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EDITORIAL

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

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

With this thought, we bring forth this journal before you.
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RIGHTS FOR ELDERLY IN VULNERABLE CONSTITUENCIES

By Anchal Agarwal & Priyanka Porwal
From JIMS School of Law, GGSIPU

ABSTRACT

Aging comes with many challenges. The loss of independence is one potential part of the process, as are diminished physical ability and age discrimination. Aging process includes biological, emotional, intellectual, social, and spiritual changes. As it has been observed many older adults remain highly self-sufficient. Others require more care. There can be a challenge for elderly adult as they can no longer hold jobs and challenges. Due to cultural misconceptions, older people can be targets of ridicule and stereotypes. The elderly face many challenges in later life, but they do not have to enter old age without dignity as our constitution provides Right to live with dignity under Article 21 to every citizen of India.

Ageism has been at the utmost concern which is reflecting in the workplace, in health care, and in assisted-living facilities, the effects of discrimination can be more severe. It can make older people fear losing a job, feel dismissed by a doctor, or feel a lack of power and control in their daily living situations.

Mistreatment and Abuse of the elderly is also a major social problem. As expected, with the biology of aging, the elderly sometimes become physically frail. This frailty renders them dependent on others for care. It has been seen an adult child caring for an elderly parent while, at the same time, depending on some form of income from that parent, would be considered more likely to perpetrate physical abuse.

All this underlines the importance of the intergenerational relationship. As family structures become looser and more scattered geographically which leads to loneliness and depression and can be severe to their health. In this paper we briefly review all the factors which elderly adult faces in our society and also analyse how these issues can be empowered.

INTRODUCTION

Old age comprises “the later path of life; the period of life after youth and middle age”. The hindrance to society’s fuller understanding of aging is that people rarely understand it until they reach old age themselves. Therefore, myths and assumptions about the elderly and aging are common. Many stereotypes exist surrounding the realities of being an older adult. While individuals often encounter stereotypes associated with race and gender and are thus more likely to think critically about them, many people accept age stereotypes without question. Each culture has a certain set of expectations and assumptions about aging, all of which are part of our socialization.

Gerontology is a field of science that seeks to understand the process of aging and the challenges encountered as seniors grow older. Gerontologists investigate age, aging, and the aged. Gerontologists study what it is like to be an older adult in a society and the
ways that aging affects members of a society.

Today, with most households confined to the nuclear family, attitudes toward the elderly have changed. Among private households in the country, only some of them are multigenerational. It is no longer typical for older relatives to live with their children and grandchildren.

We need to ensure that our older population are recognised as equal contributors to society and are a mainstream part of it, and to recognise that if people are going to live for 20 years in retirement we all have to have things to do.

**PROCESS OF AGING**

As human beings grow older, they go through different phases or stages of life. It is helpful to understand aging in the context of these phases as aging is not simply a physiological process. A **life course** is the period from birth to death, including a sequence of predictable life events such as physical maturation and the succession of age-related roles: child, adolescent, adult, parent, senior, etc. At each point in life, as an individual sheds previous roles and assumes new ones, new institutions or situations are involved, which require both learning and a revised self-definition. Each phase comes with different responsibilities and expectations, which of course vary by individual and culture. The fact that age-related roles and identities vary according to social determinations mean that the process of aging is much more significantly a social phenomenon than a biological phenomenon.

**GROWING POPULATION**

The population of the elderly persons has been increasing over the years. As per the UNESCO estimates, the number of the aged(60+) is likely to 590 million in 2005. The figure will double by 2025. By 2025, the world will have more elderly than young people and cross two billion mark by 2050. In India also, the population of elder persons has increased from nearly 2 crores in 1951 to 7.2 crores in 2001. In other words about 8% of the total population is above 60 years. The figure will cross 18% mark by 2025.

**CHALLENGES FACING THE ELDERLY**

Aging comes with many challenges. The loss of independence is one potential part of the process, as are diminished physical ability and age discrimination. The term **senescence** refers to the aging process, including biological, emotional, intellectual, social, and spiritual changes. **Ageism** is discrimination based on age. **Dr. Robert Butler** coined the term in 1968, noting that ageism exists in all cultures. Ageist attitudes and biases based on stereotypes reduce elderly people to inferior or limited positions.

Changes happened not only in the workplace but also at home. In agrarian societies, a married couple cared for their aging parents. The oldest members of the family contributed to the household by doing chores, cooking, and helping with child care. As economies shifted from agrarian to industrial, younger generations moved to cities to work in factories. The elderly began to be seen as an expensive burden. They did
not have the strength and stamina to work outside the home. What began during industrialization, a trend toward older people living apart from their grown children, has become commonplace.

Mistreatment and Abuse

Mistreatment and abuse of the elderly is a major social problem. As expected, with the biology of aging, the elderly sometimes become physically frail. This frailty renders them dependent on others for care sometimes for small needs like household tasks, and sometimes for assistance with basic functions like eating and toileting. Unlike a child, who also is dependent on another for care, an elder is an adult with a lifetime of experience, knowledge, and opinions, a more fully developed person. This makes the care providing situation more complex.

Dependency

Dependency is the main concern for elderly people, as they are dependent on youth. It is basically about how our public policy and resourcing seek to preserve both dignity and capacity among those who may be increasingly physically challenged, but who remain citizens capable of contributing vital things to the social fabric.

Delivering Dignity

Our constitution of India provides right to life and personal liberty under Article 21 which also gives Right to live with dignity and security and should be free from exploitation and mental and physical abuse. Dignified life should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self help. Older person should have the opportunity to work or to have access to other income generating opportunities.

Intergenerational relationship

As family structures become looser and more scattered geographically, it is vital that there be regular opportunities for interaction between younger and older people, not least between children and older citizens, whether through schools arranging visiting and befriending or through formal and informal oral history projects, which have been a very significant aspect of the life of some schools in creating and developing liaison with older member of the community.

EFFORTS LAID DOWN BY THE GOVERNMENT OF INDIA

1. Constitutional Protection

Article 41: Right to work, to education and to public assistance in certain cases-The State shall, within the limits of economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

Article 46: Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections-The State shall promote with special care the educational and economic interests of the weaker sections of the people and shall protect them from social injustice and all forms of exploitation.

However, these provision are included in the Chapter IV of Indian Constitution i.e., Directive Principles of the Indian

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Constitution. The Directive Principles, as stated in Article 37, are not enforceable by any court of law. But Directive Principles impose positive obligations on the state, i.e., what it should do. The Directive Principles have been declared to be fundamental in the governance of the country and the state has been placed under an obligation to apply them in making laws. The courts however cannot enforce a Directive Principle as it does not create any justiciable right in favour of any individual. It is most unfortunate that state has not made even a single Act which which are directly related to the elderly persons.

2. Legal Protections: Under Personal Laws:
The moral duty to maintain parents is recognized by all people. However, so far as law is concerned, the position and extent of such liability varies from community to community.

I. Hindu Law:
Amongst the Hindus, the obligation of sons to maintain their aged parents, who were not able to maintain themselves out of their own earning and property, was recognized even in early texts. And this obligation was not dependent upon, or in any way qualified, by a reference to the possession of family property. It was a personal legal obligation enforceable by the sovereign or the state. The statutory provision for maintenance of parents under Hindu personal law is contained in Section 20 of the Hindu Adoption and Maintenance Act, 1956. This Act is the first personal law statute in India, which imposes an obligation on the children to maintain their parents. As is evident from the wording of the section, the obligation to maintain parents is not confined to sons only, and daughters also have an equal duty towards parents. It is important to note that only those parents who are financially unable to maintain themselves from any source, are entitled to seek maintenance under this Act.

II. Muslim Law:
Children have a duty to maintain their aged parents even under the Muslim law. According to Mulla:

a) Children in easy circumstances are bound to maintain their poor parents, although the latter may be able to earn something for themselves.

b) A son though in strained circumstances is bound to maintain his mother, if the mother is poor, though she may not be infirm.

c) A son, who though poor, is earning something, is bound to support his father who earns nothing.

According to Tyabji, parents and grandparents in indigent circumstances are entitled, under Hanafi law, to maintenance from their children and grandchildren who have the means, even if they are able to earn their livelihood. Both sons and daughters have a duty to maintain their parents under the Muslim law. The obligation, however, is dependent on their having the means to do so.

IV. Christian And Parsi Law:
The Christians and Parsis have no personal laws providing for maintenance for the parents. Parents who wish to seek maintenance have to apply under provisions of the Criminal Procedure Code.

Under The Code of Criminal Procedure:
Prior to 1973, there was no provision for maintenance of parents under the code. The Law Commission, however, was not in favour of making such provision. According to its report: The Cr. PC is not the proper place for such a provision. There will be considerably difficulty in the amount of maintenance awarded to parents apportioning amongst the children in a summary proceeding of this type. It is desirable to leave this matter for adjudication by civil courts. The provision, however, was introduced for the first time in Sec. 125 of the Code of Criminal Procedure in 1973. It is also essential that the parent establishes that the other party has sufficient means and has neglected or refused to maintain his, i.e., the parent, who is unable to maintain himself. It is important to note that Cr. PC 1973, is a secular law and governs persons belonging to all religions and communities. Daughters, including married daughters, also have a duty to maintain their parents.

RECOMMENDATION

- For future generations of the elderly, we must reduce exposure to experiences that harm human development. It is equally important to enhance individual capabilities and throughout life. To achieve this, a human development, people-empowering approach is necessary that emphasizes lifelong health, education and training. A greater emphasis on active ageing policy discourse will empower people to contribute to their own development and that of their society.

- Countries need to combine comprehensive investment in building personal resilience with the provision of age-friendly enabling environments that boost community resilience. Suggestions for improving physical, social and institutional infrastructure are numerous, but lifelong learning, access to information and communication technology, social connectedness, physical safety, civic freedom and access to key public services such as transport are critical. The strengthening of social protection is required, but must be undertaken with the two interventions mentioned above. Recently, many countries have placed a strong emphasis on basic non-contributory social pensions, which have helped attain income security for older people. One other point emphasized both here and in the Global Age Watch Index 2013 report is that country-level economic development does not automatically improve the lives of older citizens. Instead, specific public policy priorities are required for promoting the quality of life and well-being of older people: Norway and Sweden for instance progressively invested in education, health care, employment and training, and social security throughout the life course long before they became “high income countries”.

- Likewise, the introduction of good practices in middle-income countries such as Mauritius and Sri Lanka is relevant to countries at a similar stage of
economic development and to emerging economies. In Sri Lanka, long-term investments in education and health have generated a cumulative lifetime advantage for many older people, offering lessons to other South Asian countries such as India and Pakistan. In Mauritius, on the other hand, nearly all the over 60s receive a non-contributory pension, which offers lessons for Africa in providing income security for older people.

Schemes/ Provisions made by the Government to improve the condition of the aged persons

Ministry of Social Welfare and Empowerment

Centre seeks to response to the changing demographics, keeping in mind the changed profile of the elderly the government had started some of its plans. “The idea of old age homes as aashrams was not acceptable and so we are now opening a large number of day care centres for the elderly.” Similarly apart from major health schemes for them, the Rashtriya Vayoshri Yojana has been launched to assist senior citizens for age related ailments and to provide them dentures, hearing aids and spectacles.

Government of India

Old age pension is provided under the Pradhan Mantri Vaya Vandana Yojana(PMVVY) which is a component of Varishtha Pension Bima Yojana 2003 and Varishtha Pension Bima Yojana 2014, incorporated by Life Insurance Corporation of India. Under PMVVY, central assistance of minimum Rs.1000/- per month and maximum of Rs.5000/- per month is provided to persons above 60 years on payment of minimum Rs.1,50,000 and maximum Rs.7,50,000.

Ministry of Health and Family Welfare

Keeping in view the recommendations made in the National Policy on Older Persons, 1999 as well as the State’s obligations under the Maintenance and Welfare of Parents and Senior Citizens, 2007, the Ministry of Health and Family Welfare had launched the National Programme for Health Care of the Elderly (NPHCE) during the 11th Plan period to address various health related problems of elderly people. The basic aim of NPHCE is to provide dedicated health care facilities to the elderly people through State Public health delivery system at primary, secondary and tertiary levels, including outreach services.

Major components of this programme, launched in 2010-11, are:

- Community based Primary Healthcare approach;
- Strengthening of health services for senior citizens at District Hospitals/ CHC/ PHC/ Sub-Centres;
- Dedicated facilities at 100 District Hospitals with 10 bedded wards for the elderly;
- Strengthening of 8 Regional Medical Institutions to provide dedicated tertiary level Medical Care for the elderly, with 30 bedded wards and Introduction of PG courses in Geriatric Medicines in the these Institutions and In-Service training of health personnel at all level.
As on date, a total of 104 districts of 24 States/UTs have been covered under the Programme.

Ministry of Finance, Department of Revenue

Insurance Regulatory Development Authority (IRDA) includes

- Allowing entry into health insurance schemes till 65 years of age
- Income tax exemption for senior citizen of 60 years and above upto Rs.3 lakhs pa
- Income tax exemption for senior citizen of 80 years and above upto Rs.5 lakhs pa
- Deduction of Rs. 50,000 under Section 80D is allowed to an individual who pays medical insurance premium for his/her parents who is a senior citizen.
- Senior citizen over the age of 80 years with total annual income of more than Rs.5 lakhs exempt from the e filing of ITR.

Ministry of Railway

The following facilities have been extended by Ministry of Railways from time to time to senior citizens:

- As per rules, male Senior Citizens of minimum 60 years and lady Senior Citizens of minimum 58 years are granted concession in the basic fares of all classes of Mail/Express/Rajdhani/Shatabdi/Jan Shatabdi/Duronto group of trains. The element of concession is 40% for men and 50% for women.
- In the computerised Passenger Reservation System (PRS), there is a provision to allot lower berths to Senior Citizens, Female passengers of 45 years and above automatically, even if no choice is given, subject to availability of accommodation at the time of booking.
- In all trains having reserved accommodation, a combined quota of two lower births per coach has been earmarked in sleeper, A/C 3 tier and A/C 2 tier classes for the Senior Citizens, Female passengers aged 45 years above and pregnant women when travelling alone.
- Instructions exist for provisions of wheel chairs at stations. This facility is provided, duly escorted by coolies on payment as per present practice. Moreover, Zonal Railways have also been advised to provide free of cost ‘Battery Operated Vehicles for Disabled and Old Aged passengers’ at Railway Stations.

Ministry of Home Affairs:

The Ministry of Home Affairs has issued two detailed advisories dated 27-3-2008 and 30-8-2013 to all States Governments/UTs advising them to take immediate measures to ensure safety and security and for elimination of all forms of neglect, abuse and violence against old persons through initiatives such as identification of senior citizens, sensitization of police personnel regarding safety, security of older persons, regular visit of the beat staff; setting up of toll free senior citizen helpline; setting up of senior citizen security cell; verification of domestic helps, drivers etc.

Ministry of Civil Aviation:

In order to facilitate the passengers, particularly senior citizens, expectant mothers, passengers with disability, first time travellers etc. all the stakeholders have
been instructed to ensure that the following requirements are complied:

- Airline /airport operator shall ensure provision of automated buggies free of charge for all senior citizens, in the terminal building to facilitate their access to boarding gates located beyond reasonable walking distance at all airports having annual aircraft movements of 50,000 or more. This facility may be extended to other needy passengers on demand basis free of charge.
- Further, Air India offers 50% discount to senior citizens on the highest economy class Basic Fare. The discount is offered to those who have completed 63 years of age on the date of commencement of journey.
- Senior citizens can also avail multi-level fares offered by Air India on each sector for travel on domestic sectors, starting from a low level advance purchase fares which facilitate early selling to the highest one.

MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS ACT, 2007

This Act provides inexpensive and speedy procedure to claim monthly maintenance for parents and senior citizen. This Act casts obligation on children to maintain their parents, grandparents and also the relative of the senior citizen. The main attraction of this Act is there are provisions to protect the life and property of such persons. This Act also provide setting of old age homes for providing maintenance to the indigent senior citizen and parents. This Act extends to the whole of India except Jammu and Kashmir state.

Criticism

Though this Acts provides provisions for a better position for the parents and elderly, there are some criticism also. It is alleged that this Act is not easy to implement, there is no obligation casts on the state government to establish old age homes, there is no provision for old age pension also.

CONCLUSION

It may be conclude by saying that the problem of the elderly must be addressed to urgently and with utmost care. There is urgent need to amend the Constitution for the special provision to protection of aged person and bring it in the periphery of fundamental right. With the degeneration of joint family system, dislocation of familiar bonds and loss of respect for the aged person, the family in modern times should not be thought to be a secure place for them. Thus, it should be the Constitutional duty of the State to make an Act for the welfare and extra protection of the senior citizen including palliative care.

REFERENCES

Websites
- Chapter-13 Ageing and the Elderly https://opentextbc.ca/introductiontosociology/chapter/chapter13-aging-and-the-elderly/
- Older people: Their Place and Contribution in Society https://www.theyworkforyou.com/lords/?id=2012-12-14a.1259.6
- Ministry of Health and Family Welfare https://mohfw.gov.in/node/575
- Senior Citizen Pension Yojana Scheme https://www.financialexpress.com/money/senior-citizen-pension-scheme-in-india

www.supremoamicus.org
India need to start Addressing Issues Concerning Its Growth Elderly Population
https://thewire.in/149627/elderly-population-demographics-india/

World Health Organisation
http://www.who.int/ageing/en/

Ways in Reducing Vulnerability of Elderly
https://content/changing-way-we-age-reducing-vulnerability-and-promoting-resilience-old-age

A framework for understanding old-age vulnerabilities
https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3672844/

Rights of Senior Citizen

Maintenance of Elderly People
www.advocatekhoj.com/.../bareacts/maintenance

Ministry of Social Justice and Empowerment
www.socialjustice.nic.in/

Senior Citizen- Income Tax Department
www.incometaxindia.gov.in/Pages/I-am/senior-citizen

Ministry of Railway-the hindu
www.thehindu.com/news/national/railway-ministry-set-to.../article19823412.ece

Ministry of Home Affairs

Senior Citizen-Government of India
https://www.india.gov.in/people-groups/life-cycle/senior-citizens

Ministry of Social Welfare and Justice
https://www.india.gov.in/integrated-programme-older-persons-ministry-social-justice

BOOKS REFERRED
D.P. SAXENA, Sociology of Aging

L.O. RANDAL, Aging and the Elderly
PETER L. BERGER AND THOMAS LUCKMANN, The Social Construction of Reality
TULSI PATEL, Family in India: Structure and Practice
M N SRINIVAS, Social Change in Modern India

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PUBLIC INTEREST LITIGATION

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ABSTRACT

PIL has a fundamental part in the common equity framework in that it could accomplish those destinations which could barely be accomplished through ordinary private case. PIL, for example, offers a step to equity to distraught segments of society, gives a road to implement diffused or aggregate rights and empowers common society to spread mindfulness about human rights as well as enables them to take an interest in government basic leadership. PIL could likewise add to great administration by keeping the legislature responsible. The concept of PIL has emerged in USA but spread through the world. PIL has been invaluable innovative Judicial remedy, but now in this 21 st century the significance PIL has been undermined by filling fictitious, baseless, vague PIL which is prevented in the cost & interest of Justice.

This article will appear, with reference to the Indian experience, that PIL could accomplish these vital targets. In any case, the Indian PIL encounter likewise demonstrates to us that it is basic to guarantee that PIL does not turn into a veneer to satisfy private interests, settle political scores or increase simple attention. Legal in a majority rules system ought to likewise not utilize PIL as a gadget to run the nation on an everyday premise or enter the honest to goodness space of the official and assembly. The test for states, in this manner, is to strike an adjust in permitting real PIL cases and debilitating silly ones. One approach to accomplish this adjust could be to work in financial (dis)incentives in PIL and furthermore limit it fundamentally to those situations where access to equity is undermined by some sort of incapacity.

INTRODUCTION

In Indian law, Public Interest Litigation means prosecution of the public interest. It is prosecution in an official courtroom, not by the bothered party but rather by the court itself or by some other private gathering. PIL, in simple word, implies, prosecution filed in a courtroom, for the protection of “Public Interest”, for example, Pollution, Terrorism, Road Safety, Constructional hazards and so on. Any issue where the interest of open everywhere is influenced can be reviewed by recording PIL in official courtroom. PIL isn’t vital, for the activity of the court’s locale, that the individual who is the casualty of the infringement of his or her privilege ought to actually approach the court. PIL is the power given to the people in general by courts through judicial activism however, the individual recording the appeal to must demonstrate as per the general inclination of the court that the request of is being petitioned for an public interest and not similarly as a unimportant prosecution by a busy body. Such cases may happen when the casualty does not have the vital assets to initiate case or his flexibility to move court has been smothered or infringed upon. The court would itself be able to take comprehension
of the issue and continue suomotu or cases can initiate on the appeal to of any public-spirited person. PIL is not defined in any statute or any act. It has been translated by judges to think about the aim of public. In spite of the fact that, the fundamental and just concentration of such suit is public interest.

ORIGIN & DEVELOPMENT OF PIL

The term “PIL” originated in US in the mid-1980s. Since the 19th century, various movements in that country had contributed to public interest law, which was part of legal aid movement. The first legal aid office was built up in New York in 1876. In the 1960s the PIL movement began to receive financial support from the office of Economic Opportunity. This supported lawyers and public spirited persons to take up cases of the underprivileged and fight against dangers to environment and public health and misuse of consumers and the weaker sections.

The seeds of the idea of public interest suit were at first sown in India by Krishna Iyer J., in 1976 in Mumbai Kamagar Sabha versus Abdul Thai (AIR 1976 SC 1455; 1976 (3) SCC 832) and was started in Akhil I3/taratiyaSos/trouble Karnu: hariSangh (Railvaiy versus Union of India), wherein an unregistered relationship of specialists was allowed to initiate a writ request of under Art.32 of the constitution for the redressal of normal grievances. Krishna Iyer J., articulated the explanations behind progression of the lead of Locus Standi in Fertilizer Corporation Kamgar versus Union of India (AIR 1981 SC 149; 1981 (2) SCR 52) and the perfect of PIL was bloomed in S.F. Gupta and others versus Union of India, (AIR 1982 SC 149).

HISTORY OF PIL IN INDIA

PIL had begun towards the ends of 1970s and came into full bloom in 1980s. Justice V.R. Krishnalyer and Justice PM. Bhagwati, honorable Judges of Supreme Court of India delivered landmark judgements which open up new vistas in PIL.

According to Justice V.R. Krishna Iyer, PIL is a process, of obtaining justice for the people, of voicing people’s grievances through the legal process. The aim of PIL is to give the common people of this country access to the courts to obtain legal redress.

MERITS OF PIL

1. In PIL careful nationals of the nation can locate a modest legitimate cure on the grounds that there is just an nominal settled court expense associated with this.
2. Further, through the supposed PIL, the prosecutors can concentrate consideration on and accomplish comes about relating to bigger open issues, particularly in the fields of human rights, consumer welfare and condition.

DEMERITS OF PIL

1. The certified cause and instances of public interest have in retreated to the foundation and unreliable PIL activists everywhere throughout the nation have begun to play a major yet not a productive part in the field of case.
Generally, a significant number of the PIL activists in the nation have discovered the PIL as a convenient instrument of badgering since silly cases could recorded without venture of substantial court expenses as required in private common prosecution and arrangements could then be consulted with the casualties of stay orders got in the supposed PILs.

2 The framers of Indian Constitution did not join a strict principle of partition of forces yet imagined an arrangement of governing rules. Arrangement making and usage of approach are routinely seeing as the select area of the official and the legislature. Vishaka vs State of Rajasthan which was a PIL concerning inappropriate behavior of ladies at work place. The court announced that till the governing body established a law steady with the tradition on the Elimination of All Forms of Discrimination Against Women which India was a signatory, the rules set out by the court would be enforceable.

3 The adaptability of technique that is a character of PIL has offered to another arrangement of issues. It gives a chance to inverse gatherings to learn the exact claim and react particular issues.

4 The believability of PIL process is presently unfavorably influenced by the feedback that the legal is exceeding the limits and that it can’t administer the compelling execution of its requests. It has likewise been progressively felt that PIL is being abused by the general population fomenting for private grievance in the get of public interest and looking for reputation as opposed to upholding public reason.

**WHO CAN FILE A PIL**

In normal cases, it is seen that abused gathering i.e. the victim, who is influenced needs to record his case in an official courtroom. That individual ought to have an enthusiasm for the debate. In any case, in documenting PIL there is no such condition. Any individual can record a PIL. The main condition being that the same must be documented Public Interest. PIL is case presented in an official courtroom, not by the oppressed party but rather by the court itself or by some other private gathering. It isn’t fundamental, for the activity court’s locale, that the individual who is the casualty of the infringement of his or her privilege ought to personally approach the court. PIL is the power given to the general population by courts to ensure interest of public at large.

Such cases may happen when the victim does not have the fundamental assets to initiate case or his opportunity to move court has been smothered or infringed upon. The court would itself be able to take insight of the issue and go before suomotu or cases can initiate on the appeal to of any public-spirited person.

**PROCEDURE TO FILE A PIL IN THE HIGH COURT**

Any public spirited native can move/approach the court for the general population cause (in light of a legitimate concern for people in general or open welfare) by documenting an appeal:
1. In Supreme Court under Art.32 of the Constitution;
2. In High Court under Art.226 of the Constitution; and
3. In the Court of Magistrate under Sec.133, Cr. P.C.

With the view to direct the mishandle of PIL the apex court it has confined certain rules (to administer the administration and transfer of PILs). The court must be careful so as to see that the applicant who approaches it is acting real and not for individual increase, private benefit or political or other angled contemplations. The court ought not enable its procedure to be manhandled by legislators and others to postpone genuine managerial activity or to increase political targets.

At present, the court can regard a letter as a writ appeal to and make a move upon it. Be that as it may, it isn't each letter which might be dealt with as a writ request of by the court. The court would be supported in regarding the letter as a writ request of just in the accompanying cases-

(i) It is just where the letter is tended to by an abused individual or
(ii) An open lively individual or
(iii) A social activity aggregate for authorization of the sacred or the legitimate privileges of a man in care or of a class or gathering of people who by reason of neediness, inability or socially or financially impeded position think that its hard to approach the court for review.

Despite the fact that it is especially basic to check the abuse and manhandle of PIL, any move by the legislature to control the PIL brings about far reaching challenges from the individuals who don't know about its mishandle and compare any type of direction with disintegration of their crucial rights. Under these conditions the Supreme Court of India is required to venture in by fusing safe watchmen gave by the Civil Procedure Code in issues of stay orders/orders in the field of PIL.

PIL is an instrument in hands of public interest residents who have a good motive behind the PIL and to keep it from turning into a weapon in the hands of those prosecutors who need to either abuse this idea for either business pick up or exposure the peak court has on numerous occasions set down different rules and by forcing costs on the trivial open intrigue suit the courts have just fortified their position.

WE PRESENT FIVE OF MANY MILESTONES OF PIL REVOLUTION

1) SheelaBarse vs State of Maharashtra (February 15, 1983):
This was a historic judgment that dealt with the issue of custodial violence against women in prisons. This resulted in an order facilitating separate police lockups for women convicts in order to shield them from further trauma and brutality.

(Photo: Reuters)

2) MC Mehta vs Union of India (Pollution in the Ganga)
This judgement delivered on January 12, 1988, lashed out at civic authorities for
allowing untreated sewage from Kanpur’s tanneries making its way into the Ganges.

A taxi driver sleeps at a cabstand in New Delhi, March 29, 2001. (Photo: Reuters)
It was the beginning of green litigation in India. In 1996, environmentalist M C Mehta’s PIL, (M C Mehta vs Union of India on December 30, 1996) resulted in stringent orders against Mathura refineries for polluting the ambient air around the Taj Mahal.
Yet another PIL by M C Mehta resulted in the CNG verdict (July 28, 1998) that forced the vehicles in the capital to switch to a different fuel in order to keep a check on vehicular pollution.

(Photo: Reuters, April 23, 2001)

3) **When the court kept its distance from policy decisions:**
The disinvestment season initiated by the NDA-1 government to sell 51% stake in BALCO (Bharat Aluminium Company Limited) was challenged by the Supreme Court in 2001.
Quite significantly the Supreme Court in its decision on December 10, 2001 said, *PIL is not a pill or a panacea for all wrongs. There have been, in recent times, increasingly instances of abuse of PIL. Therefore, there is a need to re-emphasise the parameters within which PIL can be resorted to by a Petitioner and entertained by the Court.*

Executive vs Judiciary
The judges also drew a line distinguishing between the domain of the executive and the judiciary in a bid to avoid the clash between the two. Thus, the judgement read:

*Public Interest Litigation was not meant to be a weapon to challenge the financial or economic decisions which are taken by the Government in exercise of their administrative power.*

( Photo: Reuters, April 2, 2011)

4) **The 2G Judgement**
The judiciary chose not to impinge on the authority of the government and its policy decisions in 2001, but a decade later the Supreme Court chose to step into what was described as one of the biggest scams in post-independent India.
On February 2, 2012, the top court criticised a policy decision - one taken to use ‘first-come-first-served’ as the basis to allocate natural resources. The court’s advice was to use auctions for allocations.
This was the result of separate PILs by Subramanian Swamy and Prashant Bhushan and it embarrassed the UPA government. Though some saw it through the prism of ‘judicial overreach’, that didn’t stop the court from scrapping 122 2G licences.

( Photo: Reuters, May 14, 2006)

5) **Indira Sawhney judgment**
On November 16, 1992, the Supreme Court responded to a PIL filed by lawyer Indira Sawhney and introduced 27% reservation for backward classes in posts and services under the Government of India.
Citing the age old Varna system, the court justified its reason for reservation. The court also spelled out that such a system should not exceed a tenure of ten years once a particular section is adequately represented in society.
A question often raised in this context is - has this constitutional vision been accomplished?

1. Former Delhi High Court Judge Justice RS Sodhi tells The Quint:
   PilJs have been able to pick up the grievances of people as a whole, with the objective of en masse improvement of a system. When individuals could not come to court, the courts became obliged to look into a situation as was prevalent and bring improvement in system.
   – Former Delhi High Court Judge, Justice RS Sodhi

2. Courts have not hesitated in charting unknown territory, but the fast-increasing number of PILs have increased the load on the judiciary. Responding to that, Justice RS Sodhi says:
   There are always two sides to a coin. There will be people who will try and exploit [PILs], whether courts allows themselves to be misused... that is where the wisdom of the courts lie.
   – Former Delhi High Court Judge, Justice RS Sodhi

3. The Court has to innovate new methods and strategies to provide access to justice to large masses of people who are denied basic human rights, to whom freedom and liberty have no meaning.
   — Justice PN Bhagwati (SP Gupta vs Union of India, 1981)

CONCLUSION

Public Interest Litigants, everywhere throughout the nation, have not taken generously to such court choices. They do expect that this will sound the demise ring of the general population inviting idea of PIL. Be that as it may, genuine disputants of India have nothing to fear. Just those PIL activists who want to document paltry protestations should pay compensations to then opposite parties. This really an appreciated move in light of the fact that nobody in the nation can deny that even PIL activists ought to be capable and responsible. In any capacity, PIL now requires a total reconsider and rebuilding. Anyway, abuse and mishandle of PIL can just influence it to stale and insufficient. Since it is a remarkable cure accessible at a less expensive cost to all residents of the nation, it should not to be utilized by all defendants as a substitute for common ones or as a way document negligible objections.

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CUSTOM VS. CONSTITUTION- WHY NO TO WOMEN TO ENTER INTO RELIGIOUS PLACES?

By Akanksha Gupta & Dherya Agarwal
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Abstract
While constitutional law is expected to be an area of clarity and certainty. Our Society is still facing some bottlenecks which are brought up by Customs. Customs in India are prevailing since decades and one can get amazed by the behavior of ardent cohorts of these customs who followed them sightlessly. In some famous temples of India, women are debarred from entering the temples due to some very conservative reasons like biological cycle and deity is celibate. While discussing about this topic in legal perspective, it is appropriate, to talk about the constitutional validity of this custom and the stand of judiciary in matters relating to women rights and temple entry. In the recent judgment, the Maharashtra High Court allowed women in Haji Ali Dargah of Mumbai. It has turned into a symbol of hope to similar demands across other temples throughout the country. Keeping these backward practices as the central issue, this paper seeks to do make a case against such restrictions. It tries to accentuate the need for state intervention to cure the injustice. It brings forth the ideals of gender justice and equality intrinsic in the constitution. It focuses on entangling the perplexity caused due to the conflict of interests of two different groups. The paper tries to counter the appearances given to impose such restrictions on women inside temples. Moreover, the imposition of certain fixed age limits on women as to when they are not permitted to enter temples, by some temple trusts have certainly, fixed the patriarchal norms over women devotees. Men can worship a female divinity, who signifies the value of women power, but they cannot regard the respect of a woman devotee. The write-up culminates to a conclusion that groups that impose such restriction has no proper justification for it.

Introduction
India is a land loaded with customs, traditions, rituals and various religious beliefs. Earlier when there was no rule book like Constitution of India, people were guided by these religious rules only. But now we have law of land i.e. constitution but still this system persists in this 21st century. People keep these religious rules at par with the rules written in constitution. Women have long been discriminated against on various fronts and affections with a sanction assumed to be derived from religion. The dread of their sexuality is common to all religions across the country in some shape or the other and exhibits itself in different religious practices. They were banished from holding key positions in temples, they were not permitted inside the inner sanctum

1Letty Cottin Pogrebin, Deborah, Golda, and Me: Being Female and Jewish in America
of holy places and purification ceremonies were performed to purge the divinity of a woman’s touch. Constitution takes everything under its ambit to rule upon but demonstrate liberty, when question Comes to religion and gave the authority to religious denomination to decide on religious faith, tradition and custom. But when liberty given without confining its range people start misusing it and the same is evident in present case.

