bill 2011, a precursor to RFCTLARR, explained the amendments made over the years.

“Initially, the exercise of the doctrine of Eminent Domain was limited to acquiring land for public purpose such as roads, railways, canals, and social purposes like state run schools and hospitals. The Act, however, added the words ‘or Company’ to ‘public purpose’ to distinguish land acquisition by the State for ‘public purposes’ from land acquisition by the State for ‘a Company’. Moreover, acquisition of land for ‘Companies’ was restricted to Railway Companies, until by an amendment effected in 1933, acquisition was permitted for the ‘erection of dwelling houses for workmen employed by the Company or for the provision of amenities directly connected therewith’.

The Ambit of the LAA 1894 was then significantly expanded by a number of amendments in 1962 which permitted acquisition for a Company ‘which is engaged or is taking steps for engaging itself in any industry or work which is for a public-purpose’. The amendments made in 1984 in the LAA 1894 extinguished any differentiation between acquisition for a State purpose and ‘acquisition for a private enterprise’ or ‘State enterprise’ by amending section 4 of the original Act to insert the words ‘or for a Company’ after ‘any public purpose’.

However, the law failed to address some important issues associated with land acquisition, particularly forcible acquisitions, the definition of ‘public purpose’, widespread misuse of ‘urgency clause’, compensation, lack of transparency in the acquisition process, participation of communities whose land was being acquired and lack of R&R package.

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533 Section 4 of the 1894 Act deals with the publication of preliminary notification for acquisition of a particular land and the powers of the officers thereon.
Due to a lack of clear definition of ‘public purpose’, there had been considerable difference of opinion among various judgments of the Supreme Court (SC), which resulted in granting very broad discretionary powers to the state in terms of deciding the contours of ‘public purpose’ under particular circumstances.

In the State of Bombay v. R. S. Nanji534, the SC observed, -It is impossible to precisely define the expression ‘public purpose’. In each case, all the facts and circumstances will require to be closely examined in order to determine whether a public purpose has been established. Prima facie, the government is the best judge as to whether public purpose is served by issuing a requisition order, but it is not the sole judge. The courts have the jurisdiction and it is their duty to determine the matter whenever a question is raised whether a requisition order is or is not for a public purpose.535.

In the 1988 case of Coffee Board v. Commissioner of Commercial Taxes536, the SC again stated, “Eminent domain is an essential attribute of sovereignty of every State and authorities are universal in support of the definition of eminent domain as the power of the sovereign to take property for public use without the owner’s consent upon making just compensation”537.

Acquisition of Land

As per the Land Acquisition Act, 1984 the acquisition of land is of two kinds:

- Acquisition of land by the government for public purpose,
- Acquisition of land for companies.

The public purpose is defined in section 3(f) of the Land Acquisition Act, 1984. It is an inclusive definition. ‘Public purpose’, as mentioned in the Act, is not capable of precise definition and has to be tested in the light of the purpose for which land is sought to be acquired. From time to time the apex court and various high courts have expanded the scope of public purpose. The concept of public purpose is not static. It changes with the requirements of the society from time to time and in accordance with the conditions of the country.

In EMMAR Properties’ case 538, establishment of integrated project for providing business-cum-leisure tourism infrastructure centre like villas, golf course, hotels and banquet halls was held to be for public purpose. But as per the Act, 2013 the ‘public purpose’ is clearly defined as the activities specified under sub-section (1) of section 2 of the Act, 2013.

As per the Act, 1984, there are two modes of acquisition, one is ordinary acquisition where possession of land can be taken only after an award is passed, and the second one is acquisition of land by invoking urgency clause where advance possession can be

534 AIR 1956 SC 294.
536 AIR 1988 SC 1487.
537 Ibid.
taken by giving notice of 15 days. In case of company acquisition any company for whose purpose the land is sought to be acquired has to bear the costs of acquisition. It should enter into a prior agreement with the appropriate government for payment of compensation, transfer of land and other terms as may be necessary in connection with such acquisition. Such agreement between the appropriate government and the company has to be published in the official gazette under section 42 of the Act, 1984 which is obviously to ensure transparency in the matter.

Act, 2013 at Glance

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 is contained totally 114 sections which are incorporated in 13 Chapters, and Four Schedules.

Chapter I deals preliminary i.e. short title, extent and commencement, application of the Act and definitions part (sections 1 to 3);

Chapter II deals the provisions regarding to determination of Social Impact and Public purpose (sections 4 to 9);

Chapter III deals the special provisions to safeguard food security (section 10);

Chapter IV deals the provisions for notifications and acquisition (section 11 to 30);

Chapter V deals VII deals the provisions for National Monitoring Committee for Rehabilitation and Resettlement (section 48 to 50);

Chapter VIII deals the provisions for establishment of land acquisition, rehabilitation and resettlement authority (Sections 51 to 74), Chapter IX deals the provisions for apportionment of compensation (sections 75 and 76);

Chapter X deals the provisions for payment (sections 77 to 80),

Chapter XI deals the provisions for temporary occupation of land (sections 81 to 83),

Chapter XII deals the provisions for offences and penalties (section 84 to 90),

Chapter XIII deals the miscellaneous provisions (section 91 to 114). First Schedule deals the compensation for land owners, Second Schedule deals the elements of rehabilitation and resettlement entitlements for all the affected families (both land owners and the families whose livelihood is primarily dependent on land acquisition) in addition to those provided in the First Schedule. Third Schedule deals the provisions of infrastructural amenities and Fourth Schedule deals list of enactments regulating land acquisition and rehabilitation and resettlement.

Unique feature of the Act, 2013 is to make adequate provisions for affected persons for rehabilitation and resettlement. The affected person and affected family have been defined. The affected families include not only whose land has been acquired but also families depend on agriculture labour,

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tenants widely categorized or artisans whose work may be affected in the area for 3 years prior to the acquisition of the land whose primary source of livelihood stand affected by the land acquisition. Schedule Tribe in the notified Act under Schedule Area has also been dealt with. Infrastructure projects have been elaborately mentioned. Acquisition also for strategic purposes relating to naval, military, air force and armed forces of the Union for vital national security for defence of India or state police. The projects include for affected families housing schemes specified by the appropriate government.

Market value of the acquired land means as determined under section 26. Persons interested, patta holders have also been brought within the preview of the Act. Determination, social impact a public purpose also has been dealt with Chapter II. Appraisal of social impact assessment report is to be by an expert group is mentioned in section 7. Whereas urgency provisions are invoked under section 9, it has been given power thereto to exclude social impact assessment study before acquisition. Provisions also have been made to safeguard food security.

The collector is to submit draft Rehabilitation and Resettlement scheme with suggestion to the commissioner for its approval. The commissioner shall ensure publication of the approved scheme in the local language in the panchayat etc., published in the prescribed manner. The Act also mandates to upload on the website of government which was lacking in the old Act. The government after considering the report and satisfying itself is required to publish a declaration of the identified resident area for the purposes of rehabilitation and resettlement of the affected family under the hand and seal of the Secretary to the government or an authorized authority. Different declaration may also be made in respect of different parcels of land covered by the preliminary notification. The collector shall publish not only rehabilitation and resettlement scheme but also the declaration under section 19(1) as is mandatory to make such declaration. The requiring body shall deposit the amount promptly to enable the government to publish the declaration within a period of 12 months in the pain of its invalidation. Section 25 mandates the collector to make the award within 12 months from the date of declaration under section 19, saving period of 3 months for its publication is provided, and otherwise the acquisition of land shall lapse. The collector shall record reasons for such extension and uphold on its website. Temporary occupation of waste or arable land procedure is also laid down in this Act under Chapter XI.

The Land Acquisition Rehabilitation and Resettlement Authority is one established under section 51. The meaning of the Collector is the same as in the old Act. The commissioner for Rehabilitation and Resettlement is appointed under section 44. The cost of acquisition is not only of solatium but also compensation ordered by Land Acquisition Rehabilitation and Resettlement Authority or the court. After determining total compensation including solatium at 100% of the compensation which is a new provision under the Act, he is also required to calculate interest @12% per annum on a market value commencing.
from the date of publication of social impact assessment study till the date of collector’s award or taking possession of the land, whichever is earlier.

Most notable change in the Act, 2013

Notable change is introducing a unique feature of determination of Social Impact Assessment Study for public purpose, which was inserted in Chapter II of the Act, 2013 i.e. sections 4 to 9 deals the provisions for determination of Social Impact and Public Purpose. Social Impact Assessment Study (SIAS) to be done by the authorities before preliminary notification under section 4 of the Act, 2013, if the government intends to acquire land for public purpose, which means the authorities have to conduct public hearing and give a report about the social impact by consulting with the Panchayats/Municipalities/Municipal Corporations (local authority) as the case may be prior to issuing preliminary notification under section 11 for acquisition of land. During such study the grassroots level authorities also have a say to give their opinion whether the proposed acquisition serves public purpose, number of family members likely to be affected in the acquisition, whether alienate land can be acquired, the extent of public land/house settlement likely to be affected in the acquisition, as to whether the extent of land proposed to be acquired is bare minimum requirement for the project. Under Social Impact Assessment Study, the authorities are bound to take into consideration the impact the project is likely to cause on various components such as livelihood of the affected families, properties, assets, sources of drinking water for cattle, community ponds, grazing lands etc. After such study, a report is prepared and it is mandatory that it should be made available in local language at Panchayats/Municipalities/Municipal Corporations as the case may be.

The Social Impact Assessment Study will be done by a group of persons comprising of two unofficial social scientists, representatives of the Panchayat / Grama Sabha / Municipality / Municipal Corporation, two experts on rehabilitation, technical experts etc. Then such report has to be forwarded to the appropriate government and the appropriate government after ensuring that the purpose of acquisition is bonafide and recommended such area for acquisition which would ensure minimum displacement of people disturbance of infrastructure, ecology etc. However, under section 9 of the Act, 2013 the government may exempt the undertaking of Social Impact Assessment Study if the acquisition is made under urgency clause, under section 40 of the Act, 2013.

Key features of LARR, 2013

- As per Section 10 of the Act, 2013, no irrigated multi crop land shall be acquired. If under exceptional circumstances such land is acquired, the government should ensure that equivalent area of cultivable waste land shall be developed for agricultural purposes or the amount equivalent to the value of the land acquired shall be deposited with the appropriate government for investing in agricultural for enhancing food security. This is in consonance with the Food Security Act, 2013. So, in case of acquisition of multi crop fertile lands, the object is to see that cultivable lands are not
diminished, and thereby to ensure that there is no shortage of food production.

- Rehabilitation and Resettlement: in case of land-owners/landless people whose lands are affected in acquisition, rehabilitation and resettlement scheme has to be prepared under sections 16 and 17 of the Act, 2013. A special provision is made for the benefit of the people belonging to Schedule Castes and Scheduled Tribes under section 41, and their lands should not be acquired as far as possible and in case of demonstrable last resort, their lands are acquired under a special development plan for their rehabilitation and resettlement.

- Land acquired for one purpose cannot be used for another purpose under section 99. However, if the land is rendered useless for the originally notified purpose, the appropriate government may use it for another purpose. If the land acquired is not utilized within a period of five years from the date of taking possession, it shall be redelivered to the original owner under section 101 of the Act, 2013.

- Section 24 of the Act, 2013, protects certain category of persons whose lands have been notified/acquired under the Act, 1984. The provisions of the Act, 2013 will apply

  (a) Where no award has been passed under section 11 of the Act, 1984 for payment of compensation,

  (b) Where award has been passed under section 11 of the Act, 1984, more five years or more prior to the commencement of the Act, 2013, but physical possession has been taken or compensation has not been paid,

- Then in the above two circumstances, the proceeds under the Act, 1984 are deemed to have lapsed. Further, where award is passed and compensation of majority land-holdings has not been deposited in the account of beneficiaries, then all the beneficiaries specified in the section 4 notification under the Act, 1984 will be entitled to compensation under the Act, 2013.

- Compensation payable to the land-owners is provided in Schedule-I of the Act, 2013. The land-owner will get market value multiplied by one or two times (for urban and rural lands as the case may be), along with interest which includes 100% solatium. Similarly, Schedule-II is also provided detailing out the manner in which the land-owners and landless poor will be rehabilitated and resettled.

**RECTLARR Ordinance, 2014**

The winter session of the Parliament, which started on November 24, 2014 was marred by disruptions. Proceedings of RS were washed out as opposition parties stalled the House by pressing the demand for a statement by the PM on alleged forced religious conversions in Agra. Several crucial bills, including RFCTLR Amendment Bill, Goods and Services Tax Bill and Insurance Bill, could not be discussed in the Parliament due to stiff opposition by some parties.

The political composition of both the Houses of Parliament was evident in the functioning of each of the Houses. The LS
was more productive with 126 hours of functioning during the stipulated 20 sittings. The productivity percentage of the Lower House was as high as 105 percent. In contrast, productivity of RS was only 68 percent. This could be viewed in juxtaposition with the numerical strength of NDA in each of the Houses. In the LS it had an overwhelming majority of 334 out of the 543 seats, but in the RS, it had just 62 out of the 250.

On December 23, 2014 the Cabinet Committee on Political Affairs recommended to the President to prorogue both the Houses of the Parliament to enable promulgation of two official ordinances namely Coal Amendment Ordinance and Insurance Amendment Ordinance. Proroguing of the session was crucial because, as per the rules laid down in the Constitution, an ordinance could be passed only when the Parliament was not in session and the previous session had been prorogued. Consequently, both the Houses were prorogued by President Pranab Mukherjee on December 23.

On December 27, 2014 the Government of India decided to take the ordinance route to make amendments to RFCTLARR. The Government of India sources informed that the necessary directions had been issued to the MoRD to get the draft ordinance vetted by the Law Ministry. Article 123 of the Constitution enabled the President of India to promulgate an ordinance if both the Houses of Parliament were not in session and ‘circumstances existed, which rendered it necessary for him to take immediate action’. Every ordinance had to be laid before Parliament, and ceased to exist six weeks from the end of the next sitting of Parliament. Since the Constitution mandated that Parliament to be called into session at least once every six months, an ordinance has a de facto expiration period of approximately seven and a half months. The constitutional provision with respect to the ordinance is provided in Exhibit 11.

On December 29, 2014 the Union Cabinet chaired by the PM approved the amendments and recommended the President to promulgate the RFCTLARR Ordinance 2014. The RFCTLARR Ordinance was the eighth ordinance passed in seven months of the NDA Government and the ninth for the calendar year. The ordinance brought in the following amendments:

- Compensation and R&R specified in the Act was extended to the acquisition under thirteen Acts mentioned in the Fourth Schedule.
- Projects in the areas of i) defense and defense production ii) rural infrastructure iii) affordable housing iv) industrial corridors v) social infrastructure projects including PPPs in which ownership lies with the government, were exempted from


conducting SIA and taking the consent of affected families.

- Definition of public purpose was widened to include private hospitals and private educational institutions

- The term ‘private company’ was changed to ‘private entity’ to encompass other forms of companies like proprietorship, partnership, corporation, non-profit organization, and other non-governmental entities

- ‘Companies Act 1956’, which was the reference for the definition of ‘Company’, was replaced by ‘Companies Act 2013’

- The period after which unutilized land had to be returned was extended to any period specified at the time of setting up the project. RFCTLARR 2013 required land, which remained unutilized for five years, to be returned to the original owners or the land bank.

On December 31, 2014 President Pranab Mukherjee sought further clarification regarding the urgency to promulgate the ordinance since the Amendment Bill was not presented before the Parliament. According to the Constitution, an ordinance could be promulgated by the President only after he was ‘satisfied that circumstances exist which render it necessary for him to take immediate action.’

Another reason for the clarification was said to be the increased instances of the NDA Government taking the ordinance route to avoid the logjam in the Parliament. The Government of India had issued seven ordinances within a fortnight of the end of the winter session which had also raised concerns within the Cabinet. The number of ordinances issues during various LS sessions is given in Exhibit 12.

Since the Rural Development Minister Chaudhary Birender Singh was unavailable to brief the President, three senior Union Ministers including Finance Minister Arun Jaitley, Law Minister D V Sadananda Gowda and Highways Minister Nitin Gadkari met the President. Nitin Gadkari who had earlier held the rural development portfolio explained that an ordinance was necessary to bring the 13 Central Acts at par with the compensation and rehabilitation provisions of RFCTLARR. After the discussion, the President gave his assent to the RFCTLARR Ordinance 2014.

Conclusion

As per the Act, 1984 the agriculturist/landless poor are unduly deprived on their valuable lands. Several people have been displaced from their villages, meager compensation is being paid, and acquisitions being made in colorable exercise of power, all these problems compounded have triggered our


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Parliamentarians to come up with a new Land Acquisition Act, 2013. As evident from the contents of the Act, 2013, at various stages substantial safeguards have been provided to the land owner so as to ensure that the authorities do not act arbitrarily and in discriminative manner to deprive the land-owner of his land. Ultimately the Act, 2013, will go a long way to protect the interests of farmers and landowners who are solely depended on the lands and this mechanism takes care of the longstanding grievances of the landowners/displaced persons by ensuring the acquisition of property will be made only as a last resort and if the purpose is bonafide and genuine.

However, at the beginning of the whole phenomenon of globalisation actually really helpful in the acceptance of change in climate being real by the world community and also greatly accelerated the fight against climate on a global scale. This paper is an attempt trace the effect and the contribution of globalisation as a phenomenon in helping paving the way for the first major global step in fighting a deadly climate change process i.e. ozone layer depletion.

**INRODUCTION**

“Earth without ozone is like a house without roof.”

Anonymous

The ozone layer refers to a thick layer in stratosphere which plays a key role in climate and the biosphere. This layer acts as shield to the Earth as it has the capability to absorb almost 97-99% of the ultraviolet radiations from the sun, which is harmful for living organisms. Although in small amounts, it is helpful for the skin formation as it as source of vitamin D but it is largely a cause of sunburn, blindness and cancer. The slightest rupture of this layer might lead to devastating effects leading to irreparable consequences for the planet at large. However, man’s quest to pursue his material desires has been a major cause for depletion of the ozone layer. Scientists are of the opinion that by now, it might have been damaged to such an extent that it is impossible to retain its original form. Despite the deteriorating condition of the ozone layer, there have been international efforts to curb the side effects of Industrialisation and Globalisation on the ozone layer. The Vienna Convention and the
Montreal Protocol are steps taken by the global community in this direction. The depletion of ozone layer had a direct link with the concept of the globalization. Also, the manner in which this issue was tackled by the world community, which was unlike any other environmental issue handled before, which was also the effects of globalization. This research paper aims to analyse the issue of the depletion and protection of ozone layer from the prism of globalizing world. Along with that, this paper shall try to analyse the unique impact of the Montreal Protocol on the global scale.

RESEARCH METHODOLOGY
The research methodology adopted for the purpose of this project is the doctrinal method of research. The various library and internet facilities available at National Law University, Delhi have been utilized for this purpose.

OBJECTIVE
The objective of this paper is to analyse the impact of globalization on the issue of depletion of ozone layer and how the response to ozone layer depletion issue impacted globalization.

RESEARCH QUESTIONS
• Was the way that the issue of ozone layer depletion tackled evident of the fact that the 1980’s was the time when the world truly started globalizing?
• Is the Multilateral Fund the biggest evidence of the fact that we are now living in a globalized world?
• Is it only globalization that has impacted the Montreal Experience or the Montreal Experience has also furthered the concept of globalization?

HYPOTHESIS
• The depletion of ozone layer was a direct result of globalization.
• The overwhelming enthusiasm across the globe to address the issue of ozone layer depletion was a result of globalisation.
• The Montreal Experience has strengthened the concept of globalisation.
• The concept of globalisation contributed immensely in making the Montreal Protocol the most successful environmental experience in history.

CONNECTING THE DOTS: THE DEPLETION OF OZONE LAYER, THE MONTREAL EXPERIENCE AND GLOBALIZATION
Some scholars place the origins of globalization in modern times; others trace its history long before the European Age of Discovery and voyages to the New World. Some even trace the origins to the third millennium BCE. But globalization on a massive scale began in the 19th century, especially when quick transportation was invented in the form of steam engine locomotive. But it was in the late 20th century that the world started globalizing.

and the globe has been shrinking at a breathtaking pace ever since.

The term *globalization* is derived from the word *globalize* and is a term which is quite difficult to define in words. Everybody understands what globalization is how it has changed our life but it very difficult to frame a precise definition. One of the earliest known usages of the term as a noun was in a 1930 publication entitled, *Towards New Education*, but it was Economist Theodore Levitt who is widely credited with popularizing the term in the 1980’s. In a very comprehensive manner, globalization can be defined as “the process of international integration arising from the interchange of world views, products, ideas, and other aspects of culture.” If this definition can be accepted as proposed, the world actually achieved its globalizing pace in the 1970’s.

Another seemingly epoch-making development was also occurring in the 1970’s, whose impact was felt through the 1980’s and is still being discussed in 2015. Ozone depletion describes two distinct but related phenomena observed since the late 1970s: a steady decline of about 4% in the total volume of ozone in Earth's stratosphere (the ozone layer), and a much larger springtime decrease in stratospheric ozone around Earth's Polar Regions. An essential property of ozone molecule is its ability to block solar radiations of wavelengths less than 290 nanometers from reaching Earth’s surface. In this process, it also absorbs ultraviolet radiations that are dangerous for most living beings. UV radiation could injure or kill life on Earth. Though the absorption of UV radiations warms the stratosphere but it is important for life to flourish on planet Earth. For humans, excessive exposure to ultraviolet radiation leads to higher risks of cancer (especially skin cancer) and cataracts. This was high time that world community responded to the newly discovered threat to humans as a globalizing community.

Ironically, the main cause of this ozone layer depletion was the very advancement in science and technology that was responsible for the world globalizing. As the Chlorofluorocarbons (CFCs) and other halogenated ozone depleting substances (ODS) are mainly responsible for manmade chemical ozone depletion. No significant natural sources have ever been identified for these compounds—their presence in the atmosphere is, almost entirely, due to human manufacture.

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CFCs were invented by Thomas Midgley, Jr. in the 1920s. They were used in air conditioning and cooling units, as aerosol spray propellants prior to the 1970s, and in the cleaning processes of delicate electronic equipment. Basically, chlorofluorocarbons are released into the atmosphere due to cleaning agent coolants in refrigerators, air conditioning; packing material; aerosol spray cans etc. When such ozone-depleting chemicals reach the stratosphere, they are dissociated by ultraviolet light to release chlorine atoms. The chlorine atoms act as a catalyst, and each can break down tens of thousands of ozone molecules before being removed from the stratosphere. Given the longevity of CFC molecules, recovery times are measured in decades. It is calculated that a CFC molecule takes an average of about five to seven years to go from the ground level up to the upper atmosphere, and it can stay there for about a century, destroying up to one hundred thousand ozone molecules during that time.

James Lovelock was probably the first scientist who started collecting empirical data about the abundance of chlorofluorocarbons in the atmosphere. Dr. Lovelock delivered a lecture on his findings and it was heard by Frank Rowland and Mario Molina. Frank Sherwood Professor of Chemistry at the University of California, Irvine, where he still works. Molina worked as a post-doctoral scholar in Rowland’s laboratory in 1974. When they together attended the lecture, they were both intrigued by the findings presented. They started further investigations and research on high amounts of CFCs in the atmosphere. They discovered that CFCs decompose in sunlight, to release chlorine atoms. Chlorine atoms convert ozone to oxygen, and can then attacks other ozone molecules. A single atom can destroy millions of ozone molecules before it is neutralized. Molina and Rowland’s findings were published in 1974 and shocked the entire world. Their findings were later confirmed by scientists around the world, especially the British Antarctic Survey in 1986. Molina and Rowland’s findings were published in 1974 and shocked the entire world. Their findings were later confirmed by scientists around the world, especially the British Antarctic Survey in 1986. In 1985, the Vienna Convention for the Protection of the Ozone Layer was agreed upon by the global community. Relying on the confirmed findings of Molina and Rowland’s by the British Antarctic Surveyin 1986, nations further agreed upon the Montreal Protocol on Substances that Deplete the Ozone Layer, which was a protocol to the Vienna Convention for the Protection of the Ozone Layer. This was the concrete step towards phasing out of the ozone depleting substances. Frank Rowland and Mario Molino deserve the credit for this, as the world community relied on their study and findings to base their decisions on.

This response was probably the kind of “international integration” that has been considered as an essential feature of globalization. The world community has finally started to become a globalized...

community and the response to the issue of ozone layer depletion is evidence of it.

RESPONDING LIKE A GLOBALIZING COMMUNITY
The Montreal Protocol was an epoch-making not in the field of international relations or even in environmental law. It was also very important for the concept of the globalization, as per the proposed definition above.

The remarkable thing about the change that came while reaching the Montreal protocol was that at the time of the Montreal protocol, there were no readily available substitutes for the CFCs, let alone their economic viability. However, it is also very remarkable that how quickly cost-effective substitutes were developed and began to be used in electronics, food packaging and other applications. 550 This miraculous development was a direct result of globalization i.e. it was an interchange of ideas.

In the course of human development and progress, the biggest casualty has been Mother Nature. From being a fringe field of study, environment and environmental law came into the forefront of the world political scenario and has firmly retained its position. Therefore, the principle of common concern brings about that the global environment is a common concern of humanity. 551

The response may have been a knee-jerk reaction and a very anthropocentric approach to development of environment law. But nothing is more of a unifying factor as a threat to the humankind. The year 1985 was probably the first time when a particular environmental problem affected the entire global on such a broad extent, so much so that it threatened the very existence of humanity. This was probably the first time the countries truly reacted concretely like a globalizing community.

However, some may consider this globalized response because of another political development. Such a united response may not have been seen a few years back as those were the times of cold war between the United States of America led- the Western Block and the Soviet Union led- the Eastern Block. The differences between these two power houses had brought such destruction to human-kind. It would have been very difficult for a consensus to have been reached during that time. If a consensus might have also been reached, it would have been too slow or even inadequate. Fortunately, the problem of ozone layer depletion came into light in the post-1985, during the decline of the Cold War and the reduction in the power of the Soviet Union.


551 Principle 13, IUCN Covenant.
THE GLOBALISING INDUSTRY

As pointed out earlier, ozone depleting substances were used in air conditioning and cooling units, as aerosol spray propellants prior to the 1970s, and in the cleaning processes of delicate electronic equipment. Basically, chlorofluorocarbons are released into the atmosphere due to cleaning agent coolants in refrigerators, air conditioning; packing material; aerosol spray cans etc.

The major ozone depleting substances used in various industries were as follows:

- Chlorofluorocarbons (CFCs): The most widely used ODS, accounting for over 80% of total stratospheric ozone depletion. Used as coolants in refrigerators, freezers and air conditioners in buildings and cars manufactured before 1995. Found in industrial solvents, dry-cleaning agents and hospital sterilants. Also used in foam products — such as soft-foam padding (e.g. cushions and mattresses) and rigid foam (e.g. home insulation).
- Halons: Used in some fire extinguishers, in cases where materials and equipment would be destroyed by water or other fire extinguisher chemicals. In B.C., halons cause greater damage to the ozone layer than do CFCs from automobile air conditioners.
- Methyl Chloroform: Used mainly in industry — for vapour degreasing, some aerosols, cold cleaning, adhesives and chemical processing.
- Carbon Tetrachloride: Used in solvents and some fire extinguishers.
- Hydrofluorocarbons (HCFCs): HCFCs have become major, “transitional” substitutes for CFCs. They are much less harmful to stratospheric ozone than CFCs are. But HCFCs they still cause some ozone destruction and are potent greenhouse gases.552

Along with the countries, it was also very surprising to note how well the global industry responded to reducing the ozone depleting substances being used in the industry. It was quite surprising because normally the industry does not respond well to any change in the already well-established practices and system and especially not such a radical change. The industry behaved like a well-oiled global machine.

On further analyses of this extra-ordinary development may be that the way the American industries responded to the use of ozone depleting substances by curbing its use in its industries and putting their use in a very high bracket. The United States of America was one of the significant consumers of ozone depleting substances in various industries. It was very surprising because the country that normally is opposed to most development in environmental law and mostly is signatory to them but rarely rectifies them domestically.

The fact that USA passed domestic regulations curbing the use ozone depleting substances which help set a standard for the industry and gave a fair insight to the industry that where the new environmental policy was headed. Perhaps this was the reason that they whole heartedly accepted

this radical change in their industry. The industry did not want to suffer from any disadvantage due to the American industries and would rather have a uniform global regulation. This was the indication that the age of globalized industry and multinationals was upon us.

The other remarkable thing about this response that came about from the industry was that at the time of the Montreal protocol there were no readily available substitutes for the CFCs, let alone their economic viability. However, it is also very remarkable that how quickly cost-effective substitutes were developed and began to be used in electronics, food packaging, and other applications.\textsuperscript{553} Again, as per the proposed definition of globalization this was an “international integration” of products and methods of the industry.

\textbf{SETTING THE TREND FOR THE FUTURE GLOBAL RELATIONS.}\n
The Vienna Convention for the Protection of the Ozone Layer and its protocol, the Montreal Protocol on Substances that Deplete the Ozone Layer set the trend for the future of global relations, forming what was called the Convention - Protocol system.

The Vienna Convention for the Protection of the Ozone Layer is a Multilateral Environmental Agreement. It was agreed upon at the Vienna Conference of 1985 and entered into force in 1988. It acts as a framework for the international efforts to protect the ozone layer.\textsuperscript{554} However, it did not have any legally binding obligations to reduce the use of CFCs, the main chemical agents causing ozone depletion. Those were laid down in the Montreal Protocol.

The Montreal Protocol on Substances that Deplete the Ozone Layer, the protocol to the Vienna Convention for the Protection of the Ozone Layer, is the international treaty designed to protect the ozone layer by phasing out the production of numerous substances that are responsible for ozone depletion. It was agreed on 16 September 1987, and entered into force on 1 January 1989.\textsuperscript{555} The two ozone treaties have been ratified by 197 parties, which include 196 states and the European Union, making them the first universally ratified treaties in United Nations history.\textsuperscript{556} The regulatory format of Convention-Protocol did not begin with the experience of the ozone depletion issue. However, it was popularized by the extraordinary success of the Vienna Convention and the Montreal Protocol. It is now seen as a routine practice in global relations and international environment.

\textsuperscript{553} Supra note 9.


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regulation. It has now become an integrated world view.

The 1997 Montreal Amendment to the Montreal Protocol introduced a unique adjustment system, which was revolutionary and difficult to implement has been extremely successful for the fight against ozone depletion. Many of the most dramatic changes in the phaseout schedule for various ozone depleting substances have come through adjustments rather than Amendments. The adjustment system skips the complex and uncertain process of negotiations to change the phase out schedule. It quickly and effectively brings new technology and information which can save the ozone layer quickly into the international discourse.

This amendment is a very unique approach to make international environmental law as there is neither a commission empowered under the amendment to make rules for certain countries who do not wish to such rules to be applied on them nor it requires that all changes be ratified by all the parties before they are enforced. Adjustments require the consent of 2/3 of the Parties, become binding on all Parties six months after they are formally notified about them, even those states that did not vote in favor of them. Even further the power of the Parties to make policy without the consent of some important actors was increased in the London Amendments to the Protocol. Both for the agreement as a whole and particularly in the case of the Multilateral Fund, the role of the organization's secretariats and decision-making bodies in modifying the way treaty obligations are implemented has been important. The Protocol and Fund Secretariats provide oversight and guidance as regulatory decisions are made, in ways that likely result in better decisions than would have been taken absent their involvement. The guiding role of the Protocol and Fund Secretariats is performed by the 14-state decision-making body, the Executive Committee and the Ozone Secretariat, respectively. Unlike most cases of environmental protocols, the Executive Committee and the Secretariat of the Fund did not become mere rubber-stamps or administrative bodies in the system. They took actual tough decisions and in the third meeting of the Executive Committee went to the extent rejecting all the work programs put forth as being confusing and overlapping. This action came as a shock to the implementing agencies, and resulted in greater coordination among work programs.

560 Montreal Protocol (as amended), Art. 2(9)(d).
561 Supra note 18.
Such confidence was never before seen in any Executive Committee before.

Such “international integration” shown by the world community to go as far as to put legal sanctions and making other states accept adjustments made by the majority of member states further strengthened the concept of globalization. Moreover, the drastic steps of the Executive Community makes the globe feel like a homogenized community which many scholars envisioned for globalizing world.

BATTING FOR THE WEAK PLAYERS OF THE GLOBE

Recently, Maldives held its parliament under the waters of the Ocean, in an attempt to draw the attention of the international community to the fact that their country will be the first one to feel the effect of global warming. It was a metaphor of the things to come; if the temperature of the Earth keeps on rising at the current pace, very soon, Maldives will cease to exist i.e. it will be submerged under the sea. This is evidence of the fact that certain environmental changes affect some countries more and sooner than others. It is also evident of the fact that not all the countries in the world have same sort of role in world politics or bargaining power to influence international policy.

Similar is the scenario in the issue of depletion of ozone layer of Earth. Some countries are more affected by this thinning of the layer than others and suffer the consequences sooner. But, it is not necessary that they have the same sort of geo-political position like the United States of America, to get their voices heard.

For any policy to be successful, the inclusion of the developing and third world countries is non - negotiable. It should be a policy that keeps in mind the challenges and the problems faced by such countries and not just the interests of the Big Five and other few major players. Remarkably, the Montreal protocol was such a pleasant development in the field of world policy framing, catering to the special needs and situations of the developing and developed nations.

The big developing countries like China and India have always argued that it is impossible for them to meet their developmental index ambitions without sacrificing the environment. This argument does seem plausible to a good extent that without sacrificing the environment there cannot be development, to which the whole other debate of sustainable development etc debate can be started. These countries allege that now the developed countries have achieved their goals, they are willing to talk about environment and want to curb their progress. But it is also true that in the 21st century China and India are the two of the most polluting countries of the world and are having the most adverse effect on the environment. Similarly, it was estimated at that time that India and China alone would

account for one-third of the world’s consumption of CFCs by 2008. Therefore, it was very essential that big developing economies like China and India were taken into the ambit of the Montreal system.  

In order to bring the developing countries into the ambit of the Montreal system, they were firstly given a grace period in which no sanctions or obligations will be imposed on them; initially 10 years, though it has been renegotiated for a variety of different Ozone depleting substances. Secondly, they were given trade incentives though which they can freely trade in controlled substances specified in the agreement; as only parties to the agreement were allowed to legally trade in them.  

There was also an added incentive for the developing countries which did not use ozone depleting substances, to join as joining the Montreal system was a sure shot legal way they can gain access to such substances.

The protocol considered that developing countries had special needs for financial and technical assistance.

FINANCIAL ASSISTANCE TO DEVELOPING COUNTRIES: A FIRST IN A GLOBALIZING WORLD

The monetary position of each country in the world is different and the difference sometimes being poles apart. It cannot be expected from every country without financial and technical assistance. In a globalizing world, there should not just be sharing of views, ideas or culture but of financial, technical and other resources as well. This was what precisely what the 1990 Amendment to Montreal Protocol did for the global geopolitics and globalization.

“Although the Montreal Protocol acknowledged the special needs of developing countries for funding and access to technology, the actual funding mechanism was specified under the London Amendments to the Protocol and the details worked out in difficult negotiations. These created the mechanism that came to be known as the Multilateral Fund... The specification of the Fund had the intended effect. China joined the Protocol immediately, followed by India and Brazil in 1992 and eventually by almost all developing countries. Importantly, the operation of the Fund has gone a long way toward helping some developing countries avoid ozone depleting substances or change over their use of ODS to ozone-safe chemicals or processes.”

“The Multilateral Fund for the Implementation of the Montreal Protocol provides funds to help developing countries comply with their obligations under the Protocol to phase out the use of ozone-depleting substances (ODS) at an agreed schedule. ODS are used in refrigeration, foam extrusion, industrial cleaning, fire extinguishing and fumigation. Countries eligible for this assistance are those with an annual per capita consumption of ODS of less than 0.3 kg a year, as defined in Article

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566 Supra note 18.
5 of the Protocol. They are referred to as Article 5 countries. The phase-out of ODS will enable the ozone layer to repair itself.

The Fund was the first financial mechanism to be borne from an international treaty. It embodies the principle agreed at the United Nations Conference on Environment and Development in 1992 that countries have a common but differentiated responsibility to protect and manage the global commons.