Religious perspective -
What religious scriptures says about women entry in temple?
In the religious text named “Hadith” of Muslim religion, Prophet said It is better for women to pray in the house, in her inner room, rather than going to Mosque, this is said not because of impurity of women but for facilitating their household work and to save their time, but people misinterpret this saying and start using it as restriction and when we refer Quran ‘No verses contained’ regarding restriction on women for temple access. Similarly four Vedas never stated anywhere that a woman’s body is not pure or that she can’t do religious ceremony during menstruation. Restricting women from entering temples and castigating them as impure is squarely against the teachings of the Vedas. This notion is believed to have been begun in the ancient period of civilization where the patriarchal social structure was just taking shape. It was the beginning of male dominance and the consequent subjugation of women through these practices. So, there is no truth in banning them in the name of religion.

Constitutional perspective -
Conflict between rights of religious denomination and women - whether Ban on entry of women is an essential practice of religion?
Our constitution keep individual rights and group rights at par with each other. In terms of religion rights where Article 25 provides for freedom of religion to an individual, in the same Part Article 26 gives shape to the freedom of religious denomination as a Group right. Under Article 26(b), every religious section has right to manage its own affairs in “matter of religion”. Our apex court has interpreted this ‘matter of religion’ as essential and integral practice of religion and laid down the test in Lakshmindra case to determine which religious practices can be termed as an essential religious practices. Essentiality of any practice is determined by their impact on the nature and essence of religion means practices which are fundamental to follow religious belief are essential. So in order to determine the validity of ban on entry of women in temples, in mosque or in church we have to refer their different religious texts. Like Hindu religious text talks about obligation on men and women to perform Agnihotra Yagna (Daily Havan) which is considered as Mahayagna. Here word ‘Daily’ clearly implied that women can perform it during

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3 Ibid 2
4 Part III of The Constitution of India (fundamental rights)
5 Article 26(b) of Indian constitution
6 The Commissioner, Hindu vs Sri Lakshmindra Thirtha Swamiar, 1954 AIR 28

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their menstrual days also. So when Vedas which is considered as highest source of knowledge do not consider them impure, who are the men to label them as impure. In case of Dargah it is already decided in decision of Bombay high court that no verses of Quaran talks about this sort of restriction. This is just a religion independent custom or tradition which found no reference in any religious text books. It is a custom shaped by our trustees of temples who are trying to manage freedom of other persons on the name of managing religious affair.

This monopolization of religious denomination to manage its own affairs in matter of religion is limited to the essential religious practices, henceforth our followers of this custom cannot remain under the veil of 26(b) to continue this restriction and should not use the places of worship as a sword for discrimination. So, the claim of right of religious denomination in itself is faulty as a result of which women rights will prevail.

**Custom inconsistent with fundamental right be void under article 13**

Any custom or usage which is in force in India, which is inconsistent with the fundamental rights, that custom or usage is void.  

The customs like sati system, devdasi system, polygamy etc. have been abolished because of this clause in article 13 of our constitution.

Court also stated in N. Adithyan v. Travancore Devaswom Board & Ors case that "Any custom or usage irrespective of even any proof of their existence in pre constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament”.

This custom should be abolished as it violate article 14 as this question of entry is a question of inequality, article 15(1) as age classification in essence is an discrimination on the basis of sex and the biological factor, which is a characteristic of the particular sex.

It is not just about sabrimala its about all the temples like haji ali dargah, shani singapur temple in Maharashta, Pushkar in Rajasthan etc. which restrict women on one ground or the other, which is apparent violation of their right to pray and right to live with dignity under article 21 and freedom to religion under article 25. Article 25 says that ‘all persons are equally entitled…’ This means all ‘person’ irrespective of their gender, irrespective of their being biologically different, irrespective of them being able to produce, irrespective of them being a woman or a man have a right to practice religion.

**Traditional perspective-**

*It is not even a valid custom so how could it turn into law*

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7Parkhe, M.S. Agnihotra, The Vedic Solution For Present-day Problems, Vaidika 1 Saúœodhan Maõçala, Poona, 1982, P 50.

8Article 13 Constitution of India (MP Jain 7) (2016)

9N. Adithyan v. Travancore Devaswom Board & Ors. 2002 8 SCC 106

10The State Of Bombay vs Narasu Appa Mali AIR 1952 Bom 84
when we saw this so called discriminatory custom through the lens of validity of customs it is not qualified to pass that test. Custom do not arise from the conflict in interests. In order to be valid, a custom must be reasonable, should not be opposed to morality, public policy, express enactments of legislature and it must have an antiquity and certainty feature. A custom is unreasonable if it is injurious to the masses and detrimental to the commonwealth. It is reported that the queen of Travancore have visited the Sabrimala temple in 1940 when she might have been just 45 years old\textsuperscript{11} then how could this custom be 1500 years old or of ancient times. In dargah also this restriction is not from the past but imposed just 6 years ago. This custom is clearly go up against constitutional morality by being not in conformity with the general principles of justice, equity and good conscience.

Yes it is true that clause 2(b) of article 25 provides power to state to reform such kind of derogatory practices But here in case of Sabrimala temple of Kerala in exercising this rule-making power by legislating Kerala Hindu places of public worship (authorisation of entry) Act, 1956 for the objective of facilitating temple entry to all classes and sections of Hindus in temple without discrimination end up with exactly the opposite goal. Rule 3(b) of Kerala Hindu places of public worship (authorisation of entry) rules, 1956 which turns this custom into law is blunder on the part of state. if this rule not abolished in time, it have the potential to gulp down the whole edifice of the social reform legislation itself.

Social perspective –
Fault is of menstruation but punishment given to victim of this biological process
Every girl had a thought during her initial phase of puberty that why they are bestowed with this curse of menstruation. Yes she feels depressed, discriminated when she bombarded with huge no. of restrictions on those 3 days which tagged as impure days by our obnoxious society. Among those so many restrictions; one of them is not to enter religious places. When the question comes up why she is not allowed, she never got a satisfactory answer. The two reasons which are widely used by our society to keep their irrational custom continue are menstruation or the celibacy of deity. About menstruation, I want to ask do you consider Devi Khamakhaya of Assam and Devi Bhagwathi of Chengannur(Kerala) also impure who are believed to menstruate. If yes, then why to worship her and if no, that means you’re no longer left with this argument to prohibit women. Ayurveda considered it as special opportunity for women to clean excess dosha monthly but our society consider menstruation itself as dosha to restrict women from accessing temple, it is like consider elixir as poison. It was said that earlier that if shudras enter in temples or touch the idols, god will became furious and disaster will happen but nothing of this sort happened because god do not discriminate among any class, caste or section of worshipper. It is only men who does that at God’s name. In present scenario also there are many temples where women are

\textsuperscript{11} Kerala for allowing women of all ages into Sabarimala temple, Article The Hindu FEBRUARY 08, 2008
allowed, whether they are menstruating or not. So does the god is different there? Why does religious atmosphere not get polluted in those temples by menstruating females? And on the point of celibacy. If the deity is true celibate then the onus is on deity to not get disturbed by the women why blame women on disturbing you? God is no man for whom it is difficult to control his senses. The whole point is we are so small to understand the ways of god so better is to understand the constitution and end these restrictions.

Denying a person to enter into a place of worship for reasons of purity, and maintaining the sacredness is outright outrageous. Don’t portray women as a goddess if cannot furnish her right to pray. Prohibition of women’s entry to the place of worship solely on the basis of womanhood and the biological features coupled with womanhood is derogatory to women, which Article 51A(e) aims to renounce to preserve the dignity of women.

**Conclusion**

Our moral principles teaches us to learn from the past but caution is ‘Do not copy the past’ and unlearn what comes in way as barrier to progress, so in this context we should unlearn rudimentary customs from the past and learn about the roles and respect given to women. Disallowing women’s entry into religious places is not only disregard their fundamental rights, as enshrined in the Indian Constitution, but also acts as a prevention to their socio-cultural development as it is about their civil rights also even when B.R Ambedkar fought for the rights of dalits to enter into temples they termed them as civil rights and not religious rights. So abolishing this ban in all the temples, dargah, church etc. would work as a tool to protect their fundamental rights as well as a step towards their social upliftment. It is an issue of human rights, from a larger perspective and Indian constitution has ensured fundamental rights as well as human rights to each and every individual of this country which definitely can’t be snatched away by the custom which has no source and no validity at all.
THE NEED OF THE HOUR – JUDICIAL ENCROACHMENT

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Abstract
Supreme Court favoured to introduce All India Common Test for selection of the judges for lower judiciary, stating that centralised mechanism would ensure appointment of the competent judges without any delay and would pave way for an effective judiciary. Apex court Bench comprising of CJI JS Kehar, Justice AK Goel expounded that it would be beneficial for country if there is centralised examination for the appointment of judges and tried to allay apprehension of some High courts that it was against federal structure as their role in the appointment of the judges would be taken away by a central agency. Former Justice S H Kapadia said Parliament and Executive had well defined powers under the constitution and these needed to be respected by the Judiciary. “Legality and legitimacy are important concepts and go hand in hand. If there is excess of judicial overreach, then the legitimacy of judgements will be obliterated”, he warned. In relation to this issue, one needs to ascertain as to

(a) What status the judiciary has been accorded in the Indian constitution. Is it supreme as compared to the other organs or is subordinate thereto? Whether the judiciary can interfere and encroach in the executive or legislative domain if justice demands so?

(b) Whether the creation of AIJS would lead to the further erosion of the powers of the States whose powers under the present dispensation are not many. By virtue of several entries in the Union List and as a result of the 42nd Amendment to the Constitution, the powers of the States have already been adversely affected. Is it advisable to diminish them further by taking away the power of selection from the High Courts and by vesting in a central body?

(c) Would it be advisable to amend Article 312 again by removing clause (3)?

This paper attempts to undertake the task of analysing these questions by constitutional provisions and related case laws.

Introduction
Dr. Ambedkar in Constituent Assembly Debate stated that “Our judiciary should be both independent of the other organs and must also be competent in itself. And the question is how these two objects could be secured”. The recent debates on the judicial appointments however state the contrary. The coming of the National Judicial Appointment Committee, which was later struck down and stated unconstitutional and now the favoured judgement of Supreme Court over the All India Judicial Services has brought to light a difficult question of the need of the hour. The proposal for an All India Judicial Service (AIJS) in lines of All India Services

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12Dr. B.R. Ambedkar, Reply to the debate on the draft provisions of the Constitution on the Supreme Court, (24-5-2949), in Constituent Assembly Debates, Vol. VIII, 258.
was proposed as early as 1950. The idea was first mooted by the Law Commission in the 1950s to have an All India Judicial Services. The Constitution of India was amended in 1977 to provide for an All India Judicial Services under Art 312. The Chief Justices Conferences in 1961, 1963, and 1965 favoured creation of All India Judicial Services and even the Law Commissions (1st, 8th and 11th, 16th) had suggested the creation of the service. However, each time it was faced with opposition. The proposal was again floated by the ruling UPA government in 2012 but the draft bill was done away with after opposition from High Court Chief Justices who labelled this an infringement of their rights.  

 Most recently, the Central Government after holding a meeting presided over by the Law Minister Ravi Shankar Prasad had sought the advice of its two top law officers – Attorney General Mukul Rohtagi and Solicitor General Ranjit Kumar – on the question of constituting All India Judicial Services just on the lines of All India Civil Services. There lies a very thin line between the judicial overreach and judicial activism. It was also commented that judiciary must draw its own ‘Lakshmanrekha (inviolable boundary)’ and not take decisions that fall in the domain of other organs. Just as independence of the judiciary is part of the basic structure, the primacy of the legislature in certain subjects is also a part of basic structure and interference by the courts into their domain is not justified. Judiciary should not become a super parliament that frames laws and a super executive that seeks to implement them. When the thin line between the judicial activism and judicial overreach is crossed, judicial activism is considered an encroachment on legislature. Complete separation of powers is not possible – neither in theory nor in practice. Some overlapping is unavoidable; but it should not mean an encroachment. This article will elaborately analyse this issue.

Separation of Powers
The doctrine means that specific functions, duties and responsibilities are allocated to distinctive institutions with a defined means of competence and jurisdiction. It is a separation of three main spheres of government, namely, legislative, executive and judiciary. Within the constitutional framework the meaning of the terms legislative, executive and judicial authority are of importance:

(a) Legislative authority – is the power to, amend and repeal rules of law.
(b) Executive authority – is the power to execute and enforce rules of law.
(c) Judicial authority – is the power; if there is a dispute, to determine what the law is and how it should be applied in the disputes.

The doctrine of separation of powers means ordinarily that if one of the three spheres of government is responsible for the enactment of rules of law, that body shall not also be charged with their execution or with judicial decision about them. The same will be said for the executive authority, it is not supposed to enact law or to administer justice and the judicial authority should not enact or execute laws.

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14 https://economictimes.indiatimes.com/topic/All-India-Judicial-Service?from=mdr
15 Art 50 of the Constitution of India.
Lord Mustill in R v. Home Secretary, Ex p Fine Brigades Union17 defined the doctrine of separation of powers in England as: ‘it is a feature of the peculiary British conception of the separation of powers that parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.’The meaning of separation of powers in United States of America and France shows a variety of meanings. The concept may mean at least three different things:

(a) That the same person should not form part of more than one of the three organs of government, for example, that ministers should not sit in parliament;

(b) That one organ of government should not control or interfere with the work of another, for example, that the executive should not interfere in judicial decisions;

(c) That one organ of government should not exercise the functions of another, for example, that ministers should not have legislative powers.18

The modern design of the doctrine of separation of powers is to be found in the constitutional theory of John Locke (1632-1704). He wrote in his second treaties of civil government as follows: “it may be too great a temptation for the humane frailty, apt to grasp at powers, for the same persons who have power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from the law, both in its making and execution to their own private advantage”.19 It is clear that he was advocating the division of government functions into legislative, executive and judicial. However it is the French philosopher (jurist) Montesquieu (1689-1755) who is usually credited with the first formulation of the doctrine of separation of powers. He based his exposition on the British constitution. In the pertinent chapter of his well celebrated work, L’ Esprit des Lois (1748), 20 he purported to describe the British constitutional system of the 18th century21 so that it might serve as an example to France of a political dispensation founded on liberty, which according to him, was the supreme objective of a political society. JD van Der Vyer observed that Montesquieu was a poor observer, since the British constitutional system did not comply then, neither does it today, with the basic norms of the idea of separation of powers.22 Even if it were so, Montesquieu’s analysis of the British system, is generally accepted as political ideal which is worth pursuing. Montesquieu recognised the three basic pillars of state authority, which includes the executive, legislative and the judicial functions; and he added that these functions ought to vest in three distinct governmental organs with, in each instance, different office bearers. He supported his argument

17[1995]2 at 567.
18 AW Bradley and KD Ewing Constitutional and administrative Law 13 ed p 84.
19Ch X (1), Para 143, Quoted in ‘vile Constitutionalism and the separation of powers’ p 62.
21 Visited England in 1732.
by saying:  

23 ‘all would be in vain if the same person, or the same body of officials, be it the nobility or the people, were to exercise these three powers: that of making laws, that of executing the public resolutions, and that of judging crimes or disputes of individuals’.

His idea eventually developed into a norm consisting of basic principles:  

(a) The principle of triaspolitica, which simply requires a formal distinction to be made between the legislative, executive and judiciary components of the state authority. 

(b) The principle of separation of personnel, which requires that the power of legislation, administration and adjudication be vested in three distinct organs of state authority and that each one of those organs be staffed with different officials and employees, that is to say, a person serving in the one organ of state authority is disqualified from serving in any of the others. 

(c) The principle of the separation of functions which demands that every organ of state authority be entrusted with its appropriate functions only, that is to say, the legislature ought to legislate, the executive to confine its activities to administering the affairs of the state, and the judiciary to restrict itself to the function of adjudication.  

The main objective of the doctrine is to prevent the abuse of power within the different spheres of government. In our constitutional democracy public power is subject to constitutional control. Different spheres of government should act within their boundaries. The courts are the ultimate guardian of our constitution, they are duly bound to protect it whenever it is violated. Moseende CJ also stated that the courts are more likely to confront the question of whether to venture into the domain of other branches of government while performing their functions as entrusted by the constitution.  

Within the context of the doctrine of separation of powers the courts are duty bound to ensure that the exercise of power by other branches of government occurs within the constitutional context. But the thing here is the courts must also observe the limit of their own power. 

Different scholars also echo their views on the purpose of the doctrine. Montesquieu said in this regard:  

26 ‘when the legislative and executive powers are united in the same person, or in the same body of magistrates there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the lie and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were joined to the executive power, the judge might behave with violence and oppression’.

According to Dicey, the doctrine rests on the ‘necessity… of preventing the government, 

25 ‘Oliver Schreiner memorial lecture: separation of powers, democratic ethos and judicial function’ 2008 SAJHR 341 at p 349. 

26 Supra n 5, 11.6.
the legislature and the courts from encroaching upon one another’s province. The United States constitutional system comes close to the theory of Montesquieuan theory.

The constitution of the United States is premised on the doctrine of separation of powers, according to which there is an institutional separation between the legislature and the executive, giving rise to a presidential form of government with checks and balances. This is evident by the fact that when the American constitution was ratified, the modern understanding of the doctrine of separation of powers was established. This version may be divided into two elements of division encompassed by the principles of trias politica, namely, the separation of functions and the separation of personnel. The element of independence, on the other hand, encompasses the principle of checks and balances. It is arguably strictest when it comes to separation of powers between the different branches of government. The drafters of the American constitution also adopted the principle of checks and balances to the doctrine of separation of powers. It requires different branches of the state to keep a check on one another in order to maintain a balance of power amongst them. In order to prevent anyone of the branches accumulating power at the expenses of the others the drafters of the American constitution argued that it was necessary to write a constitution, in which the powers of government should be so divided and balanced amongst several bodies of magistracy, so that no one could transcend their legal limit, without being effectively checked and restrained by others.

Indian view on Separation of Powers
Indian supreme court in Ram JawayaKapur v. State of Punjab, the court through Mukherjee J. held that the Indian constitution has indeed not recognized the doctrine of separation of powers in its absolute rigidity, but the functions of different parts or branches of the government have been sufficiently differentiated and consequently it can very well be said that our constitution does not contemplate assumption, by one organ or part of the state, of functions that essentially belong to another. A more refined and clarified view taken in Ram Jawaya’s case can be found in Kartar Singh v. State of Punjab, where Ramaswamy J. stated it is the basic postulate under the indian constitution that the legal sovereign power has been distributed between the legislature to make the law, the executive to implement the law and the judiciary to interpret the law within the limits set down by the constitution. The functional classification and sufficient demarcation, as is held by the Supreme Court, indeed does not suggest the application of the doctrine in its absolute terms. Rather it just gives a slight glimpse

27 Introduction to the study of the constitution (1959) p 337.  
32 AIR 1955 SC 549.  
as to the character of the Indian constitution which it shares with the ‘pure doctrine’ discussed above, that is, inter-alia the acceptance of the philosophy behind the doctrine pertaining to rigors of concentration of power and the avoidance of tyranny, of having a rule of law and not rule of men. Agreeing on this premise, it has also been acceded the status of basic structure by the Supreme Court.  

Another point of concern which requires clarification is whether the three organs, though not rigidly separate, can usurp their powers or are they required by the constitution to work only within the respective area earmarked in a narrow sense. To put it differently, whether the constitution mandates encroachment by one organ into the domain of another on the pretext of failure or inaction of the other organ is the next question that needs to be addressed in its context. Though theoretically, this issue has been addressed by the Supreme Court, however, it has failed to cater an effective basis in practice which is evident from the growing amount of judicial encroachment in the domain of other organs. In Asif Hameed v. State of J&K, it has been held that although the doctrine of separation of powers has not been recognized under the constitution in its absolute rigidity but the constitution makers have meticulously defined the functions of various organs of the state. Legislative, Executive, Judiciary have to function within their respective spheres demarcated under the constitution. No organ can usurp the functions assigned to another. Legislative and executive organs, the two facets of the people’s will, have all the powers including that of finance. Judiciary has no power over sword or the purse. Nonetheless it has power to ensure that the aforesaid two main organs of the state function within the constitutional limits. It is the sentinel of democracy”.

Basic constitutional provisions relating to subordinate judiciary and All India Judicial Service

Chapter VI of Part VI of the constitution of India deals with subordinate courts. Appointments of persons to be, and the posting and promotion of, district judges in any state shall be made by the governor of the state in consultation with the high court exercising jurisdiction in relation to such state. Appointments of persons other than district judges to the judicial service of a state shall be made by the governor of the state in accordance with the rules made by him in that behalf after consultation with the state public service commission and with the high court exercising jurisdiction in relation to such state. The control over the subordinate courts is vested in the high court. The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a state and holding any posts inferior to the post of district judges shall be vested in the high court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorizing the high court to deal with him

35 AIR 1989 SC 1899.
36 See Art. 233(1) of the Constitution of India.
37 See Art. 234 of the Constitution of India.
otherwise than in accordance with the conditions of his service prescribed under such law.\textsuperscript{38} There is an interpretation clause which defines the expression “district judge”. It includes “judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge”\textsuperscript{39}.

All-India services\textsuperscript{40}. Prior to the constitution (forty-second amendment) Act, 1976, it does not specifically refer to an All-India Judicial Service. It was however brought in along with clauses (3) and (4) by the constitution Amendment Act. As it stands today, article 312 reads as thus: 312. All-India services- (1) notwithstanding anything in [chapter VI of part VI or part XI], if the council of states has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, parliament made by law provide for the creation of one or more all-India services [(including an all-India judicial service)] common to the union and the states, and, subject to the other provisions of this chapter, regulate the recruitment, and the conditions of service of persons appointed, to any such service. And the clause (3) of article 312 says that: The all-India judicial service referred to in clause (1) shall not include any post inferior to that of a district judge as defined in article 236.

A reading of the afore-mentioned provision of the constitution yields the following features:

The subordinate courts/subordinate judiciary is a state subject. The appointment of the members of the subordinate judiciary is to be made by the governor. However such appointment is to made in the case of district judge, in consultation with the high court and in the case of other posts, in consultation with the public service commission and the high court. As a matter of practice, selection of district judges is made by the high court on the basis of which, formal order of appointment is issued by the governor. In case of Munsiff, magistrates, the selection is made by the state public service commission and the concerned high court acting together and orders of appointment are issued by the governor on the basis of such selection.

Though clause (1) of article 233 does not expressly say that the appointment of district judges can be regulated by the rules made under the proviso to Article 309\textsuperscript{41}, a conjoint reading of both the provisions would show that rules can be made under the proviso to Article 309 with respect to method of appointment of district judges also subject of course to the provisions to the constitution including Articles 233 and 160\textsuperscript{42}. As a matter of fact, such rules have been made in several states.

If the council of states (Rajya Sabha) declares by resolution supported by not less than two-third of members present and

\textsuperscript{38} See Art. 235 of the Constitution of India.

\textsuperscript{39} See Art. 236 of the Constitution of India.

\textsuperscript{40} See Art. 312 of the Constitution of India.

\textsuperscript{41} Recruitment and conditions of service of persons serving the Union or a State.

\textsuperscript{42} Discharge of functions of the governor in certain contingencies.
voting that it is necessary of expedient in the national interest to do so, parliament may by law provide for creation of an All-India Judicial Service (AIJS) common to the union and the states and also to regulate the recruitment and conditions of service of persons appointed to such All-India service. This proviso is made notwithstanding the provisions contained in chapter VI of part VI of the constitution. However, the All-India judicial service cannot include any post inferior to that of district judge (as defined in article 236). The law made by parliament providing for creation of AIJS as contemplated by clause (1) of article 312 may contain such provisions for the amendment of chapter VI of Part VI, as may be necessary to give effect to the provisions of that clause but no such law shall be deemed to be an amendment of the constitution within the meaning of article 368.

How far Judiciary can interfere
The prime point of our concern here is whether the judicial organ of the state is conferred with a constitutional mandate so as to overstep its limits while discharging its main functions. That is to say whether the judiciary can interfere and encroach in the executive or legislative domain if justice demands so, or it cannot do simply by virtue of the fact that the concept of separation of powers puts fetters on it. To answer these points, one needs to ascertain as to what status the judiciary has been accorded in the Indian constitution. Is it supreme as compared to the other organs or is subordinate thereto?

Judiciary under Indian constitution has been given an independent status. It has been assigned the role of an independent umpire to guard the constitution and thereby ensure that other branches may not exceed their powers and functions within the constitutional framework. Commenting and clarifying the concept of independence of judiciary, Sir A.K. Aiyar, who was one of the framers of the constitution, had observed that “the doctrine of independence (of judiciary) is not to be raised to a level of a dogma so as to enable the judiciary to function as a kind of super-legislative or super-executive. The judiciary is there to interpret the constitution or to adjudicate upon the rights between the parties concerned”.

It can thus very aptly be said that creation of judicial organ in India was not at all meant to give to it a supreme status as compared to the other co-ordinate organs. Rather, with powers and functions sufficiently distinguished and demarcated, what is expected out of judiciary is to act as a watchdog to oversee and prods to keep the other organs within the constitutional bounds.

Also on the question that where the amending power of the parliament does lies and whether art.368 confers and unlimited amending power of parliament, the S.C. in Keshavnand Bharti held that amending power was now subject to the basic features of the constitution. And hence, any amendment tapering these essential features will be struck down as unconstitutional. Beg. J. added that separation of powers is a part of the basic structure of constitution.

None of the three separate organs of the

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43 Cited in Glanville Austin, The Indian Constitution-Cornerstone of a Nation 174(1966).
44 AIR 1973 SC 1461.
republic can take over the functions assigned to the other. This scheme cannot be changed even by resorting to art. 368 of the constitution. There are attempts made to dilute the principle, the level of usurpation by judicial power is increased. In a subsequent case law, S.C. had occasion to apply the Keshavanand ruling regarding the non-amendability of the basic features of the constitution and strict adherence to doctrine of separation of powers can be seen. In Indira Gandhi v. Raj Narain, \textsuperscript{45} where the dispute regarding P.M. election was pending before the supreme court, it was held that adjudication of a specific dispute is a judicial function which parliament even under constitutional amending power cannot exercise. So the main ground on which the amendment was held ultravires was that when the constituent body declared that the election of P.M won’t be void, it discharged a judicial function which according to the principle of separation it shouldn’t have done. The place of this doctrine in Indian context was made a bit clearer after this judgement. In a democratic country goals are enshrined in the constitution and the state machinery is then setup accordingly. And the Supreme Court rulings also justify that the alternative system of checks and balances is the requirement, but not the strict doctrine. \textsuperscript{46}

Federal structure

Federalism constitutes a complex Governmental mechanism for governance of a country. It seeks to draw a balance between the forces working in favour of concentration of powers – in the Centre of it in under units. A federal Constitution establishes a dual polity as it comprises of two levels of Government. The two levels of the Government divide and share the totality of a Governmental functions and powers between themselves. The distribution of legislative powers between the Centre and the States is the most important characteristic of any federal system. Thus a federal Constitution envisages a demarcation or division of Governmental – function and powers between the Centre and the regions by the sanction of the Constitution itself which is usually a written document and also a rigid one i.e. which is not capable of amendment easily. The Constitution of India establishes dual polity in the country, consisting of Union Government and State Governments. The States are regionally administrative units into which the country has been divided and thus India has been characterized as “Union of States”\textsuperscript{47}.

Pointing out the fundamental aspect of Indian federalism, B.P.Jeevan Reddy, J. in S.R. Bommai v. UOI \textsuperscript{48}, observed that within the sphere allotted to them, the states are supreme. The centre cannot tamper with their powers. More particularly the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the states. Let it be said that Indian federalism in the Indian constitution is not a matter of administrative convenience, but one of principle-the outcome of our historical process and a recognition of the ground realities. It is equally necessary to emphasise that courts

\textsuperscript{45} AIR 1975 SC 2299.
\textsuperscript{46} Justice Katju.blogspot.com
\textsuperscript{47} Article 1(1) of the Constitution – Also see M.P. Jain, “Indian Constitutional Law” (Nagpur :Wadhwa 2003) at pp. 553-54.
should be careful not upset the delicately-crafted constitutional scheme by a process of interpretation.”

Article 142 of the constitution provides that the Supreme Court may pass such order as is necessary for doing complete justice in any cause or matter pending before it. However, a five-judge bench of the supreme court in Supreme Court Bar Association v. UOI ruled that “article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly.” The union government argued that in a federal structure it was the duty of the courts to uphold the constitutional values and enforce constitutional limitations, as the ultimate interpreter of the constitution. There is no dispute over the particular argument that judicial review acts as the final arbiter to give effect to the distribution of legislative powers between the parliament and the state legislatures and when the case does not evolve any dispute between the centre and the states over the distribution of legislative powers, nor was there any allegation that either of them transgressed those powers.

Conclusion
By taking suomoto cognisance of the letter by the union department of justice suggesting recruitment of district-level judges on the basis of all-India examination, the apex court is trying to indirectly amend the constitution. While the procedure can be changed through a constitutional amendment, the same can be done only by the parliament. Parliament, however, cannot carry out amendments which destroy the basic structure of the constitution. When the Supreme Court undertakes the task of establishing a new procedure for the appointment of district judges, it tramples upon the cherished principle of separation of powers. What is strange is that there is no complaint that the existing system in place for appointments to the subordinate judiciary is a failure. Without any serious grievances about the existing procedure, attempts to amend the constitution are highly capricious. It has to be understood that the large number of pendency of cases are due to a variety of factors and cannot be attributed only to delay in appointment of judicial officers.

Anything which has a centralising tendency is highly discriminatory in nature as it shows no concern for the marginalised. NEET exams are as classic example of that. It is an irony that the letter suggests the examinations to be based on the NEET model. NEET is a model opposed to social justice and anathema to the concept of state autonomy. Hence by attempting to take away the powers which already exist with the state government, the Supreme Court will be doing a great disservice to the constitutionally protected rights of the states and the concept of federalism.

The objections that are generally put forward against the AIJS proposal, namely:
(a) Inadequate knowledge of regional language would corrode judicial efficiency

49 AIR 1998 SC 1895 The Bench comprising of S.C. Agarwala, G.N. Ray, Dr. A.S. Anand, S.P. Bharucha and S. RajendraBabu, J.J. and the judgement of the court was delivered by Justice A.S. Anand (as he then was).
50 Frontline, 26 March 2010, at 43.
both with regard to understanding and appreciating parole evidence pronouncing judgements;

(b) Promotional avenues of the members of the State judiciary would be severely curtailed causing heart burning to those who have already entered the service and manning of the State judicial service would be adversely effected; and

(c) Erosion of control of the High court over subordinate judiciary would impair independence of the judiciary;

(d) The conflict between centre and state would start.\(^5\)

Thus in simple words, the “Doctrine of Separation of Powers” or the “Federalism” in today’s context of Liberalisation, Privatization and Globalization cannot be interpreted to mean either ‘separation of powers’ or ‘checks and balance’ or ‘principle of restraint’ or ‘division of powers between Centre and the State’ but ‘COMMUNITY POWERS’ exercised in the spirit of cooperation for the best interest of the PEOPLE.

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ABANDONED WIVES : VICTIMS OF NRI MARRIAGES-THE QUANDARY OF INDIAN WOMEN DESERTED BY NRI HUSBANDS

By Aneet Kaur & Ayushi Vohra
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“The toddler craves independence, but he fears desertion”

-Dorothy Corkville Briggs

Stability, control, flexibility and adaptation are the qualities one acquires by cohabiting. This is the reason that marriage is given so much of importance. In India, Marriage is just not restricted within caste, state, or even country. Thus, the percentage of women marrying NRI husbands has increased. But when marriage is taken for a ride, its quintessence is made fun of, when objective behind it is to earn money or just the fulfillment of sexual desires, it is then when the other partner is deceived, ill-treated and humiliated. On the satisfaction of their needs, the other spouse is deserted and left helpless. Statistically, usually a wife is deserted by their NRI husband. They are treated as puppets that are controlled by their husbands. A society where a woman is considered a liability with a low social status, adding to this a deserted woman is considered a double burden on the family. The plight of the growing number of women subjected to this abandonment needs to be given attention. This paper highlights the reasons behind this problem, major issues involved in such cases and the possible solutions to this evolving social malaise.

But from the beginning of creation, ‘God made them male and female.’ ‘Therefore a man shall leave his father and mother and hold fast to his wife, and the two shall become one flesh.’ So they are no longer two but one flesh. What therefore God has joined together let not man separate.”

- THE BIBLE

I. Introduction

Marriage also known as wedlock or matrimony is a socially and ritually recognised union between two people. It is a sacred, eternal and a permanent union. Marriage as an institution especially in a country like India has a lot of significance attached to it. It is an integral part of a person’s life in the sense that it is essential for everyone to be a part of it. A human life sans marriage is not considered a plenary life. Such a tie or a bond confers a status of ‘husband’ and ‘wife’ to the parties involved, establishes rights and obligations between the parties, accords the status of legitimacy upon the children born out of such a wedlock. Marriage is considered everlasting, timeless and immortal. It is because of this paramount reason that a divorce is considered a taboo in India. It is now that people have started getting used to the idea of divorce; otherwise it was socially unexpected in our country.

It is not necessary that every union will turn out to be a perfect union and so there are certain instances when partners cannot live with each other and the marriage turns out to be a bad bargain for them. In these cases, it is in the interest of both the parties and the society, to dissolve this union as it has broken down beyond all possible repairs.
But considering an exemplar where one partner deserts the other without any reasonable cause and consent of the other party. Here, marriage as a holy union is taken for a ride and is made fun of. The deserted party feels distressed, dejected and helpless. Such an act is a total disrespect towards the other spouse and towards the entire institution of marriage for that matter.

This issue is then no longer confined to the four-walls of the matrimonial home, in fact it crosses them and becomes a matter of concern as it now affects not only the deserted spouse but also their families.

The persisting division of 'public' versus 'private' spaces which views the entry of law in homes as "bull in the china shop" is largely responsible for keeping the homes significantly insulated from the legal system and control, notwithstanding the fact that some of the grossest rights' violations happen within the 'sacrosanct' four-walls of the homes. This dilemma, coupled with the delicate and sensitive nature of matrimonial relationships per se, are largely responsible for making the entire gamut of matrimonial disputes one of the most complex and challenging areas for legal intervention within any system. Making it further more difficult, particularly in context of India is the existence of individual personal laws for each community unlike a Uniform Civil Law. These personal laws are different from each other, thus making the matrimonial disputes especially inter-religious marriages even more difficult to deal with.

The problem gets multiplied when marriage is taken to a different level and it crosses the boundary of the country and scope of country’s legal system. Such marriages are Cross-Border Marriages. Looking to the trend in India, majorly an Indian women marries an Indian man residing in a foreign country- NRI (Non-Resident Indian), either as an Indian citizen (then legally as NRI) or as a citizen of another country- PIO (Person of Indian Origin). These marriages then enter the domain often called ‘maze’ of the private international law which deals with the interplay and conflict amongst the laws of various countries.

With the kind of social status attached to the word ‘abroad’, these marriages seem to be greener pastures for the entire family and not just the women.

II. Meaning

Even though this is a gender neutral term, typically the ‘NRI Marriages’ are between an Indian woman from India and an Indian man residing in another country (thus NRI – Non Resident Indian), either as Indian citizen (when he would legally be an ‘NRI’) or as citizen of that other country (when he would legally be a PIO – Person of Indian Origin).

III. Desertion

In family law, the five elements of spousal desertion are (1) a cessation of cohabitation, (2) the lapse of a statutory period, (3) an intention to abandon, (4) a lack of consent from the abandoned spouse, and (5) a lack of spousal misconduct that might justify the abandonment. It is the permanent

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53 Ibid, at 462.

forsaking or abandonment of one spouse by the other without reasonable cause and consent of the other. It is the withdrawal not only from a place, but from also a state of things. Cohabitation is a pre-requisite condition for desertion.

IV. Current Scenario
The problems of women abandoned by NRI bridegrooms are not really new. Earlier, it was mostly bigamous marriage entered into by men under family duress to marry within community. The husband tended to hide their foreign spouse and later abandoned the Indian wife. However, with burgeoning Indian NRI population drawn from different economic and social strata spreading across the globe the problem has become dynamic and multi-dimensional. Now the cases of women being subjected to cruelty of false marriage, dowry extortion, cheating, and mental harassment have increased. There is an increasing evidence that as the number of NRI marriages is proliferating by thousand every year, the number of matrimonial disputes in the NRI marriages has also risen proportionately. At most places, the results are as nearly two in every ten NRI marriages are fake or end up in desertion or in divorce.

V. Family Laws in India
The legislations relating to family law enacted by the Indian Parliament in 1955 and 1956 have left Indians where they were. This has resulted into an influx of family law problems, which have arisen from NRI marriages with no practical solution in the legislative enactments as they exist today. NRI’s being the Indian citizen diaspora are subject to Indian Marriage and Divorce laws. But the Indian legal system is not yet designed and amended for resolving these new age issues. With the increasing number of such incidents of NRI marriages the outdated legislation serves no purpose. It is time to amend the existing laws accordingly with the need of the changing time. Especially in the family law arena, limping NRI marriages, abandoned spouses, abducted children, overseas adoption, etc. need statutory solutions.56


knowledge and consent of his defenceless spouse by presenting fake documents and false information. In many cases wives are even deprived of maintenance allowances from their husband. The marriages are not governed any more by only the Indian legal system but by the far more complex private international laws involving the laws and legal system of the other country too, which makes the situation of these deserted women even more miserable. Issues like interparental child abduction, inter-country child adoption etc are involved. But practically there is no law on the subject which lessens the miseries of females whose kids are kept by the husbands in some of the cases. Some time, women are even denied maintenance in India on the pretext that the marriage had already been dissolved by the court in some other country (Provision of Section 19 of the Hindu Adoption and Maintenance Act, 1956 could also be looked into in order to make it applicable in case of deserted daughter-in-laws). Thus, there is a need to address the flaws in law to resolve the problems of deserted NRI married women.  

VI. Statistics
The Hon’ble Minister of Overseas Indian Affairs, Shri Vayalar Ravi provided a state-wise breakup of complaints relating to these marriages in a written reply in the Rajya Sabha on 30 June 2012, specifically on the question on harassment and desertion by husbands of their wives. The National Commission for Women received far more complaints than the Ministry of Overseas Indian Affairs. Until March 2012 they were:

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>State</th>
<th>Total number of complaints</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Delhi</td>
<td>135</td>
</tr>
<tr>
<td>2</td>
<td>Uttar Pradesh</td>
<td>68</td>
</tr>
<tr>
<td>3</td>
<td>Haryana</td>
<td>56</td>
</tr>
<tr>
<td>4</td>
<td>Punjab</td>
<td>53</td>
</tr>
<tr>
<td>5</td>
<td>Maharashtra</td>
<td>46</td>
</tr>
<tr>
<td>6</td>
<td>Gujarat</td>
<td>39</td>
</tr>
<tr>
<td>7</td>
<td>Andhra Pradesh</td>
<td>30</td>
</tr>
<tr>
<td>8</td>
<td>Karnataka</td>
<td>25</td>
</tr>
<tr>
<td>9</td>
<td>West Bengal</td>
<td>23</td>
</tr>
<tr>
<td>10</td>
<td>Tamil Nadu</td>
<td>18</td>
</tr>
<tr>
<td>11</td>
<td>Rajasthan</td>
<td>14</td>
</tr>
<tr>
<td>12</td>
<td>Madhya Pradesh</td>
<td>10</td>
</tr>
<tr>
<td>13</td>
<td>Uttrakhand</td>
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<tr>
<td>14</td>
<td>Bihar</td>
<td>07</td>
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<tr>
<td>15</td>
<td>Himachal Pradesh</td>
<td>04</td>
</tr>
<tr>
<td>16</td>
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<td>17</td>
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<td>19</td>
<td>Orissa</td>
<td>03</td>
</tr>
<tr>
<td>20</td>
<td>Kerala</td>
<td>02</td>
</tr>
</tbody>
</table>

57 Ibid. at 464-465
Efficiency of the Ministry

Legal and financial assistance rendered by empanelled NGO’s etc under MOIA’s scheme (Ministry of Overseas Indian Affairs) to the Indian women deserted by their overseas Indian spouses

- Total number of beneficiaries = 24
- Total amount of assistance rendered = Rs46,96,373/- (2007-2012)

VII. Reasons Concerning the Emerging Problem

i. The fault is not purely of the opportunist NRI’s but also of the parents and family members of the deserted wife, who got trapped into the lucrative dreams of going and settling abroad.

ii. Getting married to an NRI is looked upon as nothing but an opportunity to live abroad. Such a life seems to be very glamorous with a high standard of living.

iii. Getting a daughter from the house married to an NRI is a way for the parents and other siblings to go abroad.

iv. In some cases, a quick engagement, followed by a massive wedding, hardly leaves any time to check the veracity of the bridegroom. Also a desire to visit the foreign land and the social status attached to it leads to overlooking of this problem, after which the NRI husband flies out of India while the wife waits for her visa.

v. The greed for dowry is another reason behind a quick marriage. The husband’s family may not want to give a reasonable time to the girl’s family to verify his prospects.

vi. These women are led up to a garden path by the husband’s family who project rosy and misleading pictures about the job, earnings, property, and other material particulars, to trap her into the marriage.

vii. As there is a social status attached to the institution of marriage, there is a social stigma attached in its dissolution as well. Moreover, the Indian women due to their upbringing are taught to respect this institution, thus they do everything to preserve it.

VIII. Major Issues Pertaining to desertion of Indian Women by NRI Husband

a) Divorce

NRI marriages that fail, often the wives are either abandoned and deserted in India or are forced to return home. In her absence, a
petition for divorce in abroad is filed by the husband. Since the wife is starved for money and resources, and is unable to go to the other country to contest the proceedings and prove her side, the husband easily procures an ex parte decree. The courts in India have held such divorces invalid, and are contrary to the Indian law if the ground under which the divorce was granted is not available under the personal law applicable to the parties in India. The Courts have even held that a decree obtained abroad would be invalid and void if it was obtained without a proper consent of the parties.  

Section 13 of the Code of Civil Procedure, 1908 defines when a foreign judgment is not conclusive. Wife’s face additional problems when they initiate proceedings in Indian courts. As the husband is in abroad, courts are unable to issue summons in timely and efficient manner. Thus the proceedings last longer.

b) Maintenance

Studies reveal that the victims don’t receive maintenance from their husbands, even if some do, they don’t receive it regularly. So the wife faces a double burden, of not only trying to get an adequate maintenance order from court, but also enforcing it, sometimes in a foreign court. This is difficult unless countries mutually agree to enforce orders. Sections 44A of CPC deals with execution of decrees passed by Courts in reciprocating territories and section 45 of CPC provides for execution of decrees outside India respectively. Section 44A limits its operation to Reciprocating Territories only, that is, territories with which India has agreements to mutually enforce its decrees.  

c) Custody

In some cases, fathers forcibly take away the children abroad, and in other, mothers return with their children to India finding it difficult to live in a hostile foreign environment. If custody orders have not been previously granted, then often the father procures them ex parte in a foreign country in their own favour. The Supreme Court of India and the High Courts had upheld the interests and welfare of the child to be the guiding principle in custody matters, even when they involved children who had been brought to India. Therefore, even if a foreign court had already decided the issue of custody, Indian courts can take a re-look at the question through the angle of the best interests of the child if one of the parents filed for these proceedings in India. Majorly, the decision is in favour of the mother.

V. Ravichandran v. Union of India  

The mother was continuously moving with her child in order to escape the legal proceedings initiated by her husband. As a result, the child could not develop a stable life in India and had to frequently switch schools. The court was greatly swayed by this fact and the Constitutional Bench of the Supreme Court of India ordered that the child must be sent back to the USA, since the child was a US national of 7 years. The Supreme Court blamed the mother for not asking for custody when she first arrived in

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61 Ibid.

62 Supra 7.

63 V. Ravichandran v. Union of India, 14 SCALE, 27 (SC 2009).
India. In particular the honourable court said—

“In a case such as the present one, we are satisfied that return of minor Adithya to United States of America, for the time being, from where he has been removed and brought here would be in the best interest of the child…”

Thus, the interest and welfare of the child is of paramount importance and the courts pass their orders keeping this principle in mind.

**d) Stridhan**

In India, dowry is paid at the time and even after marriage. Refusal to provide, leads to harassment of the wife. If she escapes from the matrimonial home, stridhan-legal entitlement is not returned by the husband. It is for the wife to claim her stridhan which becomes difficult as the NRI husband does not turn up for the legal proceedings. And if by chance, the decision is in favour of the wife it is challenging for her to claim it back.

**IX. Consequences**

i. Married women are abandoned even before being taken by her husband to the foreign country of his residence.

ii. When woman reaches the foreign country of her husband’s residence and waits at the international airport there, only to find out later, that her husband would not turn up.

iii. The NRI husband is already married to another woman in other country.

iv. Women are subjected to assault, mental and physical abuse, brutally battered, are malnourished, confined, ill treated and forced to flee or are forcibly sent back.

v. When these women are abandoned by their husbands in a foreign country they are left with absolutely no means of resources, sustenance, support and even the legal permission to stay on in that country.

vi. The menace of ‘honeymoon brides’ is a big problem to deal with because there are over 20,000 brides who have not seen their husbands after their honeymoon.

vii. There are certain cases where the children are abducted and are forcibly or sometimes even cleverly taken away from the woman.

viii. Woman when finally approaches the court, either in India or in the other country, for matrimonial reliefs such as, restitution of conjugal rights, maintenance or divorce, have to repeatedly encounter technical, legal obstacles related to jurisdiction of courts, service of notices, enforcement of orders or acquiring the knowledge that the husband has already commenced simultaneous retaliatory legal proceeding in the other country.

ix. The husband is usually successful in getting an ex-parte decree of divorce in foreign country through fraudulent representations without the knowledge of his defenceless wife.

x. When the women sought to use the criminal law or any other law in order to punish their husbands and in-laws for any matrimonial offence she finds out that trial can’t proceed as the husband couldn’t come to India to submit to the trials or respond to various summons in any way.

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64Ibid.
X. Judgements
Y. Narsimha Rao and Ors Vs. Y. Venkata Lakshmi and Anr. 65

The marriage was solemnized in India under the Hindu Marriage Act. After which the husband went back to USA and obtained a decree of divorce from the State of Missouri. The husband alleged that he was resident of State of Missouri for 90 days preceding the institution of the petition. On the ground of “irretrievable break down of marriage” the husband obtained the divorce decree. The Supreme Court of India held that both - the ground on which the foreign decree was passed and the issue of jurisdiction were not in accordance with Hindu Marriage Act under which the marriage had taken place, therefore, the decree was not enforceable in India.

In this case the court layed down a golden rule:
“... The jurisdiction assumed by the foreign court as well as the ground on which the relief is granted must be in accordance with the matrimonial law under which the parties are married. The only three exceptions to this rule were also laid down by the court:
where the matrimonial action is filed in the forum where the respondent is domiciled or habitually and permanently resides and the relief is granted on a ground available in the matrimonial law under which parties are married; where the respondent voluntarily and effectively submits to the jurisdiction of the forum as discussed above and contests the claim which is based on the ground available under the matrimonial law under which the parties are married; where the respondent consents to the grant of the relief although the jurisdiction of the forum is not in accordance with the provisions of the matrimonial law of the parties”

Smt. Neerja Saraph Vs. Shri Jayant V. Saraph 66

The Supreme Court held that with rise of marriages with NRI and change in social structure, the Union of India may consider enacting a law like the Foreign Judgements (Reciprocal Enforcement) Act, 1933 enacted by the British Parliament in pursuance of which the Government of United Kingdom issued Reciprocal Enforcement of Judgements (India) Order, 1958.

The court recommended that feasibility of a legislation safeguarding the interest of women may be examined by incorporating provisions like:
• No marriage between a NRI and an Indian woman which has taken place in India may be annulled by a foreign court.
• Provision may be made for granting adequate alimony to the wife in the property of the husband both in India and abroad.
• The decree granted by Indian courts may be made executable in foreign courts by entering into reciprocal agreement. For instance, section 44A of the C.P.C. makes a foreign decree executable as it would have been a decree passed by that court. 67

• Providing the right to approach court for injunction or interim order against the husband travelling abroad or taking the children abroad (including impounding of passport).68

Harmeeta Singh v Rajat Taneja69

Within 6 months of marriage the wife was deserted by her husband and she was forced and compelled to leave the matrimonial home within 3 months of joining her husband in the US. She filed a suit for maintenance under the Hindu Adoptions and Maintenance Act 1956 in India. The High Court disposed of the interim application in the suit by passing an order of restraint against the husband from continuing with the proceedings in the divorce petition filed by the husband in the US court there. The High Court also asked him to place a copy of the High court’s order before the US court.

The Court made observations mainly that even if the husband succeeds in obtaining a divorce decree in US, that decree would not receive recognition in India as the Indian court has jurisdiction in the matter and the jurisdiction of the US courts would have to be established under Section 13, CPC. The Court also cleared that till the US decree was recognized in India, the husband would be held guilty of committing bigamy in India and would be liable to face criminal action for that. The court also said that since the wife’s stay in the US was very transient, and temporary, and she may not be financially capable of prosecuting the litigation in the US court, the Delhi courts would be the forum of convenience in the matter.70

Smt. Seema Vs. Aswini Kumar71
Supreme Court vide its judgement dated 14.02.2006 has issued the directions that the Central and State Governments shall take the following steps:
• Registration of marriages of all the persons who are citizens of Indian belonging to various religions should be made compulsory in their respective states.
• The respective states should notify the procedure for registration within 3 months.

It is now mandatory for the states to provide for registration of marriages which needs to be implemented in case of NRI marriages taking place in India. The marriage certificates for NRI marriage should be issued in duplicate copies and it must carry social security number of the NRI spouse.72

XI. New Development

A high-level joint committee of officials drawn from the Ministries of Law and Women & Child Development, External Affairs is decided to be constituted by the government. This committee shall formulate standard operating procedures (SOPs) to deal with cases of NRI husbands abandoning their Indian wives. The decision follows a meeting between External Affairs Minister Sushma Swaraj and Women and Child Development Minister Maneka Gandhi. Once chalked out, the SOPs will be shared with various Indian diplomatic missions.

68 Ibid.
69 Harmeeta Singh v Rajat Taneja, DLT, 822 (2003)
70 Ibid.
71 Smt. Seema Vs. Aswini Kumar, 2 SCC, 578 (SC 2006)
72 Supra 4, at 466-467
abroad. Meanwhile, officials of the Law Ministry brought an existing 47-year-old law in notice of a parliamentary panel highlighting that there is a ray of hope for the distressed wives. They pointed out that the Foreign Marriage Act, 1969, constituted provisions to deal with “such situations”. One of the panel members said, “We have been informed by the Law Ministry that the Foreign Marriage Act, 1969, has provisions to help women married to NRI husbands facing problems abroad. Most people are not aware of such a law.”

One of the most significant clauses of this Act was Section 14, which states that whenever a marriage is solemnised under the Foreign Marriage Act, “the marriage officer shall certify it in the Marriage Certificate Book”. It has to be followed by the signature of the couple and three witnesses. It is pertinent to note that the certificate is “deemed to be a conclusive evidence that marriage had been solemnised”, the member said. He also mentioned that the law also provides for “matrimonial relief” for the spouse.

Suggestions and Recommendations

A. Governmental interventions

i. National Commission for Women has been nominated as the coordinating agency at the national level for dealing with issues relating to NRI marriages vide ministry of Overseas Indian Affairs order dated 28th April 2008.

Based on the recommendations of the Parliamentary Committee on Empowerment of Women (14th Lok Sabha) on the subject ‘Plight of Indian Women deserted by NRI husband’ which was discussed and deliberated upon the Inter Ministerial Committee meeting held on 7th July, 2008. The National Commission for Women at the central level is the coordinating agency to receive and process the complaints relating to issues of wives deserted by NRI husbands. These figures relating to the disputes in NRI marriages reflect just the tip of the iceberg. About 1300 cases were registered with the NRI cell of the National Commission for Women and with the Ministry of Overseas Indian Affairs from 2005 to 2012. These are the only number of complaints that have reached the concerned authorities appointed by the State to deal with this matter. Many more actual cases go unreported. With such a significant role to play, it is imperative that National Commission for Women starts playing a more active role so that the picture of this social malaise is much clearer.

Thus, it is recommended that National Commission for Women must be recognized as an authorised body which can directly make applications before the foreign courts on behalf of deserted and aggrieved women.

ii. The government should take steps through bilateral or multilateral treaties whereby foreign courts be barred from passing ex-parte divorce decree in cases of marriage being solemnized as per Indian law.


72 Ibid.

75 Supra 1.
The extradition treaties of India with other countries should also include within its scope and ambit cases of domestic discord. The Law Commission of India had already recommended this in their 219th Report in 2009.

Treaties should also be signed with countries with a sizable Indian population with respect to enforcement of maintenance orders and service of summons.

B. Preventive Measures

i. Not to rush into the marriage
There is no need to rush into marriage. Extensive interaction and communication between the bride and the groom must take place. The couple should interact with each other freely and frankly, before the marriage. This will provide enough time to the girl’s family for gathering the relevant information. Also during this time the couple can themselves decide if they even want to enter in the matrimonial tie with each other.

ii. Free consent
It must be made sure that the both the parties have accepted to tie the knot with their own free and voluntary consent. It must be ascertained that there is no kind of parental/social pressure. It might be a possibility that the groom already has a girlfriend/wife in the foreign country, but his parents are compelling him to get married to the Indian girl.

iii. Verification of the antecedents of the groom’s family
The background of the prospective groom and his family should be verified. It includes his age, marital status, employment details, property claims, and citizenship status. The groom can be asked to get an affidavit proving his employment and residential status. Following are the facts that should be checked and verified.

- Citizenship and immigration status should be proved by stating an affidavit, supported by attested copies of passport, voter card and documents which show the social security number.
- Verifying the marital status, whether he is single, divorced or separated.
- Immigration status includes type of visa and the eligibility to take the spouse to other country.
- Employment details like salary, post supported by a certificate from the employer.
- Verification of the financial claims including properties owned by him in India, supported by relevant documents.
- An affidavit stating that no criminal/civil case is going on against him in the country of his residence.

iv. No reliance on Marriage Brokers
Information furnished by the marriage bureaus, middlemen and matrimonial sites should not be relied on blindly. It is possible that they are just trying to earn money by withholding the relevant information. An affidavit should be taken from the bridegroom stating his present marital status.

v. Financially and Socially Independent
It is always advisable to be financially and socially independent. The woman must have an independent account in the concerned foreign country in order to withdraw money in cases of emergencies. Also she should be educationally or vocationally qualified so
that she need not remain dependent on her husband.

Being socially active will be beneficial for her, as she will always have people backing her up. She must also have the contact details of the woman help line number, police friend and Indian Embassy.

vi. Speak out against violence
It is very important on the part of the woman, to speak out against any sort of injustice or violence against her. The more she keeps quiet, tolerating injustice, the more suppressed she would be. So, she must inform people if she is being oppressed and tortured by her husband or her in-laws.

vii. Knowledge of her Legal rights
The bride must be well aware of her legal rights and entitlements in both the domestic and foreign country. This will help her in taking legal action in time and would not get trapped in the games played by the bridegroom.

viii. Copies of Important Documents
The woman herself, her family in India or her close friend should keep copies of all important documents such as visa, marriage certificate, passport, bank details and other essential papers. In case the husband or his family forcibly take these documents away or destroy them, these copies will prove to be very beneficial and will help the woman to take the course of legal action and fight for her rights.

C. Role of an Embassy
Indian Embassy located abroad has a very important and active role to play in cases of NRI marriages, when Indian wife is being subject to ill treatment in the foreign country. Welfare officers must be appointed in countries with large Indian population to provide support services and assistance. When wives of NRI marriages are in the midst of a crisis, these welfare officers can help them avail residence and prompt visas for defending herself in legal proceedings initiated by her NRI husband in other country.

D. Law based Solutions
1. There is a dire need to enact a new law addressing this mushrooming issue and at the same time make amendments in existing laws. A new, comprehensive legislature is the need of the hour otherwise numerous lives will get destroyed.

2. An enactment of a special law, providing for a provision of speedy hearing and redressal will help the victims to have a faster access to justice and so will finally be in a position to move ahead with their life and probably remarry.

3. Registration of marriage involving NRI’s under Hindu Marriage Act with other respective Marriage Act should be made compulsory. This will help check bigamy and make the parties entitled to legal recourse. The government should set up a separate agency dealing registration of cross-border marriages.

4. The Ex-parte decrees on divorce taken by NRI’s from foreign courts should not be recognized or considered binding in India. Indian court falling under the respective jurisdiction should try the case. This way both the parties especially the wife will have an equal chance in comparison to the husband to substantiate her sides.
5. Enacting proper NRI laws, making corresponding procedural rules to implement and establishing proper competent agencies and department to execute them will prove to be really effective.

6. Establishing more NRI Commissions and NRI cells because of the growing scope of this problem is the need of the hour.

7. It is high time that strict legal methods are taken against the deserting party in case of desertion or the offender in case of any type of abuse in these cross-border marriages regardless whether it is the husband or the wife.

8. The Indian government should enter into bilateral treaties with other countries especially those with high percentage of Indian diaspora and make agreements on the procedure to be followed while dealing with the legal proceedings of cross-border marriages like issues of maintenance, custody of children, divorce etc.

9. This will help take action against the offenders on the basis of the principle of reciprocity.

10. The feasibility of section 20 of the Extradition Act, 1962 should be examined, by virtue of which any person accused of or convicted for an extradition offence, from foreign country to India.

E. Other solutions

1. The girl should be aware about the law of other country and the various matrimonial rights enjoyed by her especially against any sort of abuse, neglect, domestic violence and desertion.

2. Proper training should be given to people to deal with this problem and should be able to empathise with the victim.

3. Regular and periodic awareness campaigns should be conducted with special focus on villages to aware and warn people of this lifestyle in disguise of a dreadful trap.

4. Media can play a very significant role in this regard, where it can help in highlighting the adverse effect of marrying NRI’s in a hurry and the preventive steps that should be taken to avoid social and economic poverty with the social stigma attached to it.

5. Police and judiciary needs to be sensitized on this growing issue of matrimonial offences by NRI husbands. This helps in providing support, assistance and humanitarian treatment towards the victims of such offences. As a result, this will help in speedy redressal of these cases of violence against women.

6. “Irretrievable breakdown of Marriage” should be made a ground for divorce subject to its safeguard.

XII. Conclusion

“House and wealth are inherited from fathers, but a prudent wife is from the Lord.”

Analysing the plight and the condition of these deserted wives there is an instant need to implement the solutions mentioned above. Visibly, the problem may seem to look insignificant as the common belief is that the percentage of these victims may be less but this this problem is mushrooming at a very fast pace and so is the percentage of victims associated with them. This problem if not addressed urgently and with considerable amount of sensitivity will definitely lead to hindering the normal pace of the society with the question being raised on marriage as an institution and will in turn tarnish the respect this institution holds.
Social status and marriages in India are closely knit with each other. Because of this, the Indian families prefer getting their daughters married to a man residing in a foreign country. Coping with a new environment away from home creates a scenario where the wife is dependent on her husband for her sustenance and well being. When the marriage takes an ugly turn, the wife is desolated and has no access to justice.

Looking at the gradual increase of the helplessness of the women there should be proper laws implemented that help in resolving these issues and empower the women. The current situation either grants her a remedy where she lacks access or if she ever gets proper access there is a lack of remedy. It is rare that a wife’s complaints are redressed. Returning to India not just debars her from the marital abuse but also the legal rights and entitlements. So, in order to overcome this situation of helplessness, we propose an overhaul of the legal structure governing NRI marriages.
PROHIBITION OF CHILD MARRIAGE: A MYTH

By Ankita Jain
From Army Institute of Law, Mohali

Abstract:

The Prohibition of Child Marriage Act, 2006 was enacted with the aim to outlaw the solemnization of marriage of the children below the age of 18 years for women and 21 years for men and the incidents thereof. This Act was passed on 10th January 2007 and came into force on the 1st November 2007. The Child Marriage Restraint Act of 1929 was repealed by the current Act in question. The Act lays down various provisions for the prohibition of the child marriage, protecting and providing relief to the victims and penalizing the offenders.

This research paper focuses on the scope of The Prohibition of Child Marriage Act, 2006 and the several provisions thereof. The paper will constitute the shortcomings of the Act relating to its aims, objectives and the provisions. The aim of the research is to throw light on the Child Marriages and the current position that exists in India. The paper would commence with the introduction to the topic and then move on to the history of child marriage, its causes, consequences and thereafter on to the development of the Act in India, critical analysis of the provisions of the Act, problems in the implementation of the Act and certain suggestions for the same through research on Indian Scenario, scholarly articles and case laws.

Introduction:

Child marriages have existed since the ancient times; it was considered to be a common practice at that time. This tradition had gained importance in India under the reign of the Delhi Sultans, in the medieval times. Since then, this practice was followed by a large number of masses, just like a custom. The British for the first time paid heed to this matter and considering the consequences and causes of this practice they passed a legislation named the Child Marriage Restraint Act, 1929. This Act was later repealed by the current Act named The Prohibition of Child Marriage Act, 2006.

The Act of 2006, though talks about prohibiting the marriage between children, but in the true sense this Act does not completely forbid the selfsame. It makes the marriage only voidable at the option of the one party that is aggrieved and not void per se, which refutes the aim of the Act entirely. The issue is still a massive problem in most of the developing countries, India being one of them. This practice is one of the most serious social maladies that affects the lives and future of the youth and the nation as a whole. Thus, it is important to study the matter and the laws that are related to it. This can help give a broader view of the topic and can further assist in eliminating such a social evil from the society.

Historical Background

As per the Hindu Vedas, child marriage is restricted and discouraged. It had made the mention of the age limit for marrying as 25 years for a male and 18 years for...
female, but still it was a very common practice in the ancient times. This practice was commonly seen amongst the poor but later it started spreading to the rich society also. This concept of child marriage was bought to India in the medieval period by the Delhi Sultans as they were of the view that the girls should be married off before they reach their age of puberty to protect the sanctity of the girl. It was also noticed that the marriage was fixed by the parents when the child were not even born but existed in their mother’s womb. The people of that era were of the mindset that child marriages have positive impact on the children, family and the society as a whole. They considered it safe for their children, as it preserved the purity of the girl child and it gave the parents an opportunity to decide the partner for their children. Therefore, the girls were married as soon as they had started with their menses. Another reason for the existence of this concept was that the life expectancy in the earlier time was considered to be less than 50’s and therefore child marriage was adopted to increase the population and to continue with the family succession.

**Current Situation in India**

In the 21st century when the entire world is changing and developing into a new one with each passing second, there are unfortunately some social evils that form a darker side of the coin. Around 27% child marriages have taken place in the year 2016 although the legal age of the child is 18 years. Child marriages are prevalent in the rural areas at around 48% and in urban areas it is 29%. The states like Jharkhand, Uttar Pradesh, Orissa, Madhya Pradesh and West Bengal have the highest rate of child marriages. India is proud to reach the moon and boasts about it but it has forgotten the fact that a country can only progress when the children, the youth of the country are not forced into marriage at an early age and are allowed to work and discover themselves, so that the country can also progress and reach growth along with development.

**Causes of Child Marriage**

India has been a victim of child marriage for a long period of time now. It is one of the worst forms of violation of human rights. It clutches the childhood of the child, places the future into darkness, forces a person to be what he is not and takes away the right to learn and play. The various analyses by researchers show that the rate at which child marriage is decreasing in India every year is very slow and negligible. Despite the various legal, social and political influences this traditional practice still continues in rural as well as the urban areas. To eliminate the marriages among the children it is first necessary to understand the reasons of the same. Several factors that encourage this practice are given below.

**Customs and Traditions**

There are certain social and traditional norms in India that are till date preserved by the people, and they consider child marriage
as one of those norms. The people follow it as they recognize this concept as a custom since it was prevalent in India for a long period of time and was followed by their ancestors.

**Protecting the purity**
The people are of the view that the child if married earlier will protect the honor of the family as the child will be pure when they get married at an early age. By this word pure, it can be implied that the child would not have lost its sexuality.

**Poverty**
The mindset of the people also plays a very important role in the practice of child marriages. It is also affected by demography and income, therefore, the practice of child marriage is seen more in the rural areas than in urban areas. This is due to the lack of education and awareness in the rural areas. They are not aware of the consequences that the child has to undergo and also they are far away from the legal provisions of law.

**To secure debts**
Sometimes the children are married because of the sum of money that they receive which helps them to secure their debts. This is against the human rights as it implies the selling of the child for money.

**Lack of education**
The lack of access to information causes an increase in the child marriage. The studies by the young lives clearly state the fact that the child marries at a later stage if he is educated. A global analysis of data by ICRW also found that girls education is the most important factor associated with child marriage.

**Insecurity**
Due to the growing rate of women harassment and rape cases the parents find it convenient to marry their daughter early before she even walk into adulthood, so that she is secured with her husband.

**Inadequate laws**
There is a prohibition on the child marriage and there are various provisions prevailing that support the idea of discouraging such an evil but the problem occurs in the implementation of the law. There are several laws that protect the rights of the children from getting married at an early stage but they are not enforced because of the lack of awareness among the people and because of the existence of weak implementation of laws in India. Poor implementation of the law and lack of will and action on the part of the administration are important reasons for the continuation of child marriage.

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Above laid are some of the reasons that encourage the practice in the society. Studies have shown that the child marriage affects both the sexes but the impact on the women are more as compared to men.

**Consequences of Child Marriage**

Child marriage snatches the childhood and it is fraught with negative consequences. It renders social and economic growth in danger. It is not only the violation of the human rights but it is also considered as an obstacle in the development of the young people. Following is the list of the consequences:

**Maternal and Infant Health Risks**
The women who give birth to a child even when her body is not fully developed for performing the act of delivering the child, in such cases there are increased chances of maternal or infant deaths. This also causes more problems to the mothers as the process leads to obstetric fistula. This means that while giving birth, the bladder, rectum or vagina tears.