In 1986, industrialized countries consumed 86 per cent of the most important ODS, the chlorofluorocarbons (CFCs). They agreed to contribute to the Fund in order to help Article 5 countries achieve the Protocol’s goals. Article 5 countries committed themselves to joining the global effort to restore the depleted ozone layer. This global consensus forms the basis of the operation of the Multilateral Fund that confines the liability of the Fund to costs essential to the elimination of the use and production of ODSs. An important aspect of the Fund is that it funds only the additional (the so-called 'incremental') costs incurred in converting to non-ODS technologies.

The institutional structure of the Multilateral Fund was established at the 1990 Meeting of the Parties to the Montreal Protocol in London. Established as an interim mechanism in 1991, and on a permanent basis in 1993, its structure has not been changed in any important respect since.

- The Multilateral Fund (MLF) operates under the authority of the Parties to the Montreal Protocol.
- An Executive Committee comprising seven developed and seven developing countries oversee Multilateral Fund operations.
- The Fund Secretariat assists the Executive Committee and carries out day to day operations.
- In delivering financial and technical assistance, the MLF works together with implementing agencies: UNDP, UNEP, UNIDO, the World Bank and a number of bilateral agencies.
- The Fund Treasurer is responsible for receiving and administering pledged contributions (cash, promissory notes or bilateral assistance), and disbursing funds to the Fund Secretariat and the implementing agencies based on the directives of the Executive Committee.

Up to 20 per cent of the contributions of contributing Parties can also be delivered through their bilateral agencies in the form of eligible projects and activities.

The Fund is replenished on a three-year basis by the donors. Pledges amount to US$27 billion for the period 1991 to 2010. The Fund provides finance for activities including the closure of ODS production plants and industrial conversion, technical assistance, information dissemination, training and capacity building aimed at phasing out the ODS used in a broad range of sectors.

The Fund Secretariat is based in Montreal, Canada, and comprises a small number of professional and support staff.”

However, there was a pre-conceived notion about such a Fund being set-up which may...

\[^{567}\text{Multilateral Fund for the implementation of the Montreal Protocol” available at http://www.multilateralfund.org/aboutMLF/default.aspx(last accessed on 26th Oct, 2015)}\]
lead to a setting of a precedence that developed countries have to agree to lift some of the financial burdens it puts on the developing countries regarding environmental targets. Such concerns were first raised by the obvious United States of America, who was the main opponent of such fund being set-up; as the USA is rarely happy to share its financial resources and technical advancements with the global community. But as fortunately, the precedent was set and today every environmental agreement is made which includes a clause for a system in which funds will be provided to the developing countries to face their financial challenges and meet their obligations put on them under the agreement. Such a bold and great decision by the counties is the manifest of the impact of globalization, that the world is taking the decision as a world community and not just according to the interest of a single country.

NEGATIVE IMPACT OF GLOBALIZATION ON THIS ISSUE: THE EMERGENCE OF THE BLACK-MARKET:

As every rose has its thorns, it would be wrong to just paint the rosy side of the effect of globalization. Its negatives effect was seen as and perhaps the greatest challenge for the fight against ozone layer depletion, the emergence of a global well-organized black market for the ozone depleting substances.

The biggest challenge for the system against ozone depletion is the black market that exists for CFCs. No doubt the Montreal Amendments have adjusted the timetable for phase out of some substances and modified trade restrictions, including the creation of a licensing system to attempt to decrease the black market in ozone depleting substances. But the black market has emerged as the biggest challenge for the Montreal protocol as globalization has helped the black marketers to co-operate their efforts and provide to a market which was of “global” proportions.

There are some projects which legitimately require the use of CFCs but CFCs being very high on the tax bracket make it very difficult for the industry to be viably used. A very common example is the case of restoration of classic cars, which is the passion of every one who can afford to do so; in such cars the air-conditioning can to be restored only by the use of CFCs. Such are the cases which the black marketers cater to, as the high tax bracket makes the restoring of the classic car even more expensive.

The extent of the black market, though unknown, is significant. In some U.S. ports, CFC smuggling is second only in value to the smuggling of narcotics. Industry estimates suggest that up to 20 percent of CFCs currently in use may have been purchased on the black market. The causes of the merger of such a wide network of black market for ozone depleting substances are several. As the author rightly points out that firstly there is a difference

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between the phase out times of article 5 and non-article 5 countries. This means that some countries can legally make these substance which leaves scope for its illicit use. Secondly, the difficulty in economic transitions of these substances, make them financially viable at the black market. And thirdly, it is very easy to smuggle ozone depleting substances as it is very difficult to distinguish between virgin CFCs and recycled which is therefore legal to use. Therefore, not much threat is posed by the “globalized” black market. But its emergence like a well-organized black market on a global scale was only because of the fact of globalization.

CONCLUSION

Everybody has felt the impact of globalization in every aspect of their lives. This is equally true in case of the whole experience of the ozone layer depletion issue. This impact has mostly been positive, encouraging and progressive. But there have been side-effects as well. The concerns of the scholars who argue the negative impacts of globalization may not have been that misplaced after-all. Fortunately, this has had little impact on the health of the ozone layer. However, the most remarkable thing was that how the Montreal Experience strengthened the concept of globalization. It is quite possible that this is why the Montreal Experience is considered as the biggest success stories across various fields; from geo-politics to environmental law; from global negotiations to transfer of technology.

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572 Supra note 18.


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- Montreal Protocol (as amended), Art. 2(9)(d).
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ADMISSION AND CONFESSION: - EVIDENTIARY VALUE

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Admission and confession are two very important concepts used in law of evidence by lawyers to strengthen their cases in the eyes of the court. Both admissions and confessions are used as sources of evidence. Admission as a source of evidence is mostly used in civil cases. The expression "Admission" means "Voluntarily acknowledgement of the existence or truth of a particular fact". But in the Evidence Act admission has not been used in this wider sense. It deals with admissions by statements only oral or written or contained in an electronic form. If one party to the suit or any other proceeding proves that the other party has admitted his case, the work of court becomes easier. The admission must be clear and unambiguous.

Admission and confession are two very important concepts used in law of evidence by lawyers to strengthen their cases in the eyes of the court. Both admissions and confessions are used as sources of evidence. There are many similarities in the two concepts, but there are also subtle differences that will be highlighted in this article. Admission is taken according to the procedure stated in the Code of Civil Procedure 1908 whereas confession is taken according to the procedure stated in Section 164 of the Code of Criminal Procedure 1898. Section 17 to 31 of the Indian Evidence Act (hereinafter referred as IEA) deals with the provision of Admissions and confessions.

Admission plays a very important part in judicial proceedings. If a person gives a nod to a fact or statement, he actually admits or acknowledges the fact. Prior admission by a person can be taken in a court of law as a statement that proves guilt or a crime. Admission as a source of evidence is mostly used in civil cases. The expression "Admission" means "Voluntarily acknowledgement of the existence or truth of a particular fact". But in the Evidence Act admission has not been used in this wider sense. It deals with admissions by statements only oral or written or contained in an electronic form. If one party to the suit or any other proceeding proves that the other party has admitted his case, the work of court becomes easier. The admission must be clear and unambiguous.

There are three parts of the definition:
1. It defines term "admission"
2. It says that an admission will be relevant only if it is made by any of the person specified in the Act.
3. Admission" is Relevant only in the circumstances mentioned in the Act.
Characteristics of Admission

To constitute admission, the following characteristics are to be present as per section 17 of Indian Evidence Act:-

1. It may be oral or documentary
2. It is a statement to suggest any inference to any fact in issue or relevant fact.
3. It must be made by any person prescribed under the Act; and
4. It must be made under the circumstance prescribed under the Act.

The admission is admissible because of the following reasons:

a) Admission as a waiver of proof;
b) Admission as statement against interest;
c) Admission as evidence of contradictory statement;
d) Admission as evidence of truth;
e) Admission is the best substantive evidence that an opposite party can rely upon.

Nature of Admission

The statements made by parties during judicial proceeding are 'self regarding statements'. The self regarding statements may be classified under two heads –

i) **Self-serving Statements** - self-serving statements are those, which serve, promote or advance the interest of the person making it. Hence they are not allowed to be proved. They enable to create evidence for themselves.

ii) **Self-harming** - Self-harming statements are those which harm or prejudice or injure the interest of the person making it. These self-harming statements all technically known as “Admissions" and are allowed to be proved.

**Persons who can make admissions**

The following persons can make admissions:-

1. A party to civil or criminal proceeding or his expressly or impliedly authorized agent. This includes two classes:-
   a) Parties to suit or proceedings
   b) Agent of parties
2. Parties to the suit suing or being sued in a representative character while they hold the character, e.g., trustees, executors, etc.
3. Persons having proprietary or pecuniary interest in the proceeding if the statements are made in their character of persons so interested and during the continuance of their interest.
4. Predecessor-in title: persons whom the parties to the suit have derived their interest in the subject matter of the suit, provided the statements are made during the continuance of their interest.
5. A person whose position is in issues of liability is necessary to prove as against any part to the suit.

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574 Section 18 IEA.
575 Ibid.
577 Section 18(2), Avtar Singh v. Atma Singh AIR 1982 J&K 141.
578 Section 19 IEA, Sivalingam v. Sakhtival 1989 Mad. 252.
Confession

The word “confession” appears for the first time in Section 24 of the Indian Evidence Act. This section comes under the heading of Admission so it is clear that the confessions are merely one species of admission. Confession is not defined in the Act. Mr. Justice Stephen in his “Digest of the law of Evidence” defines confession as “confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime.” Confessional statement must be voluntary and genuine and legal.\(^{580}\)

In Pakala Narayan Swami v Emperor \(^{581}\) Lord Atkin observed “A confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not in itself a confession”.

In the case of Palvinder Kaur v State of Punjab\(^ {582}\) the Supreme Court approved the Privy Council decision in Pakala Narayan Swami case over two scores. Firstly, that the definition of confession is that it must either admit the guilt in terms or admit substantially all the facts which constitute the offence. Secondly, that a mixed up statement which even though contains some confessional statement will still lead to acquittal, is no confession. Thus, a statement that contains self-exculpatory matter which if true would negate the matter or offence, cannot amount to confession.

Kinds of confession

A confession may occur in many forms. When it is made to the court itself then it will be called judicial confession and when it is made to anybody outside the court, in that case it will be called extra-judicial confession. It may even consist of conversation to oneself, which may be produced in evidence if overheard by another.

b) Extra-judicial confession- These are those which are made by the accused elsewhere than before a magistrate or in court. It is not necessary that the statements should have been addressed to any definite individual. It may be a confession to a private person. An extra-judicial confession has been defined to mean “a free and voluntary confession of guilt by a person accused of a crime in the course of conversation with persons other than judge or magistrate seized of the charge against himself.” A man after the commission of a crime may write a letter to his relation or friend expressing his sorrow over the matter. This may amount to confession. Extra-judicial confession can be accepted and can be the basis of a conviction.

\(^{579}\) Section 20 IEA, R v. Mallary, (1884) 13QBD 33.


\(^{581}\) Mohammad Ajmal Mohammad Amir Kasab Alia

\(^{582}\) ABU Mujahid v. State of Maharashtra AIR 2012 SC 3565.

\(^{581}\) (1939) 41 BOMLR 428.

\(^{582}\) 1952 AIR 354.
if it passes the test of credibility. Extra-judicial confession is generally made before private person who includes even judicial officer in his private capacity. It also includes a magistrate not empowered to record confessions under section 164 of the Cr.P.C. or a magistrate so empowered but receiving the confession at a stage when section 164 does not apply.

Confession caused by inducement, threat or Promise
A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the

<table>
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<tr>
<th>Judicial confession</th>
<th>Extra-judicial confession</th>
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<tr>
<td>1. Judicial confessions are those which are made to a judicial magistrate under section 164 of Cr.P.C. or before the court during committal proceeding or during trial.</td>
<td>1. Extra-judicial confessions are those which are made to any person other than those authorized by law to take confession. It may be made to any person or to police during investigation of an offence.</td>
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<td>2. To prove judicial confession the person to whom judicial confession is made need not be called as a witness before whom the extra-judicial confession is made.</td>
<td>2. Extra-judicial confession are proved by calling the person as witness before whom the confession is made.</td>
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<tr>
<td>3. Judicial confession can be relied as proof of guilt against the accused person if it is proved under Section 24 Indian Evidence Act.</td>
<td>3. Extra-judicial confession alone cannot be relied it needs support of other supporting evidence.</td>
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<td>4. A conviction may be based on judicial confession.</td>
<td>4. It is unsafe to base conviction on extra-judicial confession.</td>
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difference between judicial and extra-judicial confession: (Table)

e) Voluntary and non-voluntary confession
A confession of an accused may be classified into Voluntary and non-voluntary confession. A confession to the police officer is the confession made by the accused while in the custody of a police officer and never relevant and can never be proved under Section 25 and 26. A confession appears to the court to have been caused by any inducement, threat or promise having reference to the change against the accused person proceeding from a person in authority and sufficient in opinion of the court to give the accused person grounds, which would appear to him reasonable for supporting that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him, it will not be relevant and it cannot be proved against the person making the statement. Section 24 of the Evidence Act lays down the rule for the exclusion of the confessions which are made non-voluntarily.

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584 Section 24 Indian Evidence Act.
which would appear to him reasonable, for supporting that by making it he would gain any advantage or avoid any evil of temporal nature in reference to the proceeding against him.

Confession to police
A Confession to police officer not to be proved. No confession made to a police officer shall be proved as against a person accused of any offence. Reasons for exclusion of confession to police—another variety of confessions that are under the evidence act regarded as involuntary are those made to a personnel. Confessions to police were allowed to be proved in evidence, the police would torture the accused and thus force him to confess to a crime which he might not have a committed. A confession so obtained would naturally be unreliable. Such a confession will be irrelevant whatever may be its form, direct, express, implied or inferred from conduct.

Confessional FIR
The statement which is not confession cannot be excluded by the provision of section 25. Where this statement happens to have been made to the police prior to the commencement of the investigation of the case it cannot possibly be hit by section 162 of CrPC and therefore admissible. Supreme Court has held that where the person, who lodged the FIR, regarding the occurrence of a murder is subsequently himself an accused and report lodged by him is not a confession but is an admission by him of certain facts which have a bearing on the question to be determined by the Court. Only that part of a confessional First Information Report is admissible which does not amount to a confession or which comes under the scope of section 27. The non confessional part of the FIR can be used as evidence against the accused as showing his conduct under section 8.

Confession and Police Custody
A confession which is made in custody of a police officer cannot be proved against him, unless it is made before a Magistrate. The word custody is used here in wide sense. The custody of a police officer for the purpose of section 26, IEA, is no mere physical custody.” A person may be in custody of a police officer though the other may not be physically in possession of the person of the accused making the confession. There must be two things in order to constitute custody. Firstly, there must be some control imposed upon the movement of the confessioner, he may not be at liberty to go any way he likes, secondly, such control must be imposed by some police officer indirectly. The crucial test is whether at the time when a person makes a confession he is a free man or hid movements are controlled by the police by themselves or through some other agency employed by them for the purpose of securing such confession. The word ‘custody’ in this the following section does not mean formal custody but includes such state of affairs in which the accused can be

585 Section 25 IEA.
588 Section 26 IEA.

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said to have come into the hands of a police officer, or can be said to have been some sort of surveillance or restriction.

How much of Information received from accused may be proved
If the confession of the accused is supported by the discovery of a fact then it may be presumed to be true and not to have been extracted. It comes into operation only-

- If and when certain facts are deposed to as discovered in consequence of information received from an accused person in police custody, and
- If the information relates distinctly to the fact discovered.

This section is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence. But clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate.\(^5\)

In Pandu Rang Kallu Patil v. State of Maharashtra\(^6\), it was held by Supreme Court that section 27 of evidence act was enacted as proviso to. The provisions of sections of Section 25 and 26, which imposed a complete ban on admissibility of any confession made by accused either to police or at any one while in police custody. Nonetheless the ban would be lifted if the statement is distinctly related to discovery of facts. The object of making provision in section 27 was to permit a certain portion of statement made by an accused to Police Officer admissible in evidence whether or not such statement is confessional or non confessional.

Section 24, 25 and 26 of the Evidence Act exclude certain confessions. Section 24 lays down that if a confession appears to have been caused by threat, promise or inducement from some man in authority it will be irrelevant and cannot be proved against the confessioner. Section 25 excludes a confession made to a police officer. Section 26 lays down that if a person while in custody of a policeman confesses his guilt to any other person not being a Magistrate, his settlement will not be proved against him.

Section 27 lays down that when at any trial, evidence is led to the effect that some fact was discovered in consequence of the information given by the accused of an offence in custody of the police officer, so much of the information as relates to the facts discovered by that information, may be proved irrespective of the facts discovered by that information, may be proved irrespective of the facts whether that information amounts to confession or not.\(^7\)

Confession after removal of Threat or Promise.\(^8\) u/s 24 we have seen that if the opinion of a court a confession seems to have been caused by any inducement, threat or promise having reference to the charge and proceeding from a person in authority, it

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\(^5\) Section 27 IEA.
\(^6\) 2002(1) SCR 338.

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is irrelevant and cannot be proved even against a person making the confession. Section 28 provides that if there is inducement, threat or promise given to the accused in order to obtain confession of guilt from him but the confession is made after the impression caused by any such inducement, threat or promise has, in the opinion of the court been fully removed, the confession will be relevant becomes pre and voluntary. It must be borne in mind that there must be strong and cogent evidence that the influence of the inducement has really ceased.

Impression produced by promise or threat may be removed

- By lapse of time, or
- By an intervening caution giving by some person of superior authority to the person holding out the inducement, where a prisoner confessed some months after the promise and after the warning his confession was received.

Confession otherwise relevant may not become irrelevant because of promise of secrecy, Etc., In such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of deception practiced on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to question which he need not have answered, whatever may have been the form of those questions, because he was not warned that he was not bound to make such confession, and that evidence if it might be given against him.

Section 24 lays down that a confession which is the outcome of inducement, threat or promise from a person in authority would not be relevant. Section 25 lays down that a confession to a police officer is irrelevant. Section 26 excludes the statement of an accused in a police custody to any person other than a Magistrate. Section 29 lays down that if a confession is not excluded by Sections 24, 25 or 29 it will not be excluded on the ground of promise of secrecy or of deception or of being drunk, or of being made in answer to question or without warning that it will be used against him in evidence.

Section 29 assumes that there is no bar to the admissibility of the confession in question arising from any of the earlier provision, viz, section 24 to 26 and it then proceeds to the invalidate or negative other positive objections or bars that may be raised against the admissibility.

Consideration of proved confession affecting person making it and others jointly under trial for the same offence

When more persons than one are jointly tried for the same offence, the confession made by one of them, if admissible in evidence, should be taken into consideration against all the accused, and not against the person who alone made it. It appears to be very strange that the confession of one person is to be taken into consideration against another. Where the confession of one accused is proved at the trial, the other

594 Section 29 IEA.


596 Section 30 IEA.
accused persons have no other opportunity to cross examine him. It is opposed to the principle of jurisprudence to use a statement against a person without giving him the opportunity to cross examine the person making the statement. This section is an exception to the rule that the confession of one person is entirely admissible against the other.

**EVIDENTIARY VALUE OF ADMISSION AND CONFESSION**

**Value of admission:** the reception of admission considered as exceptions to the rule against hearsay is grounded upon a fact that what a person says may be presumed to be true as against himself and when not obnoxious to that rule, upon the fact of inconsistency. The general rule is that an admission can only be given in evidence against the party making it, and not against any other party. To this rule there are certain exceptions which are mentioned in section 18-20.

**Principle underlying the evidentiary value of an admission may be as:**

1. An admission constitutes a substantive piece of evidence in the case and for that reason can be relied upon for proving the truth of the facts incorporated therein.
2. An admission has the effect of shifting the onus of proving to the contrary on the party against whom it is produced with the result that it casts an imperative duty on such party to explain it. In the absence of satisfactory explanation it is presuming to be true.

3. An admission, in order to be competent and to have the value and effect referred to above should be clear, certain and definite and not ambiguous, value or confused.

**Confession**

**Value of judicial confession** - a confessional statement made by accused before the magistrate is good evidence and accused to be convicted on the basis of it. A case where there is no proof of corpus delicti must be distinguished from another where that is proved. In the absence of the corpus delicti a confession alone may not suffice to justify conviction. A confession can obviously be used against the maker of it and in itself sufficient to support his conviction.

**Value of extra-judicial confession** - extra-judicial confessions are not usually considered with favour but that does not mean that such a confession coming from a person who has no reason to state falsely and to whom it is made in the circumstances which support his statement should not be believed. The evidence of extra-judicial confession is a weak piece of evidence. The extra-judicial confession must be received with great case and caution. It can be relied upon only when it is clear, consistent and convincing. The court has to decide whether the person before whom the

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598 *Oud Kishore v. Ram Gopal* AIR 1979 SC 861.

599 *Emperor v. LalBaksha*, AIR 1945, Lah.43.

600 *Birey Singh v. State* 1951.


admission is said to have been made is trustworthy witnesses. 603

**Value of Retracted Confession** - A retracted confession is a statement made by an accused person before the trial begins by which he admits to have committed the offence but which he repudiates at the trial. After the commission of a serious offence police officer makes investigation into the matter, examines witnesses and the accused. 604 If in his opinion the accused is proved to have committed the offence, he submits a report to a magistrate having jurisdiction in the matter. The court takes evidence and examines the accused. If during the investigation, the accused on being examined by the police officer is willing to admit the guilt the police officer sends the accused to some magistrate for recording his statement. The magistrate after being satisfied that the accused admits in his statement to have committed the offence this recorded statement by the magistrate may be proved at the trial. When the trial begins the accused on being asked as to whether he committed the crime he may say that he did not commit the crime. The question may again be put to him as to whether he made statement before the magistrate during the investigation confessing the guilt. He may deny to have made the statement at all or he may say that he made that statement due to undue influence of the police. In this case the confession made by the accused to the magistrate before the trial begins is called retracted confession. It is unsafe to base the conviction on a retracted confession unless it is corroborated by trustworthy evidence. There is no definite law that a retracted confession cannot be the basis of the conviction but it has been laid down as a rule of practice and prudence not to rely on retracted confession unless corroborated. 605

**Proof of judicial confession** - A confession recorded by the magistrate according to law shall be presumed to be genuine. It is enough if the recorded judicial confession is filed before the court. It is not necessary to examine the magistrate who recorded it to prove the confession. But the identity of the accused has to be proved. 606

**Proof of extra-judicial confession** - extra-judicial confession may be in writing or oral. In the case of a written confession the writing itself will be the best evidence but if it is not available or is lost the person before whom the confession was made be produced to depose that the accused made the statement before him. When the confession has not been recorded, person or persons before whom the accused made the statement should be produced before the court and they should prove the statement made by the accused.

**Admission and Confession Difference**
Section 17 to 31 deals with admission generally and include Section 24 to 30

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606 Section 80 IEA.
which deal with confession as distinguished from admission.

**Conclusion**

It can be said that the admission has a wider scope than confession, as the latter comes under the ambit of the former. Hence, every confession is an admission, but the reverse is not true. The main difference between these two is that in case of confession, the conviction is based on the statement itself, however, in the case of admission, additional evidence is required, to support the conviction. If the statement is found to be an admission, it shall be admissible under Section 21 and if it amounts to a confession, it shall be admissible under Section 24 to 30. If it is found to be holding improper inducement, threat or promise, it would be hit by the restriction in Section 24 and shall not be admissible as a confession anymore, but, it may still be admissible under Section 21 as an admission provided it suggests an inference as to a fact in issue or a relevant fact. A restriction on admissibility of an admission is laid down, that it shall not be made to a police officer during an ongoing investigation.

**Reference**


<table>
<thead>
<tr>
<th>Confession</th>
<th>Admission</th>
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<tr>
<td>1. Confession is a statement made by an accused person which is sought to be proved against him in criminal proceeding to establish the commission of an offence by him.</td>
<td>1. Admission usually relates to civil transaction and comprises all statements amounting to admission defined under section 17 and made by person mentioned under section 18, 19 and 20.</td>
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<tr>
<td>2. Confession if deliberately and voluntarily made may be accepted as conclusive of the matter confessed.</td>
<td>2. Admissions are not conclusive as to the matters admitted it may operate as an estoppel.</td>
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<td>3. Confessions always go against the person making it.</td>
<td>3. Admissions may be used on behalf of the person making it under the exception of section 21 of evidence act.</td>
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<td>4. Confessions made by one or two or more of the several defendants in suit is no evidence against other defendants.</td>
<td>4. Admission by one defendant is not admission by the co-accused.</td>
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<tr>
<td>5. Confession is statement oral or written which gives inference about the liability of person making admission.</td>
<td>5. Admission is statement oral or written which gives inference about the liability of person making admission.</td>
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<tr>
<td>6. A retracted confession may form the basis of conviction.</td>
<td>6. A retracted admission is of no value.</td>
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<td>7. All confessions are admission.</td>
<td>7. All admissions are not confession.</td>
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Demystifying the relevance of International laws in a globalized world

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INTRODUCTION

Law is permissive, submissive and coercive as it not only allows individuals to establish their own legal relations which consists of rights and duties but also at the same time punishes those who infringe the regulations and rules as laid down by the law. It may be believed that it is also submissive in nature because it adapts to its customary practices that may prevail from time to time in the globalizing present social scenario. In simple words law consists of rules and regulations governing the behavior of all the elements of the society as law touches all the aspects of life of all individuals living collectively and separately in a society at large.

On account of the ever growing and expanding technological and scientific advancements that man has been involved in the present globalizing era, today the world has become a smaller place to live in. We can now come to know of the developments taking place in any part of the world by just clicking a few buttons, and we can cross continents in just a couple of hours which was not the case earlier. Now in this globalizing era what has happened is that the activities that take place in one part of the world have an impact on mostly all other parts of the world. Let’s take consider a practical example of the global financial crisis that happened in the United States of America sometime in the early 2000s. It had an impact in varying proportions on developed and developing countries across the world on their financial institutions and stock markets, this included countries like China and India.

In the absence of the prevailing customs, treaties and conventions it would be very difficult to maintain peace and security among nations in the world. No nation in the world would agree to compromise on its sovereignty and the traditional belief of ‘might is right’ would probably and most certainly prevail and thus as a result of the same the developing and underdeveloped nations would be crushed by the global and nuclear superpowers, thereby resulting only in mass destruction and dictatorship type of ruling worldwide.

UNDERSTANDING THE CONFLICT BETWEEN INTERNATIONAL LAWS AND MUNICIPAL LAWS IN A GLOBALIZED WORLD

On a global level one may say that the law which operates within a particular nation is called a municipal law and its rules, regulations and norms affect only the persons residing within those territorial,
International law only treaties or conventions are not sufficient per se and thus even opinions of jurists and learned members of the society such as opinions of scholars help to understand international law in today’s globalizing era.

The two traditional branches of international law are jus gentium (law of the nations) and jus inter gentes (agreements between nations). International Law itself is divided into conflict of law (or private international law as it is sometimes called) and public international law (usually just termed as international law).\(^{607}\) The former deals with those cases, within particular legal systems, in which foreign elements obtrude and protrude their existence thereby raising questions as to the application of foreign law or the role of foreign courts.\(^{608}\)

Let’s take another very practical example in order to understand this for instance two Indian men make a contract in the United States of America in order to sell and purchase goods which are situated in London, an Indian court would apply the American laws as regards the validity of such a contract. As against that public international law is not a supplement of legal order but a separate system all by itself.\(^{609}\)

\(^{607}\) This term was first used by J. Bentham: see Introduction to the Principles of Morals and Legislation, London, 1780.

\(^{608}\) See e.g. Cheshire, North and Fawcett, Private International Law (ed. J. Fawcett and J.M. Carruthers), 14th edn, Oxford 2008

\(^{609}\) See the Serbian loans case, PCIJ, Series A, No. 14, pp. 41-2
International Laws are a particular group of laws that are binding on nations and states on a global level. These are basically sourced from generally and commonly acceptable practises and norms. Thus one can very safely say that International laws help to regulate and maintain relations among various nations and states on a global level by virtue of certain treaties, conventions and customs and this is a deciding and unique point of difference as against domestic/municipal laws of a country. International law differs from state-based legal systems as it is primarily applicable to countries rather than to private citizens. National law may become international law when treaties delegate national jurisdiction to supranational tribunals such as the European Court of Human Rights or the International Criminal Court. Treaties such as the Geneva Conventions may require national law to conform to their respective parts.

Much of international law is consent-based governance. This means that a state member is not obliged to abide by this type of international law, unless it has expressly consented to a particular course of conduct.  

There is also something known as the Supranational Laws or the law of supra national organizations, which concerns regional agreements where the laws of nation states may be held inapplicable when conflicting with a supranational legal system when that nation has a treaty obligation to a supranational collective.

The modern study of international law started in the early 19th century, but its origins go back at least to the 16th century. Alberico Gentili, Francisco de Vitoria and Hugo Grotius were popularly called as the "fathers of international law." Several legal systems were developed in Europe, including the codified systems of continental European states and English common law, which were primarily based on decisions by judges and did not depend on written codes as such for its operational functionality. Different legal systems were developed in different areas of the world; the Chinese legal traditions and systems dated back to more than four thousand years, however even at the end of the 19th century it was observed that there were still no written codes for civil proceedings in China. Some doubted the effectiveness of international law, as they see the implementation of international law as a policy option among other issues in order to tackle global dilemmas. They say that international law must be evaluated with

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611 Kolcak, Hakan. "The Sovereignty of the European Court of Justice and the EU's Supranational Legal System"


613 China and Her People, Charles Denby, L. C. Page, Boston 1906 page 203

other, possibly more effective, international law options.  

Although because of international law it has been possible that each and every underdeveloped country in the world has been able to successfully enjoy the fruits of globalization and develop themselves on a continuous basis but no country will ever be willing to forego its own sovereignty for the betterment or benefit of any other country or nation or people situated in some other part of the world and that is why till today the concept of one world has not been a success. Each nation on a global level works with the realistic theory of global justice and that professes that states interact with one another only under a form of anarchy and with underlying motives of increasing their own power, security and glory. No state interacts with another with a selfless attitude i.e. to help and pull out backward nations from its state of helplessness of its economic evils and crises. Now one may argue on this issue by saying that you should not or cannot put out fire in another’s house when your own house is on fire, but then there needs to be a line of difference between ones needs and greed’s, in other words talking on a global level nations need to realize that when their internal needs such as peace, security, sovereignty etc are achieved successfully then they need to assist the other nation states in satisfying their similar needs, without compromising their own status or position on the international level.

There have been several instances wherein there has been a conflict between the domestic or municipal laws of a country and the international laws prevailing worldwide. Let us take a practical case law prevailing in the globalized world for studying this present state of affairs. In R vs. Jones it was seen that the doctrine that customary international law formed part of the law of England as it was discussed by the House of Lords in R. Vs Jones, where the issue focused upon whether the customary international law rule prohibiting aggression had automatically entered into English criminal law. Lord Bingham, while noting that the general principle was not at issue between the parties, commented that he ‘would for my part hesitate, at any rate without much fuller argument, to accept this proposition in quite the unqualified terms in which it has often been stated.’ Preference was expressed for the view maintained by briefly that international law was not a part, but rather one of the sources of English Law.

It was further accepted unanimously by the House of Lords after this case that the doctrine of incorporation did not apply to customary international law relating to the offences of aggression. While at the same time there was another accepted notion by them that if there is an offence that is recognized as a crime under the customary international law then the same may be added and


616[2006] UKHL 16; 132 ILR, p. 668
assimilated into the domestic laws of crime without statutory provisions. Now the word used here is ‘may’ so what one needs to understand is that this notion and proposition may be applicable under the domestic laws subject to the circumstances and facts of each case individually and on its merits, and that there is no statutory obligation to accept the same under the domestic English laws.

A further explanation to the same can be that the English Courts do not have the power to create new crimes or criminal offences and that can be done only and only by way of legislation under the English laws and the same was sought to be done in the case mentioned above. Further a charge of aggression would involve a determination not only of the guilt of the accused but also of the state itself and possibly of other states should the state go to war with allies and this raised constitutional issues as to non-justiciability. This was once again observed by Lord Hoffman in the above case of R vs. Jones. Justiciability would mean that an issue can be tried according to law.

There was one more landmark case wherein it was laid by the Supreme Court of the United States of America in Reid vs. Covert\(^{618}\) that a treaty cannot disturb the existence or functioning of the constitution i.e. in other words it cannot change the constitution or be held as valid in the event that it is in violation of the Constitution. The Court further went on to recognize that the Constitution is the most supreme in the nation over everything else and even over treaties signed by the country with other countries. It pointed out and elaborated that the language used in Article VI of the USA constitution does not suggest that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. The Court further said that it would be manifestly contrary to the objectives of those who created the Constitution, as well as who were responsible for the Bill of Rights to construe Article VI as permitting the U.S. to exercise power under an international agreement without observing constitutional prohibitions.

**HISTORY OF INTERNATIONAL LAWS AND THE PROBLEMS FACED BY INTERNATIONAL LAWS**

The problem with International laws in simple words is that there is no body which can enforce these conventions, customs, treaties etc. although there is an international body called as the United Nations(which was preceded by the league of nations) but its powers are only persuasive and not coercive and thus what happens on a practical level is that in the event that a particular nation-state breaks a treaty or conventions or a custom it only faces shaming in front of the international community that also in certain cases and not always and no other detrimental consequences per se.

\(^{618}\) 354 U.S.1, 77 S.Ct.1222 (1957) and shodhganga article on “The relationship between international law and municipal law with brief account of state practises (other than India) in this regard.
One may be able to very conveniently propose that international law began in the year 1648 with the peace of Westphalia which affirmed about the sovereign equality of states. Rules concerning the conduct of war were then laid down in the Geneva Conventions of the nineteenth and twentieth century’s. Organizations started coming into existence after the World War II for the sake of resolving disputes among nations by understanding the reasons for the disputes and trying to provide solutions. The League of Nations was the first popular organization that came into existence for the purpose of preventing the outbreak of the next world war after the Second World War. However it failed miserably over the years and then came the United Nations. The League of Nations failed on account of several reasons such as dictatorship coming into existence in countries like Italy, Germany and Japan, domination by European Union countries like England and France and so on. The United Nations has regulated the world, peace and security successfully till one can say because there hasn’t been a third world war as yet till date. The UN charter defines, governs and lays down the conditions for the legal use of force and the UN has served as a primary and principally significant venue for the creation of the new and present international laws that are prevalent in today’s date.

I. THE PRESENT SCENARIO OF INTERNATIONAL LAWS IN THE GLOBALIZING WORLD

As far as the present context of international laws is concerned we can very safely and directly state that it has expanded to all the walks and interests of contemporary life such as regulations of space expeditions to the issue of division of the oceans, high seas and their respective beds and also further on to regulation of international financial capital markets to empowerment of human rights especially female empowerment from just the basic motto of maintaining global peace and security. Looking at the present state of affairs the changes that occur on an international level are nowadays quite momentous and reverberate throughout the system and thus it is extraordinarily difficult to have a standard and unitary system to control the global affairs effectively. For instance the invention of nuclear arms,ammunitions and weapons created a status quo among developed countries of the world such as Europe, USA and USSR but however it led to the threat of global terrorism. Thus we can have one very evidently simple conclusion that modern developments demand a continuous retrospection of the structure and enforceability of the international laws worldwide.

The characteristics and nature of the international political system are the reason of existence of international laws in today’s world. Every state is internally supreme and would also like to exhibit its supremacy externally but however what one needs to note is that there has to be reason to co-exist mutually because it is an interdependent world and nobody can live in isolation by claiming to be self sufficient and completely independent. Thus it is

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derived from: SUPREMO AMICUS
important for the same that all nation states must acknowledge the rights and obligations of other nation states.

It is also important to realize that states need law in order to seek and attain certain goals, whether these are economic well-being, survival and security or ideological advancement. The legal system therefore has to be certain enough and competent enough for such goals to be ascertainable, and flexible enough to permit change when this becomes necessary due to the confluence of forces demanding it.  

As and how the social scenario changes the ambit of the problems to be tackled by international laws also keeps changing. It has taken into its purview environmental protection problems by introducing the concept of climate change treaties among nation-states, human rights problems due to terrorism attacks worldwide and problem of shortage of resources on the ever-growing population. Law and politics generally cannot be separated from one another because they go hand in hand on several levels of life but one surely cannot say that they are identical as their relationship is symbiotic and synergetic. International organizations have now been accepted as possessing rights and duties of their own and a distinctive legal personality. The International Court of Justice in 1949 delivered an advisory opinion in which it stated that the United States was a subject of International law and could enforce its rights by bringing international claims, in this case against Israel following the assassination of Count Bernadotte, a United Nations official.