**Exposure to HIV/AIDS**
In certain cases where the women are married to an elder person she is more exposed to such diseases. This is because the sexual behaviors of the man cannot be negotiated to be safe. It is assumed that the older man would have been more exposed to sexual acts and therefore, it can also infect the women with a lifelong disease. It results in various pregnancies and abortions.\(^{84}\) Girls who get married at an early age are often more susceptible to the health risks associated with early sexual initiation and childbearing, including HIV and obstetric fistula.\(^{85}\)

**Domestic and Sexual Violence**
The girl child, who is married at an early age, is found to be in most of the cases, to be sexually and physically abused. An ICRW study in India shows that girls who married before age 18 reported experiencing physical violence twice as often, and sexual violence three times as often as girls who married at a later age.\(^{86}\) Domestic violence is more common among women who had been married as children. India has the highest rate of domestic violence among women married at 18 with a rate of 67 per cent.\(^{87}\)

**Deprivation of Childhood and Future**
More than anything else, the child marriage destroys the future of the children. It robs their childhood and innocence. It forces them to leave their studies and focus on the marriage. It bars them from the concept of self-discovery of one’s own identity. This practice puts an end to the future of the child and more specifically for the women. A study by the Population Council aptly captures the plight of one such young girl in Rajasthan. The girl who till recently was frolicking around in her parents village, is

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\(^{85}\) Association for Social Justice & Research vs. Union of India & others, (1995) 3 SCC 42 (India)


suddenly catapulted to a new position through early marriage, where she has to play the role of a deaf and mute wife in a long veil, and be seen only as working with her two hands.88

**Psychosocial disadvantage**

The loss of carefree childhood, burden of household chores, pressure of earning income, forced sexual relations along with physical torture leads to the psychosocial consequences. Married at the age of 12, Parashuram aged 31, confided that after the wedding, everyone around you reminds you of your responsibilities and one gets tormented by the responsibility of having a wife and family.89 At 12, Parashuram was neither ready for sexual activity nor prepared to be a father or for the responsibility of supporting a family. In his early 30’s, he admitted that he couldn't do what was expected of him as a married man, instead he felt trapped, between boyhood and fatherhood.90

**Human Trafficking**

Child marriage is closely linked with the concept of human trafficking especially when it is solemnized through force, coercion or abuse and as a means of subjecting wives to conditions of slavery in the form of sexual servitude or domestic labour.91 Marriage is also often used as the first step to trafficking for commercial sexual exploitation, forced labour or any other purpose.92

Generally the women are affected more as compared to the men due to the child marriage. This is however negated by the Nirantar study that explains that the pressures of gender weigh heavily on the grooms as well.93 While they tend to resort to drugs or alcohol to overcome their anxieties about family and sex, they turn to coercion or violence to control their wives and to assert themselves, which is a masculine role attributed to them by societal norms.94

**The Act of 2006**

Annihilating child marriage in the Indian society is a strenuous task since it is followed as a custom. Its presence is seen mostly in the rural areas and amongst those who are not aware of the consequences of child marriage. This issue was first dealt by Har Bilas Sarda; he was an academician, judge and politician. He became famous for enacting the Child Marriage Restraint Act, 1929 and therefore, the Act was also famously known as the Sarda Act. The Act was a part of the social reform movement and it focused on the prohibition of the child

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90 Ibid. at 9


92 Ibid at 8

93 Ibid at 16


95 Ibid at 1
marriages below the age of 18 years for men and 15 years for women respectively. It was the first secular law curbing the child marriage in India. However, the Act lacked implementation by the British authorities, mainly due to the loss of support by the Indian prince who were not in favour of the Act. Various amendments were made in this Act from time to time to increase the age limit but it remained just a piece of paper for years. Due to the ineffectiveness of the 1929 Act, it was repealed by the new Act framed by the legislation in 2006, named as The Prohibition of Child Marriage Act, 2006. The Act came into force on 1st November 2007. The present Act aims at prohibiting the child marriages. For the efficacy of the Act, it duly envisages rigorous punishment for the contravention of the provisions of the Act.

Applicability of the Act
The Act is applicable to the territory of India except the state of Jammu and Kashmir, irrespective of the caste, creed, religion etc. The Renoncants of the Union territory of Pondicherry are also not covered under the application of the Act as the Civil French laws are applicable on the citizens of Pondicherry.

Objectives of the Act
Child marriage has been a concern in India due to its root in traditional, cultural and religious practices. It is associated with various problems and consequences as discussed earlier and thus to decrease such instances the Act came into being. The main objective of the Act is to prohibit the solemnization of marriage between children, that is, the male below the age of 21 years and the female below the age of 18 years. It is a welfare legislation that aims to enhance the health of children and the status of women in the society.

Provisions of the Act
The premise of the law stands on the pillar that there should be no marriage between the minor. On this premise, the provisions of the Act can be divided into 3 P’s that are as follows:

A. Prevention
B. Protection
C. Prosecution

Prevention:
The law seeks to prevent child marriage, and in this regard they have set up various authorities to deal with such cases. It prevents child marriage by making it a non-bailable and cognizable offence. The child marriage prohibition officers are appointed to prevent such an act and register the matter as soon as possible. They also have the duty to create awareness and sensitization towards such issue. The court also plays

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97 Rajnandini Mahajan, *Laws On Child Marriage In India*, (Jan,28, 2018, 6:00 PM), ttps://blog.ipleaders.in/laws-child-marriage-india/#_ftn1
99 *Ibid at 1*
100 *Section 1, Supra note 1*
101 *Section 2(a), Supra note 1*
102 M.Mohamed Abbas vs. The Chef Secretary, (2015) 6 MLJ 49 (India)
103 *Section 15, Supra note 1*
104 *Section 16, Supra note 1*
105 *Section 13(4), Supra note 1*
an active role and has been given the power to pass an injunction order for prohibiting such kind of act. Thus, the Act tries to curb the practice and create consciousness among the people.

Protection:

The Act has laid down provisions for protecting the children from such evil practices of the society. Section 3 lays down that the child can apply for a decree of annulment in the court of law for getting rid of the force marriage by the parents. The child prohibition officer has been entrusted with the responsibility to provide legal aid and care and protection to the victims of the child marriage. If any child is borne out of such marriage then it would be considered legitimate child, this provision is formed so as to protect the interest of the child. The Act also provides for the rehabilitation of the children who are victims of such practice.

Prosecution:

The law envisages provisions relating to the prosecuting of offenders. Section 10 lays down that if any person performs or tries to abet another to solemnize child marriage would be punishable with imprisonment which may extend to two years and fine which may extend to one lakh rupees. Also, Section 9 states that if an adult male marries a minor female then he would held liable as mentioned in Section 10.

Critical Analysis of the Act:

Child marriage is a violation of human rights and the abuse of childhood. It has various deleterious impacts on the child. It truncates the childhood and innocence of the child. It further curtails the freedom of developing into a self-recognized and fully fledged person. It denies the opportunity of freedom of life and shoves the child into a marriage for which he is not mentally prepared.

The current legislation is the furtherance of the previous Act. The main aim and object behind the enactment of this law was to discourage marriages between under aged persons. The Act lays down provisions for preventing child marriage, it appoints various authorities for the protection of the victims and it incorporates punishment for the offenders, all the provisions that prevent child marriage are welcome. However, the coin always has two sides and so does this Act.

One of the main criticisms of the Act is that, it specifically does not declare the child marriage to be void but only voidable by the option of one party same as the previous Act. It made a specific provision for void marriages under certain circumstances but did not render all child marriages void, it introduced the concept of a voidable child marriage. It is riveting that the legislature has accepted the peril of child marriage and also that it is in violation of human rights, but at the same time, except in certain circumstances contemplating under Section 12 of the Act, the marriage is treated as

106 Section 13, Supra note 1
107 Section 3, Supra note 1
108 Ibid at 29
109 Section 6, Supra note 1
110 Section 10, Supra note 1
111 Section 9, Supra note 1

113 Lajja Devi v. State, AIR 1955 All 671 (India)
voidable.\textsuperscript{114} Also, the male can annul the marriage till the age of 23 years but the female can do so only till the age of 20 years (2 years after attaining majority, the marriage can be annulled by any party to the marriage). It is held to be discriminatory in nature, as it gives the male more time than the female. This refutes the purpose of the whole Act for which it came into being. The Act lays specific emphasis on preventing the child marriage and not prohibiting it in totality. The uncontrolled child marriages that are being performed in India, even after the passing of the legislation, clearly shows that it has no effect on the society and the people. According to UNICEF, 40% of the world's child marriages take place in India.\textsuperscript{115}

The current Act impliedly gives consent for child marriages and so do the other Acts in force. The Hindu marriage Act, 1955 lays down that the marriage can be solemnized between adults that is, bridegroom should have attained the age of 21 years and the bride of 18 years. But at the same time, the 1955 Act does not make the marriage void in contravention of the age, it only makes it punishable. The Dowry Prohibition Act, 1961 also contains provisions which give implied validity to minor's marriages.\textsuperscript{116} The words 'when the woman was minor' used in Section 6(1) (c) reflects the implied legislative acceptance of the child marriage.\textsuperscript{117} Code of Criminal Procedure also lays down that the children have the right to claim maintenance from their parents if they are minor irrespective of the fact that they are married or unmarried.\textsuperscript{118} Thus, it will not be wrong to say that is has failed drastically in its application.

**Conclusion and Recommendations:**

Child marriage is a menace that cannot be cured without the buttress of the society. It is therefore, extremely important for the government to publicize the contents of the present Act and create awareness about the ills of child marriage.\textsuperscript{119} The awareness can be spread through media, campaigns, dance, and street play or in any other appropriate form. Education must be imparted amongst the children by the teachers in the school itself relating to the harmful consequences of child marriage and thus, encouraging them to marry at a later stage. For this, Article 21A of the Indian Constitution must be promoted. The studies show that the more the child is educated the later they tend to marry. Commissions set up at State and Central level must look into such matters and report them as soon they possess the knowledge of any such act. The Acts mentioned above should all be amended in a way that it does not transgress the essence of the law and at the same time it does not promote child marriage impliedly. Also, child marriages must be made void in order to protect the interest of the child. To completely eradicate such practice from India, it is important to fabricate the child rights with the core issue of child marriage.

\textsuperscript{114}Ibid at 38
\textsuperscript{116} Yunusbhai Usmanbhai Shaikh Vs State of Gujarat, 2016 CriLJ 717 (India)
\textsuperscript{117}Ibid at 41
\textsuperscript{118} Section 125, The Code of Criminal Procedure, 1973, No.2, 1973 (India)
\textsuperscript{119}Ibid' at 8
SMALL HYDRO-POWER PLANTS IN INDIA AND ITS IMPACT ON ENVIRONMENT

By Anuj Gupta
From Indore Institute of Law
Indore, Madhya Pradesh

ABSTRACT:

Small Hydropower (SHP), considered as the non-contaminating sustainable power source having high transformation efficiency with tremendous adaptability and working and financial supremacy over other power age modes up to 25 MW, has been agreed best urge and need by Ministry of New & Renewable Energy (MNRE), Government of India because of its condition well-disposed and environmental friendly nature. Environment Impact Assessment (EIA) can be used as a device to check the ecological effects of SHP extends in pre-development, development and post-development stage. Ministry of Environment and Forest (MOEF), Government of India has set the rules for EIA, an arrangement of Environment Management Plan (EMP) and observing of moderation measures for a vast number of modern, development and different tasks including power ventures.

The present paper plots the upsides of SHP, hindrances in the improvement of SHP, EIA process in India, their effects on biological assets and human condition and EMP. Paper also integrates literature on negative impact as well as positives, highlighting its impact on both.

INDEX OF AUTHORITIES:

STATUTES REFERRED:

- The Indian Constitution, 1950
- Electricity Act, 2003
- Environment Protection Act, 1986
- Wildlife Protection Act, 1972
- Forest Act, 1927
- The Water (Prevention and Control of Pollution) Act, 1974
- Biological Diversity Act, 2002
- Environmental Impact Assessment Notification (Amendment), 2014
BOOKS REFERRED:
• H.M. Seervai, Constitutional Law Of India, (Universal Publishing Pvt.Ltd.,4th edn., Vol.1)
  • Dr. L.M. Singhvi, Constitution of India (Thomson Reuters, 3rd edn. vol.2)
  • P. Leelakrishnan, Environmental Lw in India (Lexis Nexis Butterwort’s Wadhwa Nagpur, 3rd edn. 2008)
  • Dhirajlal&Ratanlal, Law of Torts (Lexis NexisButterworthsWadhwa, 26th edn. 2012)
  • Leela Krishnan P., Environmental Case Law Book (2nd edn. 2006)
  • Doabia T.S., Environmental & Pollution laws in India (1st edn, 2005)

International Instruments
• Universal Declaration of Human Rights, 1948
• Stockholm Conference, 1973
• Rio declaration, 1992
• International Union for Conservation of Nature
• Asia - Pacific Partnership on clean development and climate
• Kyoto Protocol, 1997

Principles and Doctrines
• Public Trust Doctrine
• Precautionary Principle
• Principle of Sustainable Development

List of Cases
• M.C. Mehta vs. Kamal Nath (AIR (1997)1 SCC 388
• Francis coralie v. Union Territory of Delhi ( AIR 1994 SC 1844)
• M.P. Rambabu v Divisional Forest officer ( AIR 2003, AP 256)

Legal Databases
• Manupatra
• SCC Online
• Hein Online
• Westlaw
• India Kanoon
• Sage Online

www.supremoamicus.org
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SCOPE:

This Research Paper will highlight the issue of sustainable development in India with context to critical concern for power in particular region i.e. in the state of Uttrakhand. The paper covers the development of Small hydropower plants especially in the Himalayan region grown at much faster pace in last 7 years; they are backed up by the government as ‘green and renewable energy.’ An advocacy body...
contended it to be not as green as it has been framed by the ministry and severely causing ecological imbalance and violating much legislation including constitutional provisions of citizens and to maintain the sustainability of development along with the ecology. This Research Paper contains all decisions of Honourable Supreme court with context to same and Respective committee on Sustainable Development.

LIMITATIONS:

The Development of Small Hydro Plant Encroaching the Rights of the Citizens of the state and this issue of SHP and Problem created by it has not been given enough emphasis and ignored in various aspects such as Hydropower plants are not abiding the minimum rules and regulations of the legislation and still there is no due detail of the same. SHP’s are basically required in the Himalayan Region as Indian State Himanchal Pradesh and Uttrakhand and SHP falls under State Control Board or EIP is still a matter of Debate in the Current Scenario.

LITERATURE SURVEY

I would like to thanks to the Literature Sources and their authors from where I have picked up the vital and research points which I analyze and interpret to put in my Research work which helped me in accomplishment of my project.


RESEARCH QUESTIONS:

1. What are the Constitutional Provisions for the protection of Environment and whether rights guaranteed under it are violated?
2. Whether SHP Violates Green norms?
3. Whether Exemption of SHP from EIA is Valid?
4. What are the adequate policies of the Government for the Development of Small Hydropower plants with the contribution of Public and Private Enterprises?

INTRODUCTION

The Ministry of New and Renewable Energy has been Vested with the power to look after the business of Small/ mini/ micro power plants with 25 M.W. station capacities. However, generation of electricity with the assistance of hydropower plants is the matter of concurrent list but water falling under the state list that’s why Small Hydro-Power Plants (SHP) is governed by the state policies. Hydropower is a renewable, clean, and non-polluting or contaminating power resources with high operational flexibility and economically docile over any other power resources.
resources. As depending on the analysis, India’s economic exploitable factor is 84044 M.W. at 60% load factor and installation capacity up to 1, 50,000 M.W. India is very short in its power capacity and it’s about 13%. To meet the changes and to exploit the power need the Ministry of New and Renewable sources has unveiled the Small Hydropower plants and has been painted by them to be best-suited to combat with the problem of sustainable development as they are considered to be the primary source for electricity generations as well as they are less prone to exploit the environment and emit toxic gases and are considered to be best suited for environment.

Small Hydropower power is among one of the earliest identified and known Renewable energy sources existed in the nation since the 20th century and before as it was used in the Himalayan region as water wheels which provide power to run devices like grinders. Small Hydro Power plants have been introduced in India after the short while of its Commissioning of world’s first hydroelectric installation at Appleton, the USA in 1882. The first Energy Resource that was installed in the country was of 130 k.w at Darjeeling in the year 1997. In the Purview of Environmental law M.C., Mehta vs. Kamal Nath Case has been regarded as the Landmark Case

KAMAL NATH CASE:¹²⁰

In the State of Himanchal Pradesh, Span Motel, Possess by those relatives for Shri Kamal Nath, Minister for Environment and Forests, Govt. of India Diverted the Course of river Beas to enhance the beauty of motel and also invaded upon some forest land. The apex court ordered the management of the Span motel to give forest land to the Govt. of Himanchal Pradesh and remove all sorts of invasions. The Court Delivered the Landmark Judgment and enact principle of exemplary damages for the first time in India. The court said the polluter must pay to reverse the damages caused by his act and imposed a fine of Rs. Ten Lakhs (Rs. 10,00,000) on the span motel as exemplary damages. The Supreme Court Recognized Polluter Pays Principle and Public Trust Doctrine. Laws applied in this case law were Constitution of India and Environment Protection Act, 1986.

CHAPTER-1

1. SMALL HYDROPOWER PLANT IN INDIA

The utilization of Small Hydropower plant in India goes way back in the Historical backdrop With the country first SHP coming in the year 1897, The Sector has been growing uncommonly especially in the decade between 2003-2013 with almost double plants have been set up. In India SHP’s are referred to be a power plant with generating capacity below 25 megawatts (M.W.). No justification is available for this but according to the statutory body associated with the union ministry of power has defined SHP’s to be below 15 M.W. As this Hydropower does not abuse environment much that’s why it has been excluded from the research.

¹²⁰AIR (1997)I SCC 388
The classification/categorization of Small Hydropower plants in India has been following as under:

<table>
<thead>
<tr>
<th>Micro (kW)</th>
<th>Less Than 100</th>
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<tbody>
<tr>
<td>Mini (kW)</td>
<td>101 - 1000</td>
</tr>
<tr>
<td>Small (MW)</td>
<td>1 - 25</td>
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2. Run-of-River (ROR) Schemes without Poundage
3. Run- of –River Schemes with Poundage
4. Pumped Storage Scheme

2. HYDROELECTRIC POTENTIAL IN INDIA

2.1 First Survey (1953-59)

The First study to assess to hydroelectric resources was shoot at the duration of 1953-1959 by the Power Wing of the bygone Central Water and power commission on the basis of existing technology of hydropower. The study exploited the potential of the hydropower at 42100 M.W. at 60% load factor.

2.2 Re-assessment Studies (1978-87)

It was done by the Central Electricity Authority in 1987, have allocated the hydropower potential at 8044 MW with 60% load factor. The Recognised hydropower schemes have been 845 in numbers that will generate 442 billion units of electricity however seasonal potential would be about 600 billion units per year that means the hydro potential of 84044 MW at 60% load factor when completely developed turns out to result in capacity about 150000 M.W. on an average basis. Presently, the following forms of hydropower project are prevailing in India: 1. Storage Schemes

3. DEVELOPMENT OF SMALL HYDROPOWERPLANTS

The Ministry of New and Renewable Energy (MNRE) has been allocating the Central Financial Assistance to the State Government and public sector as well as set up Small Hydro Power Plants. Through the Alternative Hydro Energy Centre (AHEC), IIT Roorkee technical assistance is being provided to them.

According to Ministry, SHP’s in India has been a Private investment oriented program with the economic viability and keen desire of Private sector to setup SHP’s.

The Schemes offered by the Government are under follows:

- Resource assessment and support for identification of new sites:
- Scheme to support for setting up new SHP projects in the private/ co-operative/joint sector, etc.
- Scheme to support for setting up new SHP projects in the Government Sector
- Scheme to support for Renovation and Modernization of existing SHP projects
- Scheme to support for development/Up gradation of Water Mills (mechanical/ electrical output)
and setting up Micro Hydel Projects (up to 100KW capacity)
• Research & Development and Human Resource Development.\textsuperscript{121}

\textbf{Chapter-2}

1. Environments Impacts of Small Hydropower Plants And Violation of Green Norms

Small Hydro-Power Plants are subjected to Various Green Norms and the Various Legislation which is governed by the Ministry of New and Renewable energy (MNRE). SHP’s are considered to be as green and renewable technology, when compared to other forms of energy it does not have any adverse effect on the environment as its fuel is inexhaustible so it does not have any hand in polluting the air. Water pollution is also relatively low and happens only in the course of construction of the dams and cause little or no-displacement of the people. SHPs can employ diverse impacts on local environment and ecology. Because of the Fact that SHP’s are exempted from Environment Impact Assessment (EIA), not many detail projects can be found out of the cumulative impact of SHP’s in environment and ecology. At the one instances, it can be seen that in many mountainous areas development of hydro leads to electricity generation with strengthen the economy of rural areas and when Small industries linked with hydro-power there will be a lesser amount of greenhouse gases effect. The SHP’s are being promoted by the Ministry but without proper regulatory framework it is causing imbalance
The environmental impact of small hydropower (SHP) projects, of up to 25 megawatts (MW) capacity, which is being promoted by the government as ‘green”, is not green as it painted out to be. “Even on implementing the norms, the environmental impact will continue to be an issue. Redesigning the SHP projects to allow a part of the river to flow should be the next level of research.” At present, the SHP projects in the State do not follow even minimal environmental norms.

2. Typical Hydro-power Project

Hydro Power Plants with the water at head which spins turbine to convert kinetic energy to generate electricity. The very nature of hydro-power plants change dramatically so their affects also can be. Exemplified by the modification of the existing dams may have the negligible affects. Water Management by the Hydro-power plants are Categorised into two types:-

• Storage – the water flow is controlled, typically using a dam, to provide a consistent supply of water and electricity.

This approach permanently floods the area behind the dam, modifies natural cycles of high and low flows, and restricts sediment movements and migrating species.

\textsuperscript{121}Ministry of New and Renewable energy, Government of India, Annual Report 2015-16, available at http://164.100.47.193/lsscommittee/Energy/16_Energy_y_13.pdf, last seen on 08/02/2018
- Run-of river – the natural flow is diverted, but with negligible time delay or storage facilities. A weir, small dam, canal, penstock and other structures may be used to direct the water to a turbine, under pressure and then is released.

3. Environmental Impacts:

Overall, a hydro-power plan adjusts the regular variability of a waterway. Furthermore its accessibility to species, what’s more provides for this control shall not fall within and consequences would not be appropriate. The Hydro-power project while setting up Govt. should understand the environment flexibility and dynamic changes which affect the wide-area.

3.1 Environmental Impacts:

Hydro-power neither required diesel nor batteries. Small System might be set up near the river and thus mostly requires concrete and clearing for construction that would change the flow of water and at the same time require an electricity network because of the small system planted near the river. Hydro-power may require at times upstream catchments for which it results in positive for ecology. If Dam requires changing its stream flow can affect ecosystems, flooding patterns, and sediments movements.

- **Fish & Fauna:** Construction of dams and dry-river stops the migration of fish species from spawning. ‘Fish ladders’ which basically blocks river streams and created by the humans either or in existence naturally does not allow fish to pass through and ‘low’ stream side are only source to travel through the phase. The impact of SHP’s plants, dams and drying river beds to large extent are unknown.

- **Dry-river:** SHP plants close to the maximum capacity potential of hydro-power may have dams up to the height of 10 meters. These Plants re-route the flow of water through the pipelines to maximize pressure and leaving dry long stretch of river. The River left short in the Run-of-River (ROR) plants and remains dry depending on their size and geographical area from the run-of-river project.

3.2 Eco-system:

- **Water Quality and the flow both are the major focus in this.** Both can affect the migratory species and ponds. These may also result in barrier to aquatic life. Instruments like fish ladders can be used to combat with ecological problem.

3.3 Ecological flow

- Ecological flow is the concept of keeping enough water in the river downstream from a dam to sustain ecosystems and human livelihoods dependent on water from the river.70 hydropower projects with a capacity of
9,580.3 MW have “affected” 60-80 percent of the river, without taking into consideration the river’s ecological flow (e-flow). This leaves large stretches of the river dry, affecting the aquatic flora and fauna, water quality, sediment carrying capacity, erosion, groundwater quality and recharge, climate, soil and geology. It also interferes with drinking and agricultural water availability.

- Agriculture and drinking water- The water is coming from SHP. So water is being diverted to several pipes as well the machinery of hydro power. While passing through all these it contain some impurities like of lubricant of machines etc. So drinking or using this type of water is injurious to health.

3.5 Cumulative impacts:

Large Catchments are required for the multiple and large hydro-power projects and setting up multiple plants on the river increases the chances of catchment level impact on these areas such as drought and cyclones or may be heavy rainfall. Secondary impacts could be of the influencing land use.

- **Land**: Land can be degraded by the soil erosion. This is very essential to protect the locations from soil erosion, encourage afforestation, and to ensure proper utilization of muck during the construction of roads, check dams and slope maintenance. Renewable energy projects can be resource-intensive — 1 megawatt (MW) of solar power needs 2.5-3 hectares (ha) of land. This raises concerns of land acquisition, impact on local ecology if the land area is large and in eco-sensitive areas, and issues of waste disposal.

CHAPTER-3

The Effective Use and Guidelines of EIA For SHP

To Understand the Consequences and forecast its effect on environment and people is referred to be as Environment Impact Assessment (EIA). The objective of the EIA is to look beforehand and address potential environmental look over and concerns at the very early stage of project planning and set-up. According to the EIA notification 2006, a hydro-power plant below 25 MW capacities does not need an EIA. The major problem that started occurring is that every project in India is being started constructing without EIA regulations and in a falsifying manner. The large Hydro-power plant constructor split them into two parts to place plant in the category of small hydro-power capacity.

- The EIA (ministry) prepare a comprehensive policy per inspection, verification, and monitoring and the overall procedure relating to the grant of

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123 Ibid
forest clearances and identification of forest in consultation of state.\textsuperscript{124}

3.1 To Improve the Quality and transparency:

- The overall aim and object of the environmental permitting are to look after the environment and human health as well (in a transparent accountable manner) on a legally binding requirement through environment mechanism (OECD, 2007). Any projects at their primary stages have to go down through various stages of check and clearances. Ministry of Environment and Forests (MoEF) at the central level and Pollution Control Boards (PCBs) at the state level are approached for various consents.

- For improving the quality and transparency of the environment clearances process, prior informed consent of local self-government of the respective area may be introduced for the proposal requiring environmental clearance. A public hearing should also be made mandatory for the activities specified in the environment impact assessment notification.

- An Environment Impact Assessment (EIA) is a programme that analyses the environmental impact and lowers down its effect much before setting up when the planning and plotting were desired and before any promise being made. In most of the industrialized country, EIP is implemented when there is exceed the size of the hydro-power plant.

- Meanwhile, the 12th Five Year plan’s strategy aims to develop the renewable energy sector through capacity addition in wind power, small hydropower, solar power, and bio power. Thus the renewable energy space in the country is going to witness a large number of renewable energy projects in coming years. Considering the energy security concern and commitment for a ‘Low Carbon Growth Strategy’, the 12th Five Year plan has provisions to ensure sustainable development of the power sector. In their efforts to reduce GHG emissions, Government is emphasizing the development of small hydropower as well from renewable sources.

- According to section 8, any generating company intending to set-up hydro- generation station shall prepare and submit to authority for its concurrence.

- As also, stated earlier that EIA is the mechanism which analyses the overall effect of the SHP on the environment. The possible reason for exemption of EIA from SHP could be that government doesn’t want to face the impact and let people know about the harmful

\textsuperscript{124}Ministry of Forest and environment, Government of India, Annual Report, January 2014, available at http://envfor.nic.in/sites/default/files/OM%20FC%20100114.pdf, last seen 07/02/2018
effect of SHP. Mission 2022 power for all which is the ambitious target of achieving 175 G.W. of energy from the renewable source.

CHAPTER 4

CONSTITUTIONAL PROVISIONS

Protection and improvement of the environment is a constitutional mandate. The idea of Welfare State is the commitment weeded with a country which is subjected to constitutional provisions for environmental protection under the chapters of Directive Principles of state policy and Fundamental Duties. Provision of the Constitution which recognize the fundamental right to clean and wholesome environment is absent and has been set off by judicial activism in the recent times.

- Art. 21 of the constitution envisage a right to life and personal liberty of a person. The Word “life” under Art. 21 means a quality of life , which includes right to get pollution free air and water, protection of ecology and environmental pollution and freedom from noise. Also UDHR under Article 3 recognizes right to life and liberty. Article 3 UDHR

- The right to pollution free environment and protection of ecology came to acquire the status of fundamental rights under Article 21 by giving liberal interpretation.

- It is accepted throughout that the right to life under Art. 21 also embrace the right to live in a wholesome, pollution-free environment. This is to be read with Art. 48 A and Art. 51A (g) of the constitution that imposes a duty on the state to preserve and improve the environment. Further, this is in line with India’s international obligations, i.e. The Rio Summit, Kyoto protocol, etc.

- In MC Mehta case, imposed on the state, a duty to anticipate, prevent and attack the causes of environmental degradation.

Also under well established, Public Trust Doctrine, the state is the trustee of all national resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the running water, air, forest and ecologically fragile lands. The state as a trustee is under a legal duty to protect to natural resources; these resources is meant for public use

- Principle recognized regarding the matter i.e. precautionary principle, it is based on the theory that it is better to on the side of caution and prevent environmental harm which may indeed become irreversible. Precautionary principle anticipated action to be taken to prevent harm. The precautionary principle makes it mandatory for the government to Anticipate, prevent and attacked the causes of environmental protection degradation Thus it is high time the govt. policy environmental friendly way possible permission 2020, power for all to sustain and preserve the rich,
diverse ecosystem and preventing the infringement of rights of citizens.

- The SHP’s projects are causing right to live& livelihood which might cause displacement. Any person who is deprived of his right to livelihood except according to just and fair procedure established by law can challenge the deprivation as offending the right conferred by Art 21.

- Also throwing light on the Rio Summit, 1992, the UDHR, the Asia- Pacific partnership on clean development and climate, all to which India is a signatory deals with the issues of pollution, sustainable development, environmental rights and these international instruments are consider important to be read with Fundamental Rights as they further, enlarge the scope of the same

- In Virender Gaur v. State of Haryana, by referring to principle no. 1 of Stockholm deceleration of United Nations on Human Environment, 1972, the court observe that right to have living atmosphere congenial to human existence is a right to life. The state has a duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic Environment

- The Principle of Sustainable development has been also the effective doctrine has maintained the harmonious balance between environment, economy, and society keeping in view the protection of the ecology with sustainable development. The principle endeavors that while looking at economic growth the state should focus on environment growth as well and do not cause ecological imbalance.

- The concept of ‘Sustainable development’ recognized as a Fundamental Right under Article 21 to keep in mind the “principle of proportionality” so as to ensure protection of environment on the one hand, and to undertake necessary development measures on the other hand, since, the economic development can not be allowed to take place at the cost of ecology but the necessity to preserve ecology and environment should not hamper economic and other developments.

CHAPTER-5
CONCLUSION & RECOMMENDATIONS

RECOMMENDATIONS:
As Long as there is the talk of development of SHP’s we must consider the Principle of Proportionality where development and Ecological balance must go hand-in-hand so there is a lesser chance of conflict where to government or state focus on. At the cost of development, the environment should not be put in danger and vice-versa.

SHP plants either of small capacity shall also be included in the EIA clearance process by the notification of 2006.
Local Community should be benefitted from the project. Profit generated should be shared with them for development process; they should have the ‘Right to Power’.

CONCLUSION:

Human Beings can ensure fundamental equality and adequate conditions of life in an environment that permits a life of dignity and well-being. There seems to be urgent need to formulate law keeping in mind those who pollute environment are not just destroying environment but also violating human right as well. Government needs to re-think that the ecological development should be kept over environment or not.

It becomes the need of an hour that the development of small hydro-power plant should take place keeping in view all the safety parameters for the environment so that the problems which is the concern should not re-occur.

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DNA PROFILING WITH SPECIAL REFERENCE TO SUPREME COURT GUIDELINES

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ABSTRACT
Forensic science, as a scientific discipline functioning within the parameters of the legal system not only provides guidance in criminal and civil investigation but also supplies the courts accurate information about all the attending features of identification of criminals. Actually, the recent advancement in modern biological research has revolutionized forensic science resulting in a radical impact on the administration of justice. In the new scientific era, the emergence of DNA testing changes the role of forensic science in the legal system from passive spectator to the main key player. There is no doubt that this new technology can be used as an effective tool in crime detection to accelerate crime control for a better society. But at the same time we cannot overlook the fault that it cannot be implemented in any legal system without hampering some basic human rights of an all used like right against self-incrimination, right of privacy etc. Therefore, the problem, that the law makers and the judges would face in introducing this technology is how to make a susceptible behave between the above two conflicting interest at the society. This paper concerns with the importance and relevance of this technology in forensic science as well as criminal justice system.

INTRODUCTION
The correct identification of criminals and other individuals has always been one of the most important problems in criminal and civil investigation. The best and certain method, so far, had been the identification through fingerprints. This identification mode was discovered during the nineteenth century. It has been helping the criminal justice system tremendously wherever individuals from all body materials containing cells. This made, excess the other method of identification in certain respects. It permits the identification of the individual not only from the comparison of his own body materials containing body cells inter se, but the identification of his body materials can also be made from the body cells of his blood relations: parents, sons, daughters, brothers, sisters and the like.

The identification is possible from a variety of clues, which are available in different types of crime blood, semen, hair roots, body tissues, bone marrow etc. They can be inches to the source (the cut print or the victim) from which they emanated. In Naina Sahni’s Tandoor Murder case the body after the murder was being burnt in an oven Tandoor. When people suspected foul plans and stopped the burning, a badly burnt body was taken out. The body material was too much charred to permit in use in the DNA test. Bone marrow was used to identify the victim. Its DNA profile was compared to those of her parents and identity was established (CH).

The IO interrogates, on behalf of the court, witnesses including the all used and
the suspects to find out the truth. Since long the police have been all used of adopting shortcut methods in interrogation thereby violating human rights by using coercive means to extract information. The scientific evidence brings fairness in investigation and helps in corroborating other evidence during trial. Forensic evidence 125 as secondary evidence, corroborates the primary evidence and helps judiciary in delivering the justice126. The judiciary since long has been placing high reliance on scientific evidence as observed in mid 16th century by justice sanders, “it matters arise in one land which concerns others Sciences or faculties, we conventionally apply for the aid of that science or faculty which it concerns. This an honourable commendable thing in one law. We approve of them our encourage them as things working of commendation”127. Since 1897, India is using finger prints for classification of the records of criminals 128. In pursuits of truth, Indian judiciary is using forensic evidences like finger prints, post mortem reports by medical experts, serology, toxicology, odontology, ballistics, DNA profiling etc. Recent times have witnessed a spurt in the use of modern forensic techniques for deception detection like narro-analysis, brain mapping and lie detector for helping judiciary in reaching the truth in delivery of justice.

DNA profile database can be useful tools in solving crime, but given that DNA profile of a person can reveals very personal information about the individual, including medical history, family history and so on, a move comprehensive legislation regulating the collection, us analysis and storage of DNA samples needs included in the draft human DNA profiling bill.

DNA evidence was first accepted by the courts in India in 1985129 and in 2005 the code of criminal procedure was amended to allow for medical practitioners, after authorization from a police officer who is not below the rank of sub-inspector, to examine a person arrested on the charge of committing an offence and with the reasonable grounds that an examination of the individual will bring to light evidence regarding the offence. This can include “the examination of blood, blood stains, semens, swabs in case of sexual offences sputum and sweat, hair samples, and finger nail clippings, by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case”130.

Though this provision establishes that authorization is needed for collection of DNA samples, defines who can collect samples, creates permitted circumstances for collection, and lists material that can be collected among others things, it does not

125 Forensic or scientific evidence is a physical evidence derives from forensic analysis. Forensic science is the ad mixture of act and science to facilitate the process of investigation.
127Buckly V Rice Thomas (1554) 1 Plowden 118.
address now the collected DNA evidence should be handled, and what will happen to the evidence after it is collected and analyzed. These gaps in the provision indicate the need for a more comprehensive legislation regulating the collection, use, analysis and storage of DNA samples, including for crime-related purposes in India.

In 2007, the draft of human DNA profiling bill was made public but was never introduced in parliament in February 2012, a new version of the bill was leaked. It passed, the bill will establish state-level DNA databases which will fed into a national level DNA database and proposes to regulate the use of DNA for the purposes of “enhancing protection of people in the society and the administration of justice”.

The Bill will also establish a DNA profiling Board responsible for 24 functions, including specifying the list of instances for human DNA profiling and the sources of collection, enumerating guidelines for storage and destruction of biological samples, and laying down standards and procedures for establishment and functioning of DNA laboratories and DNA Data Bank. The lack of harmonization and clear policy indicates that there is a need in India for standardizing the collection and use of DNA samples. Although DNA evidence can be useful for solving crimes, the current draft 2012 draft bill is missing critical safeguards and technical standards essential to prevent the misuse of DNA and protecting individual rights.

Order of the Court for DNA test

The issue of taking biological sample of the subject is a vital issue on Forensic analysis since it may affect privacy or invade bodily integrity of a person resulting in compromising with the rights to life with dignity. Under some forensic techniques like narco analysis the statements of the subject are recorded under the influence of the drug administered to them taking them to a trans-state for allegedly recording compulsive testimony such statement although not admissible in the court, still violate right against self incrimination under Article 20(3) of the constitution of India. Hence, the Supreme court of India in Selvi v State of Karnataka (Selvi) has made it compulsory to get the consent of the subject prior to conducting of such Forensic tests.

Thus in the interest of justice, the court must have balancing approach in individuals right and community right in ordering a forensic test. The law under section 53 CrPc empowers the criminal courts to use reasonably necessary force to conduct forensic examination. Further, to prove innocence section 54 of CrPC provides on opportunity to the accused to offer medical examination. In civil disputes, free and informal consent has greater relevance. In Rohit Shekhar v Narayan Dutt Tiwari, however, the court ordered for use of appropriate force to take the blood sample.

Consent Issue

In civil dispute competent
consent\textsuperscript{135} of the subject before conducting forensic tests have been advocated by the Supreme Court in Selvi case.

**Admissibility of DNA evidence in paternity dispute cases in India** In our country initially the judges took very conservative views regarding the applicability of DNA evidence in resolving the paternity/maternity dispute cases. Indian judges often face a database question in deciding matters of paternal responsibility of whether the law should give priority to biological parentage over social parentage or not.

To determine the paternity of the child there is a statutory presumption under section 112 of the Evidence Act that any child born during the continuance of a valid marriage between his/her mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate child of that man, unless it can be shown that the parties had no access to each other at any time when the child could have been begotten. Now, DNA testing may be used to rebut the said statutory presumption arising under the Act, or to establish evidence in the circumstances. Where no presumption arises one may seek DNA parentage testing in order to obtain evidence of non-paternity for the purpose of civil proceedings against the child and mother to prove the paternity fraud and claim damages for emotional stress and financial loss that was caused due to such fraud. DNA parentage testing may provide evidence to show that a person has biological connection with a deceased person and can be a proof in support of a succession claim.\textsuperscript{136}

In *Gautam Kundu v State of W.B.*\textsuperscript{137} the supreme court expressed the most reluctant attitude in the application of DNA evidence in resolving the paternity dispute arising out of a maintenance proceeding. In the said case, the father disputed paternity and demanded blood grouping test to determine paternity for the purpose of deciding whether a child is entitled to get maintenance under section 125 of the code of criminal procedure from him. In this context, the supreme court held that while purpose of the application was nothing more than to avoid payment of maintenance, without making out any ground whatever to have recognize to the test, the application for blood test could not be accepted. It was also held that no person could be compelled to give sample at blood for analysis against his/her will and no adverse inference can be drawn against him/her for such refused.

In a judgment of the supreme court in the year 2001, *Kanti Devi v Poshiram*\textsuperscript{138}, the court gave priority to social parentage over biological parentage and thereby rejected DNA evidence by observing that though the result of a genuine DNA test is said to be scientifically accurate it is not enough to escape from the conclusiveness of section 112 of the Indian Evidence Act, 1872.

\textsuperscript{135} The competent consent includes informed consent i.e. information about health effects at the test on person and the consequences in the matter under inquiry.


\textsuperscript{137} 1993 AIR 2295; 1993 SCR(3) 917.

\textsuperscript{138} (2001) 5 SCC 311
The supreme court in *Diparwala Roy v Ronobvoto Roy*[^139] to uphold the decision of family court and the high court allowing DNA test for determining not only the paternity of new born child but also to conclusively testing the veracity of accusations of infidelity leveled by the husband in the divorce petition filed in the family court under section 13 of the Hindu Marriage Act 1955. The apex court was, therefore, firm in holding that proof based on DNA test would be sufficient to dislodge a presumption under section 112 of the Indian Evidence Act.

In *Sharda v Dharmpal*,[^140] the supreme court took a very positive view regarding importance as well as admissibility of DNA evidence in matrimonial cases. The supreme court observed that:

1. A matrimonial court has the power to order a person to undergo medical test.
2. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian constitution.
3. However the court should exercise such a power if the applicant has a strong prime farie case and there is sufficient material before the court if despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him.

In the aforesaid case the supreme court by distinguishing its earlier decision in *Goutam Kundu* case[^141] further held that right to privacy under article 21 of the constitution is not an absolute right and in case of conflict between the fundamental rights of two parties, the court has to strike balance between the competing rights.

However DNA has played vital role in strengthening rights of unmarried mother and her child especially those belonging to marginalized sections of society who suffered exploitation under various compelling circumstances including deceitful promise[^142] of marriage. In *Narayan Dutt Tiwari v Rohit Shekhar* DNA test was very helpful for Rohit Shekhar to enjoy the legal variation of being the legitimate son of Narayan Dutt Tiwari. In this case, Rohit Shekhar has claimed to be the biological son of N.D. Tiwari, but N.D. Tiwari is reluctant to undergo such test stating that it would be violation of his right to privacy and would cause him public humiliation. But supreme court rejected this point stating when the result of the test would not be revealed to anyone and it would be under a sealed envelope, there is no point of getting humiliated. Supreme court further stated that we want young man to get justice, he should not left without any remedy. It would be very interesting to see that now courts in India would allow the admissibility of DNA technology in future.

### DNA Analysis in Criminal Investigation

The introduction of DNA technology has posed serious challenge to some legal and fundamental rights of an individual such as “Right to Privacy” “Right against self-intimation” and this is the most important reason why courts sometimes are reluctant in accepting the evidence based on DNA test.

[^139]: 2014 SCC online SC 831; (2015) ISCC 139
[^140]: (2003) 4 SCC 493
[^141]: 1993 AIR 2295; 1993 SCR (3) 917
technology. Right to privacy has been included under right to life and personal liberty or Art 21 of the Indian Constitution and under Article 20(3) provides Right against self-incrimination which protects an accused person in criminal cases from providing evidences against himself or evidence which can make him guilty. But it has been held by the supreme court on various occasions that right to life and personal liberty is not an absolute right. In Govind Singh v State of Madhya Pradesh, supreme court held that a fundamental right must be subject to restriction on the basis of competing public interest. In another case Kharak Singh v State of Uttar Pradesh, Supreme Court held that right to privacy is not a guaranteed right under our constitution. It is clear from various decision which have been delivered by the supreme court from time to time that the right to life and personal liberty which has been guaranteed under our Indian Constitution not an absolute one and it can be subject to some restriction. And it is on this basis that the constitutional of the laws right to life and personal liberty are upheld by the supreme court which includes medical examination. And it is on the basis that various courts in the country have allowed DNA technology to be used in the investigation and in producing evidence.

In Priyadarshini Mattoo murder case, the trial court exonerated the accused based on allegedly broken. COC. However, in appeal the Delhi High Court awarded death penalty to santosh singh but the supreme court reduced it to life imprisonment. In Nitish Katara murder case the identification of the deceased victim was difficult due to availability of only a small portion of one un-burnt palm with fingers. Here also, DNA profile helped in identifying the body remains by matching DNA profile with parents of the deceased which helped the High court of Delhi to uphold the conviction of the accused. DNA has helped the Indian judiciary in connecting crime with criminal and identification of the victim with precision. However integrity and chain of custody (COC) of biological sample recovered from scene of crime remain of vital significance in proving guilt beyond reasonable doubt.

Suggestions
Following are the suggestions for legal reforming for effective application of DNA technology in India:

1. Section 53 of the CviPC provides some scope to the investigating officer to have the accused examined by a medical practitioner at the request of the police: This section does not specifically say whether it would be applicable for DNA test. It relates to examination of the accused by a medical practitioner. This section never contemplates that the police officer shall be entitled to

144 1975 AIR 1378, 1975 SCR (3) 946.
145 1963 AIR 1295; 1964 SCR (1) 332
146 Santosh Kumar Singh V State through CBI (2010) 9 SCC 747.
148 Chain of Custody (C.C.), in legal context, is & procedural protocol which represents custody trial in the form of chronological log containing details of seizure, custody, transfer, diagnostic and disposition.
collect semen, blood, saliva, hair root, urine, vaginal swab etc. for the purpose of investigation personally by himself. For the purpose of crime investigation, section 53 CrPC should be more specific, clear, more unambiguous, more meaningful and more purposeful so that an investigating officer may not face any difficulty for the purpose of crime investigation.

(2) Article 20(3) of the constitution of India has to be reinterpreted to the effect that the accused should not get protection of this article when the investigating officer or the court direct him to give DNA sample for the purpose of investigation and it he does not give consent then an adverse inference should not be drawn against him.

(3) The supreme court declared that the right of privacy guaranteed under article 21 of the constitution could not operate as a bar when the question of public morality and public interest will arise, but a comprehensive legislation regarding privacy law is required in our country.

Limitations of DNA Technology

Inspite of the fact that the application of DNA technology in the criminal justice system is a social necessity, this new technology is not above criticism. Questions remain concerning whether DNA evidence is a threat to the right to fair trial or the right to self incrimination as guaranteed by the Indian Constitution. There are also concerns about the statistical probability critics argued that no matter how small the chance might be that two persons will have the same profile, can we convict a person on the basis of probability? The Science may be infallible, but human action, which controls the result of the scientific forensic examination, is always and there is probability of manipulation and tempering with the scientific evidence.149

Conclusion

India could benefit from having a legislation regulating, standardizing and harmonizing the use, collection, analysis and retention of DNA samples for crime-related purposes. There is a need with certain precautions of employing scientific advancements for preventing detecting crimes so there is a need to prefer harmonising construction of protection of individual rights under art 20(3) and art 21 of the constitution for safety, security and protecting the interest of the society.

149 The UK DND database our the European court and Human Rights: Lessons India can each from UK mistakes. Power Point Presentation Dr. Helen, Genewatch UK September, 2012.
AN EMPIRICAL STUDY ON ANIMAL WELFARE IN INDIA

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Abstract:
The development of Animal Laws in India has been felt from 19th Century onwards when the government drafted the Prevention and Cruelty to Animals Act, 1960 widely known as the PCA Act, but even after fifty years has been passed the law is still not implemented as expected. Neither the machinery has been upgraded nor has the infrastructure been developed. The failure of the executive can be perceived in every street of India where hundreds of animals are subjected to cruelty or they are being crushed under the wheels of the so-called modern society. The 21st Century India is more interested in purchasing a Siberian husky or a Labrador and spending thousands rather than adopting a homeless Indian breed dog because status symbol is more important than compassion and love and they fails to understand that foreign dogs are incompatible to Indian climate. The discussion of animal rights must focus on the moral and legal rights of animals in India where on one side people are murdering another human being in the name of protecting cows and the same person is having mutton biryani for lunch. The issue of animal rights is undoubtedly important and it stems from tradition and religion. In Hinduism each and every god is associated with an animal, in Jainism and Buddhism killing any animal is a sin.

I. INTRODUCTION

Animal rights in India has always been a topic of debates and discussions but only within few and concentrated people. Many people are still not aware of the existence of animal rights which is not surprising because few of them hardly know about the basic human rights and fundamental rights. In recent times a lot of Non-Government Organizations has came up with the tools of implementation of animal rights and protecting the voiceless but the poor animals still get abused and tortured in the hands of so-called humans. Although the Government has passed several legislations in this regard but there is hardly any implementation of such laws, the vague reasons behind such failure are lack of awareness and harshness in the mind of people. People tend to forget that just like human beings; animals have also the right to live without cruelty and animosity. Often in the streets one can observe the ill-treatment an animal come across which gets ignored because no one has the time to save an animal or to protest such cruelty.

Every day in our country the animals are fighting for their lives as most of them are enslaved, beaten, kept in chains so that they can be used for human entertainment or can be used in various experiments;

“The greatness of a nation and its moral progress can be judged by the way its animals are treated”- Mahatma Gandhi
they are confined in tiny cages and electrocuted, burnt alive so that people can parade around in their coats. The abuse that animals suffer at human hands is heartbreaking, sickening, and infuriating and it’s even more when we realize that the everyday choices we make such as what we eat and the kind of product we purchase may be directly supporting some of this abuse. The kind of torture and mercilessness an animal face is beyond words but his can be stopped if the people of the society come together to prevent such atrocities against such inhumane torture.

The Constitution of India under Article 51A (g) provides: 
“To protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.”

Thus it is the fundamental duty of every citizen to safeguard the wildlife and living creatures but every day we come across the news of animal poaching and killings, because unless the mindset of the people are changed, no law or system can improve the condition of animals. Nevertheless, with the help of social media and print media slowly and steadily we are striving towards an environment of zero tolerance towards animal abuse and exploitation. Government should make laws more stringent so that animal rights are given equal footing as that of human rights.

II. OBJECTIVE
The incident of violation of animal right in India is on the rise and thus awareness among people could result in protection of animals who are not lucky to have intellects of human beings. Animal are undoubtedly the soft targets of abuse since they cannot stand for their own cause, therefore it is pertinent for the common people to fight for their cause. Animal rights workshops should be organized so that people get a clear picture to take a stance for the cause. The notion of animal rights in India is very sluggish and infirm in India and it’s high time that we not only enact laws but also implement the law properly. The objective of the research is to:

- Highlight the loopholes in the laws relating to animal rights in India and the action to be taken to make the law more stringent.
- To focus on the awareness of the people about the rights prevalent in India for animals.
- Problems faced while implementing the laws.
- Awareness about animal rights violation across the country.

III. RESEARCH QUESTION
A. Whether the public is aware of the laws relating to animal rights?
B. How the problem of stray dogs can be eradicated?
C. What is the duty of the government towards animals in India?

IV. RESEARCH METHODOLOGY
This research is undertaken by the researcher as a non-doctrinal or empirical research which entails research based on interview, observation and experiments.
The essential characteristic on which this research is based is the questionnaire distributed to and answer filed and interview undertaken. For this purpose, the researcher has conducted surveys by distributing questionnaire to animal right activists, advocates and non-law background people. Although there are few articles on the subject in India and most of the Articles which the researcher has referred are published by foreign scholars. The Researcher has made analysis of all the information obtained and drawn the inferences and conclusion.

V. LITERATURE REVIEW

1. Animal trouble and urban anxiety:
   Human—Animal Interaction in Post—Earth Day Seattle by JEFFREY C. SANDERS.
   This article focuses on the issue of habitat of urban animals specifically zoo animals, dogs and geese and the emerging ideas about nature and popular ecology with changing social and material conditions of cities. The article initiates with an incident of an irresponsible truck driver who ran over a flock of geese and later denied the entire incident. In the city of Seattle, the collusion among human and geese were front page news during the 1990s where a question always arise as to question of where geese belonged in the city waddled onto the public stage as people and animals competed. Historians have tended to locate the origins of such attitudes toward animals in the formative period when modern patterns of urbanization, class formation, and ideologies of nature consolidated in the nineteenth century. The article presents a deep-rooted thought about how cities and environment are shared by human and animals and various nuances of human-animal interactions. The essay argues popular ideas about nature, ecology, and environmentalism that took hold around Earth Day was born out of the dynamic social and ecological conditions of cities in a period of profound flux. It proceeds by telling three stories of human-animal interaction. Further how the urban dwelling and increase of population pose threat to animal habitat. Finally the essay concluded with a good note as to how animal families are getting protection and how the with a new funding source the city has increased its spending for animal control and devised better ways to manage the animal population, building a new shelter and imposing fines on animal owners.

2. ANIMAL LIBERATION OR ANIMAL RIGHTS? By Peter Singer.
   By the phrase “animal rights movement” the author has advocated a complete change in the moral status of animals through which he is making an attempt to eliminate every kind of atrocities been inflicted on animals. The article highlights a very serious dilemma that the rights which are being possessed by human should also be possessed by non-humans. Generally, animals are given a lower moral status than humans because they don’t have rational thinking ability but the fact is even infants and brain damaged humans does not possess the rational thought process like mature humans but they are also given the status of normal humans. Attribution of rights to animals is not the only way of changing their moral status. The author has mentioned the utilitarian theory which is based on
interest or something closely related to interest such as preferences and experience of pleasure and pain. The principle of equal consideration of interests in accepted among human beings although it is very difficult to find any logical basis for resisting its extension to all beings with interests. This indicates that for resisting its extension to all beings with interests. This means that nonhuman animals, or at least all nonhuman animals capable of conscious experiences such as pain or pleasure, enter the sphere of moral concern.


The Article revolves around the important aspects of animal welfare system which is a factor of governance for animals in many countries. It highlights the need of a global animal protection regime and the debates surrounding it which establishes the normative and ethical basis for such regime. The first part of the article discusses about three important instruments which are:

- CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA (CITES): CITES was created in 1973 which aims at ensuring that international trade in specimens of wild animals and plants does not threaten their survival. The preamble of the CITES states that “wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come.” It mainly aims at conservation of endangered species and regulation of transnational trade in domesticated animals or animals who are farmed.

- THE TERRESTRIAL ANIMAL HEALTH CODE (TAHC): TAHC focus on animal welfare and gives recommendation in five key areas which are the transport of animals by sea, land, and air; the slaughter of animals; the killing of animals for disease control purposes; stray dog population control and the use of animals in research and education.

- EUROPEAN CONVENTION FOR THE PROTECTION OF ANIMALS DURING INTERNATIONAL TRANSPORT: This convention laid down the general conditions for the international transportation of animals from their preparation for transport to their unloading at the point of reaching destination. It was an important step towards animal welfare which guaranteed humane treatment of animals.

Further the article provided the basic tools and model to uplift the already deteriorating condition of animal and how they suffer. But the issue of animal welfare is slowly gaining prominent place in the international community and global governance. The factors which will provide a platform for the development of animal welfare laws have been discussed in the light of how the domestic laws can be designed to come at par with international regimes. Changes can be brought through political pressure and
animal advocates by enumerating the procedure through which animals should be treated in every field where it for export, or for entertainment or in agriculture. The article suggests that economic factors are being brought into play in the emergence of an international animal protection regime through the global nature of the animal trade. Moreover all these instruments and conventions are not based on norms rather on the interest of humans or for the individual animal’s own sake or it might be connected to economic development and efficient human agricultural production. It has drawn a fine line between the two concepts of animal rights and animal welfare categorized as per the theories of Gary Francione who separated animal protection movement into three groups namely old welfarism, new welfarism and animal rights. It has also pointed out theory propounded by Peter Singer in his article of Animal Liberation and speciesism. It has presented the OIE Model, the UN Model and the Hybrid Models and the implication of such model on animal welfare. It thoroughly examines the issues of animal welfare and how standards can be set to achieve a global regime setting aside profit making motives. Animal protection strategies should be form for gaining momentum on the issue. It delves into the factors on which international organization like United Nation can be good vehicle for establishing an international animal protection regime. Finally a criticism has been dispensed that a transnational animal protection regime does not exist at present, but that the global community is capable of regulating animals internationally. A Universal declaration of Animal Welfare is much needed in the current scenario and all the models should be combining into a hybrid regime based on broad objectives.

4. The Moral Status of Animals by Robert Garner [reviewed work on Putting the Horse before Descarted Bernard E. Rollin]

Since it’s a review of the book written by Bernard E. Rollin, it started with a brief introduction of the author and about the book which is basically based on animal ethics, the relationship between science and ethics, biotechnology and industrialization of agriculture. The book highlights the contribution in spreading awareness about animal ethics in United States of America and adjacent places to end atrocious procedures carried out on animals. The author was active on seeking justice for animals and propagating equal status of humans as well as non-humans. The work of Tom Regan has been discussed who has dominated the animal rights discourse and humane treatment. Various arguments have been put forwarded in favor of animal welfare and putting humans in the positions of animals. For instance, if slavery is infringes the rights of humans then confinement of animals also violated their rights. Every to be animal deserve to be treated with respect and care which might rule out many ways in which animals are being generally treated. And there comes the hard difference between animal rights and welfare of animals where the latter wins because no country could out rightly ban the use of animals in anyway. According to the author, animals should be treated according to their nature and habitat,
because every animal have distinct feature. Industrialization of agriculture has not been supported by the author as it has vanquished the importance of each animal and traditional husbandry practices were much better. The book basically influences the decision making policy of animal’s advocacy and those who work directly with animals which serves as a valuable source of emergence of politicizing the issue. Animals deserve moral concern as they are conscious and aware beings and they must have a moral standing because they are sentient and unnecessary inflictment of pain should be avoided. Therefore the book gives an insight onto how animals should be treated and how to improve their lives and death.

5. Eating animals from the book ETHICS FOR A-LEVEL by Mark Dimmock and Andrew Fisher

The article revolves around justification behind eating animals put forwarding two possible justification, firstly, comparative justification and dominion based justification. The justification put forward the argument that it is morally correct to consume meat and relates to other carnivorous animals like lions and tigers, humans are also carnivorous. This argument is quite blunt as lions and tigers eat other animals as well as humans, it is their animal behavior thus humans cannot be compared to them in this aspect. The dominion based justification takes the shield of religion to counter their claim to consume animals. Thereafter the Article goes on justifying eating animals under various theoretical perspective forwarded by legal theorists like utilitarianism, Kantian ethics and virtue ethics.

According to various theorists like Jeremy Bentham and Peter Singer, there should be greatest amount of pleasure for greater number of persons which holds the idea of equal consideration of interests. But according to Bentham the idea of equality is not exclusive to humans. The theory of pain and pleasure has been explained by Bentham through various examples and he became a heroic figure in animal rights movements. Further, Bentham goes on arguing on the context of rational thinking ability which generally an animal lacks, but in the light of this even a child or a person in vegetative state also lacks the ability to think rationally. Thus a line cannot be drawn on the basis of rationality and justifying eating animals. Utilitarian like Bentham and Singers had strong opinions against inflicting pain upon animals and eating them as it is not morally justified.

According to Kantian Ethics, humans do not have any responsibility towards animals and they consume them at will. Kant is quite specific and clear that human doesn’t have any moral obligation towards animals and consuming animals could become a universal law. Further as per Virtue ethics, it is essential to discuss the dispositions and character traits associated with virtuous people whether or not it is justified to eat animals or not. Finally the ideas of Cora diamond has been explained in the article which focus on ethical acceptability of eating animals and questions whether it is acceptable or morally relevant to consume them. They examined the fact that although an individual will never kill or consume his or her pet, thus it is also not justifiable to
consume hens or pigs from the supermarket just because they are not your pets. Diamond holds a very strong position in upholding the position of vegetarians and opposes unethical treatment of animals.

6. **Animal Passion by GILLIAN CLARK**
   This article proliferate the idea of animal passion or emotions as animals lack overpowering, beast, savage and unsocial. Animals are irrational and living creatures without logos. But according to some theorists since animals cannot reason it is impossible for animals to have passions. The article elaborates on the concept by quoting movement which implies movement toward something that benefits us, or movements away from something harmful, are not passions, though even they may be contrary to reason because they are excessive movements, like running when you would do better to walk. Since animals do not have movement thus they cannot move so it cannot have passions. But passion must contrary reason because s that all passions involve a belief, and without reason one cannot have beliefs. Animals do not have emotions like jealousy and they get angry because of their temperament. The Article explains the context of passion which is absent in animals because they do not fall into situations and get angry or experiences other emotions. According to Stoic, animals do not possess passions as they do not involve a proposition to be accepted or rejected, and the animal does not have the option of allowing or stopping a passion. However, Porphyry did a study anatomy and neutral links where he monitored animal behavior and concluded that animals is just like humans exploiting them for food and labour and medicine and entertainment is clearly wrong.

7. **Rabies Virus Detection and Phylogenetic Studies in Samples from an Exhumed Human by Silvana Regina Favoretto, Luzia Fatima Alves Martorelli, Mauro Rosa Elkhoury, Augusto M. Zargo and Edison Luiz Durigon.**
   The article contemplates a study conducted on rabies virus among bats which infects not only humans but also other domestic animals. The rabies infection is present in bat population to a very large extent. The study is mainly conducted in Brazil where 9.3% of infection is caused by vampire bats. The article basically highlights certain scientific facts with relation to rabies and bats. Humans should be careful while handling bats and must infirm authorities if witness atypical behavior of the animal.

8. **Assessing habitat connectivity for ground-dwelling animals in an urban environment by S. Braaker, M. Moretti, R. Boesch, J. Ghazoul, M. K. Obrist and F. Bontadina.**
   Habitation is an insignificant part of any living being which guarantees it’s well being and lifestyle. The article highlights the importance of habitat for an animal which assures access to food, protection from predators, successful reproduction and maintenance of genetic diversity. In order to apply efficient for species populations in fragmented landscapes it is important to identify the habitat of such species. Habitat fragmentation is the need
of the hour due to rapid urbanization and deforestation leading to extinction of many species. In urban areas, the landscape is generally characterized by ongoing disturbances and constant habitat transformation. It is necessary to protect and promote biodiversity and to mitigate fragmentation effects of increasing urban population. Certain models has been provided for habitat fragmentation like habitat map, GPS tracking of animals, habitat selection analysis, habitat connectivity analysis, habitat connectivity and animal movement models, etc which has proved to be effective in tracking small animals like hedgehog and providing them a natural habitat for sustenance. Till date limited study has been conducted on habitat fragmentation in urban areas as land covers are typically diverse and independent patches are very small. Habitat quality is known to play a key role in habitat use which is modeled as an interaction between compositions of the landscapes. Further, habitat connectivity models are important to define dwellers as well. Habitat selection management strategies and several studies proposed showed that hedgehogs prefer urban green spaces with approaches to deal with the problematic use of structures over lawn and pastures without structures, subjective assumptions taken at different steps of the and impervious areas are least preferred. Thus the entire study focus on the issue of conservation through habitation protection which will help in evaluating the future challenges in habitat fragmentation because animals plays an essential role in marinating the ecological balance.

### VI. ANIMAL RIGHTS VIS-À-VIS ANIMAL WELFARE

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<td>Morality</td>
<td>Using of animals is morally wrong</td>
<td>Using of animals is morally right</td>
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<tr>
<td>Benefits</td>
<td>Using animal for human benefits is wrong</td>
<td>Using of animal for human benefit is rights</td>
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<tr>
<td>Interests</td>
<td>One should not invariably overrule the interest of animals with human rights</td>
<td>Human interest are more important than animal interest</td>
</tr>
<tr>
<td>Pain</td>
<td>No one has the right to inflict pain or death to animals</td>
<td>One should not inflict &quot;unnecessary&quot; pain or death</td>
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<tr>
<td>Humane Treatment</td>
<td>One should always treat animal humanely and eliminate the human-made causes of animal suffering</td>
<td>One should treat animal as humanely as convenient to him</td>
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Therefore, animal rights should be given more adherence and importance over animal welfare since it doesn’t serve the purpose of securing animals from abuse and torment.

VII. LEGAL FRAMEWORK

PREVENTION AND CRUELTY TO ANIMALS ACT, 1960 – ANALYSIS

The Prevention and Cruelty to Animals Act, 1960 has been enacted to prevent the infliction of unnecessary pain or suffering on animals. The word “animal” has been defined as any living creature other than a human being. The ANIMAL WELFARE BOARD OF INDIA (AWBI) has been constituted under the Act for the promotion of animal welfare and to protect animals from pain and torture or suffering and to carry out functions laid down in Section 9 of the Act.

Section 11: This section lays down certain kind of cruelty inflicted on animals. The punishment is- in the case of a first offence, with fine which shall not be less than ten rupees but which may extend to fifty rupees and in the case of a second or subsequent offence committed within three years of the previous offence, with fine which shall not be less than twenty-five rupees but which may extend to one hundred rupees or with imprisonment for a term which may extend, to three months, or with both.

The punishment provided is irrelevant in 2017 and requires immediate amendment since a person can escape the punishment easily as the value decided in 1960 is absolutely insignificant in current situation.

Section 12: The punishment of phooka or doom dev has been prescribed in this Section which is fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to two years, or with both which seems to be meagre comparing to the pain suffered by an innocent being.

Section 14: This Section is an irony to animal rights since it condemns the legality of performing experiments on animals. Human being can go to the extent of dissecting a poor animal for the fulfillment of his own needs. Section 17 states that the Committee for control and supervision of experiments to ensure that animals are not subjected to “unnecessary” pain or suffering. The interpretation of the word unnecessary is the need of the hour otherwise there will be no limit of pain and suffering impaired upon animals.

The rest of the Act contains general provision for animal welfare but people tend to forget that there is a sharp contrast between animal rights and animal welfare. Although, the Act is quite systematic but the rules are hardly followed and implemented in India. Therefore the Government should make the law more stringent and deterrent so that the people and the police atleast consider the matters more seriously.

WILDLIFE PROTECTION ACT, 1972

The Wildlife Protection Act provides for the protection of wild animals, birds and plants; and for matters connected therewith or ancillary or incidental thereto.
The Act safeguard the listed flora and fauna and establishes a network of ecologically-important protected areas and empowers the central and state governments to declare any area a wildlife sanctuary, national park or closed area. There is a blanket ban on carrying out any industrial activity inside these protected areas. It provides for authorities to administer and implement the Act; regulate the hunting of wild animals; protect specified plants, sanctuaries, national parks and closed areas; restrict trade or commerce in wild animals or animal articles; and miscellaneous matters. The Act prohibits hunting of animals except with permission of authorized officer when an animal has become dangerous to human life or property or as disabled or diseased as to be beyond recovery.

**ANIMAL BIRTH CONTROL RULES 2001**

The Animal Birth Control (Dogs) Rules 2001 was published under the requirement of sub-section (1) of section 38 of the Prevention of Cruelty to Animals Act, 1960 which mainly aims at immunization and sterilizations of pet as well as street dogs. The Rules emphasize on the formation of a Committee whose main functions will be

- Issue instructions for catching, transportation, sheltering, sterilization, vaccination, treatment and release of sterilized vaccinated or treated dogs.
- Authorizing a veterinary practitioner authorize to euthanize critically ill or fatally injured or rabid dogs in a painless method by using sodium pentathol and any other method is strictly prohibited.
- Creating public awareness, solicit cooperation and funding.
- Providing guidelines to pet dog owners and commercial breeders from time to time.
- Getting survey done of the number of street dogs by an independent agency.
- Taking such steps for monitoring the dog bite cases to ascertain the reasons of dog bite, the area where it took place and whether it was from a stray or a pet dog.

To keep a watch on the national and international development in the field of research pertaining to street dogs' control and management, development of vaccines and cost effective methods of sterilization, vaccination, etc.

**CONSTITUTION OF INDIA**

**Article 48:** This Article states that it is the duty of the State to organize agriculture and animal husbandry on modern and scientific line and shall takes steps for preserving and improving the breeds and prohibits the slaughter of cows, calves and other milch and draught cattles.

Under **Article 51A**, it is the fundamental duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures. If the fundamental rights of the citizens get infringed they can file writ petitions under Article 32 and 226 for remedy given under the Constitution, where no one is bothered to follow the fundamental duties which impose to have compassion towards animals. Every now and then people breach their duties and there is no deterrence available.

**INDIAN PENAL CODE**
Section 428: The Section provides whoever commits mischief by killing, poisoning, maiming or rendering useless any animal or the value of ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or both.

Section 429: It lays down that whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox, whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

THE PREVENTION OF CRUELTY TO ANIMALS (REGULATION OF LIVESTOCK MARKET) RULES, 2017
The basic purpose of the Rule is to ensure welfare of the animals in the cattle market and ensure adequate facilities for housing, feeding, feed storage area, water supply, water troughs, ramps, enclosures for sick animals, veterinary care and proper drainage etc. The primary focus is to protect the animals from cruelty and not to regulate the existing trade in cattle for slaughter houses.