It is believed that international law has started to become fragmented because of the increase in the specialized areas of international laws on a global level such as trade laws, environmental laws and human rights laws. However one may argue that the holistic system of international law may not be able to hold the law upright and it will dissolve into a series of discrete localized or limited systems which may or may not be having an inter-relationship. In many ways one can say that this is because of the globalization of international laws in the world.

Nevertheless on the other hand it is a good thing that international law has been fragmenting over the years because the fragmentation will help to tackle each and every global issue with a specialized and pragmatic approach and this will also in turn reduce the centralization of power with one particular international organization thereby reducing or eliminating in most cases a misuse or abuse of power in such centralized organization or authority

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620 Reparation for Injuries suffered in the service of the United Nations, ICJ Reports, 1949, p.174; 16 AD, p. 318

enforcing implementation of international laws in a globalized and globalizing world.

There is a general and common belief that the power of the UNO (United Nations Organization) is always driven with the interests of the American’s in mind first and then any other nation, and this is because of two reasons firstly that the United Nations organization was created by the United States of America and secondly that major funding of the UN is done by the USA. But still as per general trends seen by virtue of past precedents no country has been harmed adversely because the interests of the citizens of the United States have been given precedence. Also because there has been no revolt or outcry or outburst in the world by virtue of this state of affairs in the form of a war or any kind of national/international disturbances. But one thing is thus clear that money has been a driving force for each and every element in the society on a global level and on a domestic level and thus underdeveloped and developing nations have been left behind in this game of power play.

VIEWS AND SUGGESTIONS

Generally speaking there is a human tendency that if we get what we want along with what we need or either of the two in isolation we are going to be happy or at least satisfied and contented. There is hardly anybody or as a matter of fact more often than not nobody who is completely satisfied with their present state of affairs, primarily because of the need and desire to grow and develop and be better than the other on a continuous basis. If we apply this philosophy to nation-states then we can probably achieve the goal of effective implementation of International laws on a global level.

Apart from the above taking a utopian and conservative approach there can be amicable ways of mediation and dispute resolution among nations by giving them (quarrelling nations) what they both need (maybe not from each other but other nation-states), in other words resolving the subject of dispute without disturbing, depriving or harming the participants of the dispute in question and/or other neighboring nation-states. This utopian perspective may or may not work always but will definitely promote the idea of peace, love and security among nations.

In expressing an opinion about the issue of defining international laws then one can have a dynamic definition and a dynamic approach like that adopted by the United States of America in its constitution wherein they have given importance to the treaties governing international laws along with other laws. A dynamic definition is a must because of the changing social scenario of the world and the interactions of developed nations with the developing nations, thereby enabling accommodation of the present scenario by updating the international laws on a continuous basis as and when required. Although it is already doing the same over the years but a slightly more dynamic and enterprisingly rigorous approach might help more to eliminate and minimize the grey areas it has at present with respect to understanding what it is exactly on a global platform.
One might argue but I am in favor of the opinion that one organization or one body enforcing international laws on an international level might not be sufficient primarily due to the number of specializations that international laws have emerged into such as international investment laws, human rights and so on. As a result it is important to have a separate body for enforcement of international laws in each of its specializations and also a few branches of these bodies maybe situated on a jurisdictional basis across the entire globe in order to ensure that not only the disputes are resolved amicably but also the social scenario of each jurisdictional state can be studied separately and collectively in order to amend the international laws from time to time as it is a dynamic subject and also because social scenario is subjective concept pertaining to each state.

The legal enforceability of international laws should be improved by improving the legal enforceability of the international bodies such as International Court of Justice so that international laws are taken seriously by nation-states of the world. The aggressive nation-states who cause a threat to peace and/or security of other nation states should be punished by the International Court of Justice in such a manner that their entire existence gets threatened, for instance boycotting of such aggressive nation states in such a way that they cannot exist in isolation thereby eliminating or reducing their aggression levels completely.

The international law going by the present state of affairs is not proactively responsive to the needs, aspirations, desires and requirements of its participants. Its participants include not just states but also international organizations, individual persons and various multinational and national organizations across the entire globe and in every possible peripheral jurisdiction and territory of all countries. Finally coming to the aspect of resolving disputes among the conflict of laws between the municipal laws and the international laws one may consider the thought after an argument that we can have the concept of a constitutionality of international laws which will test the constitutionality of every international law before it is passed and adopted in such a way that it generally doesn't disturb the domestic laws or municipal laws or the disturbance may be of a negligible nature to any country. Although this may sound more difficult to practice than preach but it can be done maybe even on a case to case basis such as for instance the conflict with the domestic/municipal law needs to be checked only for the participating nation-states of a treaty or convention and the same treaty or convention will have enforceability only on those nation-states and not others. The same shall apply to all other sources of international laws. This mechanism of checking for conflicts by checking the municipal laws and comparing the same with the international laws shall be called the constitutionality of international laws. Just like every country has a constitution, even this constitution shall lay down principles which disallow conflicts with domestic laws of a country and the modus operandi for its correction if any are prevalent or happen to occur.
In other words it’s just the same concept as constitutionality of laws on a domestic level of any country is tested by making sure it doesn’t go ultra-vires the constitution and if it does it will have no enforceability whatsoever.

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TECHNOLOGY AND PRIVACY ISSUES

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ABSTRACT
The aim of this paper is to assess the impact of technology on the private lives of people. It is approached from a socio-ethical perspective with specific emphasis on the implication for the information profession. The issues discussed are the concept privacy, the influence of technology on the processing of personal and private information, the relevance of this influence for the information profession, and proposed solutions to these ethical issues for the information profession.

The three primary thrusts of this paper are: first, that people do not think enough about their own privacy, in particular, they may not know enough about their privacy that they can really make informed decisions about sharing information; second, that technologies exist that can mitigate some of the problems associated with information sharing; and third, that services (in addition to technologies) might be a reasonable way to think about addressing the privacy problem.

1. INTRODUCTION
We are currently living in the so-called information age which can be described as an era were economic activities are mainly information based (an age of informationalization). This is due to the development and use of technology. The main characteristics of this era can be summarized as a rise in the number of knowledge workers, a world that has become more open - in the sense of communication (global village/Gutenberg galaxy) and internationalization (trans-border flow of data).

This paradigm shift brings new ethical and juridical problems which are mainly related to issues such as the right of access to information, the right of privacy which is threatened by the emphasis on the free flow of information, and the protection of the economic interest of the owners of intellectual property.

In this paper the ethical questions related to the right to privacy of the individual which is threatened by the use of technology will be discussed. Specific attention will be given to the challenges these ethical problems pose to the information professional. A number of practical guidelines, based on ethical norms will be laid down.

2. ETHICS
The ethical actions of a person can be described in general terms as those actions which are performed within the criterium of what is regarded as good. It relates thus to the question of what is good or bad in terms of human actions. According to Spinello
Privacy is an important right because it is a necessary condition for other rights such as freedom and personal autonomy. There is thus a relationship between privacy, freedom and human dignity. Respecting a person's privacy is to acknowledge such a person's right to freedom and to recognize that individual as an autonomous human being.

The duty to respect a person's privacy is furthermore a prima facie duty. In other words, it is not an absolute duty that does not allow for exceptions. Two examples can be given. Firstly, the police may violate a criminal's privacy by spying or by seizing personal documents (McGarry, 1993, p. 178). The government also has the right to gather private and personal information from its citizens with the aim of ensuring order and harmony in society (Ware, 1993:205). The right to privacy (as an expression of individual freedom) is thus confined by social responsibility.

3.2. Different Categories of Private Information

Based on the juridical definition of privacy, two important aspects which are of specific relevance for the information profession must be emphasized. The first is the fact that privacy as a concept is closely related to information - in terms of the definition of Neethling (1996, p. 35) privacy refers to the entirety of facts and information which is applicable to a person in a state of isolation. The fact that privacy is expressed by means of information, implies that it is possible to distinguish different categories of privacy namely, private communications, information which relates to the privacy of a person's body, other personal information,
and information with regard to a person's possessions. Each of these categories will be briefly dealt with.

**Private communications.** This category of privacy concerns all forms of personal communication which a person wishes to keep private. The information exchanged during a reference interview between the user and the information professional can be seen as an example.

**Privacy of the body** (Westin, 1967, p. 351). This normally refers to medical information and enjoys separate legal protection (Neethling, 1991, p. 35-36). According to this legislation a person has the right to be informed about the nature of an illness as well as the implications thereof. Such a person further has the right to privacy about the nature of the illness and can not be forced to make it known to others. The only exception is when the health, and possibly the lives of others may be endangered by the specific illness - such as the case may be where a person is HIV positive and the chance exists that other people may contract the virus.3 This category of information is of specific importance for an information professional working in a medical library.

**Personal information.** Personal information refers to those categories of information which refer to only that specific person, for example bibliographic (name, address) and financial information. This type of information is of relevance to all categories of information professionals.

**Information about one's possessions.** This information is closely related to property right. According to this a person does have control over the information which relates to personal possessions in certain instances. For example, a person may keep private the information about the place where a wallet is kept.

### 3.3. The Expressed Will to Privacy

The following important aspect of privacy is the desire for privacy (by means of an expressed will) since this desire is important for the delimitation of privacy. In short, the desire for privacy implies that privacy will only be at issue in cases where there is a clear expression of a desire for privacy. For example, a personal conversation between two persons will be regarded as private as long as there is an expressed will to keep it private. The moment that this will is relinquished the information is no longer regarded as private. The same applies to the other categories of personal and private information. If a person makes a private telephone number (as a form of personal information) known to a company, it is no longer regarded as private information. According to the law it can then even be seen as business information which may legally be traded in. This expressed will to privacy acts therefore as a very important guideline for the information professional regarding the delimitation of privacy.

### 3.4. The Relationship Between Privacy and Confidentiality (Secrecy)

It is also important to distinguish between privacy and confidentiality/secrecy. The confidential treatment of information is not only applicable to the above-mentioned four categories of private and personal information - it may refer to any category of information, such as, inter alia, trade secrets.
4. THE INFLUENCE OF TECHNOLOGY ON THE PROCESSING OF PERSONAL AND PRIVATE INFORMATION

4.1. Definition of Information Technology
Before the influence of the use of technology in the processing of personal and private information can be dealt with, it is important to briefly pay attention to the concept technology. For the purpose of this paper the definition of Van Brakel (1989, p. 240) will be used, namely: the gathering, organizing, storage and distribution of information in various formats by means of computer and telecommunications techniques based on micro-electronics.

4.2. The Ethical Implications for the Use of Technology in the Processing of Information
Although technology has a major impact on the gathering, storage, retrieval and dissemination of information its main ethical impact relates to accessibility/inaccessibility and the manipulation of information. It creates the possibility of wider as well as simultaneous access to information. By implication, it becomes easier to access a person's private information by more people. On the other hand, a person can be excluded from necessary information in electronic format by means of a variety of security measures such as passwords.

The technological manipulation of information refers, among others, to the integration of information (merging of documents), the repackaging thereof (translations and the integration of textual and graphical formats) and the possible altering of information (changing of photographic images) by electronic means.

The use of technology in the processing of information can therefore not be seen as ethically neutral. Christians (1999, p. 7) refers to the use of technology as a value laden process. Kluge (1994, p. 337) even comments that technology has changed the ontological status of a document with accompanying ethical implications. By this he specifically refers to the manipulation of information by means of technology.

Brown (1990, p. 3) however on the other hand indicates correctly that the ethical problems that are caused by the use of technology do not imply - as he puts it - "...that we should rethink our moral values". The impact of the use of technology on the privacy of people manifests itself in a variety of areas. These areas include, inter alia the following:

The electronic monitoring of people in the workplace. This relates to personal information as discussed earlier. This is done by so-called electronic eyes. The justification by companies for the use of such technology is to increase productivity. Stair (1992, p. 655), however, in the discussion of this practice, clearly points out the ethical problem pertaining to the use of these technologies. According to him peoples' privacy in the workplace are threatened by these devices. It can also lead to a feeling of fear and of all ways being watched - the so-called panopticon phenomenon.
The interception and reading of E-mail messages. This poses an ethical problem which relates to the private communication of an individual. It is technically possible to intercept E-mail messages, and the reading thereof is normally justified by companies because they firstly see the technology infrastructure (E-mail) as a resource belonging to the company and not the individual, and secondly messages are intercepted to check on people to see whether they use the facility for private reasons or to do their job.5

The merging of databases which contains personal information. This is also known as databanking (Frocht& Thomas, 1994, p. 2). By this is meant the integration of personal information from a variety of databases into one central database. The problem here does not in the first place arise from the integration of the information as such. The main problems include the fact that the individual is not aware of personal information being integrated into a central database, that the individual does not know the purpose/s for which the integration is effected, or by whom or for whose benefit the new database is constructed and whether the information is accurate.6 In order to counter these problems relating to privacy and the merging of databases the American Congress passed the Computer Matching and Privacy Protection Act in the 1980s (Benjamin, 1991, p. 11).

Closely related to the merging of files is the increasing use of buying cards ("frequent-shopper cards") by retail stores. Inside such a card a computer chip is buried that records every item purchased along with a variety of personal information of the buyer (Branscomb, 1995, p. 19). This information obtained from the card enables marketing companies to do targeted marketing to specific individuals because the buying habits as well as other personal information of people are known.

Another major threat to privacy is the raise of so called hackers and crackers which break into computer systems (Benjamin, 1991, p. 7). This coincides with the shift in ethical values and the emergence of the cyberpunk culture with the motto of "information wants to be free".

The development of software that makes the decoding of digital information (which can be private information) virtually impossible also poses serious legal as well as ethical questions because it can protect criminals. A good example is the development of software called Pretty Good Privacy by P. Zimmer in 1991. According to an article in the IT Review (1996, p. 22) he has developed the most complex algorithm ever invented which makes the decoding of digital information virtually impossible.

4.3. The Individual and Socio-economical Effect
The use of technology for the processing of personal and other forms of private information has far reaching effects on society. The following effects can be distinguished:

On the individual level: The effect on the individual can be summarized as a loss of dignity and spontaneity, as well as a threat to freedom and the right to privacy. In her
research on the impact of technology on the privacy of the individual, Rosenberg (1994, p. 228) concluded that: "Technology continuous to be viewed as a threat to privacy rather than a possible solution". A survey that was conducted in 1990 by Equifax (one of the three biggest credit bureau companies in the USA) on the use of technology and the threat to the privacy of people, found that 79% of the respondents indicated that they were weary of the use of technology for the processing of their personal information (Frocht& Thomas, 1994, p. 24).

On the economic and social levels the biggest effect is the growth of large information businesses like credit bureau and telecommunication companies that specialize in the processing and trade of person-related information. This brings about a redefinition of the role of society (big businesses) in the personal and private lives of the individual (the use of personal information as a commodity). It also becomes clear that the legislation (for example on E-mail) on the protection of the privacy of the individual is falling behind due to the rapidly changing world of technology.

5. THE RELEVANCE FOR THE INFORMATION PROFESSIONAL
The above-mentioned has implications for the information professional on at least three levels. Firstly, the information professional works with all four categories of personal and private information. Secondly, increasing use is made of technology in the processing thereof. Lastly, a new profession is emerging in the infopreneur whose main line of business may be the buying and selling of person-related and other private information.

5.1. The Main Ethical Issues
In the handling and processing of these different categories of private and personal information the information professional is confronted with the following ethical issues: Deciding which categories of personal and private information the information professional is entitled to gather. This question is of utmost importance to infopreneurs.

The confidential treatment of such information. This issue refers specifically to information gained from the reference interview. According to Froehlich (1994), Smith (1994) and Shaver et al. (1985), the main ethical problems in this regard (with specific reference to online searching) are as follows: can personal details, obtained from the reference interview, be used for purposes other than for that which it was specifically gathered, is it ethically correct to re-use a search strategy formulated for one user for another user?, is it appropriate to discuss the nature of a specific query with other people? The accuracy of information. This issue is of specific importance in cases where an information professional is working with personal information that can have a direct influence on the life of a person. An example is the processing of medical information.

The purposes for which various categories of information may be used. The question here is whether an information professional may use any of these four categories of
private information for any other reasons than the original reason given for the gathering thereof. Relating to this is the question whether the person must be notified about the way in which personal information is going to be used.

The rights of a person in terms of the use and distribution of one's personal and private information. This ethical problem relates to the above-mentioned questions and boils down to the question of consent of the user in terms of the use of personal information. Related questions are as follows: does a user have the right to verify any personal and private information that is being held by an information professional, and if so, what are such person's rights regarding the correcting (in cases of the incorrectness thereof) of this information, and, does the person have the right to know who is using that personal and private information and for what purposes?

5.2. Applicable Ethical Norms

Applicable ethical norms which can act as guidelines as well as instruments of measurement must be formulated to address these ethical issues. The following norms can be distinguished: truth, freedom and human rights. They will be discussed briefly.

Truth. Truth as an ethical norm has a dual ethical application. Firstly, it serves as norm for the factual correctness of information. As a norm it thus guides the information professional regarding the accurate and factually correct handling of private information. In the second place truth is an expression of ethical virtues such as openness, honesty and trustworthiness.

Freedom. According to this norm a person has the freedom to make choices in terms of freedom of privacy and freedom from intrusion. As norm, however, it may not become absolutized. Therefore the choice to privacy from intrusion may not restrict the freedom of others.

Human rights. This norm is closely related to freedom, but can be regarded as a more concretely applicable norm. Applied to privacy it means the juridical acknowledgment and protection of a persons right to privacy. As an individual human right it also protects the individual from unlawful interference from society (amongst others the state) in the private life of an individual.

5.3. Ethical Guidelines for the Information Professional

Based on these norms, practical guidelines for the information professional can be formulated. Before the formulation of these guidelines, two fundamental aspects must be taken into consideration, namely the recognition of a persons' autonomy and freedom as well as the fact that the legal guidelines on privacy do not offer a complete framework for the ethical actions of the information professional with regard to the handling of personal and private information.

The concepts of autonomy and freedom has already been dealt with. With regard to the juridical guidelines the following comments can be made. Firstly, once a person's private or personal information has been made
known publicly (disclaim of the implied intention) such information is no longer, according to the law, viewed as private. This implies that the information can legally be dealt with as trade information. There is therefore (from a juridical perspective) no ethical sensitivity for the autonomy and freedom of the individual with regard to his right to privacy. The second remark relates to the content of legislation itself. As indicated, the immense growth in and development of information technology give rise to the fact that the legislators fall behind in the tabling of appropriate legislation on the protection of personal privacy. This is especially true in the South African situation where there is, for example no legislation on the protection of privacy to provide for information handled via E-mail.

Bearing in mind these two aspects the following practical guidelines can be given: (The appropriate norms are also given).

As an acknowledgment of the autonomy and freedom of the individual the information professional must act on the assumption that the client regards as confidential all personal and private information that is handled by the information professional. This implies that the information professional acknowledges the right of the client to control to a certain extent any personal and private information - based on the norm of freedom.

The client must, on a regular basis have access to all private and personal information that is held and used by the information professional. The reason for this is to provide the client the opportunity to verify the accuracy of the information. It is then the responsibility of the information professional to see to it that the necessary corrections are made and again verified by the client (Fouty, 1993, p. 290) - based on the norms of freedom and human rights.

The merging of personal and other private information of an individual into a different database than the one for which it was originally collected must be done with the necessary caution (Schattuck, 1995, p. 310). This is specifically applicable in situations where the client is not aware of such merging or the implications thereof. The appropriate action would not only be to inform the client about such a merging and the implications thereof, but also to give the client the right of access to the information on the central database, and the opportunity to change the information where it is incorrect, and the right to know who is using the information as well as the purpose of such use - based on the norms of human rights, freedom and truth.

The information professional must notify the client explicitly of the intended purposes of the use of all personal and private information. This implies the client's permission. Different avenues exist for seeking such permission. Spinello (1995:122) prefers the method of implicit informed consent. According to this principle, companies (information professionals) that have collected information about a person must diligently inform that person about the various uses of the information. Clients must then be given an opportunity to consent to these uses or to withhold their consent. The burden is on the client to respond, and a lack of response
implies consent. However, the client must be granted the opportunity to withdraw consent (Amidon, 1992:67) - based on the norms of freedom and human rights.

No unnecessary private information must be gathered. This is not only for logistic reasons but also to prevent the unnecessary violation or exposure of a person's privacy - based on the norm of freedom.

Personal and other private information that is no longer necessary for the function for which it was collected must be destroyed (Branscomb, 1995, p. 71) - based on the norms of freedom and human rights.

When the rendering of a specific service or product to a person is refused on the grounds of personal information (e.g. creditworthiness), the reason for this denial must be made known to the person10 - based on the norms of truth and human rights.

A person's information must be handled with the necessary confidentiality. This implies security and control of access to the information, of the right to use it, as well as the right to change or add any information (Fouty, 1993:290) - based on the norms of freedom, truth and human rights.

A private policy must be formulated consisting of the following elements: the categories of information that must be regarded as private and personal, the levels of confidentiality (e.g. who has access and use of which information), a clear explanation of the purposes of the use of the information, and the description of the procedures to ensure the accuracy of this information - based on the norms of freedom, truth and human rights.

6. CONCLUSION
It can thus be concluded that the use of technology in the processing of information, poses important questions with regard to a person's right to privacy. This right is directly linked to the right to freedom and human autonomy.

These problems relate mainly to the accessibility of information and the manipulation thereof. This is of specific relevance to the information professional who deals with private and personal information. Practical guidelines in the handling of these problems can be formulated according to the norms of freedom, truth and human rights.

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Comparative Analysis of Right to Information between India and Mexico

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Democracy must be built through open societies that share information. When there is information, there is enlightenment. When there is debate, there are solutions. When there is no sharing of powers, no rule of law, no accountability, there is abuse, corruption, subjugation, and indignation.

- Atifete Jahjaga

India is a democratic republic infused with the spirit of Justice, Liberty, Equality and Fraternity. In this republic, state plays a role in the promotion of economic, social, environmental, cultural well-being of its citizen and assumes primary responsibility for the welfare of its citizens. This is given to the citizen in the form of ‘Rights’ and government being a sovereign authority, provides guarantee to protect their rights from cradle to grave. Transparency and accountability in an administration is the sine qua non of participatory democracy. Information is oxygen that any citizen needs to live in a social structure of the society and maintain its democratic balance. So in order to maintain this democratic balance, Right to Information Act is passed in countries as a pioneer tool for citizens for protecting, promoting and defending their ‘right to know’ in which a citizen can obtain information from the government also.

According to the survey conducted, on the eve of Right to Know day, India is ranked at fourth position out of 111 countries that have a similar law and Mexico has been ranked first for having the best National level RTI law on the planet.

This research paper laid emphasis on the comparative analysis of RTI laws of India and Mexico.

Keywords: Subjugation, Indignation, Infused, Justice, Liberty, Equality, Fraternity Democratic, Sovereign, Transparency, Accountability, Eve.

INDIA (RIGHT TO INFORMATION ACT, 2005)

Preliminary

1.1 Objective of the Act - The objective of the Act is to set out a practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of public authorities and

625 Rakesh Dubbuddu, India’s RTI Act is the 4th Best in the world, Factly (Sept. 29, 2016).
to ensure smoother and greater access to information.\textsuperscript{627}

1.2 APPLICATION- This Act is applicable to public authorities and non-government organization substantially financed directly or indirectly by the government. A public authority is any authority or body or institution of self-government which has been established by the constitution of India, by the laws made by the parliament or state legislatures and by government orders or notification. It also includes bodies owned, controlled or substantially financed by the government and non-governmental organisations substantially funded by the government (Section 2(h)).

1.3 PRIVATE PARTIES PERFORMING PUBLIC FUNCTION

1.3.1 Funded: Private parties who perform public function and is substantially financed by the funds provided by the government fall within the ambit of public authorities under Section 2(h).

1.3.2 Non- Funded: Not covered.

1.4 MEANING OF INFORMATION - Information means any material in any form. It includes records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form. It also includes information relating to any private body which can be accessed by the public authority under any law for the time being in force (Section 2 (f)).

1.5 RIGHT TO ACCESS THE INFORMATION: All the citizen of the country is eligible to seek information under the Act (Section 3).

1.6 RESTRICTION IN USE OF INFORMATION: No such provision.

1.7 REASON REQUIRED FOR SEEKING THE INFORMATION: As per Section 6 of the Act person seeking information under the Act is not required to state any reason for requesting the information or any other personal details except his/ her contact details.

1.8 RIGHTS PROVIDED UNDER THE ACT: The Act provides for other rights as well which includes:

1.8.1 Right to Inspection (Section 2(j)(i))

1.8.2 Right to take notes extracts. Certified copies of document or records (Section 2(j)(ii))

1.8.3 Right to take certified samples of material (Section 2(j)(iii))

1.8.4 Right to take information in the form of diskettes, floppies, tapes or in any other electronic device (Section 2(j)(iv))

1.8.5 Right to take printout of the information stored in a computer or any other device (Section 2(j)(iv))

1.9 POLITICAL PARTY WITHIN THE PURVIEW OF RTI- There are no provisions in the Act to bring political parties within the ambit of public authority and hence, political parties are not answerable under the Act.

\textsuperscript{627} Right to Information, a citizen gateway, an initiative of department of personnel and training, government of India, http://rti.gov.in/.
1.10 **EFFECT OF THE ACT**- The provisions of the Act has an overriding effect on any other law for the time being in force or anything inconsistent with its provision\(^{628}\) (Section 22).

2. **OBLIGATIONS OF RESPONSIBLE AGENCY**

2.1 **RESPONSIBLE AGENCY**- Public authorities have designated some of its officers as Central Public Information Officer and State Public Information Officer. They are responsible for enabling access to information to any person requesting information under the Act.

2.2 **INCENTIVES TO THE RESPONSIBLE AGENCY**: No such incentives has been provided under the Act for Public Information Officer.

2.3 **PRO-ACTIVE OR SUOMOTU DISCLOSURE SCHEME**- The Act makes it obligatory for public authorities to maintain all its record to facilitate right to information in an effective manner and make such records available to the public. Every public authority is obliged to maintain all its record duly catalogued and indexed. It has to ensure that records that are capable of being computerized are duly computerized to effectively facilitate access to information to the citizens. The Act also makes it obligatory for the public authorities to publish the particulars of its organization, functions, etc. as provided under Section 4 of the Act. As per the Act the public authorities should provide as much information suomotu to the public through various means of communication.

2.4 **ASSISTANCE TO APPLICANTS**:

2.4.1 In case an application cannot be made in writing, it is the responsibility of the Central Public Information Commissioner or the State Information Commissioner to provide all reasonable assistance to the person making the request orally to reduce it in writing (Section 6).

2.4.2 In case a person has a sensory disablement, it is the responsibility of the Central Public Information commissioner or the State Public Information Commissioner to provide assistance to such person in order to enable access to the information (Section 7).

3. **EXEMPTIONS**

3.1 **EXEMPTION FROM DISCLOSURE**-

3.1.1 Sections 8 of the Act enumerate the categories of information which have been exempted from disclosure. Below mentioned information has been exempted from disclosure:

3.1.1.1 **Absolute Exemption**:

a) **Information related to sovereignty and Integrity**: Any information which would affect the sovereignty and integrity of India or would affect the

economic, scientific, security or strategic interest of the State or information which would affect the relation with foreign state or which would lead to incitement of an offence

b) **Contempt of Court:** Information which would lead to contempt of court
c) **Parliamentary Privilege:** Information which would lead to a breach of privilege of parliament or state legislatures.
d) **Confidential Information:** Information which has been received from a foreign government in confidence
e) **Information endangering Life or Safety:** Information the disclosure of which will endanger life or physical safety of any person or identify the source of information or assistance given in confidence for security purpose.
f) **Hindrance to Investigation:** Information which would cause hindrance in the process of investigation
g) **Cabinet Papers:** Cabinet papers including records of deliberation of Council of Ministers and other officers. However, the information related to decisions made and the material on which the decision was made should be made public after the decision has been taken.

3.1.1.2 Qualified Exemption:
h) **Commercial Secret:** Information which is related to commercial confidence, trade secrets or intellectual property and would harm the competitive position of a third party. This information cannot be disclosed unless the competent authority is satisfied that there lies a larger public interest which warrants the disclosure.
i) **Information held in a Fiduciary relationship:** Information available to a person in his fiduciary relationship. This information cannot be disclosed unless the competent authority is satisfied that there lies a larger public interest for such disclosure.
j) **Personal Information:** Information which is personal and is not related to any public activity or interest and would cause unwarranted invasion of the privacy of the individual. However, the Public Information Officer may allow access to information on being satisfied that the larger public interest justifies such disclosure.

A public Authority may allow the above-mentioned information to be disclosed, if the public interest in disclosure outweighs the harm to the protected interests.

3.1.2 **Copyright Infringement:** Information which would involve an infringement of copyright subsisting in a person other than the state (Section 9).

3.2 **Organisation(s) Exempted from Providing Information**
Section 24 provides for exemption of intelligence and security organizations established by the Central Government or by the State Government from disclosing any information unless pertaining to corruption or human right violation.
3.3 Mechanism for Obtaining Information from Exempted Organisations –

3.3.1 In case the information sought is in respect of allegation of violation of human rights from any of the organisation established by Central Government, the information shall be provided only after the approval of Central Information Commission within forty-five days from the date of the receipt of request.

3.3.2 In case the information sought is in respect of allegation of violation of human rights from any of the organisation established by State Government, the information shall be provided only after the approval of State Information Commission within forty-five days from the date of the receipt of request.

4. Procedural Mechanism

4.1 Procedure to Access Information:
A citizen who desires to obtain any information under the Act, should make an application to the Public Information Officer of the concerned public authority in writing or through electronic means in English or Hindi or in the official language of the area in which the application is made. The application should be precise and specific. An amount of rupee ten is required to be paid along with the application. In case the information so sought is held by another public authority the same should be transferred within five days from the date of receipt of the application and the applicant should be duly informed (Section 6).

4.2 Duty of the Responsible Agency, in Case the Request Made is Rejected:
When the request made is rejected by the Public Information Officer, the person making the request has to be informed about the reasons for such rejection, the time period within which an appeal against such rejection can be made and the particulars of the appellate authority (Section 7(8)).

4.3 Mechanism for Obtaining Information from Third Party:
A third party is any person other than the citizen who makes a request for information and includes a public authority (Section 2).

If the Public Information officer intends to disclose any information on a request made under the Act, which is related or is supplied by a third party and has been treated confidential by the third party, the officer shall within five days from the receipt of such request give a written notice to the third party of the request and invite the third party to make a submission regarding whether such information should be disclosed. The disclosure of such information may be allowed if the information is not related to trade or commerce secrets and is in the larger interest of public and outweighs the harm if any that may occur to the third party (Section 11).

5. Time Limit

5.1 Time Period for Supply of Information:

5.1.1 Speedy Access to Info: If the information sought concerns the life or
liberty of a person, it should be made available within 48 hours.

5.1.2 **ORDINARY ACCESS TO INFO:**

5.1.2.1 In the normal course, information to an applicant shall be supplied or rejected within 30 days from the receipt of the application by the public authority.

5.1.2.2 If the application needs to be transferred to another public authority, five days is to be added to 30 days or 48 hours as the case may be.

5.1.2.3 If the application is received through Assistance Public Information officer, the information is to be provided within 35 days.

5.1.2.4 In case the information is to be received from intelligence or security organisations, the information is to be provided within forty-five days from the date of receipt of such request.

5.2 **INFORMATION NOT PROVIDED WITHIN THE TIME LIMIT:** If the information so sought is not provided within the time limit, then such information shall be provided to the applicant free of charge (Section 7(6)).

6. **FEE CHARGED**

6.1 **FEE FOR THE INFORMATION:**

6.1.1 An amount of rupee ten needs to be paid along with the application as a fee for the information so requested.

6.1.2 When the information sought is to be provided in printed or in any electronic format, the applicant will have to pay:

   a) Two rupees for each page or actual cost of the photocopy or sample

   b) Fifty rupee for each diskette or floppy

   c) No fee is to be charged in first hour of the inspection. A fee of five rupee is to be charged for every subsequent hour of inspection.

   d) the extra postal charge cost involved in supply of information exceeding fifty rupee.

6.2 **EXEMPTION OF FEE:** No fee is to be charged from any person belonging to below poverty line if he has submitted his BPL certificate issued by the government along with the application.

7. **ENFORCEMENT AGENCY**

7.1 **ENFORCEMENT AGENCY** - The Act under Chapter III provides for constitution of Central Information Commission and State Information Commission which have been made responsible for proper enforcement of the Act.

7.2 **EMPOWERMENT OF COMMISSION:**

7.2.1 **COMPONENT** -

- The Central government has constituted the Central Information Commission consisting of the Chief Information Commissioner and Central Information Commissioners not exceeding ten in number. (Section 12).

- Every state has State Information Commission consisting of the State Chief Information Commissioner and State Information Commissioner not exceeding ten in number (Section 15).
7.2.2 Power and Functions:

The power and functions of the Central Information Commission and State Information Commission has been enumerated in Section 18 of the Act. According to the Section, it shall be a duty of the officer to receive and inquire into a complaint from any person.

- While inquiring into the matter the commission has been given the same power as that of a civil court as under the Civil Procedure Code of 1908 in respect of summoning and enforcing the attendance of the person and to compel them to give evidence on oath and produce the document and thing, receiving evidence on affidavit or requiring the discovery and inspection of the document and requisitioning any public record from any court or office. It can also issue summons for witnesses and documents (Section 18(3)).
- During the inquiry of any complaint the commission has power to examine any record to which the Act applies which is under the control of public authorities and no such record can be withheld on any ground.

The Commission while deciding an appeal has been given power as mentioned below:

- Require the public authority to take any such step as required for compliance with the provisions of the Act (Section 19 (8) (a))
- Require the public authority to compensate the complainant for any loss or detriment caused. (Section 19 (8) (b))
- Impose any penalty provided under the Act (Section 19 (8) (c))
- Reject the application (Section 19 (8) (d)).

8. Complaint and Appeal Mechanism

8.1 Complaint Mechanism:

A complaint can be made to the Information commission by any person:

- Who has been unable to submit a request either due to non-appointment of the Public Information officer or due to the refusal to accept the application.
- Who has been refused access of information so requested
- Who has not been given a response within the time limit prescribed
- Who has been required to pay an unreasonable amount of fee
- Who believes that he has been given incomplete, misleading or false information in respect of any other matter relating to requesting or obtaining access to information

If the commission is satisfied that there are reasonable grounds to inquire into the matter, it may initiate an inquiry. During the inquiry, the Commission will have same power as that of a civil court as provided under CPC, 1908.

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8.2 APPEAL MECHANISM - If an applicant is not provided information within the prescribed time of thirty 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 Central or State Public Information Officer. Such an appeal should be filed within a period of thirty days from the date on which the limit of 30 days of supply of information is expired or from the date on which the information or decision of the Public Information Officer is received. The appellate authority of the public authority shall dispose of the appeal within a period of thirty days or within the extended period not exceeding forty-five days from the date of filing of such appeal. If the first appellate authority fails to pass an order on the appeal within the prescribed period or if the appellant is not satisfied with the order of the first appellate authority, he may prefer a second appeal with the Central Information Commission within ninety days from the date on which the decision should have been made by the first appellate authority or was actually received by the appellant (Section 19).

9. PUNISHMENT AND PENALTY

9.1 POWER TO IMPOSE PENALTY - The Central or State Information Commissioner has the power to impose penalty on the Public Information Officer if it is of the opinion that such officer has refused to receive application for information or furnish information within specified time without reasonable cause or has malafidely denied the request for such information or has knowingly given incorrect information. Such officer on whom the penalty has been imposed shall be given reasonable opportunity to be heard. (Section 20).

9.2 AMOUNT OF PENALTY THAT CAN BE IMPOSED- The Central or State Information Commission may impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished but the total amount must not exceed twenty-five thousand rupees. (Section 20).

9.3 DISCIPLINARY ACTION AGAINST THE OFFICER: The Central Information Commission or the State Information Commission at the time of deciding an appeal has been given the power to recommend disciplinary action against the Public Information Officer in case, the officer has without any reasonable cause and persistently, failed to receive an application for information or has not been able to provide information within the time limit or has malafidely denied the information or has knowingly given incorrect or misleading information. (Section 20 (2)).