THE PERFORMING ANIMALS (REGISTRATION) RULES, 2001
The objective of this rule is significant to safeguard the animals that perform in movies and other entertainment activities. It states that every owner who hires or lends out a performing animal for a film is legally obligated to inform the legal authority about the animal and give reasons as to why such animal must be used, before the animal is used for performance.

JUDICIAL ACTIVISM:
In Animal Welfare Board v N. Nagaraja and Others150, the Supreme Court dealt with the issue of animal welfare in detail and opined that the interpretation of animal welfare should be done keeping in mind the welfare of animals and species. This case turn up to be an amazing precedent of animal welfare where the Apex Court had banned the cruel and inhuman human entertainment practice of JALLIKATTU where the bulls are subjected to extreme threat and agitation by the so-called humans just for the purpose of fun and amusement. The Court further held that every living being has the right to live which includes depriving its life for human purposes. Article 21 of the Indian Constitution is not available only to persons but also to animals and other living beings and the word “Life” denotes more than mere survival and existence, but to lead a life with intrinsic worth, honour and dignity. Every species has an inherent right to live and shall be protected by law subject to the exception of human necessity but there is actually no limit to human necessity.

The WORLD HEALTH ORGANISATION OF ANIMAL HEALTH recognizes five freedoms of animals which are:

- Freedom from hunger, thirst and malnutrition;
- Freedom from fear and distress;

150 (2014) 7 SCC 547
Freedom from physical and thermal discomfort;
Freedom from pain, injury and disease; and
Freedom to express normal behavior pattern.
All these freedom has been recognized in this case which is a welcoming move.

In the case of People for Ethical Treatment for Animals v Union of India\textsuperscript{151}, the Court held the Bombay High Court held that before using an animal for the purpose of filming a No-Objective Certificate has to be obtained from the Animal Welfare Board of India as a prerequisite for certification from the Central Board for Film Certification.

The Kerala High Court in the case of Nair N. R. and Others v Union of India and Others\textsuperscript{152}, upheld a notification by the Ministry of Environment and Forests stating that bears, monkeys, tigers, panthers and lions shall not be exhibited or trained as performing animals. A comparison is made between zoo and circus which the court found out to be unrealistic and inexpedient. The court also dismissed the argument that the petitioners’ right to carry out any trade or business under article 19(g) of the Indian Constitution was violated as those activities that caused pain and suffering to the aforementioned animals would not be allowed.

Ozair Husain v Union of India\textsuperscript{153}, the case recognized the Freedom Of Speech and Expression and declared that the packaging of products including food, drugs (except those that are life-saving) and cosmetics must contain information regarding the items’ vegetarian or non-vegetarian origins. The packaging must contain a red dot for non-vegetarian origin and green dot for vegetarian origin.

IX. RECENT INCIDENTS OF ANIMAL RIGHTS VIOLATIONS IN INDIA

PUPPY RAPED IN DELHI\textsuperscript{154}
A horrific incident of animal abuse took place in Delhi where a taxi driver has been accused of raping a female puppy which later died due to excessive bleeding. The matter happened on 25\textsuperscript{th} August 2017, when Naresh who is a cab driver raped a female puppy under the influence of alcohol, then stuffed the puppy in a jute bag and dumped it into a dry drain next to a garbage dumping site.

MAN CHOPS OFF LEGS OF A PUPPY IN DWARKA\textsuperscript{155}
A man named Pramod initially offered food to a puppy when the puppy enthusiastically scratched him and for that he brought out a blade to punish the animal.

MEDICAL STUDENTS FLUNG A DOG OFF A TERRACE
The incident occurred in Chennai where a video when viral focusing on a MBBS student namely Gautam Sudarshan who flung the dog off while posing for the camera and Ashish Paul who heartlessly

\textsuperscript{151} MANU/DE/4205/2009
\textsuperscript{152} MANU/SC/0330/1989
\textsuperscript{153} AIR 2003 Delhi 103
\textsuperscript{154} Indiatoday.in by Chayyanika Nigam 31\textsuperscript{st} August 2017
\textsuperscript{155} Indianexpress.com – 8\textsuperscript{th} Dec 2016
filmed the entire incident, who even got easy bail due to the weak laws of our country. Thankfully, later the puppy was rescued and adopted.

CULLING OF DOGS IN KERALA
Kerala, which boasts the highest literacy rate in our country, the citizen behave like complete savages when it comes to stray dogs. Among other animals, cases of abuse of stray dogs have been reported too many times. According to a report, the Old Students Welfare Association of Pala-based St. Thomas College said it will give gold coins to the civic authorities that kill the maximum number of stray dogs till December 10 in Kerala. People in Kerala are killing stray dogs because many people have suffered injuries from canine attack, but the same cannot be a solution to the problem.

X. ANALYSIS OF THE DATA COLLECTED

The questions are subjective and have been filled up by with great enthusiasm. In addition to the questionnaire, consultation with Mr. Manoj Oswal has proved to be more advantageous, which was a detail discussion of the laws and judicial activism in our country.

● ANALYSIS OF THE CONVERSATION WITH MR. MANOJ OSWAL:

The detail interaction has highlighted many gray areas where the public and the government have to work on to protect animal rights and maintaining a balance between Animal Rights and Welfare. The points which can be drought down are:

1. The policy of the government has to be changed for better implementation of laws and procedure.
2. There should be appropriate implementation of the judgments of Supreme Court and High Courts and government must consider such precedents while enacting advanced laws for animal welfare.
3. The punishment prescribed in the PCA Act has to be increased for more deterrent effect.
4. More human resource is necessary in animal welfare board and program for better implementation of the regulations.
5. More regulation is required for dog breeders, pet shop owners and aquarium rules.

Lastly the attitude of the people towards animal should be changed and then only animal rights will be at par with human rights.

XI. ANALYSIS OF THE QUESTIONNAIRE:

1. What are the rights any animal must possess according to you?

Most of the people opined Right to life which is an inherent right of every living species. Apart from right to life, around 40% people stated that animal must possess the right to have a dignified life free from exploitation and 60% people supported right to shelter.

156 Daily opinion
2. What are the laws relating to animal rights in India?
Following chart provides the analysis of legal awareness among general public.

3. Are these laws properly implemented?
Out of 15 people, 14 people stated that the laws are not properly implemented in India. According to them the laws are very weak and the punishment is meagre.

4. What is your first reaction when you find an injured animal on streets?
Do you protest when you witness any kind of animal abuse on streets?
9 out of 15 people stated that they always help an injured animal, few of them treat the pet themselves and few ask for help from NGOs. 6 people said that they either ignore such animal or are unable to help due to different circumstances. 10 out of 15 people often protest while witnessing animal abuse and many of them have never come across such situation yet.

5. Do you think slaughter house should be ban in India?
Of 15 people 8 people are in favor of banning slaughter house and 3 people are against such ideology and 4 people are not sure.

6. Have you ever filed a police complaint against animal abuse? If yes, what are the problems you have faced?
Out of 15 people only 5 people have registered a FIR in police station. The problems they have faced while filing complaint:
- In most cases police are reluctant to lodge a complaint.
- Sometimes the police file a simple General Diary and do nothing.
- Police are not aware of the laws properly.

Ban on slaughter house is a very debatable topic in present situation where many states have totally banned slaughtering cows, but many are of the opinion that it interferes with their food habit.
7. Do you know any animal breeder? Do you think breeding actually exploit the animal?
6 people opined that animal breeding actually exploit the being whereas rest of the mass stated that animal breeding is not an issue as long as it is necessary and doesn’t hurt the animal. There should be strict adherence to animal breeding guidelines.

8. Do you think more tax should be levied on importing animals especially dogs and cats?
Few people held that:
- Importing foreign should be banned
- It is not a simple issue since smuggling of animals is also widespread due to lack of administration and machinery.
- Levying more tax is not a solution because rich people will get away with it.

9. Have you ever abandoned a pet? Or witnessed abandonment? Do you think it’s wrong to abandon a pet? What should be the punishment to be imposed upon those people who abandon their pets on whatsoever reason?
In this case, many people have given certain strong viewpoints like:
- Punishment should be imposed- Section 11 of PCA ACT although provides for the punishment but it’s very meagre. People committing such offence should be heavily fine and must be prohibited from keeping a pet in future.

10. Have you ever faced any kind of problem while helping a stray animal?
8 people said that they never faced any such problems while four people contended that they have faced many problems while helping street dogs. One had even filed a police complaint but there was no solution to it. Few opined that general public hate street dogs and considers them as nuisance in the society.

11. Share your views on animal abuse in circus.
Each one of them has shared extensive views on animal abuse in circus which are as follows:
- Use of animals in a circus should be strictly regulated and controlled by administrative measures in addition to statutory measures.
- Animal use in circus should be banned.
- Circus and zoos are of the same kind and none deserves to be in captivity or be used for entertainment.
- Use of animals in circus should completely be banned. Animals undergo extremely cruel training processes which break them sentimentally and force them to the submission to their handlers.
- Animals are not meant to be used for purposes of human entertainment and thus should be banned.
12. Are you in favor of buying a pet or adopting a pet?
12 out of 15 people have voted for adoption of a pet. One is of the opinion that purchasing pets should be banished because pets are not commodities.

13. Have you ever come across OLX advertisement on pet? Do you think this should be abolished?

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Some few said that such advertisement must discontinue whereas few said that OLX ads for adoption is a good option but not for purchase and sale.

14. What do you think about animal being use as a mere purpose of entertainment like bull fighting etc?
Animal use for entertainment of human being is quite common all over the world, for example- Yulin festival of China. Some of the views in this regard are:
- Some are of the opinion that it should be completely abolished.
- More awareness should be spread imparting knowledge of animal rights which might decrease such cases.
- Most of them held that it should be banned.

15. Do you know what animal welfare is?
Among 15 people, 12 people have clear idea about the concept of animal welfare. Some of the contentions are:
- Animal welfare must be for the welfare of animals where the proper protection and food might be given to them.
- Animal welfare is about being as loyal to the animals as they are to us. Ensuring their food once daily, spay / neuter and vaccination against rabies along with working towards prevention of cruelty and having the courage to file police complaints/take action where instances of animal abuse are involved.
- Animal welfare refers to the relationships people have with animals and duty as well as responsibilities they have to ensure that the animals under their care and the animals they interact with are treated humanely and responsibly.

16. Are you aware of mass killing of stray dogs in Kerala? What are your views on such incident?
10 people are aware of such incident but 5 people are not informed which shows lack of interest in animal rights because this incident was widely reported in newspaper. According to the Mr. Anupam Tripathi, who is a Delhi based lawyer and animal right activist had moved to the Supreme Court and was successful in obtaining a stay order to stop the culling in Kerala and to protect street dogs all across India vide order dated 18th November 2015 in SLP(c) no. 619/2009 vide my WP (C) no.599 of 2017.

17. What are your views on problem of stray animals in India?
After scrutinizing the responses it can be concluded that
- Authorities and municipalities must work together and implement the Animal Birth Control Rules appropriately.
- More emphasis should be given on adoption of street dogs.
- Dogs should not be relocated from their native places which are frequently done by municipalities.
- Public awareness
- Lastly, spaying and neutering could result in a fall in the number of street dogs.

18. Do you have any idea about how to combat the problem of rabies death in India?
Around 9 people don’t have a substantial idea as to how the problem of rabies can be cured. Some of the other views are:
- Vaccinating every dog although that is very difficult to achieve and vaccination should be performed on a large pool in a particular area in a short span of time and the migration of the dogs from adjacent areas to that area should be stopped.
- Enforcement of ABC Rules.
- Ensure community participation in the ABC programme.
- Pet dogs too need to be vaccinated against rabies and most of the dog bites for which stray dogs are made a scapegoat are actually bites by pet dogs.

19. Do you know any shelter house or foster home near your residence?

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Among 15 people, 9 people are unaware of any shelter homes near their place which indicates lack of shelter homes in our country as well as public awareness. Thus more shelter homes and foster homes should be constituted by the civil authorities with the help of the general public.

20. Give a brief idea about what government should do to protect animal’s especially street animals?
A range of extensive responses has been received in this regard, few of them are:
- Establish shelters for stray animals.
- Encouraging people to report to the authorities regarding stray animals in their locality and to adopt pets from shelters instead of buying from stores.
- Government should make stringent policies and laws which must be strictly enforced.
- Violation of animal rights should be charged with heavy fine with punishment.
- Animal Welfare should be a mandatory part in the school education to build up a generation which can be more sympathetic to the street animals.
- Executive body also needs to take offences relating to animal rights seriously and file FIR when such cases reach the police station.
- Spreading of awareness so that people change their duty towards animal.
- AWBI should have more controlling power and strength to deal with the situation related to animal protection.
- The Government needs to back NGOs like FFAR India and give them a budget of a conservative 100 crore annually to take care of the issue of street animals in one city. This needs to be followed after success and results in one city in other cities too on the same lines. FFAR India is
up for the challenge to sort the street animal issue in India all across India.

- Propagating community involvement in the animal birth control programme to ensure its success and maintain transparency.
- Govt. should have an awareness program for the police staffs and inspectors in every police station to educate them about the laws associated with the animal welfare.

The above responses indicate that success can be achieved by dual functioning of the government authorities and the general public at large. Most of the people are aware of the laws but are hand tied due to certain circumstance. Thus the ties should be broken in order to discourse animal rights at par with human rights.

XII. ANALYSIS OF THE OVERALL DATA COLLECTED
From the overall data collected it can be deduced that there are a lot of areas which has remain untouched like including animal rights as a subject in the preliminary level of education as well in higher level. Almost 80% people have very clear and specific views regarding animal rights but most of them are confused regarding the mode of utilization of the laws and rules and 20% doesn’t even have a clear idea about animal welfare. About 30% of the people have registered an FIR against animal abuse but have complaints regarding casual behavior of the police. Many of them have never visited or unaware of any shelter for street animals home near their place. All these highlights that only a portion of the society is worried about animal rights and many are still unenlightened.

XIII. CONCLUSION
The symposium of Animal Rights must begin from home because home is the place where a person learns how to love and tender. Many time in the streets one witness small children are throwing stones or pellets to dogs which shows lack of affection which should be taught by the parents. Apart from family another important part is school where educating a child about animal onelfare and to have mercy can play a tremendous role in reducing animal abuse. Further in many law schools in India there is no separate subject called Animal Rights. These are few preliminary steps which the government can consider to spread animal rights education.

In addition to education, the attitude of the people should be changed which the root cause of almost every problem persisting. Awareness should be spread by conducting workshops, conferences and if necessary advertisement. In this regard the virtual world especially social networking plays a significant role in spreading awareness and news of animal welfare. For instance the Chennai case where a doctor thrown a dog from the terrace of a building had caused large public outcry in social media and the dog was later adopted as well.

One must learn from countries like Netherland where there are absolutely zero stray dogs achieved by good legislation, free services of spaying and neutering and other out of the box thinking which is struggle for almost 200 years. Few factors were involved which led to such success like:
Cultural factors- Dutch culture plays an important role in the reduction of stray animals in The Netherlands. The Dutch people think in terms of personal liberties rather than universalism. Observation and empathy are relevant mechanism which aimed at survival. Dutch culture possess feminine elements like high value to caring, collectiveness, separation of work and private life and they want to take care of their pets and not see them roam the streets.

Social factors- Due to less population the families adopt dogs and treat them as family members because if there are fewer children to care for and more time to spend, dogs often take the place of the children.

But the above two aspects is very difficult to achieve in India but it’s not impossible because India has a very large population and mixed culture. The government cannot be held responsible all the time, since without public support nothing can be achieved. Thus initiative has to be taken and a revolution is required to vanquish the problem of animal cruelty, might not be totally but to a great extent.

XIV. RECOMMENDATIONS

The researcher would like to make the following recommendations:
- Sterilization of female dogs as much as possible.
- Education to dog owners and breeders.
- Registration of owners and breeders.
- Recruitment of animal welfare officers.
- Proper implementation of Rules and Laws.
- Education to mass.
- Amendment to previous laws.
- Training to police officials.
- Establishing shelter homes.

“The worst sin towards our fellow creature is not to hate them, but to be indifferent to them; that’s the essence of humanity”.-GEORGE BERNARD SHAW

TELEPHONIC INTERVIEW OF MR. MANOJ OSWAL, FOUNDER OF PEOPLE FOR ANIMALS PUNE UNIT

1. What are activities you performed by your NGO for protecting animal rights?

Answer. We spend most of our energy on spreading awareness which has a dominant effect in the society. We adopt common method of spreading awareness like:
- Leaflet
- Convincing people to go vegan
- Print media
- Blog
- Press release

2. Do you think animal rights laws are properly implemented in India? If yes, how? If no, please give your suggestion?

Answer. The laws relating to animals are quite good, for e.g. The Prevention of Cruelty to Animals Act, 1960 is pretty stringent but there is lack of proper implementation of the laws which is the main issue persisting in India. The Act is quite systematic only the punishment is very meagre and the Act has been interpreted in detail by the Apex Court in the case of A. Nagaraja. The Court has gone into the depth of the International practices, the rights of the animals and the responsibility of the people who are holding such animal. The Act itself is not faulty except from the fact that Rs 50 was
a lot of money in 1960 and today it is not. A new Animal Welfare Draft was proposed in the Parliament but yet it has not been considered.

3. Q3. Do you report animal abuse in appropriate police station? Have you ever faced any problem while reporting an animal abuse?
Answer. Yes, we do report animal abuse incidents to police. In case of minor incident we send letter to the concerned authority and in case of major incident firstly we file a FIR under Section 73 and 74 of the Bombay Police Act, 1951 in the nearest Police Station and police take immediate cognizance of the matter. But the police sometimes avoid to file FIR because they don’t want to take extra burdens since once FIR is lodged they have to act on it. Since I am working for a long period in this area, I don’t face any such problems.

4. What do you think the reason behind abandonment of pets?
Answer. When people buy a new pet, they buy them as puppies some sort of novelty factor is attached to that and after they don’t pay attention to the dog leading to behavioral issues, then people abandon the pet which are mostly killed by other dogs. This is commonly found in Mumbai where people don’t have time. Further many people have the mindset that street dogs are not good for adoption because either they are filthy or they borne diseases.

5. What are your views regarding public outcry for protecting cows in India?
Answer. The concern over is basically myopic having a reverse effect on the same. The so called Gau rakshaks consume more dairy products where they are subjected to more cruelty. Once the cow becomes obsolete they are sent to slaughter houses. The more one consume milk the more cows are slaughtered as soon as they turn unproductive. And there is overpopulation of male cows in India which is around 200 million. Therefore more emphasis should be given on having legal slaughter house.

6. What are your views on slaughter house as there is a lot of agitation against the ban of slaughter house where people are claiming that their food habits are getting affected?
Answer. People can opt for other food choices. When we were young we didn’t know about junk foods but now people are having such foods. Animals should not be killed just because people can’t change their food habits. Apart from all these the implementation of law is very crucial, like complying with the Food Safety and Standardization Act, 2006 and Prevention of Cruelty to Animals (Slaughter House) Rules, 2001 where proper guidelines has been given as to how the animals in the slaughter house should be persuaded for the safety of food. Then rules are also there for prevention of pollution control caused by the waste of slaughter house like blood and carcass of dead animal, which contaminate nearby water bodies and land.

7. How many FIRs are being lodged by your organization every year?
Answer. Every year we file about 100-120 FIRs approximately and we get good satisfactory help from the police. There are many police who are themselves animal
lover and they try their best even under stressful condition.

8. Does your organization run any rescue centre?
   Answer. The Pune unit is mainly into spreading awareness and taking legal recourse.

9. How to prevent animal breeding in our country due to which Indian dogs are not given much preference?
   Answer. The problem is there are lakhs of breeders in India and there is lack of machinery to implement the laws. Registration of breeders and cancelling licenses of illegal breeders requires tremendous amount of human effort. In this regard the laws are not practical. Each city needs at least 50 animal welfare officers for the successful functioning of the system.

10. Have your organization ever filed a PUBLIC INTEREST LITIGATION for the protection of animal rights? If yes, please cite the case and give few details.
    Answer. The writ petitions and Public Interest Litigation are filed by Head Office in Delhi. Recently we have been successful in obtaining a stay order in Maharashtra Bullock Race. Senior Advocates fights cases without fees and it requires a lot of legal research.

11. What is your objective to curb the problem of stray dogs in India? What are the help you need from the society?
    Answer. Awareness has to be spread in the society which only could curb the problem of stray dogs in India.

12. What are your views on adding an animal right paper in legal course like human rights?
    Answer. It will be a welcoming move in the context of animal rights.

ONE SAMPLE QUESTIONNAIRE:

Q1. What are the rights any animal must possess according to you?
   Answer: Right to live, prosper, treated with some dignity and above all right not to be torture, killed and eaten - the right to be treated as a sentient being!

Q2. Which are laws related to animals in India?
   Answer:
   A. Prevention of Cruelty to Animals, Act 960;
   C. A dozen rules connected to PCA 1960 vide Section 38 of the Act.
   D. Constitution of India vide Articles 48, 48A and 51A(g).
   E. Indian Penal code, 1860 vide sections 428 and 429.

Q3. Do you think animal rights laws are properly implemented in India? If yes, how? If no, please give your suggestion?
   Answer: No! The animals are treated unfairly in India and the laws are hopelessly frail and weak to protect them. For example, while Articles 48, 48A protect animals, but these are provisions contained in the directive Principles of State Policy and similarly Article 51A (g) is contained in the fundamental duties as part of the
constitution of India. However article 25 is part of fundamental rights of people to practice, propaganda their religion and religious beliefs. Under the cover of this article religious sacrifices such as the killing of poor innocent Goats including other animals like camels on a festival celebrated by one community in India, end up taking lives of more than 10 crore such animals on 1 single day each year. No animal law prevalent in India is able to protect these animals from their fate this 1 day. Similarly take for example PCA, 1960 sec 13 of which prescribes a mere payment of upto Rs.50 fine for the first offence charged against the accused. Just Rs.50! So an animal abuser who beats up an animal mercilessly (not killing him) can get away with just a fine of Rs.50 for the first offence under PCA, 1960. It is only incase of a subsequent offence for which the same accused can be sent to jail upto just 1 or 3 months. Is it adequate??? Hopelessly not!!

Then take the example of Sections 428 and 429 of the IPC,1860. While these provisions provide for punishment to an accused who kills and animal or renders him useless for upto 5 years jail time, but unfortunately these provisions put a min value on the animal at Rs 10 or Rs.50. Thus while an owner of an animal or petwho can show that the cost price of is animalor pet was over Rs.50 can indeed prosecute the animal abuser or killer under these provisions and send him to jail, but what about stray animals???? Who do not have value??? Thus an accused killing a stray dog gets away in this case. The above are some glaring examples of how hopeless the existing laws in India are to protect our animals. There is an urgent need for this to change. I strongly suggest the passing of the Animal Welfare Bill 2011pending in parliament since more than 6 years. This bill has harsher and more practical punishments for the animal abusers and is more in keeping with the times. But unfortunately apart of Mrs Maneka Gandhi and Mr Yogi Adityanath, this bill has no takers in the Parliament. Our Parliamentarians are just not interested in animal rights. This needs to change.


Q5. Why is your first reaction when you find an injured animal on streets?
ANSWER: If I have time, I attend to it personally myself and if need be take it to a vet. Otherwise I post its location and picture on social media animal groups and tag activists in the area who could help.

Q6. Do you protest when you witness any kind of animal abuse on streets?
ANSWER: Yes by all means necessary.

Q7. Do you own any pet? If yes, give details?
ANSWER: I have 7 dogs at home almost all of them rescued and adopted.

Q8. Do you feed stray animals?
ANSWER: Yes I feed from 7 to 35 street dogs daily, besides feeding every other stray animal within my jurisdiction and sight who needs food.
Q9. Do you think Indians are over protective to cows as compared to other animals?
ANSWER:
No! I don't think so. Indians need to do more for all animals including the Cow. There is no concept of being overprotective of an animal at all!!! Believe me whatever we do is only less, we need to do a lot more for our animals.

Q10. Do you know any animal breeder? Do you think breeding actually exploit the animals?
ANSWER.
Breading animals is cruel. All puppy mills should be banned and breeder locked in jail!

Q11. Are you in favor of buying a pet or adopting a pet?
ANSWER.
Buying a pet should be made punishable with jail just like buying drugs. Buying encourages puppy mills. You should only adopt animals as pets who need loving homes.

Q12. Are you interested in rescuing any animal from streets? Or have any plans to rescue?
ANSWER.
I do it for a living, for my Dharm and purpose.

Q13. Do you think slaughter house should be ban in India?
ANSWER.
Slaughter houses should be banned all across the world!

Q14. Do you think more tax should be levied on importing animals especially dogs and cats?
ANSWER.
Importing or exporting dogs and cats should be banned all together for commercial purpose.

Q15. Have you ever abandoned a pet? Or witnessed abandonment? Do you think it’s wrong to abandon a pet? What should be the punishment to be imposed upon those people who abandon their pets on whatsoever reason?
ANSWER.
I have never ever abandoned a pet. The day I have to, I rather die. Yes I have witnessed pet abandonment every day, how else do you think our shelters are full for these pet animals looking for homes. I have rescued many such pets and brought them home. Some are my current pets.

Q16. Have you ever come across olx advertisement on pet? Do you think this should be abolished?
ANSWER.
Yes it should be banned.

Q17. Have you ever faced any kind of problem while helping a stray animal?
ANSWER.
Yes. People are not empathetic. People mostly hate stray animals and find them a nuisance. People are selfish and have spread like virus eating all of earth's resources.

Q18. Have you ever filed a police complaint against animal abuse? If yes, what are the problems you have faced?
ANSWER.
Yes. Many. I have faced no problems as being a lawyer and an activist helps. Police extends all their cooperation to me.
Q19. Share your views on animal abuse in circus.
ANSWER.
Thee is ample animal. Abuse in circus where animals are slaves of the circus owners and dependent on their whims and fancies. Having said that UNTIL THESE ANIMALS CAN BE RELOADED TO BETTER HOMES AND PLACES, THESE ANIMALS SHOULD NOT BE TAKEN AWAY FORCIBLY FROM THE CIRCUSES AS then becomes a case of from the fire into the frying pan. In the long term use of animals in circus should be banned all over the world.

Q20. Are you aware of mass killing of stray dogs in Kerala? What are you views on such incident?
ANSWER.
Yes I am the authority on it who put an end to it. I am Anupam Tripathi who secured all India directions from the Supreme Court to stop the culling in Kerala and to protect street dogs all across India vide order dated 18th November 2015 in SLP (c) no. 619/2009 vide my WP (C) no.599 of 2017.

Q21. What do you think about animal being use as a mere purpose of entertainment like bull fighting etc?
ANSWER. It makes me sick and should be banned.

Q22. Do you know any NGO which works for animal welfare?
ANSWER.
Yes! There is one Fight for Animal Rights India (FFAR India) that has impacted animal welfare in India more than any other NGO in India in the last 3 years.

Q23. What are views on problem of stray animals in India?
ANSWER.
Stray animals are abused in India. People need to open their hearts and garden spaces and bring them home. People need to stop being selfish. ABC Rules 2001 need to be strictly implemented in India for street dogs population control, minus the CORRUPTION!

Q24. Do you have any idea about how to combat the problem of rabies death in India?
ANSWER.
Rabies death in India figures is unreliable and high is inaccurate. WHO figures have all be misreported by the media. There are no more than 5000 death owing to rabies in India each year in a population of 1.3 billion. More people die of falling coconuts on their heads in India but no one reports them. Rabies is virtually nonexistent in India and has been controlled very well. Through ABC Rules the process must continue.

Q25. Give a brief idea about what government should do to protect animal’s especially street animals?
ANSWER.
The Government needs to back NGOs like FFAR India and give them a budget of a conservative 100 crore annually take care of the issue of street animals in one city. This needs to be followed after success and results in one city in other cities too on the same lines. FFAR India is up for the challenge to sort the street animal issue in India all across India.

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RIGHTS OF OLD AGED PERSONS IN INDIA

By Bhavya Gupta
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I. INTRODUCTION:

Old age is an indispensable stage of life of a human being which a man cannot refute except ultimately death. The childhood and old age are natural reliant conditions of life where children depend upon parents and vice-versa. Nowadays parents are becoming burdensome for their child whenever they lose their strength to work and earn.

The present demographic scenario of the country shows the rising trend of adult population. According to census report 2011, there are 60.3% people belonging to 15 to 59 years of age group and the percentage of people above 60+ age is 8.6%. On 14th December, 1990, the United Nations General Assembly designated 1st October as the international day for older persons. In my Research Paper I will discuss about problems faced by the old aged persons in India like economic problem etc. and mistreatment and harassment faced by the older people in India.157

Human rights are the basic rights of an individual. In other words, these are the freedom established by custom or international agreement that impose standard of conduct on all nations. Thus, these are the fundamental rights which human being possesses by the fact of being human, which are neither created nor can be abrogated by any government.

The rights of elder people are also protected under Constitution of India in Article 41, they are also protected under various Personal Laws like Hindu Law, Muslim Law, Christian and Parsi Law, rights of Old Age Persons are also protected under Code of Criminal Procedure. There are many schemes launched by the Government for the protection of Rights of Old Age Persons in India like Government has passed various Acts like The Maintenance of & Welfare of Parents and Seniors Citizen Act, 2007. The Government has setup the ministry of Justice and Empowerment has launched the program IGNOAPS, Annapurna Scheme, National Policy on Older Persons (NOPS) etc.

II. RESEARCH METHODOLOGY:

The methodology adopted for this paper is a literature survey or Doctrinal research. The research paper makes use of publicly available information on various websites, online newspapers, journals, commentaries, case laws as well as reports by organizations. These sources and the arguments advanced through them have been analyzed in the succeeding sections of the paper to present an analysis to affirm or negate the hypothesis. However, the researcher has made an attempt to analyze the views of various jurists and organization to make his research better.

III. RESEARCH QUESTIONS:-

The questions dealt with in the Research paper are:-

- To understand the problems faced by old aged persons in India?
- To critically examine the laws regarding the rights of old aged persons of India?
- To study the deciding factors in regarding the protection of Rights of Old Age Persons in India?

IV. PROBABLE OUTCOME:-

After this Research paper, we would be able to know the concept of ‘Right of old aged persons in India’. This paper will give the detailed explanation about the Rights of Old Aged Persons in India, its various aspects, protection given to old aged persons in Indian Laws.

V. NATIONAL POSITION:-

In India for the first time in the year 1993 the law relating to human rights was passed in the name of Protection of Human Rights Act, 1993. Under which a National Human Rights Commission in the national level and State Human Rights Commissions were established for smoothen the protection of human rights in India. Presently in India we have apart from national commission 18 state human rights commission in ANDHRA PRADESH, ASSAM, HIMACHAL PRADESH, JAMMU & KASHMIR, KERALA, KARNATAKA, MADHYA RADESH, MAHARASHTRA, MANIPUR, ORISSA PUNJAB, RAJASTHAN, TAMILNADU, UTTAR PRADESH, WEST BENGAL GUJARAT AND IN BIHAR. A human being is not beyond the reach of the old age in its general cycle of the life. Ageing is a natural process, which inevitably occurs in human life cycle. It brings various challenges in the life of the old age, which are mostly engineered by the changes in their body, mind, thought process and the living patterns. Ageing refers to a decline in the functional capacity of the organs of the human body, which occurs mostly due to physiological transformation, it never imply that everything has been finished. The senior citizens constitute a precious reservoir of indispensable human resource coupled with knowledge of various dimensions, varied experiences and deep insights. May be they have formally retired, yet an overwhelming majority of them are physically fit and mentally alert. Hence, they should be given an appropriate opportunity as they remain in a position to make significant contribution to the socio-economic development of the nation.

A. Problems faced by old aged persons in India:

There are five types of problems faced by old aged persons in India which are as follows:-

i. Economic Problems:-

Retirement from service usually results in loss of income and the pensions that the elderly receive are usually inadequate to meet the cost of living which is always on the rise. In simple words it includes

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160. Problems faced by old aged persons in India. Available at www.supremoamicus.org
problems related to loss of employment, income deficiency and economic insecurity.

ii. Physical and Physiological problems:-

Old age is a period of physical decline. Even if one does not become sans eyes, sans teeth, sans everything, right away, one does begin to slow down physically. In simple words it includes health and medical problems etc.

iii. Social problems:-

Older people suffer social losses greatly with age. Their social life is narrowed down by loss of work associated, death of relatives, friends and spouse and weak health which restricts their participation in social activities.

iv. Emotional problems:-

Decline in mental ability makes them dependent. They no longer have trust in their own ability or judgments but still they want to tighten their grip over the younger ones.

v. Psychological Problems:-

Mental disorders are very much associated with old age. Older people are susceptible to psychotic depressions.

B. Growing population of Old aged persons:-

The population of old aged persons is increasing day by day. According to the 2014 State of Elderly in India report released by the non-profit organization. By 2021, the elderly in the country will number 143 million, the report said. Presently, the elderly is divided into three categories: the young old (60-70) the middle-aged old (70-80) and the oldest old (80 plus).

C. Abuse of Old aged persons:-

Older abuse is also very often the result of longterm family conflict between parent and child or between spouses. Increasingly, the relationship between domestic violence and older abuse is understood to be important. In few studies which examine the CHHATTISGARH, phenomenon as a specific category, domestic violence accounts for a significant percentage of cases identified as elder abuse'.

VI. PROTECTION UNDER NATIONAL LAWS:-

The rights of old aged persons are protected under various national laws. Which are as follows:-

1. Protection under Constitutional Law:-

The provisions are mentioned in the Constitution of India for the senior citizens of India. The article 41 and article 46 which are described under part 4 of the


161 Ibid.
162 Ibid.
163 Ibid.
164 Ibid.
166 Ibid.
167 Supra 3
Constitutional law. Article 41 states that “The state shall, within the limits of its economic capacity and development, make effective provision for securing the Right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.” And Article 46 of its state that The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

2. Protection under personal laws:

The rights of old aged persons are protected under various national laws for example – Hindu Law, Muslim Law, Parsi Law etc. which are explained below:-

a) Hindu Law:-
Under the Hindu personal laws, every Hindu has the obligation to take care of their aged parents who are not able to maintain and take care of themselves. Earlier it was the legal obligation of the son to maintain his aged parents but now, it is the right of a daughter to maintain her parents who are not able to maintain out of their own earnings or property. section 20 of the Hindu Adoption And Maintenance Act, 1956, makes it an obligatory provision to maintain an aged parent.

b) Muslim Law:-

Muslim law makes it obligatory for a man to provide maintenance for his father, mother, grandfather and grandmother. According to Tyabji, parents and grandparents in indigent circumstances are entitled, under Hanafi law, to maintenance from their children and grandchildren who have the means, even if they are able to earn their livelihood. Both sons and daughters have a duty to maintain their parents under the Muslim law. The obligation, however, is dependent on their having the means to do so. in Muslim Law the children are bound to maintain their parents if they earns money.

c) Christian And Parsi Law:-

There is no personal law for Christian and Parsi for providing maintenance to the aged parents. If the parents want to seek maintenance from their children, they can apply through the Criminal Procedure Code to seek maintenance. The Criminal Procedure Code a secular law which is applicable to the entire region. This is not for a particular sect and is applicable to every citizen of the country. To claim maintenance under this law, it is necessary to prove that the parents are neglected and do not have the sufficient means of income.

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169 Ibid.
171 Ibid
172 Ibid.
173 Supra 3
174 Supra 3
to maintain themselves. **Section 125 of the Criminal Procedure Code** makes it obligatory for sons and daughters, including a married daughter, to maintain their parents.\(^{175}\)

### VII. GOVERNMENTAL PROTECTIONS:-

For protecting the rights of Old Aged Persons in India the Government has passed various acts like The Maintenance of & Welfare of Parents and Seniors Citizen Act, 2007. This act also permits State Governments to establish old age homes with the minimum capacity of 150 elders for the neglected elderly people in every district.\(^{176}\) The State Government may establish a maintenance tribunal in every district under which every old age citizen can go and claim their right of maintenance seeking monthly allowance from their children or heirs. The appellate tribunal may also be established in every district.\(^{177}\) The Government has setup the ministry of Justice and Empowerment which has launched various programs like:-

1) **NASP( National Assistance Social Programme)**:-

The National Social Assistance Programme (NSAP) which came into effect from 15th August, 1995 represents a significant step towards the fulfillment of the Directive Principles in Article 41 of the Constitution. The programme introduced a National Policy for Social Assistance for the poor and aims at ensuring minimum national standard for social assistance in addition to the benefits that states are currently providing or might provide in future.\(^{179}\)

2) **Annapurna Scheme:-**

The Annapurna Scheme has been launched with effect from 1st April, 2000. It aims at providing food security to meet the requirement of those senior citizens who, though eligible, have remained uncovered under the National Old Age Pension Scheme (NOAPS). The Scheme is targeted to cover, 20% (13,762 Lakh) of persons eligible to receive pension under NOAPS.\(^{180}\) To provide food security to those indigent senior citizens who are not covered under the targeted Public Distribution System (PDS) and who have no income of their own. Through the new "Annapurna" scheme, it is intended to provide 10 kg. of food grains per month free of cost to all such person who are though eligible for old age pension under NOAPS, are presently not receiving it. The number of persons benefitting from the Scheme are not to exceed for the present 20% of the old age pensioners within a State. The Gram Panchayat would be

\(^{175}\) Supra 14  
\(^{176}\) Supra 14  
\(^{177}\) Ibid.  
required to identify, prepare and display a list of such persons after giving wide publicity to the Scheme.\(^{181}\)

3) National Policy on Older persons (NPOP):-

The National Policy on Older Persons (NPOP), 1999 envisages State support to ensure financial and food security, health care, shelter and other needs of older persons, equitable share in development, protection against abuse and exploitation, and availability of services to improve the quality of their lives. The policy also covers issues like social security, intergenerational bonding, family as the primary caretaker, role of Non-Governmental Organizations, training of manpower, research and training.

4) The Maintenance and welfare of Parents and Seniors Citizen Act, 2007:-

In 2007, the Maintenance and Welfare of Parents and Senior Citizens Act were passed to provide maintenance support to elderly parents and senior citizens.\(^{182}\) The Act establishes the Maintenance Tribunal to provide speedy and effective relief to elderly persons. Section 19 of the act also mandates the establishment of an old age home in every district and provides for the protection of life and property of the elderly.\(^{183}\) Parents can opt to claim maintenance either under Section 125 of the Criminal Procedure Code, 1973 or under this Act – they cannot opt for both.\(^{184}\) This Act was passed for Senior citizens who are unable to maintain themselves shall have the right to apply to a maintenance tribunal seeking a monthly allowance from their children or heirs for their maintenance. But on the other hand this act has some criticisms i.e. this act is not easy to implement, there is no obligation casts on the state government to establish old age homes in every district, the is also no provisions for old aged pensions in India.

CONCLUSION: -

From the above contention it can be held that there is an urgent need to protect the rights of old aged persons in India. The rights of old aged persons are protected under various national laws like Hindu Law, Muslim Law etc. as discussed above in the research paper. The rights are also protected under CrPC Section 125. The government has also passed a bill on Maintenance and welfare of parents and senior citizens Act, 2007. The Government has launched various schemes to protect the rights of old aged persons in India like NASP(National Assistance Social Programme), Annapurna scheme etc.


\(^{183}\) Ibid.

\(^{184}\) Ibid.
ANONYMITY IN BROWSING AND ITS ADVERSE EFFECTS IN CYBERSPACE

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ABSTRACT
With the evolution of computer technology there has been a concomitant increase in cybercrimes. Most cybercrimes that surface in the web are detectible by the law enforcement agency by tracing the internet protocol address of the perpetrator but the problem arises when these cybercrimes are committed in the dark web where the user’s right to anonymity and privacy while browsing the dark web protects the perpetrators. Virtual anonymity or browsing the internet incognito makes cyber criminals more fearless in their operation and further using crypto currency as payment for any transaction in the dark web has increasingly made it difficult for the law enforcement agency to shut down their operations. This research explores the complexity of the problem of anonymity in dark web which poses a grave threat to the cyberspace in India.

Keywords: World Wide Web, Deep web, Dark web, Crypto currency.

OBJECTIVES OF THE STUDY
- Understanding the dangers that lurk in the deep web and the software used to browse the deep web anonymously.
- Understanding the threat posed by combination of crypto currency and dark web.
- Exploring the measures adopted by Indian government relating to internet censorship.
- Examining the cyber law in India.

SCOPE OF RESEARCH
This research is limited only to anonymity in browsing the dark web and does not deal with user’s privacy in the internet which is a subject still under debate. This research extends only to the criminal contents hosted in the deep web and does not deal with whistle-blowers who use the deep web. It doesn’t go into broader study of crypto currency used in transactions done in dark web but just gives an understanding of how the combination of anonymity and crypto currency in dark web poses a serious threat to the law and order in a society.

LITERATURE REVIEW
The following literatures are reviewed for the purpose of this research: Carmine Dipiero (2017) in his study on abuse of crypto currency in the dark web has suggested reformulating the approach of the investigative agency to locate the

LIST OF ABBREVIATIONS
1. CERT IND Indian Computer Emergency Response Team
2. CSAM Child Sexual Abuse Material
3. FBI Federal Bureau of Investigation
4. HTML Hypertext Mark-up Language
5. IRS Internal Revenue Service
6. IP Internet Protocol
7. ISIS Islamic State of Iraq and Syria
8. ISP Internet Service Provider
9. UN United Nation
10. URL Uniform Resource Locator
11. v. Versus
perpetrators. His study suggests that the FBI should focus more on having undercover agents to uncover the cybercriminals in the dark web than focusing just on locating servers of the users or cracking Tor. The study is limited to the problems faced by investigative agency in U.S.A. in locating the perpetrators of the crime. On the subject of privacy in dark web, he affirms that there must be a fine line between fighting against dark web markets and infringing on privacy and libertarian values.

Sophia Dastagir Vogt in The digital underworld, combating crime on the dark web(2017) has dealt extensively on privacy law in U.S.A and on combating international crime in the dark web. Her research gives an understanding on how the courts developed the third party doctrine while combating activities in dark web. The doctrine is explained as ‘a person has no legitimate expectation of privacy in information when he voluntarily turns over to third parties’. Apart from expectation of privacy, the author deals with conflicts of law and has suggested closer cooperation with foreign law enforcement agencies for overcoming jurisdictional obstacles in combating cybercrimes in the dark web.

Dominick Romeo in Hidden threat: The dark web surrounding Cyber security(2016) has dealt on the subject of dark web and how it poses a serious threat to national and domestic cyber security. His research has given rise to many critical questions about the state of cyber security and has suggested collaboration between federal government and private enterprise to combat this threat.

CYBER CRIMINALS OPERATE CLANDESTINELY DEEP WITHIN THE WORLD WIDE WEB PROTECTED BY ANONYMITY. VARIOUS NEFARIOUS ACTIVITIES \textit{inter alia} TRANSMITTING CHILD PORNOGRAPHY, SALE OF CONTRABAND SUBSTANCES, DRUGS ETC. ARE CARRIED OUT AND THESE TRANSACTIONS ARE PAID BY CRYPTO CURRENCY. THE LITERATURE ON THE DARK WEB IS VERY LIMITED. THEREFORE, THE NEED ARISES TO EXPLORE INTO THE PROBLEM OF ABUSE OF ANONYMITY AND CRYPTO CURRENCY AS IT POSES A GRAVE THREAT TO THE INTERNATIONAL COMMUNITY. THE IMPORTANCE OF THIS RESEARCH IS TO PRIMARILY EXPLORE THE DARK WEB AND EXPLAIN THE AMBIT OF CYBER LAWS IN INDIA IN COMBATING THE PROBLEM OF ABUSE OF ANONYMITY AND CRYPTO CURRENCY.

RESEARCH METHODOLOGY
This is a doctrinal research designed to be exploratory in nature for the purpose of providing an insight on the operation of criminal activities in the dark web and for understanding how online anonymity combined with crypto currency have added to the problem of increasing cybercrimes. It further goes on to examine the cyber law in India in coping with such problem. This research seeks to provide complete understanding of misuse of anonymity in dark web so that it could help future researchers to further probe into this area of study. Primary sources such as legislations, rules, decisions of courts and Secondary sources such as Articles, Journals and books, online resources were referred for the purpose of this research.

CHAPTER 1 INTRODUCTION TO THE SURFACE WEB, DEEP WEB AND THE DARK WEB
Before the advent of technology, communication between people around the world was very slow and difficult. Innovation began growing at a fast pace only since the 19th century, as a result of which personal computers, smartphones, tablet computers were invented for storing and sharing information. The most important development of all was the internet which became the quickest means of connecting people. Sir Tim Berners Lee, a British scientist at CERN, invented the World Wide Web in 1989 by conceptualizing the idea of sharing information from one computer to another. The World Wide Web is just one part of the services provided in the internet which consists of numerous websites or webpages containing information. These websites or webpage in the World Wide Web can be accessed through web browsers such as Chrome, Mozilla, Microsoft Edge, Safari etc just by using internet. Internet became the fastest means of communication and it has ever since kept people connected across the globe just by a click of the mouse. A webpage is an HTML document containing information available in the World Wide Web. The websites found in the World Wide Web contain a collection of webpages accessible through the internet by typing its unique address in the web browser and this will open up the website’s main web page otherwise known as homepage. Once the World Wide Web was made available to the public at large, many businesses started creating websites to share information about their business and products. Soon internet was made available commercially on payment of certain fee by internet service providers to access the World Wide Web. There are other services apart from World Wide Web provided by the internet such as electronic mail, messaging services, information services, file transfer etc. At present, 46.7% of internet users are there in Asia of whom 23.8% of the internet users are from India.\(^{185}\)

The contents in the World Wide Web are extensive; many webpages are being created on a daily basis. To access the webpages in the internet, search engines such as Google, Bing, Yahoo etc. were designed to search the contents in the World Wide Web. Since there were many webpages in the World Wide Web, the need arose to index the webpages so that they are discoverable in the search engine. The indexed web contains at least 4.59 billion web pages.\(^{186}\) These indexed webpages is the surface web and can be easily accessed through web browser. Those webpages that were not indexed by the search engines became a part of the deep web and they cannot be found and accessed through standard search engines. This is the stark contrast between the surface web and the deep web. Within the deep web, there are some websites that host criminal activities and these sites came to be known as the dark web. The dark web forms a small portion of the deep web and it is a platform for illegal activities, terrorism etc. The deep web and dark web cannot be accessed through standard web browsers but require some


specific software to access it. To summarise, the World Wide Web contains the surface web that are visible in search engine, the deep web and dark web that are hidden from search engines.

CHAPTER 2 THE DARK CORRIDOR TO THE WORLD WIDE WEB

ACCESSING THE DEEP AND DARK WEB

The deep web contains all such websites, online communities that are hidden from surface search engines because they are not indexed. It is also home to many academic library databases. The deep web is otherwise known as the hidden web or invisible web. The political dissidents across the world, who cannot express their views freely in the surface web, use the deep web as a means for communicating their views without fear of being persecuted. The reason behind it is that, the deep web can be accessed only through specific software that allows anonymous browsing. It is difficult to trace the person who is browsing the deep web as his internet traffic is diverted through many relays due to which the location of the user cannot be traced. One such software that allows anonymous browsing of deep web is the Tor browser. Before looking into the working of Tor project, it is first necessary to understand the difference between anonymity and privacy for the purpose of this research.

ANONYMITY AND PRIVACY have been used synonymously but they have distinct meanings. In terms of anonymous user of the internet, it means the user remains unknown and unidentified by others. Through anonymity, a person’s name, identity details, gender, IP address is unknown to others in the web. By remaining anonymous, the user’s location cannot be tracked nor can the user’s activities be monitored. The user can go by various pseudonyms covering his true identity. Whereas privacy of a user of the internet means that the right of the user to choose what personal information needs to be protected and to whom it is to be revealed. A user’s information is protected in a public domain thus protecting his private space in the internet. Anonymity is narrower to the concept of identity whereas privacy deals with protecting personal information and personal space from others.¹⁸⁷ This research only focuses on anonymity while browsing the web and not the right to privacy.

TOR PROJECT was first developed by U.S. Naval Research Laboratory for sharing military documents in the internet anonymously and in 2012 it was launched to the public at large.¹⁸⁸ It is a free and open software that can be downloaded by anyone from https://www.torproject.org/. It’s a software that protects the user’s anonymity. Tor requires a lot of assistance from its users across the globe to volunteer for the purpose of running relays, that is, to divert internet traffic of the person browsing the website so that his IP address remains unknown.

hidden. In other words, the internet traffic is run through Tor relays which mean that once the internet traffic of the user is received by a volunteer, it is passed along to another across the globe. Tor aims to protect the users’ privacy and gives them a sense of freedom by allowing them to access the internet anonymously. It is difficult to trace the Internet Protocol address of the user and therefore the location of the user remains hidden. The Tor browser encrypts all data sent and received by the user. Tor browser blocks plugins such as flash, realplayer etc. since these plugins or add-ons reveal the user’s IP address. It also takes measures in preventing users from opening the downloaded content in the browser since this might reveal their IP address. Such is the anonymity and protection given to the user of the Tor browser.

Tor by default uses the search engine known as DuckDuckGo which enables a person to access information in the deep web as well as other websites in the surface web anonymously. This search engine does not track the user’s location. The domains in Tor browser use ‘.onion’ suffix addresses unlike other domains like ‘.com’, ‘.net’ etc. Tor works on onion routing which protects a person from traffic analysis attacks, letting users to communicate with each other anonymously. So while analysing the internet traffic, it will be hard to figure out who is communicating with whom. Just as how onions have multiple layers, Tor wraps several layers of encryption over the communication so that the identity of the user remains untraceable.

**USERS OF TOR:** There are 100,000 users world-wide who use Tor every day and 5% of users are from India. Activists, whistle-blowers, the political dissidents and those who are persecuted from their country are more likely to voice their views freely by using Tor since they feel safe that their identity is protected by the software. It helps people to communicate sensitive information anonymously. Tor thus became a haven for political dissidents, persons who are persecuted from their country, journalists working in danger zones, to those who want their activities to be private from advertisers and to those evading censorship. People can access myriad database of knowledge that has been hidden away by national firewall and censorship laws in their country by using Tor. Some countries which have strong censorship policy have blocked Tor project making it difficult to download it directly from their website, but Tor has hosted mirror websites in such countries so that the users will be able to access it.

Tor software is an effective censorship circumvention tool, allowing its users to reach otherwise blocked destination or content. It not only protects the user’s anonymity while viewing the contents in the internet but also helps them to host websites

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192 Tor Project, Supra Note 4.
and services anonymously. Instead of taking a direct route from source to destination, it takes its users through many relays run by volunteers making it difficult for anyone to snoop into the websites that have been visited by the user. It also prevents the websites from learning the physical location of the user. The location of the server which hosts the website is also hidden from others. The benefits of Tor are encryption, right to anonymity and privacy protection. However, over the years, it has been misused by criminals and terrorists. What began as a medium of free speech and expression soon became a hideout for those involved in criminal activities.

**COMBINATION OF ANONYMITY AND CRYPTO CURRENCY:** The criminals have created a network within the deep web that came to be known as the dark web where drugs, stolen credit cards, fake passports etc are being sold. Pornography contents such as child pornography are readily available, assassins and hit men can be hired and such other nefarious activities are being operated. Dark web is similar to a black market that is hidden deep in the web, where anything illegal is available. The payments for transactions in these sites are entirely done through cryptocurrencies. The most recent crypto currency that has gained popularity among the internet users is Bitcoin\(^{193}\). This currency is protected by high levels of encryption making it hard to trace the names of the buyers and sellers in a virtual transaction. Whatever a person buys or sells using Bitcoin is entirely private and cannot be traced back to them. The payments made through Bitcoins are entirely anonymous. Thus, more and more cyber criminals in the dark web use bit coins for any transactions that takes place, thus protecting themselves and the buyer. Anonymous browsing through Tor along with crypto currency has made the cyber criminals bolder in their operation as their identity cannot be traced and the payments also cannot be traced back to them. When these two forces combine, the cyber criminals become invincible. Some of these nefarious websites in the dark web are hereinafter analysed to give some insight to this problem.

**PROMINENT WEBSITES IN THE DARK WEB**

**SILK ROAD** is one such website that introduced the terminology ‘dark web’ into a layman’s vocabulary. The investigation into the operation of this website opened the Pandora’s box of various complex issues. The first and foremost difficulty into the investigation was tracing an invisible trail left by an anonymous person who launched the website in the dark web. At first glance, Silk Road might seem like any other e-commerce site but the oddity is that anyone could purchase or sell contraband drugs, narcotics etc in this website that is operated in the dark web and pay for these transactions entirely through Bitcoins. Since it’s operated in the dark web and the payments were done entirely through crypto currency, it was very difficult for the investigative agency to trace the administrator of the site who went by the pseudonym Dread Pirate Robert. Silk Road by 2013, was making sales of $1.3 million.

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It came to be known as one of the most notorious online marketplace for illicit drugs. The U.S. government had been trying to shut the website down for over two years but was unable to find the server from which it was operating. The Federal Bureau of Investigation with the help of an IRS agent finally arrested Dread Pirate Robert whose real name was Ross Ulbritch. Soon after his arrest in 2013, the FBI shut down the website. The arrest of Ross Ulbritch was possible only due to his own human error inter alia using his email id with his original name while advertising Silk Road in an online forum. His own mistakes helped the FBI to trace him; otherwise it would have been very difficult to link Silk Road to Ross Ulbritch. The FBI orchestrated Ulbritch’s whole arrest, by waiting until he logged on to his computer, ensuring that all the data remained intact, before arresting him in a public library at San Francisco. Robert Ulbritch was in his 20’s when he was arrested and was operating within USA. The true potential of dark web came to light only because of Silk Road prosecution. Ulbritch was formally charged with the following offenses: Distributing narcotics by means of the Internet, conspiring to commit narcotics trafficking, engaging in a continuing criminal enterprise, computer hacking conspiracy and conspiring to commit money laundering. Justice Katherine B Forrest of the U.S. District Court, New York termed the crime as “planned, comprehensive and deliberate scheme which posed serious danger to public health and community” and sentenced Robert Ulbritch to life imprisonment without possibility of parole. The judgment of the District court was affirmed by the court of appeal. The most deterring punishment was given in his case but this did not stop other cybercriminals in the dark web from hosting Silk Road 2.0 within weeks the original site was shut down.

**FREEDOM HOSTING** A large child pornography website that operated in the dark web was shut down by the FBI. The FBI sought extradition of an Irish man who was the administrator of the website. A study found that over 80% of Dark Web visits are related to paedophilia. It’s seen that the conviction of cyber criminals becomes a problem when the person who commits the crime is working outside the country.

**HIDDEN WIKI** is a dark web directory that provides link to other hidden services in the dark web including uncensored links relating to money laundering, contract killing, child pornography etc.

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197 United States v. Ulbricht, No. 15-1815 (2d Cir. May 31, 2017)

C'THULHU provides services relating to assassination and hiring hit men and also takes crypto currency for its services.\(^{199}\)

**DEADPOOL** is a service that allows users to pool in bitcoins and predict assassination of people and the user who guesses it correctly can claim the entire pool. The above mentioned list are not exhaustive, there are many number of websites hosting similar services in the dark web.

These criminal activities in the dark web are mostly unnoticed by law enforcement agencies due to the anonymity that Tor offers to its users. It is dangerous for any faint hearted person to venture into the dark web because of the graphic contents of violence posted in it. Dark web is the greatest threat to national security as there is a great danger that terrorist organisation may use it as a means of communication. The digital footprints of the cyber criminals are hidden completely from the eyes of the law enforcement agency. More and more criminals are exploiting anonymity on the internet and this has become the biggest problem which the world faces today. The cyber criminals across the globe are using the onion routing (TOR) software for carrying out their nefarious activities and making profit in a short time. This poses a real danger to the law and order situation in a nation and also a major threat to the security of international community at large since these crimes have no borders and it is difficult for any agency to trace the location, let alone catch the perpetrator. The drug cartel activities in the dark web are the most prolific and profitable of all in the dark web, it has high clientele across the globe. The UN drug report shows that there is a 50% increase of drug transaction in the dark net from 2013 to 2015.\(^{200}\)

The cyber criminals in the dark web stand tall knowing well that operating anonymously will protect them from being arrested.

Chapter 3 **EFFORTS OF THE INDIAN GOVERNMENT AND JUDICIARY TO BLOCK WEBSITES HOSTING PROHIBITED CONTENT**

India has moved towards digitisation and has initiated Digital India Campaign to transform the country into a digitally empowered society. In order to protect India’s cyberspace, the government of India has created a separate ministry under it known as the Ministry of Electronics and Information Technology which oversees many divisions *inter alia* Cyber laws and E security division for protecting India’s cyber space. However, when it comes to internet freedom, India has ranked 41 among the world, the reason being Indian government’s active involvement in blocking websites.\(^{201}\)

For the purpose of this research, it is important to look specifically at the cyber laws in India in relation to blocking of websites that hosts prohibited/illegal contents. This will give an insight on the


preparedness of the government to tackle the criminal activities in dark web.

I. LAWS AND RULES RELATING TO BLOCKING WEBSITES: The Information Technology (amendment) Act, 2008 permits the Central government to block websites *inter alia* to protect the safety and security of the nation and for maintaining public order. In exercise of its powers under section 87(2) (z), the Ministry of Electronics and Information Technology has prescribed rules relating to the procedure for sending complaints regarding websites that host prohibited content and also laid down rules relating to blocking these websites in Information Technology (Procedure and safeguard for blocking for access of information by public) Rules, 2009. As per the said rules, complaints relating to prohibited contents in websites shall be sent by public to the nodal officer of the concerned organisation who examines the complaint and forwards it to the designated officer. On receipt of the complaint, the designated officer will issue notice to the intermediary or the person who hosted the information to clarify the matter within 48 hours and if it sees fit shall direct the agency of government or intermediary to block such website. The Act further prescribes punishment for intermediaries such as Internet Service Providers, web hosting service providers etc who fail to comply with the directions relating to blocking of websites for a term that may extend to seven years and shall also be liable with fine. The Information Technology (Intermediaries Guidelines) Rules, 2011 framed by the government in exercise of its powers under section 87(2)(zg) imposes obligation on the intermediaries such as Internet Service provider, web hosting service providers etc to take down websites that deal with criminal activities within 36 hours upon obtaining knowledge or upon acting on some complaint. It also lays down certain due diligence standard which the intermediary must follow.

The constitutional validity of section 69A of Information Technology (amendment) Act, 2008 and the rules relating to the Information Technology (Procedure and safeguard for blocking for access of information to public), 2009 were upheld by the Supreme court. It also upheld the validity of the Information Technology (Intermediaries Guidelines) Rules, 2011.

With regard to interception, monitoring and decryption of online information by the Union and States, the rules relating to its procedure have been laid down in the Information Technology (Procedure and Safeguard for Interception, Monitoring and Decryption of Information) Rules, 2009. It also prescribes the procedure to be adopted at the time of emergency when obtaining prior directions are not feasible.

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202 Sec.69A, Information Technology (Amendment) Act, 2008.
203 *Supra* Note 18.
206 ShreyaSinghal vs. Union of India AIR 2015 SC 1523
II. BLOCKING WEBSITES RELATING TO CHILD PORNOGRAPHY: The Information Technology (Amendment) Act, 2008 prescribes punishment for publishing or transmitting obscene or sexually explicit materials and also materials relating to children in sexually explicit form. Further, in exercise of powers under section 87(2)(zg) read with section 79 of the Information Technology Act, the Ministry of Electronics and Information Technology has issued Information Technology (guidelines for cyber café) Rules 2011, permitting cyber cafés to use filtering software to prevent access to child pornography and obscene materials. For the purpose of curbing Child Sexual Abuse Material online, the cyber laws and e-security division under the ministry in exercise of its powers under section 87(2)(zg) has issued an order dated 18.04.2017 recommending solutions to curb the problem. It was observed that there was no central agency to monitor CSAM and that most of these websites were hosted outside India. Based on these observations, The Cyber laws and E security Division in its order directed the Internet Service Providers to remove online CSAM by following the list of those URLs maintained by the Internet Watch Foundation.

III. THE COMPUTER EMERGENCY TEAM (CERT IND) had been created under the Ministry of Electronics and Information Technology to respond to any security threat to India’s cyber space. CERT-IND has been authorised by the ministry to issue instructions to the Department of Telecommunications (LR


In KamleshVaswani v. Union of India212 The petitioner approached the court, for directing the government to block all websites relating to pornographic content inter alia child pornography. The Supreme Court has made several observations relating to child pornography and the need to curb it. On July 31, 2015, DoT ordered ISPs to block access to 857 URLs for hosting pornographic content.213 The notification stated that the websites were found to be violating morality and decency under Article 19(2) of the Constitution of India, read with Section 79(3)(b) of the Information Technology Act.214 The centre later clarified that only child pornography may be blocked.215 Though the Supreme Court made reservations on blocking pornography as anyone would challenge that under Article 21, it felt otherwise about child pornography.

212 KamleshVaswani v. Union of India & others W.P.C. No. 177 of 2013
214 Ibid.
Cell) to block the websites hosting prohibited content after checking the veracity of the complaint.\textsuperscript{216} It is the duty of the Internet Service Providers to block such websites and inform CERT IND. \textsuperscript{217} The following persons can approach CERT IND for the purpose of blocking websites:

1. Secretary, National Security Council Secretariat.
2. Secretary, Ministry of Home Affairs, Government of India.
3. Foreign Secretary in the Department of External Affairs or a representative not below the rank of Joint Secretary.
4. Secretaries, Departments of Home Affairs of each of the States and of the Union Territories.
5. Central Bureau of Investigation, Intelligence Bureau, Director General of Police of all the States and such other enforcement agencies.
6. Secretaries of Heads of all the Information Technology Departments of all the States, and Union Territories not below the rank of Joint Secretary of Central Government.
7. Chairman of the National Human Rights Commission or Minorities Commission or Scheduled Castes or Scheduled Tribes Commission or National Women Commission.
8. The directives of the Courts.
9. Any others as may be specified by the Government.\textsuperscript{218}

As seen above, government surveillance plays a vital role in discovering such criminal activities in the web. The above mentioned government authorities can approach CERT IND to block these websites.

IV. CENTRAL MONITORING SYSTEM has been set up in Delhi and Mumbai by the Ministry of Electronics and Information Technology for surveillance of online traffic. This will help detect the activities of cybercriminals. Although there might be concerns of violation of privacy, this approach by the government is a step towards bringing an effective system in place to monitor websites in the dark web. Though the government has taken several measures to block child pornography, many new sites are popping up in the dark web on a daily basis and the only way that the Central Monitoring System can block such contents is by taking proactive action.

Measures are yet to be taken to block websites relating to online sale of drugs which has become a menacing problem in India. Many incidents have been reported about teenagers being arrested for possessing contraband substances which they purchased from the dark web.\textsuperscript{219} Terrorist’s organisations such as ISIS

\textsuperscript{216} Sec.70B, Information Technology(amendment) Act,2008.
\textsuperscript{217} Ministry of Electronics and Information Technology, http://meity.gov.in/content/it-act-notification-no-181 (last updated on June 26, 2015)
\textsuperscript{218} Supra Note 33

Prakruthi PK, \textit{While porn is keeping us busy, Kids are buying hash online}, BANGALORE MIRROR (Aug.6,2015) available at
use dark web for the purpose of spreading jihad and to fundraise for their activities. Using crypto currency to hire hit men and assassins, exotic animal trade, and trade of illegal substances, fake identity cards, passports etc are all websites that have not been brought to the notice of the nodal agency that oversees threats to cyberspace in India. Bit coins though not recognised by the Reserve Bank of India, are still being used for transactions online. Money laundering and gambling websites using crypto currency is being operated in the dark web and less attention is paid to monitoring it. Most of the websites that operate in the dark web are hosted outside India and the perpetrators remain unscathed. The Information Technology Act, 2000 applies to all such offences that have been committed by any person outside India irrespective of his nationality if that person uses Indian network. The need of the hour is coordination among the investigative agency and the CERT IND to address the concerns of criminal activities in dark web. The provisions of this Act may help in monitoring and taking down the indexed content in the World Wide Web or those that are visible in the search engine, but whether it would effectively help in blocking websites in dark web is a question left for further analysis.

CONCLUSION

Eric Jardine, a research fellow for the Centre for International Governance Innovation, stated that “The anonymity of the technology of the Dark Net cuts both ways — while people can use the network for villainous purposes, people can also use it for good. Despite public opinion, shutting anonymity networks is not a viable long-term solution, as it will probably prove ineffective and will be costly to those people that genuinely benefit from these systems.” But the argument posed here is should such level of anonymity be allowed so as to threaten the national security. This research has provided some insight on the modus operandi of cybercriminals in the dark web where they misuse onion routing and crypto currency and exploit anonymity. The challenge is to shut down these dark websites which would require discovering numerous secret servers located worldwide which is a mammoth task for any country. These are crimes committed across borders, that is, the website maybe hosted by a person in one country, the buyer and sellers might be from different countries. The international community should work together for shutting down these nefarious activities. This research has thus far, explored the complex issue of anonymity in operating the dark web that

221Sec.75, Information Technology Act,2000.

has led to prominent criminal network in the dark web, making it a major challenge for the international community at large. Though laws may be sufficient to punish the perpetrators, the most obvious concern is to locate these perpetrators who shield themselves in the cloak of dark web.

BIBLIOGRAPHY

BOOKS AND ARTICLES:
1) Aparna Viswanathan, Cyber law Indian and International perspectives, Lexis Nexis (2017)
2) A. Dominick Romeo, Hidden Threat: The Dark Web Surrounding Cyber Security, 43 N. Ky. L. Rev. 73, 86 (2016)
4) NS Nappinani, Technology laws Decoded, Lexis Nexis (2017)

STATUTES:
1) Information Technology (amendment) Act, 2008.
2) Information Technology (Intermediaries Guidelines) Rules, 2011.
3) Information Technology (guidelines for cyber café) Rules, 2011.

WEBSITES:
• http://www.thedelhibulletin.com/news/
• http://money.cnn.com/
• https://freedomhouse.org/
• https://www.wired.com/
• http://www.deccanchronicle.com/
• http://meity.gov.in/home
• https://freeross.org/?v=47e5dceea252
• https://www.fbi.gov/

www.supremoamicus.org
CAPITAL PUNISHMENT: A JURISPRUDENTIAL ANALYSIS

By Byomakesha Kumar Singh
From National Law University and Judicial Academy, Assam

Abstract

Capital Punishment is a topic which has always been a controversial one especially in a country like India. Bipolar views are there regarding its abolition. Many people support it while many oppose it and support its abolition. Even from a jurisprudential perspective, there are two views and many renowned jurisprudents support these two contrasting views. They support and attack it on various grounds such as morality, right to life, etc. The same has been dealt in the project where both the viewpoints and their respective arguments have been looked at. Finally, the paper concludes on what should be done after looking at both the viewpoints.

Introduction

Capital punishment, popularly known as death penalty, is basically a government sanctioned practice, in which the state puts a person to death as a punishment for a crime. The sentence that is given in such a manner is called ‘death sentence’ and the act of carrying out that sentence is called ‘execution’. Crimes for which death sentence is awarded are called ‘capital offences’.

As of now, 56 countries have retained capital punishment, 103 countries have completely abolished it for all crimes, 6 have abolished it for ordinary crimes and 30 are abolitionist by practice.