9.4 PUNISHMENT IN CASE OF VIOLATION OF SUO-MOTU DISCLOSURE: There is no punishment provided in case of violation of suo-motu disclosure

9.5 PUNISHMENT IN CASE OF FALSE OR VICIOUS COMPLAINT: The Act does not provide any punishment for false or
vicious complaint made to the Information Commission under the Act.

10. **MISCELLANEOUS**

10.1 **PROTECTION AVAILABLE**- The Act provides for protection from prosecution or other legal proceedings to any person for anything done in good faith (Section 21).

10.2 **POWER OF COURT UNDER THE ACT**- The Act under Section 23 bars the jurisdiction of court from entertaining any suit, application or other proceedings in respect of any order made under the Act. (Section 23).

MEXICO (FEDERAL LAW OF TRANSPARENCY AND ACCESS TO PUBLIC GOVERNMENT INFORMATION, 2002)

1. **Preliminary**

1.1 **Objective**: The objective of the act is provided under Article 4 of the act, that are:

- Right to access information through simple and expeditious procedures,
- Promote disclosure of public administrative task through dissemination of information issued by respecting disclosure parties,
- To guarantee protection of personal data held by disclosure party,
- To promote rendering of accounts to citizens so that they can evaluate the performances of disclosing party,
- To upgrade organisation, classification and handling of document,
- To contribute to democratization of Mexican society and the existence of Rule of Law.\(^{630}\)

1.2 **Application**: This act is applicable to government officials, autonomous constitutional bodies (like Federal electoral Institute, National Human Rights Commission, Central Bank, Universities, and other higher educational institutions which have derived the authority by law as well from federal constitution of Union Mexican States), entities, disclosing parties (like the Federal Executive, attorney general office, legislative branch, judicial branch, Federal administrative courts). The government official is defined under Article 108 first paragraph of Federal Constitution or any individual who handles or use federal funds.

1.3 **Private parties performing public function**: Private parties who handles or uses Federal funds fall within the ambit of government officials.

1.4 **Meaning of information**: Information according to Article 3(V) means information contained in document issued, obtained, acquired, transformed, or kept by disclosing party under any title.

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www.supremoamicus.org
1.5 Right to access the information: Any person is eligible to seek information under the act.

1.6 Restrictions in use of information: No such Provision provided under the act.

1.7 Reasons required for seeking information: Any person seeking information under the act from Liaison Unit is required to submit his name, address, clear and accurate description of information required, any other information that help in location of information under Article 40 of the title two of the act.

1.8 Rights provided under the act: Any person seeking information has the right to direct inquiry, to take certified copies, Photostatic copies or from any other means.

1.9 Political party within the purview: Any organisation established in political constitution i.e. political parties are included within the ambit of autonomous constitutional entities under Article 3(IX) of the act.

1.1 Effect of the act: No such provision provided in the act.

2. Obligation of responsible agency

2.1 Responsible agency: The disclosing parties are considered to be responsible to provide information on application being made by an applicant.

The act under Article 41 made Liaison unit a link between the department or agency or people seeking information and shall be responsible for notification consigned. Head of each department or agency appoint Liaison unit to collect and disseminate information, to receive and process request in some situation, to keep records of requested information.

2.2 Incentives provided to Responsible Agency: No such provision under the act.

2.3 Pro-active or suo moto disclosure scheme: Chapter II of the act creates transparency obligation on disclosing party regarding the information that they should have to provide people through remote or local communication means. Article 7 of the act enumerates the list of information that disclosing party has to provide to the public and to update it according to regulations and guidelines issued by the institution;

- Organizational chart,
- The authority conferred upon each administrative unit,
- The directory of government officials at head of department level or equivalent level,
- Monthly salary by position,
- The address of the liaison unit including e mail to address request of information,
- Goals and objective of each administrative unit based on their operational programme,
- Services offered by said unit,
- The procedures, requirement and forms,
- Budget allocated and information on application in terms of Federal Expenditure Budget,
- The result of disclosing party’s budget audit’s conducted,
- The design, execution, amount allocated and criteria to access subsidized programs,
• The concessions permit, or authorization granted including the names of holders,
• Legal framework applicable to each disclosing party,
• Reports issued by disclosing party’s according to the provision of the act,
• Citizen participation mechanism,
• The contracts entered into pursuant to applicable legislation including public work, goods procured or leased and services contracted in case of research and studies, amount, name of supplier, contractor, individual or corporation and date of performance,
• Any other useful information that public should know.

Reports submitted by National political parties and political association to Federal Electoral Institute and the audits and reviews ordered by the Public Funds Auditing Commission of the Political Parties and Associations must be publicized upon completion of the respective auditing procedure as according to Article 11 of the act.

Disclosing party should publish all information related to amounts and recipients of public funds as well as reports rendered by said recipients on the use and destination of said resources according to article 12 of the act.

2.5 Assistance to an Applicant: The act under article 40 provides Liaison unit to assist private entities in formulation of request for access to information especially when an applicant is illiterate.

3. Exemptions
Chapter III of the act enumerates the categories of privileged and confidential information which have been exempted from disclosure of information. The heads of administrative unit as specified under Article 16 shall be in charge of classification of information based on criteria and regulations issued under the act. The head of each department is required to keep and protect classified files.631

3.1 Privileged Exemptions: The privilege character may not be invoked in case of patent violation of fundamental rights or crimes against humanity. Privilege treatment period specified under the act is not more than twelve years maximum.

3.1.1 If such disclosure of information would prejudice the national security, public security or national defence,
3.1.2 If such disclosure of information cause an extreme damage to law enforcement activities, crime prevention or prosecution, tax collection, administration of justice, migratory control operations, procedural strategies in judicial or administrative actions,
3.1.3 Commercial, industrial, fiscal, bank or fiduciary secrets,
3.1.4 Criminal Investigations,
3.1.5 Judicial or administrative law case which have been prosecuted through law suits as long as they shall not become and conclusive,
3.1.6 Public officer liability proceeding as long as no final and conclusive

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631 Kate Doyle, Mexico’s New Freedom of Information Law (Jun. 10, 2002).
administrative law o jurisdiction ruling has been issued,

3.1.7 Information containing opinions, views, recommendations that are not the part of deliberation process of government officials as long as the final decision has not been issued,

3.2 Confidential Exemptions:
Confidential information is released by private entities to disclosing parties and personal data subject to private entity’s consent for dissemination, distribution or commercialization.

3.2.1 If such disclosure of information would impair the development of negotiations, international relations including confidential information submitted by other state or international organisations to Mexican state,

3.2.2 If such disclosure of information would damage Mexican State’s financial, economic or monetary stability,

3.2.3 If such disclosure of information would jeopardize the health, life, security of any person,

3.3 Organisation(s) Exempted from providing information: The National Security Investigation Center; the Drug Control Planning Center; the Intelligence Coordination Division of the Preventive Federal Police; the Organized Crime Unit, the Presidential Staff, the National Defense Staff and the Navy Staff or the substitute administrative units, are exempted under Article 31 of the act.

3.4 Process to obtain information from such exempted organisation(s): In case there has been a request to access confidential information, disclosing party may disclose it with the express consent of private party as provided under Article 19 of the act.

4. Procedural mechanism
4.1 Procedure to access information:
Any person can file an application in writing to responsible parties to access information. In case of Personal data, an interested party or their representative may ask for information from Liaison unit.

In case the information requested is already been provided to the public in printed matter, an applicant will be informed about the source and place of information.632

Liaison unit forward the application to administrative unit and in return administrative unit inform Liaison unit whether the information will be provided or not and the same has to be informed to the applicant.

4.2 Duty of responsible agency, in case the request made is rejected: In case of personal data, if the request made is rejected, the writ of review may be filed.

5.2 Mechanism for obtaining information from third party:

5. Time limit
5.1 Time period for supply of information: A person seeking

5.2 Information not provided within the time limit: If the information is not provided within the time limit, shall be interpreted as an affirmative answer and the department shall be required to provide information within ten business days in case the cost from reproduction of material has been received unless the institution tells them clearly that such information is under the privileged or confidential category.

6. Fee charged
6.1 Fee for the information: Fee is to be charged according to Chapter V of the act which states that the information may not exceed the sum of cost of material employed in the reproduction of information and mailing cost.
6.2 Exemption of fee: Release of personal data is exempted from fee under Article 24 of the act except the mailing cost.

7. Enforcement agency
7.1 Enforcement agency: Federal Institute for access to public information established under Chapter II of Title two of the act is made responsible for proper enforcement of the act.

7.2 Empowerment of commission:
7.2.1 Component of Commission: Federal Institute for access to public information is a body of Federal Public Administration with operational, budgeting and decision making autonomy in charge of promoting and dissemination right to access public information, issuing resolutions, denial of request, protection of personal data in possession of department and agencies.

7.2.2 The commission has five commissioners appointed for seven years without possibility of re-election and not be allowed to hold any other position.

7.2.3 Eligibility to become a commissioner; Mexican national, not convicted for fraudulent offence, thirty five years old at the time of designation, flawless record in professional, public service of academic activities related to the subject matter, not to have been a secretary of state, head of an administrative department, attorney general, senator, federal or local representative, president of political party or association, state governor, head of the government of federal district during the year immediately preceding designation.
7.2.4 Power and Function: Article 37 of the act enumerates the list of function;
- To interpret an act in administrative sphere,
- To hear and issue a ruling on writs of review file by an applicant,
- To design and review the criteria for classification, declassification, and custody of privileged and confidential information,
- To act as co-adjustor of National Archive in preparation and application of criteria for listing and keeping of document,
- To supervise and in case of non-performance provide recommendations to department and agencies to perform,
- To provide counseling to private entities on their request,
- To provide technical support to department and agencies in formulation and implementation of program,
- To formulate guide,
- To promote and carry out training of government officials in access to information and protection to private data,
- To prepare and publish studies and research to publicize the knowledge on the subject matter,
- To prepare internal regulations,
- To prepare its annual budget to be submitted to the Department of Finance and Public Credit for inclusion in Federal Budget,

8.1 Complaint mechanism: A complaint can be made to the institution by any person or his representative who is not providing access to information within time limit or been refused to have access, has an option to file a Writ of review with the institute or to the liaison unit that heard the matter within fifteen business days from the date of notification.

8.3 Appeal mechanism: If an applicant is not provided with the information within time limit, he may prefer an appeal to Federal Institute of Public Information. The appeal should contain the content like department or agency to whom the request is being made, name of appellant, date on which appellant was notified. The notice is served to the commissioner, he shall within thirty days has to submit draft of resolution in a plenary session and this session shall issue a final decision within twenty business days of the receipt of draft of resolution further an individual other than government bodies if not satisfied with the decision is allowed to appeal in federal judicial power.

9. Punishment and penalty
Title four has the provision regarding punishment and penalty.
9.1 Power to impose penalty: Federal law of administrative liabilities of government official has the power to impose penalty (Article 63).
9.2 Amount of penalty that can be imposed: The act does not provide any amount of penalty that can be impose but it does amounts certain
obligations as serious offences for the purpose of administrative law penalty that are:

- To use, destroy, hide, damage, disclose or alter in an unlawful manner the information in custody to which the government official is allowed to access by reason of their employment, position, commission,
- To act negligently, fraudulently or in bad faith in procession of access to information,
- To classify privileged information fraudulently, that it does not meet the conditions specified therein,
- To release intentionally incorrect information.

9.3 Disciplinary action against the office: There is no such provision provided under the act.

9.4 Punishment in case of violation of suo moto disclosure: There is no punishment provided in case of violation of suo moto disclosure.

9.5 Punishment in case of false or vicious complaint: The act does not provide any punishment for false or vicious complaint made to the department.

10. Miscellaneous

10.1 Protection available: No such provision is provided by the act.

10.2 Power of court under the act: No such provision is provided by the act.

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Interaction of Moratorium under IBC with SARFAESI Act- Unambiguous

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LEGAL FRAMEWORK
Moratorium signifies an authorized postponement, usually a lengthy one, in the deadline for paying a debt or performing an obligation. 633 The Banking Regulation Act, 1949 permitted the issuance of such orders against banking companies only by the Reserve Bank of India or the Central Government. 634 The Apex court pinpoints issuing a moratorium order to be a preemptive act in order to protect the bank and the associated stakeholder, whenever the banks are in precarious financial position. 635 However, the new insolvency law in the country has extended the power of issuing moratorium in the hands of a quasi-judicial body i.e. National Company Law Tribunal (“NCLT”). 636 Interestingly, the scope of moratorium passed by NCLT’s under the Insolvency and Bankruptcy Code, 2016 (“IBC”) shall not have any effect on the proceeding pending under Article 226 before the High Court and under Article 32 before the Supreme Court, respectively. 637

634 Section 45, The Banking Regulation Act, 1949 [Act 10 of 1949].
635 Ganesh Bank, Kurundwad Ltd. v. The Union Of India And Ors., Civil Appeal No. 3698 of 2006 arising out of SLP (C) No. 7188 of 2006.
636 Section 5, Insolvency and Bankruptcy Code, 2016 [Act 31 of 2016].
Section 14 of the IBC is the enabling provision whereby the NCLT shall issue a moratorium in order to prohibit certain acts subject to a few exceptions like supply of essential commodities and others as specified by the Central Government. The basic intent behind a moratorium as identified by the Bankruptcy Laws Reform Committee is value maximising for the entity to continue operations even as viability is being assessed during the insolvency resolution process (“IRP”) and eliminating any additional stress on the business after the public announcement of the IRP. Maintaining consistency with the abovementioned intent, the Apex court held that the purpose behind a moratorium is “to provide the debtor a breathing spell in which he is to seek to reorganize his business.”

FACTUAL MATRIX
In the case of Indus Finance Limited v. Quantum Limited, the Petitioner had provided Quantum with an unsecured term loan amounting to INR 2 crore in the year 2011. The corporate debtor was highly irregular in paying interest in the year 2012, which consecutively, turned into a non-performing asset (“NPA”) by March, 2013 and credit options of the corporate debtor with a bank also tuned into an NPA. This led to sale of the liabilities upon Quantum to J M Finance Asset Reconstruction Company Private Limited, by the bank. Whereas, J M Finance Asset Reconstruction Company Private Limited, adopting it’s due legal recourse filed claims before the DRT under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 (“SARFAESI Act”) and got an order of recovery. The said recovery was to be realised by disposing the properties hypothecated, leaving the Petitioner in the present matter, remediless. Therefore, in light of the aforesaid facts and aggrieved by the default in payment, the Petitioner initiated corporate IRP against Quantum under Section 7 of the IBC.

JUDGEMENT
The NCLT applying the literal rule of interpretation admitted the application allowing the moratorium to sustain during the insolvency resolution process. The reason accorded by the tribunal was the difference in the time taken to adjudicate a dispute under SARFAESI vis-a-vis that of an IRP under IBC. IRP’s inherent feature of being a fast track procedure (maximum up to 180 days) shall not create an eclipse on the proceedings before Debt Recovery Tribunal (“DRT”).

- The adjudicating authority understood the position of the petitioner as an unsecured creditor who was unable to join the proceedings before the under the SARFAESI Act. Thus, it accepted the separate application under IBC, despite, it being a parallel matter arising out of the same of facts and same transaction.
- Further, the NCLT unambiguously held that there is no overstepping of jurisdiction as both the statutes have separate objectives. Thus, by virtue of Section 14 (1)(c), there is

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639 Innoventive Industries Ltd v. ICICI Bank Ltd, CIVIL APPEAL NOs. 8337-8338 OF 2017.
no contradiction or overlapping between the two statutes and the powers conferred by them

IMPACT ANALYSIS
The order shall have an overall positive impact as it sets up a precedent negating the overlap. It upholds the law given under IBC and clearly demarcates the universe in which IBC and SARFAESI will operate and not coincide or disturb each other with respect to the moratorium. The SARFAESI Act is known to come to aid for the secured creditors by speedy enforcements and even reconstruction of assets subject to the economic viability of the same. Whereas IBC is understood to strictly focus on decreasing the quantum of losses or speedy recovery of losses, already incurred, so as to encourage and facilitate an economically conducive environment for debt financing.

The order takes into consideration the defects under SARFAESI Act which were subsequently, cured by IBC by providing adequate remedies to other class of creditors. Further, one of the objectives of IBC inter alia is prevent a tilt in balance of power in favour of the creditor. This objective is achieved by a moratorium and this order brings into effect a ‘calm period’ for negotiations given to a debtor by removing all encumbrances on assets till the conclusion of IRP.

CONCLUSION
A moratorium shall subsist during the pendency of proceedings before DRT and the rights of secured creditors shall not override those of the unsecured ones. Merely because a proceeding is pending before the DRT, shall not dissolve the claims of the unsecured creditors. Any class of creditor, who cannot seek a remedy under the SARFAESI Act, can approach the NCLT under IBC and the tribunal shall address the cause of their grievance, once the tribunal is satisfied on the occurrence of a ‘default’.

NCLT Mumbai had also dismissed the application for sale of a property in favour of JM Finance Limited filed under Section 65 of the IBC, as the moratorium stood valid and an order of disposing off of a property to settle claims under SARFAESI cannot intervene the IRP without complying with the mandatory conditions specified under Rule 9 of the Security Enforcement Rules, 2002.

%%%AN ANALYSIS OF CYBER TERRORISM – NATIONAL AND INTERNATIONAL PERSPECTIVE

default” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be. Section 12(2), Insolvency and Bankruptcy Code, 2016 [Act 31 of 2016].

Mathew Varghese v. M. Amritha Kumar , (2014)5 SCC 610


642Supra note 6
643Ibid

www.supremoamicus.org
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ABSTRACT

This paper deals with Cyber Terrorism-National and International Perspective. Cyberterrorism means any “criminal act perpetrated through computers resulting in violence, death and/or destruction, and creating terror for the purpose of coercing a government to change its policies." Cyber terrorism has been recognized as a threat at national and international level. The reason of that cyber attacks can come from anywhere on the globe and be easily hidden. This essay contains an analysis of what cyber crimes are as against cyber terrorism. The main aim of this paper is to trace out the factors that influences cyber Terrorism. Then focus shifts on analysing various issues concerned with the policy implications. This essay ends by suggesting measures to be taken to counter the threat along with a legal analysis of the threat as it affects aviation and addresses several issues, including a discussion on some national efforts at curbing the problem in some prominent jurisdictions. Responding to cyber terrorism requires special efforts and developing strategies and policies that need to be as inclusive as possible. This study is strengthened with case laws, illustrations and advanced technology.

INTRODUCTION

Terrorism has been one of the complex issues faced by governments, policy makers, analysts, and the public. The complexity of terrorism has come out not only from the definition of the concept itself but also the tactics that terrorist groups use.

As the world changes at an unprecedented pace, the types of weapons, tactics of the terrorists have changed. Today, it is considerably clear that information technologies, such as computers, telecommunication devices, software, and the internet have been used by all terrorist organizations. In our day, almost all of the active terrorist organizations have Web sites and use several languages to reach out to more and more people.

Government, military, financial and service sectors use computer systems and internet widely. As the world has become more and more reliant on technology and networked systems, not only have legitimate entities benefited from this trend, but also illegal groups, such as terrorists, organized crime groups, and other criminal entities have been using cyber space for their own benefits. The growing dependence of societies on information technology has created a new form of vulnerability, giving terrorists the ability to approach targets such as national defense systems and air traffic control systems.

There are multiple reasons to think terrorist groups will utilize information systems as weapons of terror. Cyber terrorism is a wise choice for modern terrorists, who assess its anonymity, its potential to cause massive damage, its psychological impact, and its media appeal. If we consider terrorists as rational people who calculate the necessary preparation and consequences of their
actions, cyber terrorism provides plenty of opportunity for terrorists because the attacks are cost-effective and may potentially disrupt and destroy enough lives to serve their political agenda. Also, cyber space enables terrorists to attack multiple targets at the same time, which can increase the significance of the attack. Cyber terrorism is one of the newest national security issues in the twenty-first century. The international and national legal system must adapt to this battleground.

DEFINITION OF CYBER TERRORISM

cyberterrorism refers to the convergence of terrorism and cyberspace. It is generally understood to mean unlawful attacks and threats of attacks against computers, networks, and the information stored therein when done to intimidate or coerce a government or its people in furtherance of political and social objectives.  

Politt (1997) defines cyberterrorism as “the premeditated, politically motivated attack against information, computer systems, computer programs, and data which result in violence against noncombatant targets by sub-national groups or clandestine agents.”

To clarify the difference between information warfare and cyberterrorism, it should be understood that cyberterrorism can be a component of information warfare, in other words, information warfare encompasses cyberterrorism. According to Ron Dick, Director of NIIPC in 2002, cyberterrorism means any “criminal act perpetrated through computers resulting in violence, death and/or destruction, and creating terror for the purpose of coercing a government to change its policies.” (as cited in Berinato, 2002).

By combining the above concepts, cyberterrorism may also be defined as the politically motivated use of computers as weapons or as targets, by sub-national groups or clandestine agents intent on violence, to influence an audience or cause a government to change its policies.” (Wilson, 2003, p. 4.)

TYPOLOGY OF CYBER TERRORISM

<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>DEFINITION AND EXPLANATION</th>
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<tr>
<td>Information</td>
<td>Cyberterrorist attacks focused on altering or destroying the content of electronic files, computer systems, or the various materials therein.</td>
</tr>
<tr>
<td>Infrastructure</td>
<td>Cyberterrorist attacks designed to disrupt or</td>
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647 Denning, Dorothy E., “Cyberterrorism: The Logic Bomb versus the Truck Bomb”, Global Dialogue, Volume 2, Number 4, Autumn 2000
WHO IS A CYBER TERRORIST?

A terrorist does not usually spend his or her entire life working at a computer. However, there are crackers and some other people who are in that business. These people are potential candidates for becoming cyberterrorists. This conversion from cracker to terrorist may be motivated by money, prestige, and/or ideology (Collin 1997). However, some analysts suggest that as terrorists are becoming more familiar with technology, a new generation terrorists who are more computer-savvy may be growing, and they may focus on using this technology to carry out cyber attacks.

INTERNATIONAL EFFORTS

Offences against civil aviation, particularly with regard to unlawful interference with civil aviation relating to aircraft have been addressed in three significant occasions in the Tokyo Convention of 1963, The Hague Convention of 1970 and the Montreal Convention of 1971. However none of these directly or indirectly referred to cyber terrorism. For the first time, the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, adopted in Beijing in Article 1 d) provides that an offence is committed when a person destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight. This undoubtedly refers, inter alia to cyber terrorism, but links the offence exclusively to the safety of aircraft in flight. 

Article 2a) of the Convention provides that the aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation; in the case of a forced landing, the flight would be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board. If therefore as a result of an act of cyber terrorism, a taxiing aircraft collides


652Abeyratne (1998), which discusses extensively the treaties. See also, Abeyratne (2010) at 205–264.

with an aircraft which has opened its doors for disembarkation but the passengers are still on board awaiting disembarkation, that act would not be considered an offence in terms of the passengers in the process of disembarkation. In other words, the offender would not be committing an offence under the Treaty either against the second aircraft or its disembarking passengers. Nonetheless, the Beijing Treaty of 2010 is a step forward in the right direction with the threat of cyber terrorism looming, affecting the peace of nations. Air transport could well be a target towards the erosion of that peace.

On a more general basis, and certainly of relevance to aviation, are the efforts of various international organizations such as the United Nations, Council of Europe, Interpol, and OECD dating back to the 1980s in responding to the challenges of cyber crime. One significant result of this collective effort was the publication of the United Nations Manual on Cybercrime and United Nations Resolution of 2001 which exhorted States, in the context of an earlier UN Resolution on Millennium Goals which recognized that the benefits of new technologies, especially information and communication technologies are available to all—to ensure that their laws and practices eliminate safe havens for those who criminally misuse information technologies; while also ensuring law enforcement cooperation in the investigation and prosecution of international cases of criminal misuse of information technologies which should be coordinated among all concerned States. The Resolution went on to require that information should be exchanged between States regarding the problems that they face in combating the criminal misuse of information technologies and that law enforcement personnel should be trained and equipped to address the criminal misuse of information technologies.

The Resolution recognized that legal systems should protect the confidentiality, integrity, and availability of data and computer systems from unauthorized impairment and ensure that criminal abuse is penalized and that such systems should permit the preservation of and quick access to electronic data pertaining to particular criminal investigations. It called upon mutual assistance regimes to ensure the timely investigation of the criminal misuse of information technologies and the timely gathering and exchange of evidence in such cases. States were requested to make the general public aware of the need to prevent and combat the criminal misuse of information technologies. A significant clause in the Resolution called for information technologies to be designed to

654 The mission of the Organisation for Economic Co-operation and Development (OECD) is to promote policies that will improve the economic and social well-being of people around the world. OECD provides a forum in which governments can work together to share experiences and seek solutions to common problems. We work with governments to understand what drives economic, social and environmental change.


657 A/RES/55/2.
help prevent and detect criminal misuse, trace criminals and collect evidence to the extent practicable, recognizing that the fight against the criminal misuse of information technologies required the development of solutions taking into account both the protection of individual freedoms and privacy and the preservation of the capacity of governments to fight such criminal misuse.

A seminal event in the international response to cybercrime occurred in 2001 with the adoption of the Cybercrime Convention 658 of the Council of Europe which was opened for signature in November 2001 and came into force on 1 July 2004. The Convention was ratified by President Bush on 22 September 2006 and entered into force for the United States on 1 January 2007. The main concern of the Convention was the risk that computer networks and electronic information may also be used for committing criminal offences and that evidence relating to such offences may be stored and transferred by these networks. States Parties to the Convention therefore expressed their view in a Preambular Clause to the Convention—that co-operation between States and private industry in combating cybercrime was necessary and that there was a need to protect legitimate interests in the use and development of information technologies. The intent of the Convention can therefore be subsumed under three premises:

(a) harmonising the domestic criminal substantive law elements of offences and connected provisions in the area of cyber-crime;

(b) providing for domestic criminal procedural law powers necessary for the investigation and prosecution of such offences as well as other offences committed by means of a computer system or evidence in relation to which is in electronic form; and

(c) setting up a fast and effective regime of international co-operation.

The Convention in Article 2 requires each Party to adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, access to the whole or any part of a computer system without right. The provision goes on to say that a Party may require that the offence be committed by infringing security measures, with the intent of obtaining computer data or with other dishonest intent, or in relation to a computer system that is connected to another computer system. There are also provisions which call for States Parties to adopt legislative or other measures to counter illegal inception of transmission of computer data, data interception and exchange interception.659 Of particular significance to aviation is Article 7 on alteration of data and forgery, which goes on to require each Party to adopt such legislative and other measures as may be necessary to establish as criminal offences.

658 European Treaty Series no. 185. Forty two European States, the United States, Canada and many other countries were signatories to the Convention.

659 Cybercrimes Convention, Articles 3, 4 and 5 respectively.
under its domestic law, when committed intentionally and without right, the input, alteration, deletion, or suppression of computer data, resulting in inauthentic data with the intent that it be considered or acted upon for legal purposes as if it were authentic, regardless whether or not the data is directly readable and intelligible. The Provision concludes that a Party may require an intent to defraud, or similar dishonest intent, before criminal liability attaches.

Article 7 protects certain measures adopted by the aviation community to ensure that the integrity of passports and other machine-readable travel documents are protected with technology such as the Public Key Directory (PKD). PKD is based on a brand new technique known as quantum cryptography which is calculated to eliminate the terrifying vulnerabilities that arise in the way digitally stored data are exposed to fraudulent use. This new technique uses polarized photons instead of electronic signals to transmit information along cables. Photons are tiny particles of light that are so sensitive that when intercepted, they immediately become corrupted. This renders the message unintelligible and alerts both the sender and recipient to the fraudulent or spying attempt. The use of a technique such as the public key directory in passports is a good example. The public key directory is designed and proposed to be used by customs and immigration authorities who check biometric details in an electronic passport, and is based on cryptography which is already a viable tool being actively considered by the aviation community as a fail-safe method for ensuring the accuracy and integrity of passport information.

The use of biometric information for the identification of persons is another method that counters cyber terrorism and interference of computer imagery. Biometrics target the distinguishing physiological or behavioral traits of the individual by measuring them and placing them in an automated repository such as machine encoded representations created by computer software algorithms that could make comparisons with the actual features. Physiological biometrics that have been found to successfully accommodate this scientific process are facial recognition, fingerprinting and iris-recognition as being the most appropriate. The biometric identification process is fourfold: firstly involving the capture or acquisition of the biometric sample; secondly extracting or converting the raw biometric sample obtained into an intermediate form; and thirdly creating templates of the intermediate data is converted into a template for storage; and finally is the comparison stage where the information offered by the travel document with that which is stored in the reference template.

NATIONAL EFFORTS

Interception of data is a critically offensive act which serves as a precursor to cyber crime and cyber terrorism. The Cybercrime Convention defines interception as:

Listening to, monitoring or surveillance of the content of communications, to the procuring of the content of data either directly, through access and use of the computer system, or indirectly, through the
use of electronic eavesdropping or tapping devices.\(^{660}\)

Surveillance laws against interception in the United States have been somewhat ambivalent until they underwent reform in 1986 with the Electronic Communications Privacy Act (ECPA) which was adopted prior to the introduction of the internet and the World Wide Web. Courts have referred to such laws as convoluted and confusing and uncertain. In the decision of Konop v Hawaiian Airlines,\(^{662}\) handed down by the United States Court of Appeal 9th Circuit in 2002, the Court noted inter alia that the ECPA defines “electronic communication” as a “transfer” of signals, and that “unlike the definition of ‘wire communications’, the definition of ‘electronic communication’ does not include electronic storage of such communications”, which drew the Court to the conclusion that the Act was not equipped to handle modern forms of electronic communication.\(^{663}\)

In the United Kingdom, the Regulation of Investigatory Powers Act (RIPA) of 2000 was a legislative attempt by Parliament to unify in a single legal framework provisions responding to the interception of information and communications. RIPA does not discriminate between types of communications or the location at which communications are intercepted. Initially, in Section 1.1. RIPA provides that it is an offence for a person intentionally and without lawful authority to intercept, at any place in the United Kingdom, any communication in the course of its transmission by means of a public postal service or a public telecommunication system. In Section 1.1.2. RIPA prescribes it an offence for a person to intentionally and without lawful authority, intercept at any location in the United Kingdom any communication while it is being transmitted via a public or private telecommunications system. An important provision is Section 4.1. which makes conduct by the interceptor lawful if the interception of a communication in the course of its transmission by means of a telecommunication system constitutes interception carried out for the purpose of obtaining information about the communications of a person who, or who the interceptor has reasonable grounds for believing, is in a country or territory outside the United Kingdom. Such interception would relate to the use of a telecommunications service provided to persons in that country or territory which is either a public telecommunications service; or a telecommunications service that would be a public telecommunication service if the persons to whom it is offered or provided are members of the public in a part of the United Kingdom.

Australia has adopted the Telecommunications (Interception and Access) Act of 1979 Section 7(1) of which provides that a person must not intercept, authorize, suffer or permit another person to intercept or do any act, or thing that will

\(^{660}\) Cybercrimes Convention Explanatory Report, paragraph 53.

\(^{661}\) US. V. Smith 155 F 3d 1051 at 1055 (9th Cir. 1998)

\(^{662}\) 302 F 3d 868.

\(^{663}\) Id. 461
enable him or her or another person to intercept a communication passing over a telecommunications system. A Key provision is Section 108 (1) which provides that a person commits an offence if that person, with intent and knowledge accesses a stored communication or authorises, suffers or permits another person to accesses a stored communication or does any act or thing that will enable the person or another person to access a stored communication where the intended recipient of the stored communication or the person who sent the stored communication had no knowledge of the offender’s act.

In Canada a ambivalent legislative structure dealing with unlawful interception of documents and communications. In the absence of specific legislation one could draw parallels in Canada’s criminal legislation, for example in the Canadian Criminal Code where Section 184(1) provides that an agent of the State who intercepts a private communication to, as soon as is practicable in the circumstances, destroy any recording of the private communication that is obtained from an interception, any full or partial transcript of the recording and any notes made by that agent of the private communication, if nothing in the private communication suggests that bodily harm, attempted bodily harm or threatened bodily harm has occurred or is likely to occur. It is also important to note that Section 287(1)(b) provides that every one commits theft who fraudulently, maliciously, or without colour of right uses any telecommunication facility or obtains any telecommunication service.

POLICY IMPLICATIONS

In terms of a theoretical discussion, any country concerned about cyberterrorism should embrace the double approach. That is, while taking every necessary step to ensure the safety of their critical infrastructures, they should also make every effort to achieve an inclusive partnership/alliance with other countries.

To achieve such an overwhelming task, different venues should be sought after, including formal and informal cooperation. Cooperation may involve both formal and informal relationships, and the effectiveness of both may vary depending on the case in

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664 The Act defines a telecommunications system as a service for carrying communications by means of guided or unguided electromagnetic energy or both, being a service the use of which enables communications to be carried over a telecommunications system operated by a carrier but not being a service for carrying communications solely by means of radio communication.

665 Section 287 defines telecommunication as “any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by radio, visual, electronic or other electromagnetic system.
question. While the desired relationship should be formal cooperation, it has drawbacks, most notably, bureaucratic procedures takes a long time which could be crucial for law enforcement and other national security agencies. Particularly, investigating cyberterrorism does not provide the luxury of spending time for going through bureaucracy. On the other hand, while informal mechanisms are efficient in terms of time, in some countries, informal cooperation may not be approved by their governments. Therefore, in responding to cyberterrorism or cybercrime, both informal and formal cooperation should be put into practice while efforts are being made to lessen the bureaucratic procedures which can be achieved by bilateral agreements.

Awareness is another cornerstone toward achieving real-concrete cooperation. Developing awareness at the domestic and international level toward cyberterrorism and cybercrime will help concerned parties to work with other countries. Recognizing existing or potential risks will motivate countries to start to take necessary measures to respond to cyberterrorism and cybercrime, to include legal, technical, and political procedures.

Another important issue with respect to policy implications is the legal discrepancies and/or lack of legal measures targeting cyberterrorism and cybercrime. While countries amend new laws or update the existing ones to compensate the gap stemming from new trends to respond to cyberterrorism, they also should try to establish a consensus as to what cyberterrorism constitutes and what the general procedures should be in terms of handling investigations and prosecution of cyberterrorism related incidents. Conventions, such as the Council of Europe Convention on Cybercrime – even though there are some questions about the article in the Convention Treaty- is an ambitious attempt toward achieving such a consensus.

In terms of facilitation of cooperation at the national and international levels a number of entities can play important roles. In particular, institutions, such as CERT and FIRST can be instrumental in carrying out informal and formal bilateral and multilateral cooperation. In the area of cyberterrorism and cybercrime such an activity at the informal level among private or public institutions can lead to formal cooperation since informal processes can guide the development of a culture of cooperation. Moreover, entities, such as G-8 and OECD can lead other non-member countries toward developing a certain level of awareness. While these entities do not have operational branches, they can set the standards for future applications and strategies for themselves and be examples for other countries. On the other hand, institutions, such as the UN and the Council of Europe can be more active organizations since they constitute more member states. Also the members can be obliged to fulfill the requests from these multilateral entities, which can be vital to achieve consensus666.

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Also, developed countries can offer technical and legal assistance to other countries; in other words, developed countries can expand the response policies by supporting other countries. One way to accomplish a sound cooperation is to identify regions and focus those areas. Countries such as Turkey can be a center in the Middle East, including the former Soviet Union Republics. Turkey can work with experts from the US and other European countries to train law enforcement in the region in the area of terrorism and cybercrime. Given the fact that Turkey has a long history of struggle against terrorism and organized crime, the experience can be utilized toward advancing regional countries’ abilities and understanding toward how to handle terrorism, in particular, cyberterrorism and cybercrime.

Other critical and rather sensitive issues are national sovereignty and jurisdiction. National sovereignty is a political issue that may be an obstacle since countries have every right to claim their sovereignty when it comes to investigating cyberterrorism. Respectively, the issue of jurisdiction becomes a legal issue when investigating cyberterrorism and cybercrime, both of which are transnational in nature. To overcome these two critical issues existing applications from other areas can be considered. Aviation is one of those areas that involve internationally recognized and implemented regulations worldwide. Agreement over such an area can be a model for cyberterrorism and cybercrime initiatives. Another application is the "European Arrest Warrant" which can give a clue as to how the international community will overcome issues of jurisdiction. Of course the author of this study does not imply that we need to have such a system; however, the European Arrest Warrant can be taken as an example.

In terms of overlaps between cybercrime techniques and cyberterrorism, the study suggests that cybercrime techniques are readily available tools for terrorists to exploit. More importantly, technology provides ample opportunity for terrorists to expand their operations and establish new networks with other terrorist organizations. More importantly, cyberspace gives terrorist new tools to recruit new members and to support their activities financially. The C-F-R-P factor is very critical in terms of responding not only to cyberterrorism, but also to traditional terrorism. The C-F-R-P factor can, in fact, be monitored by law enforcement and can be used to identify possible recruitment techniques, possible new recruits, and finance sources. Also, it can provide invaluable information in terms of communication. It is true that not every terrorist organization uses the Internet for communication; nevertheless, communication on the Internet can provide leads for further investigations.\footnote{Nosworthy, J. D. (2000). Implementing information security in the 21st century- Do you have the balancing factors? Computer & Security, 19, 337-347.}

**CONCLUSION**

Cyber terrorism knows no borders. Responding to cyber terrorism requires special efforts, developing strategies and
policies and includes bringing efforts from all parties; governments, private sector, and multinational agencies and also requires all concerned parties work together at all fronts, technically, legally, politically, and culturally. These efforts may involve developing new tactics and strategies for effective terrorism response, creating legislation and establishing bilateral and multilateral cooperation taking into account universally accepted principles of law and justice. While taking necessary measures, governments should also be aware that the fundamental rights of individuals should be protected from. There is always tension between protecting the rights of a person and enforcing laws. Fundamental rights, democracy and the rule of law need to be protected in cyber space.

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AN OVERVIEW OF CYBER CRIME AND CYBER SECURITY

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ABSTRACT

In the era of cyber world as the usage of computers became more popular, there was expansion in the growth of technology as well, and the term ‘Cyberspace particularly cyber space.’is used as platforms int the communication of information and the delivery of services. Cyber law is aterm used to describe the legal issue related to use of communication, technology became more familiar to the people. The evolution of Information Technology (IT) gave birth to the cyber space wherein internet provides equal opportunities to all the people to access any information, data storage, analyse etc. with the use of high technology. Due to increase in the number of netizens, misuse of technology in the cyberspace was clutching up which gave birth to cyber crimes at the domestic and international level as well.

Though the word Crime carries its general meaning as “a legal wrong that can be followed by criminal proceedings which may result into punishment” whereas Cyber Crime may be “unlawful acts wherein the computer is either a tool or target or both”.

Cyber crimes also includes criminal activities done with the use of computers which further perpetuates crimes i.e. financial crimes, sale of illegal articles, pornography, online gambling, intellectual property crime, e-mail, spoofing, forgery, cyber defamation, cyber stalking, unauthorized access to Computer system, theft of information contained in the electronic form, e-mail bombing, physically damaging the computer system etc.

Cyber security is necessary since it helps in securing data from threats such as theft or misuse, also safeguards your system from viruses.

Major Security Problems : Virus, Hacker, Malware, Trojan horses, Password Cracking.

Safety tips to Cyber Crime :
Use antivirus software, Insert Firewalls, Uninstall unnecessary software, Maintain backup, Check security settings, Stay anonymous: Choose a genderless screen name never give your name or address to strangers.

Introduction:

Crimes by computer vary and they don’t always occur behind the computer, but they executed by computer though all people are not victims to cyber crime but still there are in risk of hesitation in using the computer and internet. With increase in technology the criminals don’t have to rob banks, nor do they have to be outside in order to commit any crime. They have everything they need or their lap. Their weapons are not guns anymore, they attack with mouse, cursers and passwords.

Meaning of cyber crime:

The crime committed using a computer and the internet to steal a person’s identity. Cyber Crime or computer related crime, is crime that involves a computer and a network. The computer may have been used in the commission it may be a target of crime, or cyber crime may threaten a person or a nation security and financial health.

The Cyber Crime committed using a computer and the internet to steal a person’s identity or illegal imports. The first recorded cyber crime took place in the year 1820.

Categories of Cyber Crime:

- Computer as a target: Using a computer to attacks other computer. eg. hacking, virus forms attacks.
- Computer as a weapon: Using a computer to commit real world crime. eg. Cyber terrorism, credit card fraud and pornography etc.

Classification of Cyber Crime:

Cyber Crimes which are growing day by day, it is very difficult to find out what is actually a cyber crime and what is the conventional crime so to come out of this confusion, cyber crimes can be classified under different categories which are as follows:

- Cyber Crime Against Person
- Cyber Crimes Against Persons Property
- Cyber Crimes Against Government
- Cyber Crimes Against Society at large

1. Cyber Crimes against Persons:

There are certain offences which affects the personality of individuals can be defined as:

- Harassment via E-Mails: It is very common type of harassment through sending letters, attachments of files & folders i.e. via e-mails. At present harassment is common as usage of social sites i.e. Facebook, Twitter etc. increasing day by day.
- Cyber-Stalking: It means expressed or implied a physical threat that creates fear through the use to computer technology such as internet, e-mail, phones, text messages, webcam, websites or videos. Cyber stalking involves use of internet to harasse some one.
behaviour includes normally majority of Cyber Stalkers are men and majority of victims of women.

- **Dissemination of Obscene Material**: It includes Indecent exposure/ Pornography (basically child pornography), hosting of web site containing these prohibited materials. These obscene matters may cause harm to the mind of the adolescent and tend to deprave or corrupt their mind.

- **Defamation**: It is an act of imputing any person with intent to lower down the dignity of the person by hacking his mail account and sending some mails with using vulgar language to unknown persons mail account.

- **Hacking**: It means unauthorized control/access over computer system and act of hacking completely destroys the whole data as well as computer programmes. Hackers usually hacks telecommunication and mobile network.

- **Cracking**: It is amongst the gravest cyber crimes known till date. It is a dreadful feeling to know that a stranger has broken into your computer systems without your knowledge and consent and has tampered with precious confidential data and information.

- **Spoofing**: It is the act of disguising one computer to electronically “look” like another computer, in order to gain access to a system that would be normally restricted.

- **E-Mail Spoofing**: A spoofed e-mail may be said to be one, which misrepresents its origin. It shows it’s origin to be different from which actually it originates.

- **SMS Spoofing**: Spoofing is a blocking through spam which means the unwanted uninvited messages. Here a offender steals identity of another in the form of mobile phone number and sending SMS via internet and receiver gets the SMS from the mobile phone number of the victim. It is very serious cyber crime against any individual.

- **Carding**: It means false ATM cards i.e. Debit and Credit cards used by criminals for their monetary benefits through withdrawing money from the victim’s bank account malafidely. There is always unauthorized use of ATM cards in this type of cyber crimes.

- **Page Jacking**: When a user, click on a certain link and an unaccepted web site gets opened through that link, someone steals apart of real website and uses it in a fake site.

- **Cheating & Fraud**: It means the person who is doing the act of cyber crime i.e. stealing password and data storage has done it with having guilty mind which leads to fraud and cheating.

- **Child Pornography**: It involves the use of computer networks to create, distribute, or access materials that sexually exploit underage children.

- **Assault by Threat**: refers to threatening a person with fear for
their lives or lives of their families through the use of a computer network i.e. E-mail, videos or phones.

2. Crimes against Persons Property:
As there is rapid growth in the international trade where businesses and consumers are increasingly using computers to create, transmit and to store information in the electronic form instead of traditional paper documents. There are certain offences which affects persons property which are as follows:

- **Intellectual Property Crimes:** Intellectual property consists of a bundle of rights. Any unlawful act by which the owner is deprived completely or partially of his rights is an offence. The common form of IPR violation may be said to be software piracy, infringement of copyright, trademark, patents, designs and service mark violation, theft of computer source code, etc.

- **Cyber Squatting:** It means where two persons claim for the same Domain Name either by claiming that they had registered the name first on by right of using it before the other or using something similar to that previously. For example two similar names i.e. www.yahoo.com and www.yaahoo.com.

- **Cyber Vandalism:** Vandalism means deliberately destroying or damaging property of another. Thus cyber vandalism means destroying or damaging the data when a network service is stopped or disrupted. It may include within its purview any kind of physical harm done to the computer of any person. These acts may take the form of the theft of a computer, some part of a computer or a peripheral attached to the computer.

- **Corporate Espionage:** Means theft of trade secrets to illegal means such as wire taps or illegal intrusions.

- **Hacking Computer System:** Hacktivism attacks those included Famous Twitter, blogging platform by unauthorized access/control over a computer. Due to the hacking activity there will be loss of data as well as computer. Also research especially indicates that those attacks were not mainly intended for financial gain too and to diminish the reputation of particular person or company.

- **Transmitting Virus:** Viruses are programs that attach themselves to a computer or a file and then circulate themselves to other files and to other computers on a network. They usually affect the data on a computer, either by altering or deleting it. Worm attacks plays major role in affecting the computerize system of the individuals.

- **Cyber Trespass:** It means to access someone’s computer without the right authorization of the owner and does not disturb, alter, misuse, or damage data or system by using wireless internet connection.
• **Internet Time Thefts:** Basically, Internet time theft comes under hacking. It is the use by an unauthorised person, of the Internet hours paid for by another person. The person who gets access to someone else’s ISP user ID and password, either by hacking or by gaining access to it by illegal means, uses it to access the Internet without the other person’s knowledge. You can identify time theft if your Internet time has to be recharged often, despite infrequent usage.

3. **Cybercrimes Against Government:** There are certain offences done by group of persons intending to threaten the international governments by using internet facilities. It includes:

   • **Cyber Terrorism:** Cyber terrorism is a major burning issue in the domestic as well as global concern. The common form of these terrorist attacks on the Internet is by distributed denial of service attacks, hate websites and hate e-mails, attacks on sensitive computer networks etc. Cyber terrorism activities endanger the sovereignty and integrity of the nation.

   • **Cyber Warfare:** It refers to politically motivated hacking to conduct sabotage and espionage. It is a form of information warfare sometimes seen as analogous to conventional warfare although this analogy is controversial for both its accuracy and its political motivation.

   • **Distribution of pirated software:** It means distributing pirated software from one computer to another intending to destroy the data and official records of the government.

   • **Possession of Unauthorized Information:** It is very easy to access any information by the terrorists with the aid of internet and to possess that information for political, religious, social, ideological objectives.

4. **Cybercrimes against Society at large:** An unlawful act done with the intention of causing harm to the cyberspace will affect large number of persons. These offences include:

   • **Child Pornography:** It involves the use of computer networks to create, distribute, or access materials that sexually exploit underage children. It also includes activities concerning indecent exposure and obscenity.

   • **Cyber Trafficking:** It may be trafficking in drugs, human beings, arms weapons etc. which affects large number of persons. Trafficking in the cyberspace is also a gravest crime.

   • **Online Gambling:** Online fraud and cheating is one of the most lucrative businesses that are growing today in the cyber space. There are many cases that have come to light are those pertaining to credit card crimes, contractual crimes, offering jobs, etc.

   • **Cyber Phishing:** It is a criminally fraudulent process in which cyber criminal acquires sensitive
information such as user name, passwords and credit card details by disguising as a trustworthy electronic communication.

- **Web Jacking**: The term refers to forceful taking of control of a website by cracking the password.

- **Spamming**: It is sending of unsolicited bulk and commercial messages over the internet all though irritating it is not illegal unless it causes damages of overloading network and disrupt the service.

- **Financial Crimes**: This type of offence is common as there is rapid growth in the users of networking sites and phone networking where culprit will try to attack by sending bogus mails or messages through internet. Ex: Using credit cards by obtaining password illegally.

- **Forgery**: It means to deceive large number of persons by sending threatening mails as online business transactions are becoming the habitual need of today’s life style.

**Introduction**:
The Term Cyber Security is used to refer security offered through on – line services to project your on – line information.

**Cyber Security**: Cyber Security means internet security is a branch of computer security specifically related to internet, is object is to establish rules and measures to use against attacks over the internet.

**Need of Cyber Security**:
Cyber security is necessary since it helps in securing data from threats such as theft or misuse, also safeguard your system from viruses.

- The Cyber Security will defend us from critical attack.
- It helps us to browse the safe website.
- It process all the incoming and outgoing data on our computer.
- Cyber Security will defend from hacks and virus.
- The Cyber Security developed will update their database very weak once. Hence the new virus also deleted.

**Viruses and worms**:
A virus is a program that is loaded onto your computer without your knowledge and runs against your wishes.

**Solution**:
Install a security suit that protects the computer against threats such as viruses and worms.

**Hackers**:
In common a hacker is a person who breaks into computers, usually by gaining access to administrative controls.

**Types of Hackers**:
**White hat hacker**: A WHH is a computer security expert and ethical hacker who breaks the protected systems and network.

**Black Hat Hacker**: Crackers or dark side hacker is an individual with extensive computer knowledge whose purpose is to breach or bypass internet security. They may steal or modify data or insert viruses or worms which damage the system.
Grey hat hacker: Are often hobbyists with intermediate technical skills, dabble in minor white collar crimes. They will hack into networks, stand alone computers and software.

How to present hacking: It is very difficult to prevent computer hacking using passwords and firewalls can help to prevent.

Malware: It is derived from the term “malicious software”. Malware is software that infects and damages a computer system without the owner’s knowledge or permission.

To stop Malware:
- Download an anti-malware program that also helps prevent infections.
- Activate network threat protection firewall, antivirus.

Trojan horses:
- Trojan horses are email viruses that can duplicate themselves, steal information, or harm the computer system.
- These viruses are the most serious treats to computers

How to avoid Trojans:
- Security suites, such as Avast means protect your devices with the best free antivirus on the market. Internet security will prevent you from downloading Trojan horses.

Password Cracking: Passwords attacks to different protected electronic areas and social network sites.

Security password:
- Use always strong password.
- Never use same password for 2 different sites.

Cyber security is everyone’s responsibilities:
- India stands 10\textsuperscript{th} in the cyber crime in the world.
- USA is 1\textsuperscript{st}

Privacy Policy:
Before submitting your name email, address on a website look for the sites privacy policy.

Keep software up to date: Use difficult password.

Anti – Stalking tips:
- Maintain vigilance over physical access to your computer and other web – enabled devices like cell phone.
- Use always logout of your computer programs when you step away from the computer.
- Use the privacy settings in all your online accounts to limit your online sharing.
- Make sure to practice good password management and security.

Preventive Measures For Cyber Crimes:
Prevention is always better than cure. A netizen should take certain precautions while operating the internet and should follow certain preventive measures for cyber crimes.
crimes which can be defined as:

- Identification of exposures through education will assist responsible companies and firms to meet these challenges.
- One should avoid disclosing any personal information to strangers via e-mail or while chatting.
- One must avoid sending any photograph to strangers by online as misusing of photograph incidents increasing day by day.
- An update Anti-virus software to guard against virus attacks should be used by all the netizens and should also keep back up volumes so that one may not suffer data loss in case of virus contamination.
- A person should never send his credit card number to any site that is not secured, to guard against frauds.
- It is always the parents who have to keep a watch on the sites that your children are accessing, to prevent any kind of harassment or depravation in children.
- Web site owners should watch traffic and check any irregularity on the site. It is the responsibility of the web site owners to adopt some policy for preventing cyber crimes as number of internet users are growing day by day.
- Web servers running public sites must be physically separately protected from internal corporate network.
- It is better to use a security programmes by the body corporate to control information on sites.
- Strict statutory laws need to be passed by the Legislatures keeping in mind the interest of netizens.
- IT department should pass certain guidelines and notifications for the protection of computer system and should also bring out with some more strict laws to breakdown the criminal activities relating to cyberspace.
- As Cyber Crime is the major threat to all the countries worldwide, certain steps should be taken at the international level for preventing the cybercrime.
- A complete justice must be provided to the victims of cyber crimes by way of compensatory remedy and offenders to be punished with highest type of punishment so that it will anticipate the criminals of cyber crime.

Safety tips to Cyber Security:

- Realize that you are an attractive target to hackers. Don’t ever say “It won’t happen to me.”
- Practice good password management. Use a strong mix of characters, and don’t use the same password for multiple sites. Don’t share your password with others, don’t write it down, and definitely don’t write it on a post-it note attached to your monitor.
- Never leave your devices
unattended. If you need to leave your computer, phone, or tablet for any length of time—no matter how short—lock it up so no one can use it while you’re gone. If you keep sensitive information on a flash drive or external hard drive, make sure to lock it up as well.

- Always be careful when clicking on attachments or links in email. If it’s unexpected or suspicious for any reason, don’t click on it. Double check the URL of the website the link takes you to: bad actors will often take advantage of spelling mistakes to direct you to a harmful domain. Think you can spot a phony website? Try our Phishing Quiz.

- Sensitive browsing, such as banking or shopping, should only be done on a device that belongs to you, on a network that you trust. Whether it’s a friend’s phone, a public computer, or a cafe’s free WiFi—your data could be copied or stolen.

- Back up your data regularly, and make sure your anti-virus software is always up to date.

- Be conscientious of what you plug in to your computer. Malware can be spread through infected flash drives, external hard drives, and even smartphones.

- Watch what you’re sharing on social networks. Criminals can befriend you and easily gain access to a shocking amount of information—where you go to school, where you work, when you’re on vacation—that could help them gain access to more valuable data.

- Offline, be wary of social engineering, where someone attempts to gain information from you through manipulation. If someone calls or emails you asking for sensitive information, it’s okay to say no. You can always call the company directly to verify credentials before giving out any information.

- Be sure to monitor your accounts for any suspicious activity. If you see something unfamiliar, it could be a sign that you’ve been compromised.

**Case Studies on Cyber Crime:**

**Case law:** Satyam Infoway Ltd Vs Silfynet solutions Pvt

2004(3) AWC 2366 SC

In this case, SC pronounced that the Indian Trade Marks Act, 1999 is applicable to the regulation of domain names. The decision in favour of Satyam Infoway was premised on the court’s observation that domain names may have all the features of trademarks. The court observed the confusion in identical of domain names. In that situation instead of being directed to the website of the legitimate owner of the name, a user could be diverted to the website.

State of Tamil Nadu vs Subus Katti

In this case, a woman complained to the police about a man who was sending her obscene, defamatory and annoying messages in a Yahoo message group. the accused also forwarded emails
received in a fake account opened by him in the victim's name. The victim also received phone calls by people who believed she was soliciting for sex work.

The accused is found guilty of offences under section 469. 509 IPC and 67 of IT Act 2000 and the accused is convicted and is sentenced for the offence to undergo rigorous imprisonment for 2 years under 469 IPC and to pay fine of Rs 500/- and for the offence U/S 509 IPC sentenced to undergo 1 year simple imprisonment and to pay fine of Rs 500 and for offence u/s67 of IT Act 2000 to undergo rigorous imprisonment for 2 yrs and to pay fine Rs. 4000/-

**Important Sections inserted by the IT Amendment Act 2008**

Section 43A - Compensation for failure to protect data.

Section 66 - Computer related Offences

- Section 66A - Punishment for sending offensive messages through communication service, etc.
- Section 66B - Punishment for dishonestly receiving stolen computer resource or communication device.
- Section 66C - Punishment for identify theft
- Section 66D - Punishment for cheating by personation by using computer resource
- Section 66E - Punishment for violation for privacy
- Section 66F - Punishment for cyber terrorism
- Section 67 - punishment for publishing or transmitting of material in electronic form

- Section 67A - Punishment for publishing or transmitting of material containing sexually explicit act, etc, in electronic form.
- Section 67B - Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc in electronic form.
- Section 67C - Preservation and retention of information by intermediaries
- Section 69 - Powers to issue directions for interception or monitoring or decryption of any information through any computer resource.
- Section 69A - Power to issue directions for blocking for public access of any information through and computer resource.
- Section 69B - Power to authorize to monitor and collect traffic data or information through any computer resource for cyber security
- Section 72A - Punishment for disclosure of information in breach of lawful contract
- Section 79 - exemption from liability of intermediary in certain cases
- Section 84A - Modes or methods for encryption
- Section 84B - Punishment for abetment of offences
- Section 84C - Punishment for attempt to commit offences.

**Kenneth L. Haywood:**

Kenneth L. Haywood (born 1964) became involved in a 2008 controversy in the Indian city of Mumbai after his wireless
connection was allegedly used by terrorists to transmit a message to Indian news networks before their attacks. It was subsequently revealed that Haywood had been living a double life as an "executive skills trainer" and a Christian pastor, while the firm that he worked for was a probable front for evangelical religious activities. Haywood was not charged by Indian authorities in connection with the blasts, which occurred at Ahmedabad and Surat, in late July 2008.

Cyber pornography:

Some more Indian incidents revolving around cyber pornography include the Air Force Balbharati School case. In the first case of this kind, the Delhi Police Cyber Crime Cell registered a case under section 67 of the IT act, 2000. A student of the Air Force Balbharati School, New Delhi, was teased by all his classmates for having a pockmarked face.

Cyber stalking:

Ritu Kohli has the dubious distinction of being the first lady to register the cyber stalking case. A friend of her husband gave her telephonic number in the general chat room. The general chatting facility is provided by some websites like MIRC and ICQ. Where person can easily chat without disclosing his true identity. The friend of husband also encouraged this chatters to speak in slang language to Ms. Kohli.

Important case studies in India:

A complaint was filed in by Sony India Private Ltd, which runs a website called sony-sambandh.com, targeting Non Resident Indians. The website enables NRIs to send Sony products to their friends and relatives in India after they pay for it online.

The company undertakes to deliver the products to the concerned recipients. In May 2002, someone logged onto the website under the identity of Barbara Campa and ordered a Sony Colour Television set and a cordless head phone. A lady gave her credit card number for payment and requested that the products be delivered to Arif Azim in Noida. The payment was duly cleared by the credit card agency and the transaction process. After following the relevant procedures of due diligence and checking, the company delivered the items to Arif Azim.

At the time of delivery, the company took digital photographs showing the delivery being accepted by Arif Azim.

The transaction closed at that, but after one and a half months the credit card agency informed the company that this was an unauthorized transaction as the real owner had denied having made the purchase.

The company lodged a complaint for online cheating at the Central Bureau of Investigation which registered a case under Section 418, 419 and 420 of the Indian Penal Code.

The matter was investigated into and Arif Azim was arrested. Investigations revealed that Arif Azim, while working at a call centre in Noida gained access to the credit card number of an American national...
which he misused on the company’s site.

The CBI recovered the colour television and the cordless head phone.

The accused admitted his guilt and the court of Shri Gulshan Kumar Metropolitan Magistrate, New Delhi, convicted Arif Azim under Section 418, 419 and 420 of the Indian Penal Code — this being the first time that a cyber crime has been convicted.

The court, however, felt that as the accused was a young boy of 24 years and a first-time convict, a lenient view needed to be taken. The court therefore released the accused on probation for one year.

Case-2: First juvenile accused in a cyber crime case.

In April 2001 a person from New Delhi complained to the crime branch regarding the website. Amazing.com, he claimed, carried vulgar remarks about his daughter and a few of her classmates. During the inquiry, print-outs of the site were taken and proceedings initiated.

After investigation a student of Class 11 and classmate of the girl was arrested.

The juvenile board in Nov 2003 refused to discharge the boy accused of creating a website with vulgar remarks about his classmate.

The accused’s advocate had sought that his client be discharged on the ground that he was not in a stable state of mind. Seeking discharge, the advocate further said that the trial has been pending for about two years.

While rejecting the accused’s application, metropolitan magistrate Santosh Snehi Mann said: ‘The mental condition under which the juvenile came into conflict with the law shall be taken into consideration during the final order.’ Mann, however, dropped the sections of Indecent Representation of Women (Prohibition) Act.

The accused would face trial under the Information Technology Act and for intending to outrage the modesty of a woman. She held the inquiry could not be closed on technical ground, especially when the allegations were not denied by the accused.

Case 3: First case convicted under Information Technology Act 2000 of India.

The case related to posting of obscene, defamatory and annoying message about a divorcee woman in the yahoo message group. E-Mails were also forwarded to the victim for information by the accused through a false e-mail account opened by him in the name of the victim. The posting of the message resulted in annoying phone calls to the lady in the belief that she was soliciting.

Based on a complaint made by the victim in February 2004, the Police traced the accused to Mumbai and arrested him.
within the next few days. The accused was a known family friend of the victim and was reportedly interested in marrying her. She however married another person. This marriage later ended in divorce and the accused started contacting her once again. On her reluctance to marry him, the accused took up the harassment through the Internet.

On 24-3-2004 Charge Sheet was filed u/s 67 of IT Act 2000, 469 and 509 IPC before The Hon’ble Addl. CMM Egmore by citing 18 witnesses and 34 documents and material objects. The same was taken on file in C.C.NO.4680/2004. On the prosecution side 12 witnesses were examined and entire documents were marked. The Defence counsel argued that the offending mails would have been given either by ex-husband of the complainant or the complainant herself to implicate the accused as accused alleged to have turned down the request of the complainant to marry her. Further the Defence counsel argued that some of the documentary evidence was not sustainable under Section 65 B of the Indian Evidence Act. However, the court based on the expert witness of Naavi and other evidence produced including the witness of the Cyber Cafe owners came to the conclusion that the crime was conclusively proved.

The court has also held that because of the meticulous investigation carried on by the IO, the origination of the obscene message was traced out and the real culprit has been brought before the court of law. In this case Sri S. Kothandaraman, Special Public Prosecutor appointed by the Government conducted the case.

Honourable Sri. Arulraj, Additional Chief Metropolitan Magistrate, Egmore, delivered the judgement on 5-11-04 as follows:

“The accused is found guilty of offences under section 469, 509 IPC and 67 of IT Act 2000 and the accused is convicted and is sentenced for the offence to undergo RI for 2 years under 469 IPC and to pay fine of Rs.500/-and for the offence u/s 509 IPC sentenced to undergo 1 year Simple imprisonment and to pay fine of Rs.500/- and for the offence u/s 67 of IT Act 2000 to undergo RI for 2 years and to pay fine of Rs.4000. All sentences to run concurrently.”

Conclusion:

Since users of computer system and internet are increasing worldwide, where it is easy to access any information easily within a few seconds by using internet which is the medium for huge information and a large base of communications around the world. Certain precautionary measures should be taken by netizens while using the internet which will assist in challenging this major threat Cyber Crime.

Cyber Security is the body of technologies, processes and practices designed to protect networks, computers, programs and data from attacks, damage or unauthorized access. In a computing context, security includes both Cyber Security and Physical Security.

“Technology is destructive only in the hands of people who do not realize that they are one and the same process as the universe”.

www.supremoamicus.org
“Think before you click, care to be aware”.

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Uniform Civil Code: A Religious Myth or Legal Controversy

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ABSTRACT
India is a religiously diverse country with all the foremost religions of the world-finding place in this land. It is a singular country not only in terms of its geography however conjointly in terms of its social state of affairs. Individuals from all sects live here and so, our Constitutional ancestors felt the need to build a social cohesion in the country. There was the requirement of reformation of our personal laws as a result of which Muslim women are denied their rights that has already been given to them 1400 years ago in Quran. The practices like halala, sati, polygamy continue to persist today that finds no mention in the religious texts. The Shah Bano case in this context, for the first time took the need of the hour to its apex, highlighting the flaws in the system. The paper looks the back cover of issue, whether, what all persists today, is religiously wrong, the principle on which India runs and people govern, or its legal flaws, through which government runs because it’s high time that the roots of the issue needs to be discovered.

Keywords: Religion, Social evils, legislation, Democracy

INTRODUCTION

The expression ‘Uniform Civil Code’ consists of three terms- ‘Uniform’, ‘Civil’ and ‘Code’. The word ‘Uniform’ refers to a form of thing. The Constitution of India in its A.44 uses the expression ‘Common’ instead of ‘Uniform’, but generally the two words has been used simultaneously.

The term ‘Civil’ is derived from Latin word ‘Civilis’ meaning a citizen. When it is used as an adjective in terms of law, it refers to law concerned with ordinary citizen rather than criminal, military or religious affairs.

The word ‘Code’ is derived from the Latin word ‘codex’ which means, a book.

When the term ‘Civil Code’ is tread in conjunction with the adjective ‘Uniform’ it connotes a code which shall be uniformly applicable to all citizens irrespective of their religion, race, caste, sex and creed.

Thus, Uniform Civil Code refers to same set of secular civil laws to govern different people belonging to different religions and region that covers areas related to marriage, divorce, maintenance, adoption, acquisition and administration of property.

In India, the debate on Uniform Civil Code is much heated that dates back to the colonial period. The idea of Uniform Civil Code was introduced into the national political debate in 1940 when a demand of such code was made by the National Planning committee appointed by the Congress.

668 Encyclopaedia Americana, Vol. 6,(1960), 734
669 Encyclopaedia Americana, Vol. 7,(1960), p.194
The directive to enact a UCC in the Constitution was included as the result of the efforts of Minoo Masani, as a member of the sub-committee on Fundamental Rights, who moved on 28 March, 1947 a proposal that State should be made responsible to enact a Uniform Civil Code in order to break down the barriers between different communities. Minoo Masani, Hansa Mehta, Rajkumari Amrit Kaur and Dr. Ambedkar voted in favour of the inclusion of the clause on the Uniform Civil Code, but the majority of its sub committee voted against its inclusion on the ground that it was beyond the scope of Fundamental Rights. However, when the rights were decided to be divided as justiciable Fundamental Rights and non-justiciable Directive Principles, sub-committee agreed to make enactment of the UCC a Directive Principle. In the end of the debate Article 35 was carried without any amendments, it was later remunerated as Article 44 and read, “The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India.”

CASE- Mohd. AHMED KHAN v/s SHAH BANO BEGUM

The husband who was appellant was married to the wife in 1932. In 1975, he drove the wife out of the matrimonial home. The wife filed a petition against the husband under Section 125 of the Criminal Procedure Code, 1973 asking for maintenance. The husband divorced her by an irrevocable talaq which was his prerogative under Islamic law. His defence was that she had ceased to be his wife by reason of the divorce granted by him and thus claimed to be under no obligation to maintain her since he had already paid maintenance to her during the period the of iddat. The All India Muslim Personal Law Board also supported Mohd. Ahmed Khan’s argument further intervening on his behalf.

In August 1979, the learned Magistrate directed appellant to pay a sum of Rs. 25 per month to the respondent by way of maintenance that was further enhanced to Rs. 179.20 per month.

The husband appealed by special leave before the Supreme Court. The Constitutional bench delivered an unanimous verdict April 25, 1985 and upheld the decision of High Court to grant maintenance in favour of Shah Bano under CrPC. The decision took note for the need of implementation of Uniform Civil Code as provided for under Article 44 of the Constitution.

The decision grew several criticism from the conservative groups within Muslim community. Giving in to the mounting pressure from conservative forces, the Rajiv Gandhi government which was in power in 1984, felt a need to pacify the masses and accordingly passed the Muslim Women (Protection on Divorce Act), 1986.

The Act reversed the decision in Shah Bano’s Case laying down that the husband was bound by law to pay maintenance to a divorced wife only for the period of iddat under S.3(1)(a), following which, in case


671 Article 136, Constitution of India

672 A reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband.
a woman was unable to provide for herself, or did not have relatives to support her under S.4, the magistrate could direct the Waqf Board to provide her with sufficient means of sustenance for herself and her dependant children, if any.

The Constitutional validity of the Act was challenged by Shah Bano's lawyer Daniel Latifi and upholding the validity of the Act, the SC observed that the liability of the husband to pay maintenance was not limited to iddat period.

**Case Analysis:**

Following contentions were being laid down:

1) The payment of mehar by the husband on divorce does not absolve him of any duty to pay maintenance to the wife.

The Court command that divorced Muslim women is entitled to maintenance under S.125 CrPC. The Court created on the top of the conclusion in support of the ruling in Bai Tahira where Justice Krishna Iyer held that “...The payment of illusive amounts, mehr, are going to be thought-about within the reduction of maintenance rate however cannot kill that rate unless it's an inexpensive substitute.”

2) The liability of the husband to pay maintenance to the mate extends even on the far side the iddat period, if the she doesn't have spare means that to take care of herself.

Referring to the views put forth by the learned scholars (Mulla, Tyabji and Paras Diwan), the Court concluded that the sum settled by way of Mahr is generally expected to take care of the ordinary requirements of the wife, during the marriage and after thus did not cover cases in which the wife is able to maintain herself after the divorce.

The Court refused to accept that an order for maintenance under S.125 CrPC could be struck down under S.127(3)(b) only for the mere fact that the husband had made a payment to the wife at the time of the divorce under the concerned personal laws. The court also used Quran (Aiyats 240-242) during its interpretation that

673 Under S.9 of Waqf Act, 1954, or any other law for the time being in force in India
674 Danial Latifi v UOI, (2001) 7 SCC 740: 2001 CrILJ 4660),
675 1979 AIR 362, 1979 SCR(2) 75

676 Aiyats 240-241: Those of you, who shall die and leave wives behind them, should make a will to the effect that they should be provided with a year’s maintenance and should not be turned out of their homes. But if they leave their homes of their own accord, you shall not be answerable for whatever they choose for themselves in a fair way; Allah is All-Powerful, All-wise. Likewise, the divorced women should also be given something in accordance with the known fair standard. This is an obligation upon the God-fearing people.
Aiyat 242: Thus Allah makes clear His commandments for you. It is expected that you will use your common sense. The Hon’ble Court after studying the Scriptures was of the opinion: “These Aiyats leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife.”
husbands were bound by the duty to maintain their wives.

3) **Section 125 of the Code applies to Muslims:**

The Court command that the Section applies to all or any individuals of the country regardless of their faith and took occasion to outline Clause(b) of the reason to Section 125(1), which defines ‘wife’ as “including a divorced wife, contains no words of limitation to justify the exclusion of Muslim women from its scope.”

4) **Section 125 would prevail over the personal law of the parties, in cases where they are in conflict:**

The Court in answering this question held that it is uniform law that is applicable to all citizens of the country.

5) **There is no conflict between the provisions of Section 125 and those of the Muslim Personal Law on the question of the Muslim husband’s obligation to provide maintenance for a divorced wife who is unable to maintain herself.**

Further, the principle has been applied in number of cases as:

**Sarla Mudgal v. Union of India**

This is the second instance in which SC directed government that A.44 was in this case. The Court held that if there exists first marriage, than it has to be dissolved under the Hindu Marriage Act,1955 before contract second one. Thus, husband’s first marriage is valid and second is illegal. Justice Kuldip Singh while delivering the judgement remarked the need of UCC and appeal to government made to have a re-look at Article 44 of the Indian Constitution, which suggests UCC for all citizens.

**Lily Thomas v. Union of India**

In this case, various persons have filed review petition under Art. 136 of the Constitution to review law laid down by Sarla Mudgal case and which upheld in this case before in the criminal proceedings. Lily Thomas is the lawyer of distressed wife urged the court to declare polygamy in the Muslim law to be unconstitutional.

The order dismissed the review petition and held that the conversion is not exercise of freedom of conscience but rather fraudulent without the change of faith. Thus, marriage from such conversion is void also due to violation of Article 21 which states that, “no person shall be deprived of his right of life and personal liberty except as per procedure established by law”. Here persons are...
apprehended for offences under S. 494 & 495 IPC therefore, no right has been desecrated as a result of such apprehension has been laid down by law.

**Danial Latifi v. Union of India** 680:

After the passing of Muslim Women (Protection on Rights on Divorce) Act, 1986, one of the counsel of Shah Bano’s Danial Latifi challenged the above act on the basis of its Constitutional validity of Art 14 & 15.

Danial Latifi judgement revived the principles settled down in Shah Bano case that, the husband’s liability to maintain his wife doesn’t end with the iddat period. Hence, the position of law is that, the provisions of the Act basically emanate from principles set forth in the Shah Bano case. The principle has been seconded by SC once again in Iqbal Bano v. State of UP 681.

**Jordan Diengdeh v. SS Chopra** 682:

It was yet another example that focused attention on the immediate and compulsive need for a UCC. The facts of the case exposed the unsatisfactory state of affairs that arose due to the absence of UCC. Time has come for the intervention of the legislature to provide for UCC for marriage and divorce as envisaged by Art

44. The Order of Court was delivered by Chinappa Reddy, the case focuses attention on the immediate and compulsive need for UCC.

But such piecemeal attempts by the Courts to bridge the gaps between personal laws cannot take the place of a common civil code. These problems can be eliminated only if a law is made in conformity with the present day social and economic realities. The orthodox Muslim opinion has characterised this ruling as anti-shariat while the liberal opinion accept the ruling as progressive.

Further, the same has been contended in number of cases. 683

**NEED FOR UNIFORM CIVIL CODE**

It was argued that a common civil code ‘will help break down the customary practices harmful to women and give women individual identity as independent citizens of India’. Hence, the uniform civil code essentially means unifying all these "personal laws" to have one set of secular laws dealing with these aspects that will apply to all citizens of India irrespective of the community they belong to.

The general understanding about the uniform civil code is that if it fully implemented it would strengthen the national integration. The Common Civil

680 R. Lakshmanan have provided sound measures to keep this rampant practise under strict constraints so as to prevent such atrocities from ever occurring.
681 AIR 2007 SC 2215
682 1985 AIR 935, 1985 SCR Supl.(1)704, Decided on May 10, 1985
684 John Vallamatton v Union of India, AIR 2003 SC 2902

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The spine of controversy revolving around uniform civil code has been the secular character of the nation and the freedom of religion enumerated in the Constitution of India. The idea of common civil code is also against the very spirit of secularism which is one of the essential features of Indian Constitution. The preamble of the Constitution states that India is a "secular democratic republic". This means that there is no State religion but State equally respects all religions which is also an important component of secularism. A secular State shall not discriminate against anyone on the ground of religion and also not interfere in the religious affairs of the communities. A State is only concerned with the relation between man and man.

Even in the triple talaq case, SC has held that freedom of religion, subject to restrictions under Article 25 & 26 are absolute. The right to follow personal law has been elevated with highest status of fundamental rights.

Basically gender-based discrimination has been inherent in the mindset of present male dominated society not in the religious texts. Further no religion permit any kind of discrimination, violence and subjugation against women. Gender impacts the lives of the women most intensely, it relegates them to a subordinate the status and makes them vulnerable to a large number of social ills like infanticide, foeticide, child marriage and gender biases in the rights of coparcenery property etc. It is most unfortunate that even in this enlightened 21st century when the whole world is awakening to the call of enlightened feminism but our
country has not been able to free itself from the stranglehold of obsolete social customs and traditions. In the above stated reasoning, it is doubtful that whether uniform civil code ensure utmost guarantee from all gender based discrimination and violence.

That UCC is against the religious freedom as it aims to replace religious personal laws. It is also said that its implementation would damage the cultural ethos and that the forced uniformity would alienate the people from the State, because law and legal system are closely interlinked with culture of society, therefore, protection of culture requires protection of personal laws.

Further, SC held in Minerva Mills Case, 1980685, that to destroy the guarantees given by Part III, i.e., Fundamental Rights in order to achieve the goals of Part IV, i.e., Directive Principles, is plainly to subvert the Constitution by destroying its basic structure...

It was held in SR Bommai v UOI686, that Constitution has chosen secularism as its vehicle to establish an egalitarian social order. Secularism is a part of fundamental law and basic structure of Indian political system.

MOVING TOWARDS SOLUTION

B.R. Ambedkar at the time of initiating the dialogue and finalising the draft of the Constitution, saw no merit in the role of religion in its application to personal laws. The truth is that personal laws are what we confront in our personal lives from birth to death, viz. laws of marriage, maintenance, adoption, custody, guardianship of children and succession. Religion is the first resemblance at birth and it is carried through at one’s will through the laws that we recognise as personal to the person. If we withdraw the personal laws by force, we ditch upon the most intimate emotion of an individual. There is no personal law which is complete and just in itself. What cannot be achieved through forced legislation, we are slowly achieving by seamless transition through secular laws.

Where there have been seeming inappropriateness in the application of laws for provision for maintenance being restricted for divorced Muslim women only for the period of iddat, and the ease of dissolution of marriage through pronouncement of talaq, they have changed largely due to judicial pronouncements. Now under the law of the land, she is entitled to provision for maintenance for a lifetime or until she is remarried, which shall be made within the period of iddat (Danial Latifi v. Union of India, 2001687) — a long distance travelled from an attempt to nullify the effect of the Supreme Court judgment in Shah Bano’s case by the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986.

Talaq shall not be valid unless preceded by an effort for reconciliation and strict rules of evidence about the pronouncement itself (Shamim Ara v. State of U.P., 2002688).

685 AIR 1980 SC 1789  
686 1994 AIR 1918, 1994 SCC(3)  
687 Ibid. p.8  
688 MANU/SC/0850/2002
These judgments have blunted the injustice against waggish acts of husbands.

The dynamics of social transformation through the process of law from diverse civil code to uniformity shall be gradual and cannot happen in a day. The process should take place by borrowing freely from laws of each other, making gradual changes in every pieces of legislation, specifically acknowledging the benefit that one community secures from the other.

There is a serious need of proper interpretation of the religious old texts (Vedas, Quran, Hadith, etc) because a number of misconceptions are being borne by the people or priests rather than the reality. The evil practices like gender inequality, polygamy, Sati, halala, triple talaq no where exists in these texts, on basis of which there is springing debate going on in the country. The conceptions have been misinterpreted.

1. Talaq is a right given to men by Islam to divorce his wife in case if the marriage can’t be continued for some reason. But in case of the talaq, once given, the husband has to wait for three months. This is where it is to be known about the triple talaq. It doesn’t mean saying or messaging ‘talaq’ three times and ending marriage. Rather it means the person has to wait for a period of three months. Within the stipulated time if there is change in the mind or the concerned problem is resolved mutually, surely they can continue the marriage.

For the next time, that is generally bound not to happen immediately, if again they face a problem, talaq needs to be pronounced again with the same procedure. In the meantime it the responsibility of the family members to try to reconcile them. The Muslim clerics can also be approached. The third time will be the final chance given to a Muslim. Things become totally tough for the husband. If Allah’s laws are obeyed, several months or years pass between each talaqs.

After the third talaq the marriage really comes to an end. The three chances are exhausted by now. Even if the husband wishes to reunite it is not possible unless the wife who have entered another marriage degree over them [in responsibility and authority]. And Allah is Exalted in Might and Wise”

689 The Quran 2:228, “Divorced women remain in waiting for three periods, and it is not lawful for them to conceal what Allah has created in their wombs if they believe in Allah and the Last Day. And their husbands have more right to take them back in this [period] if they want reconciliation. And due to the wives is similar to what is expected of them, according to what is reasonable. But the men have a

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divorces her husband and that is really impossible. This is TALAQ, the actual way Islam deals. There is a serious confusion nowadays (especially in India) among the both Muslim and non-Muslim people regarding talaq. It can never be said thrice at once.

Therefore it is clear that it is nowhere said by the prophet or mentioned in the Quran that all three talaqs can be said at once let alone messaging or whatsapp-ing it.

2. The next serious issue is Nikah halala that is unIslamic and barbaric. Halala, opposite of the word haram that means forbidden, is halaal or that which is permissible.

The word has been coined by Muslims (not Islam) that denotes a temporary, pre-planned marriage, which involves sexual intercourse that makes the remarrying of the divorced wife by the husband legal.

Quran does not permit it, what it says is completely different[^692]. It interprets:

In order that a man does not divorce his wife in a fit of temper or without proper consideration an almost impossible condition was set. Thus a divorced woman is free to marry another man after her waiting period (iddat) after the divorce. But, she can marry the earlier husband who had divorced her, if the man she has married dies or divorces her - she is now halal or permissible for him. This should be of her own free will and not a marriage entered into just for the purpose of an immediate divorce so that she can remarry the first husband again. Such a heinous marriage is just a mis-practice or an innovation against the spirit of Islam.

Nowhere, exists any suggestion for a husband who has arbitrarily given divorce to his wife or a condition of sex between the second husband and wife before marriage to the first.

In fact, the Prophet denounced it[^693]. The Caliph Omar also pronounced pre-planned Nikah Halala as adultery.

There is an enormous distinction between what Muslims do and what Islam prescribes and that we should bear in mind to form that distinction. It violates the right of a woman and her dignity to live an equitable life. The matter is lack of awareness among Muslims concerning the jurisprudence and writings within the religious text. Most Muslims browse the religious text in Arabic, usually learning it by anyhow however while not understanding it.

[^692]: Quran 2:230, These are the limits of Allah, which He makes clear to a people who know and if he has divorced her (for the third time), then she is not lawful to him afterward until (after) she marries a husband other than him. And if the latter husband divorces her (or dies), there is no blame upon the woman and her former husband for returning to each other if they think that they can keep (within) the limits of Allah.

[^693]: Abu Dawud, Book 005, Hadith Number 2071 narrated by Ali ibn Abu Talib: “Curse be upon the one who marries a divorced woman with the intention of making her lawful for her former husband and upon the one for whom she is made lawful”.

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Ironically, for a faith that was nearly the primary to grant rights to women, its women have designately been bereft of learning and understanding their rights. They follow like sheep their husbands who dictate them.

Halala is simply a sort a form of crime against vulnerable women who are ready to go to any extent to save their marriage, maybe for economic reasons as being entirely obsessed on the husband and would be of obscurity while not his support.

3. **Sati Pratha**, said to be originated from Vedas. This is a big misconception. In reality, Sati Pratha is nowhere being mentioned in Hindu scriptures. There is no such advice of forceful burning widows in Vedas. This confusion was created in middle ages by careless commentators of Vedas.

**Atharvaveda 18.3.1**\(^694\) is generally quoted as Vedic Mantra which supports Sati Pratha. In this Mantra the phrase ‘Choosing her husband’s world’ is interpreted that wife is advised to join the dead husband in afterlife in next world, thus, she must burn herself in funeral pyre (Agni means fire) after her husband’s death. The word Agre was mis-interpreted as Agni. Maxmuller condemned this fraud widely.

Next, in Mahabharata Madri burned herself to death not due to custom of Sati Pratha but due to regret. She felt that it was she who was responsible for death of husband Pandu. There is no evidence of Women practising this in Mahabharata post war whose husbands were killed in the Great War.

Thus it is proved that Vedas never supports Sati Pratha. Vedas asks a widow to return from her husband’s corpse and live a happy life after remarriage.

\(^694\) “Choosing her husband’s world, O man, this woman lays herself down beside thy lifeless body. Preserving faithfully the ancient custom. Bestow upon here both wealth and offspring.”

\(^695\) “Rise, come unto the world of life, O woman: come, he is lifeless by whose side thou liest. Wife hood with this thy husband was thy portion who took thy hand and wooed thee as a lover.”

\(^696\) “Rise up, abandon this dead man and re-join the living.”
Besides this, there are a number of other misconceptions that needs to be resorted to. It needs to be noticed that line on which UCC stands, that is, gender inequality, gender biasness, social evils like sati, halala is completely baseless as this practices finds no where place in the religious texts. Its all the creation that has come out of the man’s mind. Thus, instead of directing a completely new code Bill, focus and aim should be on the removal of anomalies persisting in existing personal laws and beyond that the correct interpretations of the religious texts.

As has been done in Parsi community: It prohibited Parsi polygamy in 1865 through enactment Parsi personal law including Parsi Marriage & Divorce Act of 1865, counterpiece of Statue was invalidation of polygamous Parsi marriages which was earlier in practice.

But, in 1865 Act, right to have sex with prostitutes, that is, adultery by husband was protected, which was further eliminated in 1930s when Parsi Marriage & Divorce Act of 1936 became a law.

Next, example is last law passed in Hindus, that is Hindu Succession (Amendment) Act, 2005 that gave Hindu women equal coparcenary rights in joint family property and deleted discriminatory clause on agricultural land.

Then, is the glaring example in Muslims with the recent judgment of invalidation the triple talaq.

Thus, the reformations in the personal itself, while retaining its religious and historical perspective would prove more easier, fruitful and acceptable to every community instead of tying them in the knot of single Code, completely new and different.

There are certain steps that needs to be taken by AIMPLB, to ensure gender justice as:

1. It should declare triple talaq, halala to be Haraam, which it clearly is. They know they are wrong. Therefore, they should declare that Halala is Haraam.

2. Women should be given a meaningful role in the functioning of the AIMPLB with the power to play a decisive role, especially in matters that concern women with positions of authority and real power.

3. Prominent Muslim members of civil society (male and female); politicians, academicians, lawyers, journalists, educators, youth leaders, activists and administrators be invited to become members of the Board.

4. Movement to English as its language of communication because its current language, Urdu, is not the language even of all Indian Muslims, that has led to serious impediments in interpretation of proper texts.

Next, like Hindu law reforms Committee which was formed in 1941, the government should constitute, as a I step, a Muslim law Reforms Committee, Tribal & Indigenous law Reforms Committee, Christian & Parsi Law Reforms Committee and based on recommendations take reforms in personal law forward.
CONCLUSION

Shah Bano case definitely emerged as a limelight to the plight of Muslim women of the country and paved the way towards progressive character of society.

There are inequalities in communities but strict implementation of UCC is definitely not a solution. In the 64 years of independence, lots of things and controversies arose. The judicial stand even in the matter too has not been uniform. In the case of Maharshi Awadsh, a plea for a writ directing the government to enact a uniform civil code had been dismissed by the Supreme Court. In famous Sarla Mudgal case, the second judge on the Supreme Court Bench, has asked the government to look after the implementation of UCC. In the next Pannalal case of 1996 judge, K Ramaswami, had said that “a uniform law is highly desirable but enactment thereof in one go may be counter-productive to the unity and integrity of the nation.”

In this connection Prof. Tahir Mahmood suggested that as per the extremely clear words of Article 44, uniformity in civil laws is not to be achieved by one stroke of Parliamentary legislation. Its gradual evolution is to be secured by the State through proper and prolonged endeavours.

All communities, minorities and majority, are entitled to their personal laws, a right protected by Article 25 & 26 of the Constitution. The mention of UCC is found in the Directive Principles, which do not enjoy the same status as the various Articles enshrined as Fundamental Rights.

In the meantime, in the country where 37% of the people are illiterate, instead of UCC, the focus should be on to bring changes in personal laws slowly. Let us have a codified law that would give the much-needed legal protection, on par with other co-citizens.

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Trade-off between a Citizen's Right to Privacy and National Security

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ABSTRACT

The current paper deals with the interconnection between the right to privacy and national security of a country and whether the present right to privacy given to an individual can override the importance of national security of a country or vice versa. This paper discusses the jurisprudential aspect of right to privacy and national security in terms of the research done by two major philosophers Jeremy Bentham and Emmanuel Kant, wherein an analysis has been made between the two theories of Utilitarianism and Categorical Imperative respectively. In this, the theory of cost-benefit analysis has also been applied.

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698 Sarla Mudgal v. Union of India, 1995 AIR 1531 SCC 635
700 Tahir Mahmood, Uniform Civil Code: Fictions and facts, 1995, p.133
wherein the weightage of both national security as well as right to privacy of an individual is taken into consideration. This paper leans more to a qualitative research method. Here I will argue on the perspective of both- the right to privacy and national security I will also lay down arguments of how the right given to one (Right to privacy) can override the right of many (national security) and vice versa. Using these arguments in a philosophical point of view, a conclusion has been drawn for the purpose of understanding the trade-off between national security and right to privacy.

Trade off between a Citizen’s Right to Privacy and National Security

What is the Right to Privacy?

To know exactly what the right to privacy entails first the term “Privacy” must be interpreted. Privacy is a state wherein an individual and his/her affairs is not disturbed or interfered with. When the person is aggrieved from any unwarranted public or private attention into his personal life then he can claim that his right to privacy has been infringed.

The constitution of India does not explicitly provide for the right to privacy for obvious reasons that every right has a reasonable restriction and there cannot be a right such as privacy when there is the question of national security. Right to privacy is a right which an individual is given which enables him/her to be left alone and live freely without any unwanted public scrutiny or attention.

Till date in India there were many cases which did not grant the Right to privacy to citizens and certain precedents held that it was not a fundamental right. Like in the case of MP Sharma v. Satish Chandra the eight judge bench held the following “When the Constitution makers have thought fit not to subject such regulation to constitutional limitations by recognition of the fundamental right to privacy, analogous to the American Fourth Amendment, there is no justification for importing into it, a totally different fundamental right by some process of strained construction.” This in simpler terms meant that if the constitution makers who were part of the constituent assembly did not feel the need to incorporate the right to privacy as a fundamental right then it was unnecessary to bring up the issue of the right to privacy.

This particular case and the case of Kharak Singh v State of Uttar Pradesh, wherein it was held that privacy was not a constitutional right and couldn’t be guaranteed by the constitution, was overturned by the following case of Justice Puttuswamy v. Union of India in which the right to privacy was enshrined as a valid constitutional fundamental right. This case which was provoked by the Judge of the Karnataka High Court gave India a new precedent which opens up a plethora of cases herein, by prescribing Right to privacy as a fundamental right. This judgment brought out the fact that the right to privacy is already an existing part of the right to life and liberty which is protected under Article

701 MP Sharma v. Satish Chandra, AIR 1954 SC 300
702 AIR 1963 SC 1295
703 Writ Petition (civil) No 494 of 2012 (Unreported)
21 of the Indian Constitution. It said that the right to privacy should be read as a fundamental right in the Part-III of the Constitution.

What is national security?

Since there has been a general understanding of what exactly is the right to privacy, now arises the question as to what exactly is national security? National security is a broad concept and putting it in a simplified way, it would mean that the sovereign (government) should protect the interests of all the citizens and it should control the functioning of the state in a smooth and hassle-free manner. This is so that there is no harm that befalls the citizens of the state and so that there is no chaos when it comes to the governance of the same. Matters of national security are usually classified and confidential and hence are not brought out into the open to take into consideration the panic that citizens could go through. A threat to national security means that the safety of the citizens is compromised and protection through drastic means must be taken. Some examples of threats to national security are- Terrorism, Espionage, Insurgencies, Belligerencies (war) etc.

To curb such activities the government finds it necessary to implement emergency provisions and military strategies to help restore national peace and order. But at times like these fundamental rights such as those of the citizens can be taken away brutally and without question. An issuance of threat to national security gives abundant amount of power to the government and possibilities of misuse is great.

One of the examples which proved that the right to privacy has been quashed secretly by the government in the name of national security is the Edward Snowden case. In this particular case the NSA’s (National Security Agency) classified files were leaked in the United States of America by Edward Snowden. These classified files had the details of domestic surveillance plans which were to be conducted for the purposes of greater security. This was a significant non-consensual breach in privacy wherein the individual was unaware of the breach. Surveillance is one of the major infringements of the right to privacy and it includes phone tapping, spying on an individual’s personal life and following their routine closely. With such measures being taken by the government in the name of national security it would be logical to ask the question as to whether compromising a citizen’s privacy for National Interest is a fair trade off or not.

The question of amount of weightage given to Privacy and National Security:

Whether the right to privacy should be given greater importance than national security must be looked at with scrutiny. Though any right guaranteed comes along with it a set of reasonable restrictions, can the government override such restrictions in the name of national security? Such questions would be addressed jurisprudentially in this paper, below.

Usually one can look at the perspective of both sides of the coin, philosophically. The right to privacy is an individual right and national security is the right provided to a
group of people. In a broader sense we are trying to make a compromise with one right for another. There are two ways in doing this, the first way is to give the larger number of people their safety hence propagating national security over one’s right to privacy or there could be another way wherein the individual is given the right to privacy irrespective of national security.

The first concept is a form of utilitarianism, which "evaluates actions based upon their consequences." Jeremy Bentham was the first person to talk about the idea of utilitarianism. Bentham says that the action which does not amplify maximum happiness is morally wrong. This means that any act should be in pursuance of happiness and if not then it causes pain which is undesirable and wrong (wherein the pleasure-pain principle came in). Utility in an economic aspect can be said to be usefulness of a particular product, it could also be called as the measure of happiness or satisfaction a consumer gets from a single product. It basically considers the greatest good in the greatest number. In relation to the right to privacy, here national security amplifies the greater happiness as it protects larger number of individuals whereas an individual’s right to privacy protects only one, the utility of national security weighs much more than the utility of an individual’s right over his or her privacy.

The second concept propagates something known as a Categorical Imperative which was first propounded by the German Philosopher Immanuel Kant. What is categorically wrong? According to Kant, a moral law is that which is unconditional and absolute and doesn’t necessarily portray the ulterior end of the claim. Kant characterized the Categorical Imperative as an ‘objective, rationally necessary and unconditional principle that we must always follow despite any natural desires or inclinations we may have to the contrary.’ In relation to the right to privacy if we do apply the categorical imperative, then it could be said that the violation of individuals right to privacy is always wrong irrespective of whether it gives happiness to the entire society by protecting national security. This concept would say that the breach of privacy in itself constitutes a wrong even if the end is beneficial to many.

Now the matter to be addressed is - which one of the following concepts should we enshrine into our legal system? Should we bring in the concept of the right to individual’s privacy as utmost and greater than national security and adopt Kant’s theory of Categorical imperative? Or should we bring in the concept that national security plays a vital role in increasing general welfare of the society which is to adopt Bentham’s theory of maximum happiness or Utilitarianism?

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Consequential moral reasoning is the reasoning that provides for the lives of the greater masses than a single life. This is similar to the reasoning of Jeremy Bentham’s Utilitarianism. It reasons that it is always better to save many lives compared to just one. Similarly when the topic of national security arises the government vouches for the fact that the greater good and safety of the masses are of utmost importance and can overpower the individual’s right to privacy. But this isn’t a tangible right. The protection of national security means that there would be an invasion of privacy of an individual’s present for the prevention of a future incident (the future incident may or may not be happening). The future incident being uncertain is definitely a risk taking step initiated by the government. At this time while applying the cost-benefit analysis theory, the situation of infringement of right to an individual’s privacy for national security can become a little flawed.

Violation of a person’s privacy would cost more to the person and the society than the tangential benefit it may provide to larger number of individuals. Tangential benefit at that particular time would be almost nothing. An illustration would help understanding this reasoning. A person ‘A’ has been using his laptop for an innocent search on a search engine. A national security threat has been issued of which the individuals do not get any information as to what is the threat since it is classified which ultimately leads to the checking of the individuals search history by the government which may not have provided any fruitful result to the government. At this point of time the individual’s right to privacy has been invaded but there hasn’t been a substantial benefit to the national security either. Hence there hasn’t been a tangential benefit at the present time and there has only been a subsequent cost incurred (here the cost being the violation of the right to privacy of ‘A’).

There is always a question of ‘may’. Unless there is an imminent threat to national security there is no possible benefit at that point of time hence the cost to one person is greater than the benefit to a large number of people which is presently nothing. The only problem of the matter would be the violation of an individual’s right to privacy.

Coming back to the philosophical point of view which laid down two major concepts of – Utilitarianism and Categorical Imperative, the question arises as to which one of the following is more fruitful and beneficial to the society? The above arguments that I had made against national security does propagate the fact that the Categorical Imperative is what has been chosen when there is no tangential benefit coming out of the invasion of privacy of an individual. But in a case where there is an actual benefit coming out of the invasion of privacy of an individual then in that scenario the greater good must be taken into account as Bentham says that maximum happiness comes from maximum number of people being satisfied.

**Conclusion:**

Having laid two phases of my opinion jurisprudentially, it wouldn’t be fair to
choose one over the other. Though at first glance it is most sought out that the greater good must benefit as the traditional morality of “Kill one than five” comes into the picture (as like in Right to privacy can be infringed if there is a threat to national security). But in the same scenario similar weightage must be given to a single individual too. As the categorical imperative would lay down that “Murder is wrong no matter what.” (Right to privacy being infringed by the government even at the cost of national security is wrong no matter what). Hence having said this, an absolute rule shouldn’t be formed. There must be a constant debate as to whether a Citizen’s right to privacy could be compromised for the national security and vice versa so as to yield significant results that would help in forming a consensus between an individual’s right and a group of individual’s rights.

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A Socio-Legal Study of Live in Relationships and its Impact on the Institution of Marriage

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1.1 Introduction:
A live in relationship refers to a practice of mutual co-existence wherein heterosexual couples decide to live together without entering into the formal institution of marriage. It is also popularly known as mutual cohabitation however it does not necessarily include sexual relationship. It is generally informal in nature however some countries do offer registration of such couples as well. There can be a number of reasons for entering into a live in relationship such as to test compatibility or to avoid the hassles of marriage ceremonies and lengthy divorce procedures if later on the couple decided part ways. Another reason can be that they see no benefit or value offered by a formal marriage or their financial condition averts them from it. The culture of live in relationship has been common in the western countries since a long time; however lately, this practice has also acquired prevalence in the Indian society. The growing prominence of nuclear families, changing priorities and mind set of the youth and the hassle free nature of such relations are the prime reasons for which even in a traditional society like India, where the institution of marriage is “sacred”, an increasing number of couples choose a live-in relationship, sometimes even as a permanent arrangement over marriage. However with these changing scenarios several social and legal challenges have also arisen. These issues and challenges need to deal with much caution and care, in order to ensure that the sanctity of relations remain intact and at the same time; injustice is also not meted out to

706 https://www.enotes.com/everyday-law-encyclopedia/cohabitation%20on%20by Keth Lee, accessed on 19th July’ 17 at 18:00 pm.
707 Dholam, S. N. Socio-legal dimensions of ‘live-in relationship’ in India.
anyone in exercise of their own choice and free will\textsuperscript{709}.

Fundamentally speaking a live in relationship can be of two kinds ‘relationship of choice’ and ‘relationship by circumstances’. A relationship of choice is one in which the couple voluntarily decides to live in together. It may exist even when one or both the partners are already legally married to someone else and still they decide to live into such a relationship as a matter of preference\textsuperscript{710}. However there may be other couples who are not married to somebody else but still they don’t want to enter into a formal marriage with each other and are happy to continue as live in partners. In metros like Delhi and Mumbai it is extremely difficult for bachelors and spinsters to get accommodation who are working in multinational companies or corporate houses\textsuperscript{711}. In such a situation young people often get into an agreement with the opposite sex for the sake of accommodation and live together. Though their relation is neither real nor fake in the eyes of law and they don’t share any intimate relationship, however with passage of time they may begin to nurture feelings for each other. On the other hand a ‘relationship of circumstance’ is one in which both the partners are mistaken that a valid marriage exists between them or they are into a misconception that they had validly divorced their previous partners or they cannot afford to enter into a formal marriage institution owing to their financial constraints. Such a case may occur where a man or woman is led to believe that the man or woman whom they are to marry is unmarried, divorced or widowed and married him or her when in reality this is not the case\textsuperscript{712}. Even if all the rituals of marriage are readily followed; still the marriage won’t be valid in the eyes of the law; if either of the parties has a husband or wife living at that time, whom they have not divorced formally. Such a live in relationship is thus involuntarily entered into and the government and law makers need to take special measures to protect socio-economic and legal interest of people who are caught in circumstantial live in relations\textsuperscript{713}.

1.2 Objective of the Research:
There are several legal concerns associated with live in relations as well such as those pertaining to issues of maintenance and succession. Further if the rights of wife and live in partner become equivalent then it would promote bigamy. Hence it is very essential to wisely consider all the pros and cons and try to institute a legal framework that would ensure a balance in the society in respect of the valid societal concerns as well as the rights and liberties of the couples in live in relations. Hence the main object or purpose of this research project is ‘To conduct a socio-legal study of live-in

relationships and its impact on the institution of marriage'.

1.3 Research Questions:
The researcher aims to achieve the objective of this research by investigating and trying to acquire satisfactory answers for the following research questions:
1. How the Indian Legal system has evolved in the last two decades while adjudicating on cases pertaining to live in relationship?
2. What are the rights of female partners in a live in relation under the Indian law with respect to maintenance and protection from domestic violence?
3. What is the status of children born out of live in relationships under the Indian legal system?
4. Has society’s perspective towards live in relationship changed in a positive manner or there is still no progress?

2. Differentiation between Live in Relationship and Other Forms of Cohabitation:
Often society and even the judiciary tend to meddle with the difference between live in relationship and other forms of mutual cohabitation. However there is still a subtle and prominent distinction between them which needs to be accorded clarity in order to ensure protection of rights and interests of the genuine stakeholders.

a) A “mistress” also known as paramour or lover refers to a man’s long term companion and sexual partner with whom he shares an intimate relation, despite being married to someone else. There may be instances where the man may provide for his partner’s expenses and other facilities; however the two don’t live together like in case of live in relationship. Moreover the status of such relationships is mostly semi permanent only and it’s generally secretive. However there is no clear cut division with respect to the rights of the parties in both the cases as many a times it’s seen that the court grants similar rights to a mistress as to a live in partner.


b) A “concubine” refers to a woman who cohabits with a man in addition to his official wife. The practice of keeping concubines is an age old practice mostly followed by Asian, Arab and European rulers. The status of such woman is lower than the official wife and thus they enjoy limited rights. Moreover it may be regarded as a form of sexual slavery and under Hindu law these women are known as ‘Avarudha Stris’. Such a relationship is distinct from a live in relation because a woman generally enters into a live in relationship voluntarily however that may not be the case with concubines. Furthermore the purpose of entering a live in relationship might not solely be sexual pleasure, however the sole purpose of relationship with a concubine is sexual intimacy.

715 Ibid pp. 334-347.

3.1 Status of Live in Relationships in India:
The custom of men and women living together without marriage has been observed since time in memorial. In ancient times especially during the period of royalty the kings and nawabs not only had multiple wives but they also lived with several live in partners.716 In fact in those days it was not at all considered immoral for men to have live in partners outside their marriage. However with changing times as royalty slowly vanished from India and society progressed we became more sensitive towards the causes and concerns of women717. Thereafter post independence when bigamy became prohibited under the law and women became more empowered and aware of their rights; this practice almost died out. However once again the society is under a phase of transition but fortunately this change is not against the rights and interests of any one particular gender neither it is biased and unjust. This change has come with the changing mentality of the people especially the educated sections living in the bigger towns and cities.718

The new generation concept of live in relationship does not involve multiple cohabitations as the practice in the ancient times however it involves the male and female partner living together like a husband and wife without actually being married formally719. But the problem that emerges is that the traditional Indian society prohibits such relations as being against our values and culture720. Moreover the institution of marriage is revered in our country and live in relations are considered to be dismantling and dishonouring the piousness of marriage. Thereafter women in our society are expected to remain virgin till they get married however the concept of live in relationship contradicts this idea as well. To add to it as earlier women were considered to be financially dependent on men so the instability of live in relation tended to make women all the more subservient to men in regard of their social and economic status721. However with changing times as women are becoming financially independent there is no threat to their economic status due to their personal status as they are no longer subservient and dependent on men for their financial needs. Moreover, mostly the girls opting for live in relations are those who come from financially sound background and are also well educated and job oriented. So the question of the instability associated with live in relations making women all the more vulnerable becomes immaterial to a great extent722.

Hence the main problem still remains the patriarchal and tradition oriented nature of the Indian society; and its belief of live in relationship harming the sanctity of

718 Supra note 8 pp. 217-223.
marriage; that creates the major impediment for live in relations acquiring social acceptance in India. In fact initially the idea was considered to be so morally and legally abhorrent that neither common people nor the courts were even willing to give a fore thought to these ideas. Hence needless to say such relations remained mostly secretive for a long time at least till the late 1990s. In 1988 the honourable Supreme Court of India in Yamunabai Vs. Anant Rao held that where a man married for the second time while his first marriage was still subsisting, the second wife was not entitled to maintenance under Section 125 of Cr.P.C even if she was unaware of the first marriage. The Supreme Court refused to consider that the two had lived together even if the marriage was void and the husband was allowed to take benefit of his own mistake. Even though he had acted fraudulently but still he was in fact allowed to take advantage of this fact. Even in the year 2000 the Allahabad High Court in Malti Vs. State of Uttar Pradesh held that a woman living with a man without marriage cannot be equated as his wife. In this case the woman was a cook at the man’s place and shared an intimate relationship with him. However the court denied including a live in partner within the ambit of the expression ‘wife’ under Section 125 of Cr.P.C and accord to her maintenance rights.

Thereafter in Mohabbat Ali vs. Imran Khan the apex court held that living together for a long time does not make a relationship legally valid. However there have also been instances where the judiciary has given some protection and recognition to these relations as well. In Dinohamy v. WL Blahamy the Supreme Court held that where two people have been proven to be living together like a husband and wife presumption will be of a valid marriage subsisting between them unless it can be reasonably proven otherwise. Thereafter again in Gokal Chand v. Pravin Kumari the honourable Supreme Court reiterated the same principle of Dinohamy Vs. Blahamy however it even notified that couple will not be granted legitimacy if the evidences are able to disapprove the presumption and prove beyond reasonable doubt that in fact no valid marriage subsists between the couple.

3.2 Position of Live in relationships in Foreign Countries:
In order to closely understand and evaluate the rate of progress in our laws it is essential to know the status of live in relationships in foreign countries and also the laws in respect of the same.

726 1988 AIR 644, 1988 SCR (2) 809.
728 Kusum Family Law Lectures, 1st Edn, 2003, LexisNexis, New Delhi, pp. 224-225
729 AIR 1929 PC 135
730 AIR 1927 P.C. 185.
731 1952 AIR 231, 1952 SCR 825.
732 Supra note 24.
Scotland: The Family Law (Scotland) Act, 2006 recognised live in relationship for the first time and thereby accorded legal status to 150000 live in couples of the country733. The Act has also laid down certain guidelines for determining the legal validity of the relationship such as length of period for which the parties have stayed together, the kind of relation shared by them and the type of financial arrangement between them734.

France: In France Live in relationships are covered under and governed by the Civil Solidarity Pact of ‘pacte civil de solidarité’735. This Act was passed by the French National Assembly in October 1999. The pact defines the relationship to be a contract and states that for the contract to be valid the contracting parties must not be bound by any other agreement of marriage or siblings or lineage736.

United Kingdom: In England live in relationships are covered under the Civil Partnership Act, 2005. However the couples under a live in relation have no right on each other’s property737. This means that if a live in couple separates then they shall have no claim on each other’s property and even the court shall not have the power to override this restriction in terms of property and divide the same as in case of divorce738.

United States of America: In the U.S.A live in relationships were not recognised for a long period of time after which 1970 due to a lot of need and pressure legislation was passed to recognise live in relations739. Hence it was granted the status of common law which would be subject to certain requirements740. Later on the State institutionalised live in relations by granting such couples the same rights as those enjoyed by married couples, as it exists in Sweden and Denmark741.

Canada: In Canada living together is recognised as a form of common law marriage. This relationship gets legal sanctity subject to a few conditions742. These

conditions include the couple has been living in a conjugal relationship for at least 12 continuous months, or the couple should be the parents of a child by birth or adoption, or one of the persons should have custody and control of the child and the child is suppose to be wholly dependent on that person for support.

4.1 The Changing Judicial Perspective in India:
Though the outlook of the judiciary towards validity of live in relations has remained confusing since the inception of this debate however still it remains undeniable that lately we have been trying to be more liberal and open towards live in relations, both socially and legally.

It was the 1978 case of Badri Prasad vs. Dy. Director of Consolidation\textsuperscript{743}, when the court recognised live in relationship for the first time and held it to be a valid form of marriage. The Court gave legal recognition and validity to the live in relation of a fifty year old couple.

Thereafter in Payal Katara Vs. Superintendent Nari Niketan and Ors.\textsuperscript{744} the Allahabad High court held that live in relationship is not illegal. A man and woman can live together without getting married. It may be considered to be immoral by the society but it is certainly not unlawful.

Thereafter in Tulsa and Ors. Vs. Durghatiya and Ors.\textsuperscript{745} the Supreme Court provided legal status to children born out of live in relationships. The court laid down a pre condition that while giving legal status to the child it must be considered that the couple must have been living and cohabiting under the same roof for a considerably long period of time and it should not be a mere walk in and walk out relation. Hence this decision also granted property rights to children of live in couples.

After that the judgement in D. Velusamy Vs. T. Patchaianmal\textsuperscript{746} evaluated the pre requisites for a live in relationship to be considered to be valid in the eyes of law. It was held that the couple must hold themselves out as husband and wife and must fulfil all the essential pre conditions of a valid marriage including that of being unmarried. In fact they shpuld also be of the legally marriageable age and should be voluntarily co habiting. It was further held that if these conditions are fulfilled then the relationship will be equivalent to marriage and will also get the benefits of Prevention of Domestic Violence Act, 2005. In this case the court while delivering its decision relied on the concept of ‘palimony’ which was used by the California Supreme Court in the landmark judgement of Michelle Marvin Vs. Lee Marvin\textsuperscript{747} for the grant of maintenance in live in relationships\textsuperscript{748}.

Thereafter in the case of Gokul Chand Vs. Pravin Kumari\textsuperscript{749} also the Supreme Court

\textsuperscript{743} 1978 AIR 1557, 1979 SCR (1).
\textsuperscript{744} AIR 2001 All. 254.
\textsuperscript{745} (2008) 4 SCC 520.
\textsuperscript{746} (2010) 10 SCC 469.
\textsuperscript{747} 18 Cal. 3d 660.
\textsuperscript{748} Chambers, D. L. (2001). For the Best of Friends and for Lovers of all Sorts, a Status Other than Marriage (Symposium: Unmarried Partners and the Legacy of Marvin v. Marvin).
\textsuperscript{749} AIR 1952 SC 231.

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held that there will be a presumption of marriage if there has been a continuous cohabitation between the parties for a reasonably long period of time.

Further in the case of S. Khushboo vs. Kanniammal & Anr.\(^{750}\) the Supreme Court recognised living together as an essential component of Right to life guaranteed under Article 21 of Indian Constitution. The apex court held that live in relationships is not illegal even if they may be considered immoral by the society.

Thereafter in the landmark 2013 judgement of Indra Sharma Vs. V.K.V Sharma\(^{751}\) the Supreme Court has laid down different categories of live in relationships that can be considered and proven in a court of law.

1. First the relationship between an adult unmarried man and an adult unmarried woman which is the most uncomplicated form of relationship.
2. The relationship between a adult married male and an adult unmarried female which has been entered knowingly by both parties.
3. The relationship between an adult unmarried male and an adult married female. However the man here can be convicted for adultery under Section 499 of I.P.C.
4. Domestic relationship of same sex individuals (gay or lesbian).

Further the Court also stated that a live in relationship shall fall under the preview of the expression “relationship in the nature of marriage” under Section 2(f) of the Protection of Women Against Domestic Violence Act, 2005.

4.2 Rights of Women under Live in Relationship:
The rights of women under a live in relation has been ambiguous and unprotected to a great extent except for Protection of Women Against Domestic Violence Act, 2005 according some protection to them by including within its ambit relationship similar to marriage or in other words, live in relationships\(^{752}\). However in the recent years the recommendations by various NGOs and committees have awakened the conscience of the government to be more considerate towards the cause of such women. However while providing protection for the women who genuinely deserve it, the more important factor that needs to be seen is that the undeserving ones are not brought within its ambit as that would mean misuse of the legal provisions and it will also be unjust towards the couples who genuinely deserve such protection and recognition\(^{753}\). For this reason itself the Supreme Court in D. Veluswami v D. Patchaimmal\(^{754}\) has held that the woman needs to fulfil certain criteria’s in order to be eligible for maintenance under Section 125 Cr.P.C. The apex court noted that merely spending weekends with each other or a one night

\(^{750}\) AIR. 1998 SC 128].
\(^{751}\) AIR 2014 SC 309.


\(^{754}\) Supra note 37.
stand shall not be considered as a domestic relationship in the eyes of law

The National Centre for Women made certain recommendations to the Ministry of Women and Child Development to include females under a live in relationship within the scope of Section 125 Cr.P.C and provide them the same maintenance rights as those enjoyed by a married female. The Supreme Court has also in the case of Abhijit Auti v. State of Maharashtra supported the recommendation made by the above committee. Furthermore the legislature has also started changing its perceptive towards such relations as the Maharashtra government accepted the Malimath committee report and also the Law Commission of India Report which stated that if a live in relationship has existed for a reasonably long period of time then she is entitled to maintenance under Section 125 Cr.P.C. Thereafter even in the landmark judgement of Chanmuniya Vs. Virendra Kumar the court held that the term wife needs to be given a broad interpretation to include even those women within its meaning who have been living with their male partners for a reasonably long period of time. Moreover the ceremonies for a valid marriage under Section 7 of HMA should not be an essential pre requisite for grant of maintenance under Section 125 of Cr.P.C. Further the Delhi High court in Varsha Kapoor Vs. Union of India and Ors has held that females living in a live in relationship akin to marriage have right to file complaint not only against their male partners, but also against his relatives.

4.3 Rights of Children Born out of Live in Relationship:
The first right accorded by Supreme Court of India to children born out of live in relationships is right to legitimacy. The apex court in the case of SPS Balasubramanyam v. Sruttayan held that if a couple has been cohabiting under the same roof for a reasonable period of time then as per Section 114 of Indian Evidence Act the presumption will be of them being a legally married couple unless proven otherwise and so the children born out of such cohabitation will be legitimate. The court also interpreted that legitimacy of children born out of live in relations is also a part of Directive Principles of State Policy under Article 39 (f) of the Constitution wherein duty is casted upon the state to provide propitious conditions for the development of children. Further the only pre condition for the legitimacy of such children will be that he must not be born out of a mere walk in and walk out relationship as stated in Madan Mohan Singh and Ors v Rajni Kant & Anr. Hence the court has continued to remain considerate in its approach in order

756 AIR 2003 Bom 304.
757 (2011) 1 SCC 141.
761 Flavia Agnes, Family Law: Marriage, Divorce, and Matrimonial Litigation, Volume 2, Oxford University Press.
762 AIR 2010 SC 2933.
to ensure that the children born out of such relations are not made to suffer for no fault of theirs as it has been seen in the case of Bharata Matha & Ors. V.R. Vijaya Renganathan & Ors. In this case the Supreme Court held that children born out of live in relationships will have inheritance and succession rights in the self acquired property of their parents.

5.1 Pros and Cons of live in Relationship:
The legal status accorded by the Supreme Court of India to live in relationships has sparked a lot of debate across the country. A number of sociologists feel that this can give rise to under age pregnancy, drug abuse, violence and juvenile crimes. In this way the new generation can be more spoilt and rebellious in nature. They may disobey their parents without any reasonable reason and more importantly there is no guarantee that the partner in such a relation will turn out to be loyal and will not leave the other and run away without any prior notice. Further there is another contention that it may actually be harmful for the sanctity of the institution of marriage in our society as it may encourage adultery or extra marital affairs. This may lead to an increase in marital disputes or divorce rates in the country. As in Alok Kumar Vs. State of Delhi the High Court held that live in relationship is a kind of walk in and walk out relationship based on a contract that needs to be renewed every day and it can also be terminated by either of the parties whenever they wish to walk out of such a relationship. However the importance of live in relationship emanates from the fact that it informs the principle of individual freedom. Further it reduces the complications of marriage and gives more opportunities to a person to comfortably explore a relation. Further even if things don’t go well in long run then coming out of a live in relationship is any day easier than coming out of a marriage. Furthermore the youth in today’s time especially the girls have become more aware and empowered. In the words of Jayanti Mishra a Delhi based author the youth of today’s time has become more pragmatic because they are not afraid to follow their preferences and live their life according to their wish. Moreover the bigger advantage is that they know what they are doing and they have the power to bear the consequences of their own decisions.

5.2 Suggestions for a Healthier Legal and Societal Approach:
Certain important suggestions in order to make our legal system and society more liberal in their approach better equipped to deal with the issue of live in relationships and protect the rights and dignity of the live in partners as well as their children are as follows. These suggestions not only intend to afford protection to genuine live in partners but it also intends to prevent the misuse of law by those who try to

763 AIR 2010 SC 2685.
766 AIR 2014 SCC 398.
undermine our social and legal values in the name of their rights.\textsuperscript{767}

1. A separate legislation needs to be drafted on the subject of live in relationship to make the law clear and do away with all kinds of confusion. This shall also help the courts in better adjudicatory exercise, when they determine the rights and claims of partners in a live in relation and also of the children born out of these relations.\textsuperscript{768}

2. People entering in a live in relationship while having a living spouse should be convicted for bigamy.\textsuperscript{769}

3. Further the sooner the society accepts these relationships with an open mind and heart, there will be better chances of the legislator passing a separate legislation in this regard.\textsuperscript{770}

6. Conclusion:

After the April 2014 judgement of Justice MY Iqbal and Justice Amita Roy, it remains an undeniable fact that live in relations are fast acquiring pace in the metros of India. This historic verdict by the court that couples in a live in relationship shall be presumed to be married unless proven otherwise is certainly proving instrumental in changing society’s perception towards couples in live in relations; however there is still a long way to be covered in this regard. Despite all these changes and progress it is still considered a taboo in the major parts of the country.\textsuperscript{771} Moreover such relationships not only lack societal acceptance but also proper legal recognition. Though the law makers have begun to identify the need to protect the rights and interest of partners in a live in relationship, however there is still a long way to go before we can affirmatively proclaim; that the Indian legal system is completely equipped to ensure satiation of the common law principles of natural justice while adjudicating on matters pertaining to live in relationships.\textsuperscript{772} Further the laws with respect to the rights of the children born out of such relations also need to be strengthened to ensure that they are not been made to bear the brunt of something in which they had no role and are able to lead a life of dignity and quality.\textsuperscript{773}

Hence the most cardinal requirement of the hour is to enact a formal legislation that would clarify several important queries associated with such relations, such as the time required to give legal recognition to these relationships, registration and rights of the parties and most importantly the rights of the children born out of such relations; in order to provide them a dignified and secure future.\textsuperscript{774}

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FREEDOM OF PRESS A MYTH OR REALITY?

By: Shubhangi Srivastava

\textsuperscript{772} Supra note 12, pp. 156-158.
\textsuperscript{774} Supra note 23, pp. 213-215.
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INTRODUCTION

Freedom of expression has always been considered as an essential basis of a democratic society. There are a number of reasons for this: firstly, the right of a person to self-fulfillment that requires the communication of thought; secondly, the growing importance of attempting to know the truth where the attempt could be frustrated if the information is suppressed or the way to attain the information is blocked; thirdly, the inherent right of an individual belonging to a democratic society to participate in decision making that implies within it the freedom to obtain and communicate the information; and lastly, the increasing necessity of maintaining the precarious balance between healthy cleavage and necessary consensus. A further dimension to the freedom of expression has been added by the introduction of mass society, where the communication among the citizens is made possible through Press and broadcasting. In a democratic society, it is important that the citizens should have the right to know what is happening in different regions and sectors of the respective society, and to have knowledge about different and alternative approaches so that they can effectively participate in the process of self-governance. However, it is not possible for all such citizens to personally gather such news and information. Therefore, the media acts as an agency of the people and provide them the access to such information that may be vital for them. And it is for this reason that the freedom of press has grown so relevant in nearly all the democratic countries, while not permitted in feudal or totalitarian regions. In countries such as India, where the State monopoly prevails over broadcasting in both technical and financial context, the importance of Press has grown to be even more crucial.

The emergence of Press in India and its contribution during the British period and after Independence makes it clear that a free and vigilant Press is vital to restrain corruption and injustice and to arouse public opinion through press investigations and comments. There have been a number of incidents of injustice and wrong doing that have been uncovered by the Press, like the various incidents of bonded labor in the different parts of the country, the misuse of power by G.R Antulay, and the existence of smuggling rackets in the West coast. The media has always acted as a powerful tool to make people aware of the various social, political and economic evils existing in the society and their responsibility to eradicate them. During the period of British colonization, the Press was used as a chief instrument to carry out the tasks of arousing, training, mobilizing and consolidating public opinion. Powerful newspapers like the Hindu, Kesari, Maharatta under B.G. Tilak, and Bengalee under Surendranath Banerjea emerged during this period. These newspapers were used as a medium to arouse the feelings of nationalism and patriotism amongst Indians so that all of them can come up together to revolt against the Britishers.

Thus the growing importance of media in the administration of society and the fundamental principle of the people’s right to know elevated the freedom of press to a fundamental right that found its significance
in the Constitution of India. The freedom of press is considered to be implicit in the right to freedom of speech and expression provided under Article 19(1)(a). As observed by J. Patanjali Sastri in *Romesh Thapper vs. State of Madras* 776 “The Freedom of speech and expression and the Freedom of Press lays at the foundation of all democratic organization, as without free political discussion no public education that is so vital for the proper functioning of the process of popular government is possible.” In *Brij Bhushan & another vs. the State of Delhi*, 777 AIR 1950 SC 129, it was held that freedom of press is a part of the right to freedom of speech and expression.

The American Press Commission expressed that ‘freedom of the press is essential to political liberty. However, if a man is not able to convey his thoughts freely, the freedom is not secured, and where freedom of expression exists the beginning of a free society along with the retention of liberty is present.’ The Indian Press Commission reiterated this and said, “Democracy arises not only under the vigilant eye of the Legislature but also through the care and guidance of public opinion, where the press is the vehicle through which the opinion becomes articulated.” The importance of the freedom of press is realized by the fact that for most of the individuals the prospects of personal familiarities with newsworthy events is unrealistic. It is through the media only that the people are able to receive the free flow of information and ideas and form strong opinions in this behalf.

However, like all other freedoms and rights guaranteed by the Constitution, the freedom of press too is not an absolute freedom and the State is empowered under Article 19(2) to impose reasonable restriction on it. Thus, the freedom of press could be curtailed in the interest of sovereignty and integrity of India, the security of the State, public order, decency or morality or in cases of contempt of court or defamation or incitement of an offence. In *Sakal Papers Ltd vs. Union of India*, the Daily Newspaper Order, 1960 that fixed the minimum price and the number of pages of a newspaper, was challenged as being unconstitutional as it infringes the freedom of press. The Supreme Court held that the freedom of speech and expression cannot be taken away by placing unreasonable restriction on the business activity of a citizen and can only be restricted on the grounds that are mentioned in Article 19(2) of the Constitution of India. The freedom of press has always been considered to be an integral part of the right to freedom of speech and expression which has been so depicted by a plethora of judgments by the Supreme Court. In *Papnasam Labor Union vs. Madura Coats Ltd*, the Hon’ble Supreme Court laid down the guidelines that should be considered while challenging the constitutionality of the statutory provisions restricting the fundamental rights guaranteed under Article 19(1)(a)-(g). Similarly in *Virender vs. State of Punjab* 778, it was held that although the freedom of press is not

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775 Provides that every citizen shall have the right to freedom of speech and expression, but this is subject to limitations provided under Article 19(2) that empowers the State to put reasonable restrictions on the freedom.

776 AIR 1950 SCR 594

777 AIR 1950 SCR 605

778 AIR 1958 SC 986
specifically mentioned in the Constitution anywhere, but the same is included within the freedom of speech and expression. And in the case of Hamdard Dawakhana vs. Union of India,\textsuperscript{779} the Supreme Court reiterated that the freedom of speech and expression includes the right to acquire and import the ideas about the matters of common interest. And this freedom also includes the right of publication of advertisements and commercial speech as held in the case of TATA Press vs. MTNL.\textsuperscript{780}

WHY IS THE FREEDOM OF PRESS IN THREAT?

In India, it is often argued that the freedom provided to the press is diminishing and is in danger because of various reasons, the most important being the predominance of some newspapers groups. There is no complete freedom to the editors and journalists for collecting and dissenting facts as they are under the continuous pressure of capitalist owners. Following are some of the reasons that highlight the current scenario posing a threat on the freedom of Press.

LEGISLATIVE LIMITATION

A number of legislations have been introduced from time to time that pose a serious limitation on the exercise of the freedom of press guaranteed to it by the Constitution. These legislations are as follows:

The Press (Objectionable Matters) Act, 1951- The enactment provides that no newspaper should be permitted to be published or printed if any of its content is found to be inciting any crime or any other objectionable matter. It also empowers the Central Government to make regulations regarding the price, number of pages and size of the newspaper and also regulations relating to the allocation of space for advertisements in the newspaper.

Defense of India Act, 1962- This Act was enacted during the period of Emergency in 1962. This Act considerably restricted the Freedom of the Press to a large extent in lieu of the unrest prevailing in the country due to the war with China. This Act also empowered the Central Government to make rules regarding the publication and enlist the matters that are prohibited to be published as is considered to be prejudicial to the civil defense or military operations.

Civil Defense Act, 1968- According to this Act the Central Government is empowered to make regulations regarding the prohibition on printing and publication of any book, newspaper, article or any other document which according to it is prejudicial to the civil defense.

MEDIA REGULATORS WITHOUT POWER

The Press Council of India, a statutory body was established in the year 1966 and was conferred quasi judicial powers to regulate Press Media. However, the body lacked punitive power meaning it cannot levy fines or make any order relating to withdrawal of advertisements by government agencies or others. In India, the media regulation revolves mainly around the idea of self regulation. However, recently, there has been a rapid growth in the number of media

\textsuperscript{779} AIR 1960 SCR 671
\textsuperscript{780} AIR 1995 SCC 139

www.supremoamicus.org
organizations both in print and online sectors along with the tremendous commercial pressure, by which the objectivity in reporting has suffered significantly. In context of television media, News Broadcasting Standard Authority (NSBA) is the regulating body that is responsible to look into the violation of the code of ethics so laid down by the News Broadcasters Association (NBA). The biggest problem faced by this body is that it has the provision of voluntary membership and not compulsory membership. And therefore, out of the 135 news channels of the country only 28 news broadcasters that own 57 news channels are the member of this self- regulatory body and a large number of news channels are beyond the ambit of any kind of regulation as NSBA is the sole regulating body in this field. And hence both these self regulating bodies continue to act as toothless tigers.

NO STRINGENT LAWS RELATING TO PROTECTION OF MEDIA PERSONS
As per the HOOT’s compilation, 54 incidents of attacks on the journalists of India and 25 cases of threatening have been reported in the past 16 months, where the actual figures could even be higher. The death of six journalists in the year 2016 itself highlights the urgency to formulate stringent laws in order to protect them. The evidences reveal that the efforts to censor and silence these journalists are relentless taking on absurd dimensions. Free speech has been in threat from three sources; firstly, the government that either ban or censor the media report on account of public interest, the social groups that proclaim to be the protectors of group interest and the thugs who could even go to the extent of killing with whom they disagree with. The attack on journalists has become a daily phenomenon and has been increasing both in frequency and brutality as they continue to be the targets of those who have vested interests in the issues they highlight. In 2014, murder of a journalist who worked with Kanak TV in Odisha was reported where the investigation revealed that the owner of a local cashew nut factory was supposedly behind the murder as the journalist was about to expose the practice of child labor in that factory. Similarly, the recent murder of the journalist Gauri Lankesh has raised a voice of concern regarding the low level of protection that is provided to the journalists.

NO LAWS FOR THE PROTECTION OF SOURCES
In India there is no statutory provision that accords protection to the sources from which the media personnel unearth the truth. A journalist has no right to protect the identity of its sources from getting revealed. Moreover, he may be punished of contempt of court if he refuses to disclose such sources. Thus, though freedom of press is a fundamental right that can be curtailed only to the extent that is provided under Article 19(2), it is no more a reality as no proper laws are framed to afford protection to the journalists and the information that they procure by their own efforts.

THE STATE AS THE MAIN THREAT
Since Independence, it is realized that the Sate acts as a source of the most potential threat to the Press freedom. This could be
understood by the fact that after the Constitution coming into force, those in power continued to bring more and more grounds under Article 19(2) in order to curb Press freedom and reasoned it as necessary for the security of the State. A persistent attempt to curb the freedom of Press was made in 1969 by the Indira Gandhi’s Government. Propaganda was mounted against the Press as well as judiciary, both of which appeared to be not easily amendable to the wishes of the government. However, the antipathy of the Press grew and became further intensified as most of the newspapers expressed their dissatisfaction towards the ruling government and even advised to resign. But this antipathy was short lived and was culminated as a result of the pre-censorship imposed in the country during the internal Emergency in 1977. Theler censorship so imposed saw a considerable misuse of power by the fact that a large number of media reports including criminal conviction of an actress and a businessman was black out as they were envisaged as unpleasant by those in power. Even today, the situation has not improved and has been worsen, where instances of threats to free functioning of the Press have become common. In Bangalore, a kind of a gherao was witnessed in order to prevent the publication of a newspaper which had a report that was disliked by the then Chief Minister. The Tamil Nadu Government has from time and again, put special curbs on contacts between the Government official and the Press, and has introduced provisions that make scurrilous writings a nonbailable offence that also includes the imprisonment on conviction as an obligatory step.

CONCLUSION

In a democratic country like India, a proper functioning of the Government is only possible when the people are well informed and are free to participate in public matters by having the widest choice of alternative solutions of the different kinds of problems that arise. And in order to sustain the democratic status it must be understood that freedom of press and information are fundamental for a speedy growth of the nation and it co-exists with the freedom of speech and expression in such a way that these two cannot be separated. The articles and reports published in the newspaper depict the harsh reality and the true picture of the Indian society. India as a country is at a developing stage in terms of social, political and economic aspects and the newspaper plays a key role in highlighting the serious issues existing in the society and encourages the citizens to fight against them. It has become increasingly important that the people have a modern approach by removing the backward ideas and become the part of enlightened India. It has to be realized that the seeking of information cannot be limited to the state borders anymore and therefore efforts must be done to have a conductive environment for the free flow of information. This would in return prepare the nation to face any challenge that is thrown at it in the world of technology and freedoms.

The daily newspapers have become an indispensable part of an individual’s life and are practically the only material which most people read to gather information. And only when the newspapers and electronic media are freely allowed to represent different
point of views, the people would be able to exercise their right to freedom of speech and expression. Through this paper, the author would like to put up certain recommendation through which the freedom of press could become a reality and not merely a myth. Following are the suggestion:

- Freedom of press should be introduced as a separate fundamental right in the Constitution of India.
- Parameters of freedom of press and the restrictions that could be imposed on it should be clarified by the Legislature.
- Information should be available at an affordable rate and the unnecessary barriers hindering such information to be made to the public should be removed.
- There should be a proper mechanism that should make a check on the fake news and reports.
- And the freedom of press should be restricted to be exercised for influencing the Judiciary.
- There should be a uniform law to clearly demarcate the various rights, privileges and restrictions to be imposed on the media and its various sources.
- Legislations should be introduced in order to afford protection to the media persons and a fast track court should be formed for the speedy delivery of justice in cases of harassment, threats, physical assault, kidnapping and murders of media personnel and journalists.
- The press must be law enforcing and preventive of crime.

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KAMESHWAR SINGH vs STATE OF BIHAR (AIR 1951 Pat 91)

By: Surkhab Singh
From: UILS, Panjab University

Facts of the case:
The object of the British Parliament is enacting Sub-section(2) of Section 299, Government of India Act, 1935, and of His Majesty the King in inserting in the Instruments of Instructions, which were issued under the Royal Sign Manual to the Governor-General and to the Governors of Provinces, a direction not to assent to any Bill regarding which they felt doubt, whether it did or did not offend against that section, was to secure owners of property in the enjoyment of their rights and to ensure that, in the event of the State, in exercise of the right known to American jurists as the right of eminent domain, depriving them of their property, they should receive compensation, meaning thereby the value in money of the property to the owner at the time at which he is called upon to relinquish it. On 6-7-1949, the Governor-General gave his assent to an Act entitled the Bihar Abolition of Zamindaris Act, 1943(Bihar Act XVIII [18] of 1918). That Act empowered the Provincial Government to deprive proprietors and tenure-holders of their estates and tenures it provided, or purported to provide, for the payment of compensation to them, but the compensation was not, and perhaps, in the circumstances of the case, could not be, compensation within the meaning of the term as used in the statutes as the Consolidation of Lands Clauses Act
A preliminary issue has therefore been framed as to whether, in consequence of this enactment, any cause of action, which the plaintiff had or may have had, has not been taken away and whether or not the suit can or ought to proceed.

While the assent to the Bihar Abolition of Zamindaris Act, 1948, was given by the Governor-General, assent to the Act which repeals, or purports to repeal it was given by the Governor. The main argument which had been addressed to the judges by Mr. P.R. Das for the plaintiff, on the preliminary issue is based on this circumstance and is, in short that the legislative body or authority which has purported to repeal the Act is not the legislative body or authority which enacted it. The legislative body or authority, it is said, consisted, in the former case, of the Governor and the two Chambers of the Legislature, and, in the latter case, of the Governor-General and the two Chambers of the legislature. It is, Mr. P.R. Das said, axiomatic that the legislative body or authority which if competent to repeal an act must be the same legislative body or authority as enacted it, or legislative body or authority having powers co-extensive with the powers of the legislative body or authority which enacted it. It necessarily follows, it is suggested that the repealing Act is null and void, that, in consequence, the impugned Act still remains on the statute book and that the plaintiff is entitled to show and, if he succeeds in showing, to obtain, a declaration, that the impugned Act is an unconstitutional Law.

Issues Raised:
In view of the importance of the questions raised, Shearer, J. stated briefly and in his own words, the conclusions he had reached with regard to the preliminary issue,--- an issue raised by way of a bar to the suit being proceeded with, on the decision which, he thought, the fate of this suit depends on. Mr. Setalvad appearing for the defendant has rightly pointed out that the preliminary issue consisted of three parts. As a matter of logical sequence, the questions involved may be stated in the following order:

- Is the Bihar Abolition of Zamindaris Repealing Act, 1950(Bihar Act IX [9] of 1950) hereinafter to be referred to as the Repealing Act, validly enacted?;
- If so, does it take away the plaintiff’s cause of action based on the Bihar Abolition of the Zamindaris Act, 1948(Bihar Act XVIII [18] of 1949), hereinafter referred to as the Abolition Act?;
- Should the suit proceed to trial on the other issues?

Contentions and Judgments:

This case was decided by a division bench. A division bench is a term in judicial system in India in which a case is heard and judged by at least two judges. The two judges in this case were Justice Das and Justice Shearer. Both judges gave their opinions after the arguments and the arguments and the opinions are mentioned below.

**JUSTICE DAS**

Das, J. gave a short answer to the to the contention put forward by the learned counsel for the plaintiff is that the legislature which has repealed the Act is the same legislature as enacted it, namely, the legislature consisting of his Majesty and of the Bihar Legislative Assembly and the Bihar Legislative Council. Section 60(1), Government of India Act, 1935, states:

“There shall for every Province be a Provincial Legislature which shall consist of His Majesty, represented by the Governor, and in the Province of Bihar, two Chambers.”

Section 75 of the Act states:

“A Bill which has been passed….. by both Chambers of the Provincial Legislature, shall be presented to the Governor, and the Governor shall declare either that he assents in His Majesty’s name to the Bill, or that he-withholds his assent there from, or that he reserves the Bill for the consideration of the Governor-General.”

Section 76(1) states:

“When a Bill is reserved by a Governor for the consideration of the Governor-General, the Governor-General shall declare, either that he assents in His Majesty’s name to the Bill, or that he-withholds his assent there from.”

Nevertheless, although the Governor-General directly, and the Governors of Provinces indirectly, are no longer required by any Instrument of Instructions to reserve bills for the signification of His Majesty’s pleasure, Governors are still required or authorized to reserve certain bills for consideration of the Governor-General under Sub-section(2) of a 107, Government of India Act, Section 90, British North America Act, 1867,
similarly empowers the Lieutenant Governors of Canadian Provinces to reserve bills for the consideration of the Governor General of Canada. A device invented by British statesmen a century ago for the protection of imperial interests and the prevention of international incidents has been made to sub-serve another and very different purpose, namely to ensure that a Provincial Legislature does not enact a law which is illegal and unconstitutional in whole or part, or a law clashing with the legislation of the Federal Legislature. The necessity for a provision of this kind in the Indian Constitution Act is the greater, as in a large number is of matters the Federal and Provincial Legislatures have concurrent powers. Mr. P.R. Das, is, of course, correct to this extent that an Act of the Provincial Legislatures may be unconstitutional if it has received the assent of the Governor and yet would have been constitutional if it had received the assent of the Governor-General. It does not, however, at all follow that the criterion to be adopted in deciding whether a law is or is not unconstitutional, is to see whether it has been assented to in the name of His Majesty by the one representative of His Majesty or the other representative. The criterion must, in each case, be whether the Provincial law deals with a matter enumerated in the Concurrent Legislative List and, if so, whether it contains any provision repugnant to the provisions of an earlier Dominion law or an existing law with respect to that matter. It may well be that the Bihar Abolition of Zamindaris Act, 1918, dealt with matters enumerated in the Concurrent Legislative List and contained provisions repugnant to the provisions of an existing law, or existing laws, of the Federal Legislature with respect to these matters. Presumably, it did, in fact, contain such provisions, or was believed to contain such provisions, as the object of reserving the bill for the assent of the Governor General was to ensure that the bill should be subjected to scrutiny by the legal advisers of the Government of India in order that the Government of India might decide whether, if the effect of it was to make the law in certain matters in Bihar different from the law in these matters prevailing in other provinces, there was, on grounds of policy, any objection to this. It is important to notice that the checks on, or safeguards against, a clash between the laws passed by the Federal and the Provincial Legislatures which were devised by the British Parliament and embodied in Section 107(2) and other connected sections of the Government of India Act were twofold. In the first place when a proposed law of a Provincial Legislature as the effect of altering or repealing an Act of the Federal Legislature, it has to be reserved for the consideration of the Governor-General. Secondly, when the Governor General has given his assent to such a proposed law and, in consequence, the law which obtains in that Province is different from the law, which prevails in other Provinces, no proposed law which has the effect of again altering the law, can be introduced in the Federal Legislature without the previous sanction of the Governor General. While, however, the Federal Legislature cannot repeal the provincial law unless the repealing bill has received the previous sanction; of the Governor General before it is introduced in the Federal Legislature there is clearly nothing to prevent the Provincial
Legislature itself repealing it. The effect of the repeal is merely to restore the status quo ante and to bring the law in that province once more into conformity with the law prevailing in the rest of India. There is, on principle, no reason why, before such a course is taken by a Provincial Government, the Government of India should be consulted. In fact, as the original object of His Majesty in the delegating to the Governors of Provinces authority to assent in His name to proposed legislation was to avoid unnecessary delay in His assent being obtained, there is every reason why an Act which merely repeals an existing Act, and does not purport to do anything more should not be reserved.

Mr. N.C. Chatterji, who followed Mr. P.R. Das, for the plaintiff, put forward an argument which, one must confess, he had some difficulty in comprehending. The question or one of the questions, raised is the preliminary issue is as to whether the Bihar Abolition of Zamindars Repealing Act, 1950, is intra vires of the Provincial Legislature. If, Mr. Chatterji said, the Bihar Abolition of the Zamindaris Act, 1948, is itself void and of no effect the Bihar Abolition of Zamindaris Repealing Act, 1960, is similarly and necessarily void and of no effect. In other words if Justice Das understood the argument correctly, Mr. Chatterji contended that it was impossible to distinguish between the two Acts and that in consequence, we must consider and could not avoid deciding, whether the Bihar Abolition of Zamindaris Act, 1948, was or was not an unconstitutional law. There is, in his opinion, no substance in this argument. It is, of course, true that an unconstitutional law has no validity whatever, and that rights which it may purport to take away from individuals continue to exist to the same extent as they would have existed if the law had never been enacted. On the other hand, a law is not an unconstitutional law unless and until it has been so decided by the judicial tribunal competent to pronounce on its validity. Moreover, unless and until a question as to its validity is directly raised and a court of law has no option but to decide it, the courts must proceed on the presumption that the law is valid law. In that situation, it appears to him that, if the validity of the repealing act can be questioned at all, it can be questioned only on the ground raised by Mr. P.R. Das, namely, “that in enacting it the proper procedure was not followed, and, for the reasons just given, that ground must fail.” There is another and more cogent reason for our declining to go into the question which Mr. Chatterji asks them to, namely, that as the impugned act has been repealed, the Government of Bihar is debarred from taking any action under it. If, however, no action can be taken under the impugned act, the question as to whether that act was or was not an unconstitutional law becomes a question of purely academic interest. Sir Alladi Krishnaswamy Ayyar, for the defendant cited a number of authorities to show that the courts will not decide such questions. One of these decisions namely, Attorney-General for Alberta vs Attorney-General of Canada, 1939 A.C. 117: (AIR (26) 1933 P.C. 53) is very much in point. That was an appeal against an opinion expressed by the Supreme Court of Canada that two wills which had been introduced in the Legislature of the Province
of Alberta were ultra vires of that legislature. If the proposed laws had been enacted, no action could have been taken under them except under and in accordance with certain provisions contained in another Act, known as the Alberta Social Credit Act. During the pendency of the appeal this Act was, however, repealed. **Lord Maugham**, after observing that the bills could no longer be brought into operation, said:

“Since nothing can be done there under, the appeal from the order of the Supreme Court is one of no practical interest. It is contrary to the long established practice of this Board to entertain appeals which have no relation to the existing rights created or purported to be created, and there Lordships have, therefore, found it necessary to decline to hear arguments on this appeal in so far as it relates to the bills.”

The other decisions cited were **Sun Life Insurance Co. of Canada vs Jervis, 1944 A.C. 111** : (113 L.J.K. 174), and the **Lawrence P. Mills vs W. Briggs Green, 159 U.S.S.C.R 651**.

**Paragraph 10** of the plaint is as follows:

“The plaintiff is further advised and submits that his title to the said properties will subsist notwithstanding any notification that may be issued by the defendant declaring that the estates or tenures of the plaintiff have passed to and become vested in the Crown. He further submits that the promulgation of the said Act by the defendant constitutes an infringement, or a threatened infringement, upon his title to the properties collectively known as “**Raj Reyasat Darbhanga**” and that as a cloud has been thrown upon his title, he is entitled to as declaration that the said Act is wholly void and inoperative.”

As Justice Das already said, while the **Bihar Abolition of Zamindaris Act, 1948**, has been repealed, a bill which contains precisely the same provisions has been introduced in the Provincial Legislature. **Mr. P.R. Das**, for the plaintiff, made a great deal of this and said, more than once, that the cloud which had been cast on his client’s title and which constituted his cause of action had not been dissipated. The defendant, however, does not deny the title of the plaintiff and the suit cannot be said to be a suit falling under III.(g), **Section 42, Specific Relief Act**, the intention of the Crown, as manifested in the bill now pending in the Legislative Assembly, is to deprive the plaintiff of his property in exercise of its sovereign powers. That the right or power of the State to deprive a citizen of his property is one of the incidents of sovereignty, there can be no question. In most democratic countries, the Constitution imposes on the exercise of this power a twofold limitation. In the first place, it is to be used only for the enjoyment and exercise of the powers conferred on the executive and, secondly, when it is used, it is to be used “on just terms”, to borrow the expression used in the **Australian Constitution Act** (vide Clause XXXI of Section 51, **Commonwealth of Australian Constitution Act**). The people of India have adopted a Constitution and that Constitution is to come into operation in the course of this week. What limitations the Constitution imposes on the exercise of the right of eminent domain is the matter to be dirty mind hereafter. For the present, it is enough
to say that the *Bihar Abolition of Zamindaris Repealing Act, 1950*, is intra vires of the Provincial Legislature and that the effect of that Act is to deprive the plaintiff of the cause of action on which he sued. *Mr. P.R. Das* suggested that, as we were not a final Court of Appeal, we ought to decide the other issues. We have, however, discretion in the matter and, in his opinion, we would be exercising it wrongly if we went into the other issues. In the events which have happened, the suit cannot and ought not, in his judgment to proceed, *Justice Das* dismissed it but would make no order for costs against the plaintiff. In order to avoid any misapprehension, he wishes to say that, as at present advised, he is not prepared to say that when a law is enacted and before it is put into operation or any action is taken under it, a person who may be prejudicially affected by it, is entitled to ask the court for a declaration that is an unconstitutional law.

**JUSTICE SHEARER**

As to first issue, *Mr. P.R. Das* appearing for the plaintiff has contended that the repealing act is not validly enacted. His main thesis is that the *Abolition Act* was passed by a different authority, and on the principle that the repealing authority must be same as the enacting authority, the repealing act is bad for want of assent of the Governor General, which assent was given to the *Abolition Act on 6-7-1949*. *Mr. Das* has developed his argument in the following way. He states that from *Sections 99-107*, and in particular *Section 107(2), Government of India Act, 1935*, as adapted by India (Provisional Constitution) Order, 1947, follows the conclusion that the Governor General is an integral part of the machinery for legislation when the Provincial law relates to one of the matters enumerated in the Concurrent Legislative List, particularly to a field already occupied by an earlier dominion law or existing law. The *Abolition Act*, according to him, contained provisions repugnant to or in conflict with, provisions of (a) *The Civil Procedure Code*, (b) *The Transfer of Property Act*, (c) *The Contract Act*, (d) *The Trusts Act* etc. : therefore, under the provisions of *Sub-section(2) of Section 107*, the *Abolition Act* required the assent of the Governor General for its validity. If with regard to the *Abolition Act*, the assent of the Governor General was necessary, such assent is also necessary for the *Repealing Act*. This, in substance, is the contention of *Mr. Das*.

*Justice Shearer* said the contention has no sound foundation in law. *Section 107, Government of India Act, 1935*, does not act up any enacting authority, nor does it deal with competency or power to legislate in the strict sense of the term. It merely states what will happen in the case of in consistency between Dominion law and Provincial law, and in *Sub-section(2)* lays down how to get over a repugnancy of a particular character. It does not deal with the question of ultra vires, which is far more fundamental than more repugnancy. The position becomes, *Justice Shearer* thinks, quite clear, if one examines the provisions in *Chap. III Part III*, and *Chap. I. Part V, Government of India Act, 1935*. The former deals with the Provincial Legislature and the latter with the Distribution of Powers. Under *Section 60*, the Provincial
Legislature of Bihar consists of two Chambers and His Majesty represented by the Governor. That is the legislative body, or the enacting authority. Section 73, etc. deal with legislative procedure. Section 75, states that a bill which has been passed by both the Chambers shall be presented to the Governor, and the latter shall declare either he assents in His Majesty’s name to the bill or that he withholds assent there from or that he has reserved the Bill for the consideration of the Governor-General. Section 76 says that when a Bill is reserved for the consideration of the Governor General, the latter shall declare either that he assents in His Majesty’s name to the Bill or he withholds his assent there from. It is to be observed that the Governor or the Governor General, as the case may be, acts in the name of His Majesty. Then comes Sections 99 to 107. Section 99 lays down the extent—territorial extent—of different legislatures. Section 100 delimits the field or subject matter of legislation, with reference to three lists, respectively called the Federal Legislative List(List I), Concurrent List(List III), and Provincial Legislative List(List II). Under Sub-sections (2) and (3) of Section 100, the Provincial Legislature has power to make laws with respect to any of the matters enumerated in List III and List II. Then there is Section 107, which, as Justice Shearer has already said, deals with the inconsistency or repugnancy of a particular character. It would be wrong to assume from the provisions of Section 107 that the Governor General as representing His Majesty is part of the legislative machinery of a Province. The legislative machinery is indicated in the Section 60, and not by Section 107. A Provincial law even with regard to a matter enumerated in the Concurrent List does not become bad, merely because the assent of the Governor General has not been taken. The only effect of Section 107 is that, in the absence of such assent, the Provincial law will be void to the extent of the repugnancy may be in part or entirety. But surely Section 107 can have no application, when there is no repugnancy. The short answer to the argument of Mr. Das, based on Section 107, is that the Repealing Act does not create any repugnancy; on the contrary, it removes the repugnancy, if any, created by the Abolition Act, the latter Act itself not being either a Dominion law of an existing law as defined in Section 311. The absence of the assent of the Governor General does not, therefore, invalidate the Repealing Act, which has been enacted by the proper legislative authority of the Province, viz., the two Chambers and His Majesty represented by the Governor. The decision Mr. Das relied on are Rev. Robert Dobie vs The Temporalities Board, (1881) 7 A.C. 136 : (51 L.J.P.C. 26). In this case the question was considered with reference to Sections 91 and 92 of the British North America Act, 1867, Section 129, upon the legislature of Quebec to repeal and alter the statutes of the old Parliament of Canada were co-extensive with the powers of direct legislation with which the said legislatures was invested by the other clauses of the Act of 1867. The question was considered with reference to Sections 91 and 92 of the
British North America Act, which enumerate and the Parliament of Canada, as well as those in relation to which are within the exclusive right of making law. If it cannot be disputed in this case that the Provincial Legislature has power to make laws with regard to compulsory acquisition of land (item 9 of List II) or land and land tenure, including rights in and overland, (item 21 of List II) or even with regard to matters enumerated in List III, then on principle of the decision in Rev. Robert Dobie vs The Temporalities Board,(1881) 7 A.C. 136 : (51 L.J.P.C. 26) that Legislature will have power to repeal, modify or alter such laws. The question of the assent of the Governor General will come in, not with regard to the competency or power to legislate but in case there is repugnancy of the kind mentioned in section 107.

It remains now to consider another argument urged by Mr. Das but developed more fully by Mr. Chatterji who followed Mr. Das on behalf of the plaintiff. The constituent parts may be stated thus (1) let it be assumed that the Abolition Act was ultra vires, being in contravention of the provisions of section 299. Government of India Act, 1935; (2) on that assumption, the Repealing Act is also a nullity, because that which is ultra vires does not exist in law and cannot be repealed; (3) therefore, it is necessary in this suit to decide whether the Abolition Act was ultra vires. In fairness to Mr. Chatterji, Justice Shearer made it clear that he did not state the constituent parts in the way in which he has stated them for the purpose of understanding the implications of the argument. So stated, the argument has the obvious fallacy that it assumes the very question to be decided. The Abolition Act was Provincial law till it was repealed, and the effect of the repeal is as if it never existed except as to transactions past and closed. Even assuming that the Abolition Act was bad, it is no longer in the statute book and no judicial intervention is called for with regard to something which does not exists there being no past transaction under the Act which was never brought into force.

A reference was made to a large number of decisions, some of which Justice Das had noticed, on the point that the Court will not decide a constitutional question which is merely academic and has no live relation to the rights of the parties it would be a vague thing to re-examine those decisions, except on which Mr. Das relied. The point is summarized at pp. 338-339 of Cooley’s Constitutional Limitations (Edn.8) as follows :

“Neither will a Court, as a general rule, pass upon constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. While Courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more proper and more respectful to a co-ordinate department to discuss constitutional questions only when that is the very lis mota.”
In the present suit the plaintiff asks for two reliefs--- (1) a declaration that the Abolition Act is ultra vires and void; and (2) an order of injunction restraining the defendant and its officers from issuing any notification under Section 3, Abolition Act, having been validly repealed, does not exist, and it is unnecessary to pronounce on its validity or otherwise, because the plaintiff has now no cause of action.

There has been some argument before the judges as to the continued threat to the right of the plaintiff in the almost identical clauses of the Land Reforms Bill now pending before the legislature. Mr. Das has suggested that the intention of the defendant is to take advantage of Section 31(4), Constitution Act, when it comes into force on 26-1-1980, so as to make the acquisition of the plaintiff’s property, without payment of adequate compensation, not liable to question in any Court. The judges are not concerned with questions of motive, expediency or policy, or on the legislative ethics. It may even be doubted if the introduction of a Bill by itself constitutes any threat the Bill may or may not be passed, or may be passed with different Clauses. These are all speculative matters, and, it is quite outside the province of judicial enquiry on the present occasion. Obviously, what the position of the plaintiff may be when some new law is made cannot be determined now.

Order:
The order given by both the bench is a just order. Both the judges came to the conclusion that all the three questions involved in the preliminary issue must be answered against the plaintiff and the suit must fail on that ground. So the suit cannot proceed further. Both the judges have not given any order for the costs.

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Relationship between a doctor and a patient under the realm of Medical Negligence: One Holistic View.

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ABSTRACT

Medical Negligence has been a central point of debate since quite a while for now. Negligence on the part of the physician, even be it involuntary is unacceptable as Hippocrates rightly said, “Wherever the art of medicine is loved, there is also a love for humanity”.

www.supremoamicus.org
The relationship between a doctor and a patient is a key to prosperity in this world. A physician has certain kinds of relations with his patients mainly fiduciary and contractual. Reasonable duty to care is also an important element of the relation between a doctor and a patient. Medical negligence indeed has some liabilities under Criminal Law, Tort Law and Consumer Protection. Basically, the paper will cover the relation of a doctor and a patient from the viewpoint of medical negligence comprising the holistic view of the aspects related to torts.

HYPOTHESIS
The project relies on the premise that the words ‘doctor’ and ‘physician’ and ‘medical negligence’ and ‘medical malpractice’ are interchangeably used and liabilities under medical negligence also exists in form of Criminal Law, Tort Law and Consumer Protection. The project also depends on the assumption that a doctor certainly has two kinds of relation with his patient namely fiduciary and contractual.

INTRODUCTION
The relationship between a physician and a patient is a key aspect to prosperity in this world. Both the parties require each other and cannot sustain without each others mutual trust. Trust is the most important element of any relationship, but specifically in a physician-patient relationship, it’s the core on which the relationship is developed and sustained. Without both of them trusting each other there can be no solution to any medical emergency or medical problem in this world.

Hippocrates, possibly was the first person to deduce this relation between a doctor and a patient. He is also referred to as the ‘father of early medicine’ for his contributions to the field of medicine. Also he was the first person to deduce that disease can be caused by nature or human kind and not because of gods or superstition, as mentioned by him in his work, ‘On the Sacred Disease’, “It is thus with regard divine nor more sacred than other diseases, but has a natural cause from the originates like other afflictions. Men regard its nature and cause as divine from ignorance and wonder.”

It is not necessary that the relation be only of a trust based nature or rather fiduciary in nature, it relation can also be contractual in nature. There can be a contract between a physician and a patient.

Ever since ages, a relation between a doctor and a patient has been considered sacred and if either of the parties tries to distort this sacred relation then there exists sanctions and liabilities under Tort laws, Criminal Laws and Consumer Protection Laws.

THE SACRED RELATION
The most important elements of a relation between a physician and a patient, as discussed earlier is ‘trust’ and ‘care’. Trust and care are the sole pillars on which a physician-patient relationship sustains and prospers. A physician basically, has a fiduciary relation (trust based) and a duty of care towards his patients. But this duty of care should not be confused with absolute duty of care. The duty of care in such a

781 Hippocrates, ‘On the Sacred Disease’.
relation depends on the reasonability or what we call in lawmen terms, ‘reasonable duty of care’.

The significance of a relation between a physician and a patient dates long back to some 400BC, where Hippocrates, a Greek physician was the first one who identified such a relation and since then it is subject to a lot of scrutiny. ‘The relationship between doctors and their patients has received philosophical, sociological, and literary attention since Hippocrates, and is the subject of some 8,000 articles, monographs, chapters, and books in the modern medical literature.’

Hippocrates did consider trust and care as the basis of such a relationship and relied more on the fact that a physician must act in the best interest of his patients as mentioned by him in his Oath, ‘The Hippocratic Oath’, ‘The Hippocratic oath expresses the essence of the fiduciary relationship between a physician and each of his patients. The physician has a duty to act in the patient’s best interest and to refrain from exploiting the patient. Respecting the fiduciary relationship and the trust of the patient is a cornerstone of the ethical physician’s practice.’

TRUST AND REASONABLE DUTY TO CARE

Healthcare is considered of a crucial nature in the US and they also regard trust as an essential element to a physician-patient relationship. ‘providing health care, and being a doctor, is a moral enterprise. An incompetent doctor is judged not merely to be a poor businessperson, but also morally blameworthy, as having not lived up to the expectations of patients, and having not violated the trust that is an essential and moral feature of the doctor–patient relationship’.

Trust and duty to care plays a significant role in a fiduciary relationship (FR), which will be discussed in the next part. The important thing to be noted is that, the duty to care of patient is reasonable in nature and not absolute, which means a physician can only be only he held liable if he doesn’t perform his duty to care in reasonably foreseeable manner.

Duty to care in a FR, means ‘the fiduciary owes a duty of care toward the principal. This means they are legally required to be educated and informed about the laws and issues regarding the procedures, conditions, and surgeries they are administering. If they are not adequately informed, they may not be legally liable if they did not have enough time to obtain the relevant information.’

Thus, ‘Trust is most realistic when a relationship has a history of reliability, advocacy, beneficence, and good will’.

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785 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1496871/

786 Supra Note 2.
FIDUCIARY RELATIONSHIP

A fiduciary relationship (FR) basically means a relationship based on trust and mutual care. A physician-patient relationship is mostly based on mutual trust and duty to care on the part of the physician. ‘United States law considers the relationship fiduciary; i.e., physicians are expected and required to act in their patient’s interests, even when those interests may conflict with their own.’\textsuperscript{787} A fiduciary relationship generally works on the principal-agent relation, ‘the beneficiary delegates discretionary powers to the fiduciary, eg principal-agent, who is then held to strict fiduciary standards of conduct.’\textsuperscript{788} The term fiduciary is very important as a physician can be held for non-performance of the obligation. ‘Once an FR is established, fiduciary obligations are due, and fidelity or loyalty is universally considered the most fundamental obligation.’\textsuperscript{789} A fiduciary owes certain set of duties towards his agent, ‘a duty of care in deciding whether to undertake the task, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient.’\textsuperscript{790}

CONTRACTUAL RELATIONSHIP

There can also be a contractual form of relationship between the patient and the physician. ‘The contract between the patient and physician will be formed with the acceptance of the physician on the issue of medical treatment in addition to the application of the patient to physician. This contractual relationship will form the basis of patients’ and physicians’ rights, requests and obligations. Because of the service contract the performance of the patient will be to pay the wage which was fixed with the contract. The patient has an obligation to comply with physician’s recommendations and treatments; moreover the patient has also a obligation not to have any objection. Otherwise the physician will not be liable.’\textsuperscript{791}

It’s because of all these reasons that a physician-patient relationship (be it fiduciary or contractual) remains a cornerstone to care.

MEDICAL NEGLIGENCE

Medical Negligence, also known as Medical Malpractice is a tort (civil wrong) under professional negligence wherein there is an omission of act by medical practitioner or health service provider in which the treatment provided to the person lacks uniform and accepted standards in the medical field.

The important thing to note is that the proof to establish that whether there is a medical malpractice on the part of the physician is on

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\textsuperscript{788} EC Hui, Doctors as fiduciaries: a legal construct of the patient physician relationship.
\textsuperscript{789} Ibid
\textsuperscript{790} Dr. Laxman Balkrishna Joshi vs. Dr. Trimbak Bapu Godbole and Anr, 1969 (1) SCR 206.
the victim or patient in a Court of Law and not on the physician or the medical body themself.

LIABILITIES UNDER MEDICAL NEGLIGENCE

There are broadly three kinds of liabilities under the tort of medical negligence or medical malpractice under the various heads:

2. Under Tort Law.
3. And, under Criminal Law.

The various liabilities and their effects on both the patient and the physician is discussed below.

I. Consumer Protection Act:— The victim (patient) can approach the Consumer Court as its first approach to seek remedy for the loss done to him by a negligent physician. The act or relation between a patient and physician in here is to be treated as a ‘service’. That means the relation between a patient and physician will be of a consumer-buyer nature. This kind of relationship also states that if there is no ‘consideration’ involved in transaction of the service, then the patient cannot be deemed as a consumer of the medical service. The Supreme Court case of ‘Kishore Lal vs. Chairman, Employees State Insurance Corporation’ is a landmark case in this kind of relationship as it defined the nature of such relationship. ‘The Court held that the relationship between a medical practitioner and a patient carries within it a certain degree of mutual confidence and trust and, therefore, the service rendered by the medical practitioners can be regarded as a service of personal nature, but since there is no relationship of master and servant between the doctor and the patient the contract between the medical practitioner and his patient cannot be treated as a contract of personal service and it is a contract for service and the service rendered by the medical practitioner to his patient under such contract is not covered by the exclusionary part of a definition of service’.  

Another SC case of ‘Indian Medical Association vs. VP Shantha’ was also a landmark judgment as medical profession was brought under Sec. 2 (1) (o) of Consumer Protection Act, 1986 in this case.

Tort Law:— When the Consumer Protection Act, ends the Tort Law takes over the charge of protecting the interest of people even in the case when the service is provided free of cost to the consumer (which is a major shortcoming of the Consumer Protection Act). The Tort Law can help the victims to claim for compensation for the loss suffered to them but however, ‘the onus is on the victim to prove the negligence on the part of the physician’. This is a major shortcoming of the tort law...

792 Kishore Lal vs. Chairman, Employees State Insurance Corporation, AIR 2007 SC (1819).
793 Philips India Ltd. v. Kunju Pannu, AIR 1975 Bom.306.
(which we will try to solve further ahead in the paper).

III. **Criminal Law:** In some cases of negligence, the omission or commission of act on the part of the physician is so ‘blatant’, ‘reckless’ or ‘gross’ that it can attract criminal liability. However, ‘every civil negligence is not criminal negligence’. A negligent physician can be punished under Sec. 304(a) of the Indian Penal Code. However, Sec. 88, 89 and 92 provide immunity to the physicians who act in good faith.

**AREA OF PROBLEM**

The sole and major area of concern here in this structure of remedy against the medical inefficiencies and lacunas is that ‘the onus to prove the charge or allegation is on the victim or the consumer’. This kind of system in turn, attracts social evils like corruption as medical service providers are generally backed by bureaucratic powers and more often than not ‘genuine’ cases of medical malpractice either die down (because of bribing the jurists) or are settled out of the court and thus as a result there is not efficient precedent set in the Indian Judiciary as to how to mitigate this problem as physicians often get away with the notion of ‘reasonable duty to care’.

**SOLUTION**

The Indian Judicial System did foresee this issue and as a result has carried out certain acts and amendments like the introduction of the Consumer Protection Act in the field of medicine liability (as discussed earlier in the case of IMA vs. VP Shantha). But none of these amendments have been able to succeed to mitigate the loss of the victims as ‘lives lost as a result of medical malpractice cannot be regained back’.

But one of the efficient solutions to this problem can be the changing of the archaic rule by transferring the onus of proof of medical malpractice over the medical service providers. This significant change cannot only help to reduce corruption in such field as the medical service providers will have to prove the burden rather than hiding it from the suffering party, but also to the increase efficiency as some of these decisions can be set as precedent to work benefits for the greater good of the victimized people at large. This solution in fact sees to it that doctors (negligent) get away with their act by the very notion of ‘reasonable duty to care’. Such an efficient solution will help to improve the relationship between a physician and a doctor.

‘The Bolam Case’ and ‘Jacob Matthew vs. State of Punjab’ are some of the cases where this solution could have been worked out and would not have left the victims stranded in these cases.

Though there will increase in number of unwanted and fake complaints regarding medical malpractices by the victims but then the solution will itself help to identify the
‘genuine’ complaints and reduce corruption, as we must look at the ‘greater picture’. This solution, however doesn’t mean that there should be an imposition of absolute duty to care over the patients as that would be unfair to doctors who ‘act in good faith’ of the person.

CONCLUSION
This project work shows the relationship between a physician and a patient and how can it be improved by working out the inefficiencies related to the tort of ‘medical negligence’ and its liabilities. ‘Medical profession is touted to be a noble profession, a profession wherein doctors heroically saves the lives of others and make the world a happy place to live, but doctors are also humans and mistakes are bound to happen in such a dynamic field, but the burden upon doctor’s is profound as somebody’s life and health is on stake’. It is not always that medical professionals are always wrong or negligent ‘but a willingness to admit one’s shortcomings, is I believe crucial in a doctor-patient relationship.’ It is because of this reason why Hippocrates rightly quoted ‘Whenever a doctor cannot do good, he must be kept from doing harm’.

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Mediation and Negotiation in resolving Mass Torts

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ABSTRACT: “Mass Torts” can be best explained as Tort i.e., ‘civil wrong’, being inflicted upon a large number of people or sector of society where they get affected simultaneously. It involves a sizable number of people or litigants, we may say, and that is the reason these cases must be resolved through mediation and negotiation. Mediation not only reduces the pendency of cases but also leads to peace and harmony in society. By agreeing to mediation, we would be relieving the citizens of a huge set of problems.

The present paper tries to analyze and emphasize on the strict need of Mediation and Negotiation in resolving cases of Mass Torts.

Keywords - Benefits of mediation, Current situations, Mass number of litigants, Reducing pendency of cases.

... both were happy with the result, and both rose in public estimation... I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing out private compromises of hundreds of cases. I lost nothing
I. INTRODUCTION

The word ‘tort’ has been derived from Latin word ‘tortum’, which means ‘to twist’. Thus, “tort” means “a conduct which is not straight or harmful, but, on the other hand, twisted, crooked or unlawful.” It is equivalent to the English term ‘wrong’. The law of Torts consists of various ‘torts’ or wrongful acts whereby the wrongdoer violates some legal right vested in another person. The term “Mass torts” signifies a single tort i.e., civil wrong that results in causing injury to several number of victims by the virtue of an single event or act. And therefore gives birth to numerous number of plaintiffs against only one single defendant (or may be several) who behaved in a negligent manner. Most of the ‘Mass torts’ cases consists of many plaintiffs suing one defendant based on harms arising from a single event which caused damage simultaneously to a number of people. It is not necessary that the defendant was working negligently, he may be working with due care and diligence and still he can be held liable by the virtue of “Vicarious liability”. Generally, a person is liable for his own wrongful acts and one does not incur any liability for the acts done by others. In certain cases, however, “vicarious liability”, that is the liability of one person for the act done by another person, may arise. The common examples of such a liability are:

- Liability of partners of each other’s tort;
- Liability of the master for the tort of his servant.

CAPACITY TO SUET[1]

Generally, every person has a capacity to sue, liability to be sued in tort. There are some variations in this rule in case of certain persons and their position has, therefore, been specifically discussed.

Act of State: An act done by a sovereign power in relation to another State or subjects of another State is an Act of State and cannot be questioned by municipal courts.

Corporations: A corporation being an artificial person cannot be itself liable but its agents and servants can be sued for the wrongful and negligent acts.

Minor: A minor has a right to sue like an adult with the only procedural difference that he cannot himself sue but has to bring an action through his next friend.

Independent and Joint Tortfeasors: When two or more persons commit one tort against the same plaintiff, they may be either independent tortfeasors or joint tortfeasors.

Position in India

India being the hub of leading corporations and pharmaceutical industries have seen in its history a number of such incidents where a single firm, working negligently, had caused harmed to numerous number of people through an single act. May it be the State functionary or a Private corporation, the receiving end of harm is with the poor and the downtrodden section of society.
From the ‘Bhopal Gas Tragedy Case’ of the year 1984 to the recent Railway accidents Cases, the one thing that has been common is deprivation of life of the people, mentally or physically. A large number of people die and if by chance, left alive, they’re mentally tortured and harassed for the claims of their damages by long trials and complicated processes of the court.

The only way out of this bane, is by developing such facilities for quick relief and settlement of the compensation cases and this is possible only through ‘Mediation’. Mediation and Negotiation are a boon to society through which a large number of cases can be easily and quickly settled and people can be compensated without any difficult hardships they face while knocking the doors the courts.

India is in absolute need of developing the scope of Mediation and Negotiation for the settlement cases of Mass torts in order to provide relief to the people of the country from the complicated court processes. There is a common saying, “Justice delayed is Justice denied”, it means that, that justice is of no use which came at a point where the one seeking it has lost all the hope and faith in the judicial system. In some of most common cases in India, it was observed that the compensation seeker, mostly the poor and downtrodden classes, are either denied Justice, or they are provided with such a small amount of relief and that too after such a long time.

Mediation is a voluntary, cooperative process in which an impartial and neutral mediator facilitates disputing parties in reaching a settlement. A mediator does not impose a solution but creates a conducive environment in which disputing parties can resolve all their disputes. It is tried and tested alternative method of dispute resolution. It has proved to be great success in all the major cities of the country with its rapidly widening scope. Mediation is structured process where a neutral person uses specialized communication and negotiation techniques, a settlement process whereby disputing parties arrive at a mutually acceptable agreement.

Mediation comes with numerous benefits such as being quick and responsive, economical in nature with no or very little amount of costs included, provides harmonious settlement and also keeps it confidential and informal, parties too have a say in their disputes. Mediation is far more satisfactory way of resolving disputes as compared to litigation. There is no loss of time and no requirement of financial investment at all.

II. Legislative Acts dealing with Compensation of victims

The Public Liability Insurance Act, 1991

The Public Liability Insurance Act, 1991 aims at providing for public liability insurance for the purpose of providing immediate relief to the persons affected by accident occurring while handling any hazardous substance for matters connected therewith or incidental thereto. Every owner, i.e. a person who has control over handling of any hazardous substance, one or more insurance policies providing for contracts of insurance whereby he is insured against liability to give relief in
case of death or injury to a person, or damage to any property, arising from an accident occurring while handling any hazardous substance. In respect of already established units, insurance policies or policies have to be taken as soon as possible, but within a maximum period of one year from the commencement of the Act. Such liability shall be on the principle of “no fault” liability. “Hazardous substance” means any substance or preparation which, by reason of its chemical or physio-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plants, micro-organism, property or the environment.

Railways Act, 1989

With effect from 1.8.1994 under Section 124-A of the Railways Act, 1989 the railway administration has also become liable to pay compensation for loss of life or injury to bonafide rail passengers who become victims of untoward incidents such as terrorist acts, violent attack, robbery, dacoity, rioting, shoot-out or arson by any persons in or on any train carrying passengers, waiting hall, cloak room, reservation or booking office, platform, any place within the precincts of a railway station or the accidental falling of any passenger from a train carrying passengers. Section 124-A of the Railways Act, 1989 reads as under:- “When in the course of working a railway an untoward incident occurs, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitle a passenger who has been injured or the dependent of a passenger who has been killed to maintain an action and recover damages in respect thereof, the railway administration shall, notwithstanding anything contained in any other law, be liable to pay compensation to such extent as may be prescribed, and to that extent only for loss occasioned by the death of, or injury to, a passenger as a result of such untoward incident.

Provided that no compensation shall be payable under this Section by the railway administration if the passenger dies or suffers injury due to:- (a) suicide or attempted suicide by him; (b) self-inflicted injury; (c) his own criminal act; (d) any act committed by him in a state of intoxication or insanity; (e) any natural cause or disease or medical or surgical treatment unless such treatment becomes necessary due to injury caused by the said untoward incident. Explanation: For the purpose of this section, “passengers” includes (i) a railway servant on duty; and (ii) a person who has purchased a valid ticket for traveling, by a train carrying passengers, on any date or a valid platform ticket and becomes a victim of an untoward incident.

![Casualties in rail accidents](image-url)
III. Cases relating to Mass torts in India

THE BHOPAL GAS LEAK DISASTER CASE [2] : On the night of 2/3 Dec, 1984, a mass disaster, the worst in the recent times, was caused by the leakage of Methyl Isocyanate (MIC) toxic gases from a plant set up by the Union Carbide India Ltd. (UCIL) for the manufacture of pesticides, etc., in Bhopal. UCIL is a subsidiary of Union Carbide Corporation (UCC), a multinational company, registered in U.S.A. The disaster resulted in the death of at least 3,000 persons and serious injuries to a very large number of others (estimated to be over 6 lac), permanently affecting their eyes, respiratory system, and causing scores of other complications, including damage to the fetuses of pregnant women.

The peculiar problem regarding the claim of compensation was involved because of such a large number of victims, most of those belonging to the lower economic strata. On behalf of the victims, a large number of cases were filed in Bhopal, and also in U.S.A against UCC. There was an effort for out of court settlement between the Government of India and the UCC but that failed. The Government of India then proclaimed an Ordinance, and thereafter passed the “The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985”. Section 3 of the Act confers an exclusive right on the Central Government to represent, and act in place of every person who has made a claim, or is entitled to make, a claim arising out of, or connected with, the Bhopal gas leak disaster. Empowered by Section 9 of the Act, the Government of India also framed “The Bhopal Gas Leak Disaster (Registration and Processing of Claims) Scheme, 1985”.

Settlement: After long drawn litigation for over 4 years, there was a settlement between Union of India and Union Carbide Corporation and in terms thereof, the Supreme Court in Union Carbide Corporation v. Union of India, 1990, passed an Order on February, 1989 directing the payment of a sum of 470 million U.S. Dollars or its equivalent nearly Rs. 750 crore as compensation was provided.

In spite of the anxiety of the Supreme Court for providing expeditious relief to the gas victims, there is much to be desired regarding medical care, rehabilitation and compensation. The progress regarding compensation claims is so slow, that it may take 15 years for all the cases to be heard. According to a report 74% of the Bhopal Gas claims heard so far, have been rejected, and moreover, sufficient number of claims court have yet to be set up to deal with claims. The fact that the victims of Bhopal tragedy have not been able to get any substantial relief, rehabilitation, proper medical facilities and compensation for over 8 years after the accident shows that the administrative and legal in India has failed miserably in catering to enormous problems. Even
after so many years after the disaster and also settlement, the state of affairs is extremely unsatisfactory.

M.C.MEHTA V. UNION OF INDIA, 1987 [3]: The Supreme Court was dealing with claims arising out from the leakage of oleum gas on 4th and 6th December, 1985, it was alleged that one advocate practicing in Tis Hazari Court had died and several others were affected by the same. The action was brought through a writ petition under Article 32 of the Constitution by way of public interest litigation. The Supreme Court thus evolved a new rule creating absolute liability for the harm caused by dangerous substances as was hitherto not there. The following statement of Bhagwati, C.J., which laid down the new principle may be noted: “We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results on account of hazardous or inherently dangerous activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which engaged must be conducted with the highest standards of safety and if any harm results on the account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.” The court held that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in the escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in Rylands v. Fletcher.

Prabir Kumar Das vs Unknown on 26 November, 2012
The Indian Railways have decided to pay compensation to all the victims of the train accident that took place in August 2012 at an un-manned level crossing near Sambalpur. In pursuant to an High Court order passed in November 2012, the Railways have decided to pay damage to the next of keen of the deceased and to the injured in the accident. In a letter to the Human Rights activist and lawyer Prabir Kumar Das, a divisional engineer of East Coast Railways has informed that an amount of Rs. 77,44,569 has been sanctioned as compensation. All the victims were farm labourers and were socially and economically disabled. While 13 of the 14 deceased were women, their family members independently could not fight with the Railways to seek damage and therefore a PIL was filed in the High Court by Das.

Compensation : Deciding the case, the High Court had directed the Railways to pay compensation at the rate of Rs. 5 lakh to each of the families of the deceased.
The Railways were also asked to compensate other injured persons by paying damage ranging between Rs. 5,000 and Rs. 25,000 as per the gravity of the injuries from the date of filing of the PIL with six per cent interest per annum.

IV. Mediation

Mediation is the process by which the participants together with the assistance of neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and aim to reach a consensual agreement that will accommodate their needs. It is a confidential, voluntary and participatory process. The parties to the disputes have an opportunity to ventilate their grievances and feelings through the process of mediation and thereafter tailor the solution to their unique circumstances and demands.

The mediator does not impose any solution but creates a favorable environment to enable the parties to resolve their disputes themselves amicably.

The concept of Mediation is ancient and deep rooted in our country. In olden days disputes used to resolve at the community level. Punches used to be called Panch Permeshwar. Now we have grown into a country of 1.3 billion people and with liberalization and globalization, there is tremendous growth. All this has led to explosion of litigation in our country.

Though our judicial system is one of the best in world and highly respected but there is a lot of criticism on account of long delays in the resolution of disputes in the court of law. The litigant is vary of approaching the court for a decision of his dispute. Hence we’ve turned to ADR mechanism.

Mediation is a simple process as compared to litigation which is more complicated, time consuming and money consuming. Mediation is an informal process, without any strict or binding rules of procedure. It enable disputing parties to interact even on a one-to-one basis and is completely voluntary. It is an inexpensive and speedy mode of dispute resolution. Harmonious and quick settlement is guaranteed to parties with no hidden or extra costs. Even the plaintiff is entitled to refund of full court fees as per section 16 of the Court Fees Act, 1870, if the dispute is settled through the process of mediation.

The graph shows the increment in mediation cases over the years. A significant number of cases in the year 2016 can be seen...
The above figures represent the trends of cases referred to mediation and resolved and unresolved disputes over the years.

**Impact of Mediation**: There is no doubt that mediation has had a significant impact on dispute resolution all over the world. In Bangladesh, mediation has been extremely successful in delivering justice to the poorer sections of the society. In America, mediation is the norm of dispute and litigation is the exception. In England, the courts do not award costs if a litigant unreasonably rejects mediation as an alternative dispute resolution mechanism. In India, mediation has shown significant results in dispute settlement in Bengaluru and Chennai, both of which have a very vibrant mediation centers running successfully for a long time. The district courts of Delhi are presently running three mediation centers in different parts of the city and have resolved more than 12,000 cases so far.

Effective mediation requires a comprehensive participation of the claimant, one has to believe in the process and be familiar with the facts and the issues. It’s good to show empathy, build rapport, reinforce neutrality, and do so equally with the parties. One should not be fazed or at least don’t show.

Lawyers also play an important role in the process of mediation. It has become increasingly important as society views mediation as an effective ADR mechanism to litigation. The lawyer is the well known champion of the client, advising on the law and procedure, articulating the clients’ views to others, and above all, pursuing the clients’ best interests at all times. The participation of lawyer is required in mediation in certain ways; Client preparation and participation, Interests and positions, Reality test, Opening statement is important, Use private session effectively and Be part of the problem and part of the solution.

**V. Challenges faced by Mass Torts**

The courts are inundated with large number of cases which turn out to be difficult to manage and are much likely to resolve.

The claims gravitate towards different jurisdictions that claimants believe more suitable. As a result there is disparity
among the judicial system and can’t deliver proper justice.

In case of legitimate case being tied with dubious claims, the problem intensifies. Settlement burden on defendant is increased with the joining of additional claimants.

Plaintiffs try to look for as much money as possible, resulting in difficult for the actual claimants to get the desired relief.

The graph below shows the difference between the Plaintiffs and Plaintiff lawyers.

All the above factors jointly make the settlement of Mass Torts in the judicial system challenging. These turn out to be overwhelming for the judicial system and thus, makes it necessary to discover new arenas of the dispute management system, specifically in mass torts cases.

VI. Alternative methods for dispute settlement

As a legal scholar, I would recommend more stringency in current rules i.e., consolidation, alterations in current rules i.e., class actions, and new compensation mechanisms i.e., claims resolution tribunals, setting up of special courts etc.

Most of these recommendations aim at procedure rather than substantive doctrine and incur more capabilities in judges to achieve global standards of mass tort litigation. It must not deal I the legal and factual complexity of the cases and must address the conflicts of interest or problems related to future plaintiffs. Most importantly, these proposed rules ignore the peculiar risk that comes with the mass tort litigation. In an effort to lessen the grievances and the financial expenditure of the people, the focus on rationalizing what courts are already practicing, but have not achieved the desired goals.

Mediation and negotiation is found to be the best alternative method for the settlement of mass torts in India. Keeping in mind the financial conditions and literacy levels of the most of the population, mediation is the only way. As mostly the claimants are not so educated or economically strong, this would be
boon for the people i.e., Mediation and Negotiation for dispute resolution and also it would open new horizons of the judicial system. An impartial justice delivery system would be assured by this. India is still a developing country and for this to be efficient, an all round contribution is required by the side of People, Administration and the Judiciary.

VII. CONCLUSION
To show the advantages and essence of mediation at present it is considered that the approach of courts sending parties for mandatory mediation may inspire confidence as India is high context society where cultural norms and customs play a vital role in bringing a solution to any dispute and thus only once the parties are send for such mediation they realize its efficacy and uniqueness.

Finally it would be apt to say that Mediation can only be achieved if we understand that this fast paced process of ADR is not an independent procedure but procedure that is connected with the judicial system and that compliments and does not supplant the justice system as a whole. In achieving this level of understanding the litigants must put their faith in court annexed mediation which is a vital element in development and evolution of Mediation as Dispute Resolution system preferred than other systems.

Mediation and Negotiation is emerging out as an alternative dispute resolution mechanism in India, particularly it is a boon in the field of Mass Torts. It has come as a reaction to the complicated and tiring process of litigation, keeping in view the variation in the Indian population i.e., diversity, literacy level, financial aspects etc. People would be highly benefited by this mechanism and it would be easy for more claimants to file for relief for the damages caused to them. As compared to strict nature of the litigation, mediation is a more lenient, informal, inexpensive and a speedy mode of resolution. Disputes are settled through a mediator, a neutral person and even the decision of he mediator is just a suggestion to the parties. A party not satisfied from the decision can at any time knock the doors of court and seek justice. India has seen a whole lot of cases of Mass torts i.e., from the Bhopal Gas tragedy of the year 1984 to the recent Railways Accidents where the most of the suffering parties are the poor and indigent class, for whom, it is a bane to step in the complicated process of litigation. Even the Constitution of India states that “Welfare of the People” is its paramount interest.

Once there is a case of Mass Torts, the Courts are flooded with litigants. This not only decreases the quality of justice but adds unto the already tons of pending cases. Mediation and Negotiation once adopted will be great relief to the judicial system.

So in the light of these circumstances, it is deliberately recommend to adopt Mediation and Negotiation as a normal code of conduct for the increasing Mass Torts cases in India.

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