The debate of capital punishment is a matter of controversy in various countries including India as well. As of now, capital punishment in India is given for seven crimes. They are: murder, dacoity coupled with murder, war against the state, false evidence which results in capital punishment of an innocent person, instigating a minor or an insane person to commit suicide, and leaking out secrets to other countries. However, four types of persons are exempted from capital punishment. They are: (i) children below 15 years of age, (ii) pregnant women, (iii) mentally disabled persons, (iv) persons above 70 years of age. Also, the president is given the power to grant pardon to persons who have been awarded capital punishment.

The table below highlights the scenario of capital punishment in India over various years:

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Murderers</th>
<th>Persons Actually Convicted</th>
<th>Persons Awarded Capital Punishment</th>
<th>Persons Actually Hunged</th>
</tr>
</thead>
<tbody>
<tr>
<td>1959</td>
<td>10,712</td>
<td>7,992</td>
<td>843</td>
<td>190</td>
</tr>
<tr>
<td>1960</td>
<td>10,910</td>
<td>4,992</td>
<td>791</td>
<td>210</td>
</tr>
<tr>
<td>1970</td>
<td>15,708</td>
<td>8,508</td>
<td>576</td>
<td>13</td>
</tr>
<tr>
<td>1976</td>
<td>16,673</td>
<td>13,309</td>
<td>312</td>
<td>82</td>
</tr>
<tr>
<td>1978</td>
<td>19,314</td>
<td>14,347</td>
<td>329</td>
<td>80</td>
</tr>
</tbody>
</table>


Criminology, Ram Ahuja, Rawat Pubns (1 January 2000)
What we can conclude from the table is that in the last two-three decades, the number of persons actually executed has sharply come down. But even then, the debate of capital punishment is unending and is highly controversial. Both retentionists and abolitionists have different point of views which has been dealt in the paper.

**Argument of Retentionists**

1. **Retribution:** The foremost argument given by retentionists is that of retribution. This theory of retribution is based on the idea of vindictive justice. The basic principle is that of an eye for an eye or a tooth for a tooth or a limb for a limb. They feel that the offender deserve to die, be it a murderer, traitor, rapist or any other for committing such terrible crime. Their death will only satisfy the public and prevent the public to take law into its own hands. The offender deserves to die even if it does not benefit the victim.

2. Kantian ethics also rests on the need for moral consistency, but its focus is less on producing consistent results and more on staying internally true to the moral principles upon which one acts, no matter the consequence. For Kant, for punishment to be just, it must not “use” persons as instruments for serving the general welfare in the way the naked utilitarian calculus allows. Such motives for punishment are simply destructive of the foundation of justice in treating every human being as worthy of respect as an end in himself. So for Kant, the only just purpose for punishment was retribution, namely punishment responding purely to the individual guilt of the criminal.

3. Kant argued that while executing a murderer, what we do is we treat him as a free and rational human being who is capable of bearing moral responsibility for his voluntary acts. Capital punishment, to this extent is morally permissible and consistent with punishments which respect the dignity of the punished. Kant went on further to say that the society must categorically execute all murderers, since no lesser punishment is responsive to the moral harm to the equal dignity of all human beings the prisoner has done in taking a human life.226

Morris Cohen said that it is very easy to dismiss this retributive theory by remarking it is a remnant of barbaric conception of vengeance.227 But an important fact here is that many of the early Greek and ancient spiritual books decried that a person has an

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225 Judicial punishment can never be merely a means of furthering some extraneous good for the criminal himself or for civil society, but must always be imposed on the criminal simply because he has committed a crime. For a human being can never be manipulated just as a means of realizing someone else’s intentions . . . . He is protected against this by his inherent personality. [W]oe betide anyone who winds his way through the labyrinth of the theory of [utilitarianism] in search of some possible advantage [to society]

226 [http://moritzlaw.osu.edu/osjcl/Articles/Volume2_1/Symposium/Abramson.pdf](http://moritzlaw.osu.edu/osjcl/Articles/Volume2_1/Symposium/Abramson.pdf) accessed on 5 October 2017.

obligation to avenge the killing of a kinsman. The traditional code of honour which is still prevalent in many of the societies is that a person must, at the risk of his own life, resent an insult to the extent of seeking to remove it with the blood of the offender. Even the popular sentiment in modern times is that if a wife of a person is violated or insulted, he does not need to wait for a policeman; it is his duty and obligation to knock the offender down. Such a view is still prevalent in many of the enlightened nations.

2. **Deterrence:** Just as a wild animal cannot be allowed to roam freely, similarly a dangerous criminal cannot be allowed to roam freely and his liberty is restrained and the penalty of law is imposed until and unless the danger of his giving indulgence to his criminal propensities be past. The mere threat of death penalty many a times deters many people to commit capital offences. People like Ranga and Billa who killed two children in Delhi, murderer Auto Shankar who killed seventy persons with a stone, Nagaraja who killed over a dozen of people in Andhra Pradesh and Karnataka, a psychopath like Maya Dolas of Mumbai, the psychopath who was famously known as ‘VIP Serial Killer’ of Lucknow, the four persons of Punjab who killed a large number of men and women by dragging them out of the bus, and many more such killers deserved death penalty. It is therefore essential to protect the society and at the same time preventing people from committing such acts. Hence there are two purposes of deterrence: (i) to restrain the wrong-doer from constantly and repeatedly engaging in a crime, and (ii) to set an example in the society for other so they too don’t commit the same crime. This theory of deterrence is based on the principle of ‘free will’, according to which a person is free to do what he pleases until and unless he does not harm the society; and if he does he must be given a deterrent punishment for violating laws. Not only must he be taught a lesson but others must also be frightened via his punishment to obey the law. The believers in the doctrine of the freedom of the will are known as ‘libertarians’.

Moral consistency is an important principle in both utilitarian and Kantian schools of ethics. Utilitarianism is a pragmatic doctrine that judg action by the consequences it produces rather than by the intent of the actor. Public policy ought to favor those actions that produce or maximize the general welfare. 228 When it comes to capital punishment, assessing its utility turns largely on whether its use has a general deterrent effect on future crime. 229

3. **Protection:** It protects the society from ravaging and dangerous criminals who if let free would prey upon the people.

4. **Social Solidarity:** Execution of criminal in a way unifies the society and brings the society closer and together. It also avoids the feeling of private vengeance. Hence, the

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228 For the general principles of utilitarianism, see HENRY SIDGWICK, METHODS OF ETHICS I (1907).
229 Of course, the death penalty also serves the purpose of incapacitating the particular defendant (sometimes referred to as specific rather than general deterrence). But few argue that the marginal utility gained by using execution rather than life imprisonment to achieve the prisoner’s incapacitation outweighs the social and economic costs of maintaining capital punishment for this purpose alone.
justification for punishment for capital punishment under maintenance of social solidarity is that (i) it prevents private revenge, and (ii) it upholds the moves of the society and brings it together. Emile Durkheim has stated that “the true function of punishment is to maintain social cohesion intact.”

5. Cost: From an economic perspective, capital punishment is less expensive when compared to keeping a criminal in a prison for life.

J.S. Mill on Capital Punishment

John Stuart Mill (1806-1873) was born in London, England and was a member of Britain’s parliament and also the most influential philosophers of the 19th Century. He delivered a speech before the parliament in 1868 on capital punishment. This speech is not listed in the Bibliography of the Published Writings of John Stuart Mill since Mill wanted to exclude speeches delivered after 1865 unless they were published as pamphlets. The speech, however, is given in Stuart’s Autobiography as an example of speeches delivered in the parliament that, “… were opposed to what then was, and probably still is, regarded as the advanced liberal opinion.”

He supported death penalty and contended that it is more humane than imprisonment and that it improves the society due to its deterrence value. In response to the arguments against capital punishment he said that:

“The influence of a punishment is not to be estimated by its effect on hardened criminals. Those whose habitual way of life keeps them, so to speak, at all times within sight of the gallows, do grow to care less about it; as, to compare good things with bad, an old soldier is not much affected by the chance of dying in battle. I can afford to admit that is often said about the indifference of professional criminals to the gallows—though of that indifference one-third is probably bravado and another third confidence that they shall have the luck to escape, it is quite probable that the remaining third is real. But the efficacy of a punishment which acts principally through the imagination, is chiefly to be measured by the impression it makes on those who are still innocent; by the horror with which it surrounds the first promptings of guilt; the restraining influence it exercises over the beginning of the thought which, if indulged, would become a temptation; the check which it exerts over the graded declension towards the state--never suddenly attained--in which crime no longer revolts, and punishment no longer terrifies. As for what is called the failure of death punishment, who is able to judge of that?”

Certainly, people partly know those who are not deterred by the capital punishment, but do they know the people who have been

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230 The Division of Labour in Society, Emile Durkheim, 1964: 108
234 John Stuart Mill, speech before Parliament, April 21, 1868.
deterred by it? It is a remarkable and worth pondering question asked by him. Capital Punishment, according to him is more humane than keeping the criminals for a life long imprisonment. Also, in cases where innocents are accidently executed, Mill responds by saying that such cases are so tragic that it should encourage judicial systems to take the appropriate measures to ensure that it never actually occurs.

Immanuel Kant on Capital Punishment

According to Immanuel Kant, “society and individuals must act in such a way that you can will that your actions become a universal law for all to follow.” Kant’s idea of crime and punishment is written in his work “Metaphysics of Morals” (Part One). According to him, crime is a violation of social laws, i.e., it is committed against the society and hence punishable. People who obey the society’s laws are the members of the society and people who commit crimes lose the right to be the members of the society and deserve to be punished.

Violation of law can be divided into two: personal or social crime. A personal crime is a crime committed against a person and are reviewed by the civil court. A crime that is committed against the society and reviewed and punished by the criminal code. Kant differentiates between private and public crimes: "Any transgression of the public law which makes him who commits it incapable of being a citizen, constitutes a crime, either simply as a private crime, or also as a public crime” (Kant, 1996). Example of private and public crimes are abuse of somebody’s trust and coinage offence respectively. However, a private crime is not less serious in comparison to public crime, and hence not subject to a lighter punishment. A victim is not allowed to punish the violator but administrator is since it is believed if the victim punishes the violator, it is no longer seen to be punishment but revenge.

The law always provides for punishing violators. If the crime is unpunished, that means the laws are weak. Weakness of the justice system means that the society itself is weak. If there is no crime, there should be no punishment. Punishment of the innocent means the legislation is worthless; which means that the legal system is not able to differentiate between the criminals and the innocent people.

A criminal does not realize that the damage inflicted by him on the society is equivalently harmful to him as well. A human being cannot exist outside the society, hence if a person is killing or stealing, he is setting up a precedent that the same can happen to him and it might him who suffers from the same crime. The above formula of “eye for an eye” justifies punishment, but is not always acceptable either. For example, if a monetary penalty is imposed upon a person who insults somebody would mean that a wealthy person can always insult the poor and pay money. This definitely would not be fair.


Kant adamantly prescribes capital punishment for murderers. According to him, "whoever has committed murder, must die" (Kant, 1996), because no matter how difficult life might be, it is still better than death: "However many they may be who have committed a murder, or have even commanded it, or acted as art and part in it, they ought all to suffer death" (Kant, 1996).

A society that does not sentence a murderer to death turns itself into an accomplice in crime. Furthermore, a person sentenced to death can’t ask for appeal for pardon or lighter punishment. If it happens, then that would mean justice is in a ridiculous position.

According to Kant there are circumstances whilst a murderer merits lighter penalty. E.G. Every now and then a mother kills her child to keep away from shame; people die combating a duel to guard their honor and many others. In those instances regulation provides for milder punishment however as the time passes, the society will become increasingly more liberated from those indulgences and the precept requiring capital punishment for murderers is still legitimate. A punishment must always correspond to the crime. It is a mistake to impose different punishment for the same crime, even in those cases when the criminal has no honor. E.g. when one prisoner prefers death and the other shameful life imprisonment. A death sentence would be an equal punishment for the both, but a life imprisonment will not, because it would be a more severe punishment for the first prisoner, who prefers death. Therefore, when a sentence is passed on rebels a death sentence would be highest measure.

Kant stresses that besides murderers, people who commit lese-majesty also deserve death. Lese-majesty is a crime equal to death, because it might bring very significant misfortune upon each member of society. As an example Kant describes Karl Edward Stuart's unsuccessful attempt to usurp the throne (1745-1746). A lot of people died due to this rebellion, including Lord Balmerino. Of course the rebels did not have the same goals. Some fulfilled their duties towards Stuarts' dynasty, others had some private interests.

According to him, the ruler cannot be punished for his crime, however he can retire due to his committing crime. "The head of the state cannot therefore be punished; but his supremacy may be withdrawn from him" (Kant, 1996)

In conclusion, it can be said that Kant's doctrine on crime and punishment contains many valuable ideas on issues that are widely discussed in the modern world. It is still very useful for contemporary legislators and moralists.

Abolitionists on Capital Punishment
The retributive theory of eye for an eye and tooth for a tooth is not always accepted in a civilised and advanced society. Furthermore, the argument to deter people to commit a crime via the fear of capital punishment is also not based on hard evidence. Three methods can be used to determine the deterrent effect of death penalty. First, by comparing the homicide rates in countries which have abolished capital punishment with the countries who have retain it; second by comparing

homicide rates in the countries which have abolished the capital punishment and after its abolition; third by comparing homicide rates in a state/country before abolition, during abolition and after the reintroduction of capital punishment( which happened for instance in Travancore State in India or in Italy which abolished capital punishment in 1890, reintroduced the same in 1930 and abolished it again in 1947). We will definitely find variations in homicide rates. For instance, in the United States, homicide rates in states which have abolished the capital punishment is 30 to 50 percent higher than those which have capital punishment(Sutherland, 1956:292). In Travancore, the number of murders reduced during the abolition period(between 1944 and 1950) but however increased when it was reintroduced, with the numbers going from 159 in 1950 to 170 in 1952. Italy showed a similar pattern between 1930 and 1947. Sweden and Norway which abolished capital punishment have homicide rates, about one-half as high as England which had retained it till 1969. In Australia too, the homicide rate was higher after abolition than before abolition. Hence, the difference in these rates of homicides is due to other factors and not just death penalty. The composition of population of a state/country and the culture which the people follow is of much more significance than the abolition or presence of capital punishment. The above data justifies the fact that death penalty does not always prove to have a deterrent effect. There is no denying the fact that human behaviour is influenced via fear but it is equally true that all individuals don’t think of death penalty before committing a murder. In India, it has been estimated that about three-fourths of the murders are emotional and only one-fourth are premeditated and pre-planned. Selling(1932:12) stated, “Death penalty can never be made deterrent. Its very life seems to depend on its rarity and therefore on its ineffectiveness as a deterrent.”

It has also been argued that crime is not a result of personality deficiencies but is caused by unfavourable environment and interaction of various factors. Hence, a long imprisonment is a considered a better alternative for abolitionists.

Retentionists argue that for improving the conditions and living standards of jail and giving long imprisonment might need a huge amount of money. The counter to this by abolitionists is that it can be improved by spending a significant amount of money and not too much. Furthermore, is it logical and sane to link economy with hanging human beings? Is it civilised and proper to argue that it would be cheaper to kill mentally and physically ill persons than to treat them, and hence we should hang such persons. Also, the introduction of wage system in the prisons can help prisoners to earn money and support their families.

Many a times due to the defects of the judicial system, many a times an innocent person is hanged. It is hence unfair. Capital punishment has a negative effect in the criminal justice system. Abolition of death penalty might improve the situation of criminal justice system since judges take a lot of time in deciding cases and determining whether a person must be given capital punishment or not.

238 Ibid 2.
Cesare Beccaria on Capital Punishment

Cesare Beccaria, who was born in Milan, Italy, is remembered for his famous work on “Crime and Punishment” (1764), which basically critiqued the oppressive and brutal criminal justice system of his time. He is often said to be the one who presented the sustained critiques of death penalty. His core argument was that capital punishment does not deter criminals, rather a long term imprisonment creates a long lasting impact on the minds of the criminals and spectators. Furthermore, what death penalty does is that it reduces people’s sensitivity to human suffering, hence it has a kind of harmful effect on the society. He accepts the fact that death capital punishment is practiced everywhere and it would be hard to break that custom; however, he feels that the collective voices of the critics of the capital punishment scattered around the world will influence the political rulers.

What right, I ask, do people have to cut the throats of their fellow creatures? It is definitely not the right on which the sovereignty and the laws are founded. The laws are only the sum of the smallest portions of the private liberty of each individual, and represent the general will which is the aggregate of that individual. No one has certainly given others the right to take one’s life.

However, there can be one justification for capital punishment and when the life of a person can be taken away. This is when the person is deprived of his liberty and yet has adequate and sufficient power and connections to endanger the security of the nation. However, even this is would be only done if and only if there are high chances of a nation losing its liberty or on the verge of losing it, or in the times of absolute anarchy, when the disorders hold the place of laws themselves. Hence, a citizen cannot be deprived of his life when the state is in a reign of peace, or is properly fortified against its enemies or any other similar circumstances.

Furthermore, it not the intenseness of the pain but its continuance which has the greatest effect on the mind. Our sensibility is strongly affected by weak and repeated impressions, rather than by violent and momentary impulse. It is the power of habit which is universal over every sentient being. It is only by habit that we learn to talk, to walk and to satisfy our needs. In the same way, the ideas of morality are stamped on our minds by repeated impressions. The death of a criminal is terrible but only a momentary spectacle, and hence less effective in deterring others, than the continued example of a person deprived of his liberty and condemned. “If I commit such a crime, I shall be reduced to that miserable condition for the rest of my life”, says the spectator to himself. This is a powerful preventive than the fear of death itself.

Conclusion

Despite the arguments of retentionists, the paper concludes on the note that capital punishment must be abolished, since everybody has a right to live under Article 21 and the criminals deserve a chance to be

239 Crime and Punishment, Cessare Beccaria (1764), tr. Edward D. Ingraham, Ch. 28.
240 Ibid 17.
reformed so that they can be used as worthy assets for the development of the society.
The argument that death penalty serves as a deterrent is also not a true one. In 1988 a survey was conducted for the UN to determine the relation between the death penalty and homicide rates. This was then updated in 1996. It concluded:
"...research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment. Such proof is unlikely to be forthcoming. The evidence as a whole still gives no positive support to the deterrent hypothesis.
The key to real and true deterrence is to increase the likelihood of detection, arrest and conviction.

The death penalty is a harsh punishment, but it is not harsh on crime."²⁴²
-Amnesty International

Furthermore, the fear of capital punishment puts the life of victim at risk and many a times the innocent too are hanged. Also, the theory of retribution does not hold water anymore with the humanisation of society. What one can conclude is that the arguments of abolitionists outweigh the arguments of retentionists.

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CRITICAL ANALYSIS OF THE JUDICIAL INTERPRETATION OF ‘OFFICE OF PROFIT’ WITH REFERENCE TO THE ADVOCATES ACT

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INTRODUCTION

The concept of ‘office of profit’ was imported from Britain in India and came into vogue with the Morley- Minto reforms proposal. The ‘office of profit’ disqualification started in England through the Act of Settlement, 1701. Till 1919, legislators who were appointed ministers used to lose their right to sit as members in the House of Commons. The Commons Disqualification Act, 1975, lists the offices which can be disqualified. In the US, Article 1, Section 6, Clause 2 explicitly lays down that ‘no senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of United States, which shall be created or the emoluments whereof shall have been increased during such time and no person holding any office under the United States, shall be a member of either house during the continuance in office’. Thus, legislators cannot create an office and then be appointed to it.243

The principle debarring holders of office of profit ‘under the Government’ from being a member of Parliament is such that a person cannot exercise his functions independently of the executive of which he is a part.244 In Satrucharla Chandrashekhararajv. Vyricherla Pradeep Kumar Dev 245 the Supreme Court held that the object to this provision is to secure the independence of the member of Parliament from the benefits of the executive which may be under influence and there maybe conflict between duty and self-interest among the members of Parliament.

In India, Article 102 (1) and 191 (1) has been incorporated in the Constitution which prescribe restrictions at the Central and State levels. Therefore, Art.102 and Art.191 deals with disqualification of members of Parliament and state legislature respectively.

Article 102 and 191 of the Constitution of India states:

“102. Disqualification for membership – (1) a person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

(a) if he holds any office of profit under the government of India or the government of any state, other than an office declared by parliament by law not to disqualify its holder;”

“191. Disqualification for membership – (1) a person shall be disqualified for being chosen as, and for being, a member of either


Legislative Assembly or Legislative Council of a State—

(a) if he holds any office of profit under the government of India or the government of any state, specified in First Schedule, other than an office declared by Legislature of the State not to disqualify its holder;”

Article 58(2) and 66(4) deals with disqualification for election as President and Vice-President. They read as under-

“58. Qualifications for election as President—

(2) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said governments.”

“66. Election of Vice-President—

(4) A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said governments.”

Under Arts. 58(2) and 66(4) no person is eligible for election as President and Vice-president respectively “if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said governments.”

The essential conditions as laid down under Article 102(1)(a) to hold an office of profit are-

1. there must be an office of profit
2. it must be under the Government of India or Government of any State
3. it must not be declared by Parliament not to disqualify its holder.

ESSENTIAL CONDITIONS TO HOLD OFFICE OF PROFIT

I. THERE MUST BE AN ‘OFFICE OF PROFIT’

The expression ‘office of profit’, has not been defined in the Constitution or in the Representation of the People Act, 1951. But the courts in various cases have defined it.

Lords in the case of Mcmillon v. Guest249, where Lord Wright has opined —"The word ‘office’ is of indefinite content. Its various meanings cover four columns of the new

246 The Constitution of India
247 Ibid.
248 H.M. Servai, Constitutional Law of India
2148(Universal Law Publishing, Delhi, 4 edn.).
249 (1942) A.C 561.
English Dictionary, but I take as the most relevant for purposes of this case the following: a position or place to which certain duties are attached, especially one of a more or less public character."

In *Deorao v. Keshav Lakshman Borkar*, the court held that the word ‘office’ necessarily implies that there must be an existence of office apart from the person who holds it. It must exist independently of the holder of the office.

In *S.S. Inamdar v A.S. Andanappa*, the Apex court opined that profit means any pecuniary gain or material gain. If there is really a gain, its quantum or amount would not be material; but the amount of money receivable by a person in connection with the office he holds may be material indicating whether the office really carries any profit.

For the purposes of Article 102(1) and 190(3) a ministership either of the Union or of a State is not considered an office of profit. The word “Minister” occurring in Article 191(2) includes a deputy minister as he performs functions and has obligations similar to those of a Minister.

In case of *Shibu Soren vs. Dayanand Sahay & Ors* it was held by the Supreme Court that it is the substance not the form which matters and even the quantum or amount of “pecuniary gain” is not relevant. What needs to be found out is whether the amount of money receivable by the concerned person in connection with the office he holds, gives to him some "pecuniary gain", other than an 'compensation' to defray his out of pocket expenses, which may have the possibility to bring that person under the influence of the executive, which is conferring that benefit on him.

In case of *Jaya Bachan v. Union of India (UOI) and Ors* declared that the post of Chairperson of Uttar Pradesh Film Development Council that is held by the petitioner as ‘office of profit’. The court further held that it is immaterial if a person actually obtained a monetary gain or not. What is material is the fact that by virtue of his position the person is capable of yielding a profit or pecuniary gain.

**II. IT MUST BE UNDER THE GOVERNMENT OF INDIA OR GOVERNMENT OF ANY STATE**

It is therefore essential that the office so held by any person must be an office under the government.

In case of *Chandrasekhar Raju v. Vyricherla Pradeep Kumar Dev and Another* the Supreme Court, held that:

“(1) The power of the Government to appoint a person in office or to revoke his appointment at its discretion. The mere control of the Government over the authority having the power to appoint, dismiss, or control the working of the office employed by such authority does not disqualify that

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250 AIR 1968 Bom 314.
251 (1971) 3 SCC 870.
253 H.M. Servai, *Constitutional Law of India* 2149(Universal Law Publishing, Delhi, 4 edn.).
254 AIR 2001 SC 2583.
255 2006 (5) SCALE 511.
officer from being a candidate for election as a member of the Legislature.

(2) The payment from out of the Government revenues are important factors in determining whether a person is holding an office of profit or not of the Government. Though payment from a source other than the Government revenue is not always a decisive factor.

(3) The incorporation of a body corporate and entrusting the functions to it by the Government may suggest that the statute intended it to be a statutory corporation independent of the Government. But it is not conclusive on the question whether it is really so independent. Sometimes, the form may be that of a body corporate independent of the Government, but in substance, it may just be the alter ego of the Government itself.

(4) The true test of determination of the said question depends upon the degree of control the Government has over it, the extent of control exercised by very other bodies or committees, and its composition, the degree of its dependence on the Government for its financial needs and the functional aspect, namely, whether the body is discharging any important Governmental function or just some function which is merely optional from the point of view of the Government."

Supreme Court in case of Shivamurthy Swami vs. Agadi Sanganna Andanappa 257 said the test which may be applied to determine whether an office is “office of profit” under the state government thus: -

“(1) whether the Government makes the appointment;

(2) whether the Government has the right to remove or dismiss the holder;

(3) whether the Government pays the remuneration;

(4) what are the functions of the holder and

(5) Does the Government exercise any control over the performance of those functions?”

II. IT MUST NOT BE DECLARED BY PARLIAMENT NOT TO DISQUALIFY ITS HOLDER

Parliament may enact a law which may declare that a holder of an office of profit is not disqualified. By the virtue of the power conferred on the Parliament, it enacted that Parliament (Prevention of Disqualification) Act, 1959 which exempts certain offices as not to disqualify their holders for membership of Parliament. This Act provides that if a Member/Director of a Statutory or non-statutory body/ company is not entitled to any remuneration other than the compensatory allowance, the Member would not incur disqualification for receiving those allowances. Under Section 2 (a) of the said Act, “Compensatory allowance” has been defined as any sum of “money payable to the holder of an office by way of daily allowance (such allowance not exceeding the amount of daily allowance to which a Member of Parliament is entitled under the Salary, Allowances and Pension of Members of Parliament Act, 1954), any conveyance allowance, house-rent

257 (1971) 3 SCC 870.
allowance or travelling allowance for the purpose of enabling the member to recoup any expenditure incurred by the Member in performing the functions of that office”.

In the case of Consumer Education and Research Society V. Union of India, Supreme Court clearly held that when the amending act “retrospectively removed the disqualification with regard to certain enumerated offices, any member who was holding such office of profit, was freed from the disqualification retrospectively. As of the date of the passage of the Amendment Act, none of the Members who were holding such offices had been declared to be disqualified by the President.”

For holding that a person holds an office of profit or not, the Supreme Court Considering the subjectivity of the topic held that all the determinative factors need not be conjointly present. The critical circumstances, not the total factors, prove decisive. A practical view, not pedantic basket of tests, should guide in arriving at a sensible conclusion. (Madhukar G.E. Pankakar v. Jaswant Chobbidas Rajan, A.I.R.1976, S.C. 2283)

Therefore, if a person holds an office of profit, the person shall be disqualified on the ground of holding it.

Two important questions which now arise in relation to ‘office of profit’ and the Advocates Act are-

1. Whether practicing law in courts by MP’s and MLA’s fall under office of profit?
2. Whether there is violation of Article 14, Advocates Act, 1960 and Rule 49, Bar Council of India Rules if MP’s and MLA’s are permitted to plead in courts as advocates?

MP’s AND MLA’s AS ADVOCATES AND THE ‘OFFICE OF PROFIT’

As per the Advocates Act, 1961, section 2 (a) states that an “advocate” means an advocate entered in any roll under the provisions of that Act.

As per Article 102 (1)(a) the office of profit must be under the government of India or the Government of any State.

Supreme Court in case of Shivamurthy Swami vs. Agadi Sanganna Andanappa said the test which may be applied to determine whether an office is “office of profit” under the state government thus:-

(1) whether the Government makes the appointment;
(2) whether the Government has the right to remove or dismiss the holder;
(3) whether the Government pays the remuneration;
(4) what are the functions of the holder and
(5) Does the Government exercise any control over the performance of those functions?”

Applying the test laid down in the above-mentioned case, it is clear that the Members’

258Sixteenth Lok Sabha, Report: Joint Committee on Offices of Profit(2017).
260Sixteenth Lok Sabha, Report: Joint Committee on Offices of Profit(2017).
261Supranote 15 at 5.
of Parliament do not hold an office of profit because working as an advocate is not an employment under the Government of India or the Government of any state. MP/MLA’s are not appointed as advocates by the Government, nor does the Government have the right to remove or dismiss them. The Government does not pay any remuneration to them and it certainly does not exercise any control over the performance of the functions of such MP/MLA who practices as an advocate.

In the case of Mahadeo v. Shantibhai and Ors. the question for consideration was whether appointment of a person on the panel of lawyers by Railway Administration can be held to be an office and is that office one for profit? The Court, in that case referred to observation of Lord Wright of the House of Lords in the case of Mcmillon v. Guest, where Lord Wright has opined – “The word 'office' is of indefinite content. Its various meanings cover four columns of the new English Dictionary, but I take as the most relevant for purposes of this case the following; a position or place to which certain duties are attached, especially one of a more or less public character.” and opined that it is difficult to hold that the person held any office of profit under the Government.

The Supreme Court of India further observed in All India Bar Examination case that right to practice law is a fundamental right of every person who holds a law degree. In Re. Lily Isabel Thomas the Supreme Court held that right to practice is equal to enlightenment to practice. Further section 30 of the Advocates Act, 1961 states that-

“30. Right of advocates to practice. — Subject to provisions of this Act, every advocate whose name is entered in the State roll shall be entitled as of right to practice throughout the territories to which this Act extends,—

in all courts including the Supreme Court; before any tribunal or person legally authorized to take evidence; and before any other authority or person before whom such an advocate is by or under any law for the time being in force entitled to practice.

The act nowhere mentions that a person who is an MLA/MP shall be debarred from practicing as an advocate or the name of the person shall not be entered into the state roll. Therefore, as per the aforementioned section, an advocate can practice law as a matter of right conferred to him under the Advocates Act, 1961.

This protection to practice on any trade, business or profession is further given under article 19(1)(g) of the Constitution of India. Since practicing law is a profession, therefore, it is the fundamental right of a law degree holder to carry on the profession of his choice, namely, practicing as an advocate in the courts in India.

The Supreme court in Bhagwati Prasad Dixit Ghosal v. Rajeev Gandhi held that a member of Parliament drawing salary


Supramote 7 at 3.


1964 CriLJ 724.

1986 SCC (4) 78.
cannot be said to hold an office of profit.\footnote{Government of India, Report: \textit{Joint Parliamentary Committee to Examine the Constitutional and Legal Position Relating to Office of Profit}(2008).} The same is applicable to MP’s practicing as advocates in the courts and drawing a salary therefrom.

The rationale behind the concept of ‘office of profit’ and maintaining separation of powers between executive, legislature and judiciary does not work in India. Disqualification on the basis of office of profit seems to be incorrect as in India, there is no water tight compartment for separation of powers. It is imprudent to think that members of ruling party will act independently of their government. Therefore, even absence of perks cannot ensure that there will not be any undue influence on them. Further, certain offices are exempted from being held as Office of profit to enable disqualification of a member of parliament. If such exemptions are allowed then it clearly indicates that the doctrine of separation of power is not complied with in all circumstances and therefore, allowing MP’s and MLA’s to plead in court is not against the law.

III. MP’s AND MLA’s PLEADING IN COURTS AS ADVOCATES AND THE RELEVANT LAWS

Section 24 and 24A of the Advocates Act states the qualifications of any person for admission as advocate on State roll and disqualification for enrolment.

“24. Persons who may be admitted as advocates on a State roll. -(1) Subject to the provisions of this Act, and the rules made thereunder, a person shall be qualified to be admitted as an advocate on a State roll, if he fulfills the following conditions, namely:

(a) he is a citizen of India

(b) he has completed the age of twenty-one years;

(c) he has obtained a degree in law

(e) he fulfils such other conditions as may be specified in the rules made by the State Bar Council under this Chapter…”

“24A. Disqualification for enrolment. — (1) No person shall be admitted as an advocate on a State roll—

(a) if he is convicted of an offence involving moral turpitude;

(b) if he is convicted of an offence under the provisions of the Untouchability (Offences) Act, 1955 (22 of 1955);

(c) if he is dismissed or removed from employment or office under the State on any charge involving moral turpitude.

(2) Nothing contained in sub-section (1) shall apply to a person who having been found guilty is dealt with under the provisions of the Probation of Offenders Act, 1958 (20 of 1958) …”

Therefore, section 24 and 24A deal with admission of a person to get enlisted on state roll after which the person will be considered as an advocate as defined under section 2(a) of the Advocates act, 1961. Section 24A deals with disqualification for enrollment but the legislature has not provided any express disqualification for
Member of Parliament from getting enrolled as an Advocate. Unless a disqualification is incurred or section 24 is not complied with an application for enrollment to Bar Council of the respective state cannot be cancelled, except as provided under section 26A where BCI has been conferred the power to remove names from roll of persons who are dead or of the person who has made a request in this behalf, and therefore, MLA’s/MP’s have the right to plead in the court.

Section 49 of the Act deals with general power of the Bar Council of India to make rules. Clause (1) states that The Bar Council of India may make rules for discharging its functions under this Act. By virtue of this power conferred on the Bar Council, it formulated the Bar Council of India Rules.

As per Part VI, Chapter-II, Section VII, Rule 49 of the Bar Council of India Rules:

“An advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practice, and shall on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears and shall thereupon cease to practice as an advocate so long as he continues in such employment.”

As per this rule an advocate shall not be a full-time salaried employee but the question of salary arises only when there is an employer-employee relationship. Such a relationship comes into existence only when a contract of employment is executed between the parties. MLA’s and MP’s are not government employees because they have not entered into any contract with the government. They fulfill their constitutional duties which are of public nature and do not enter into any contract of service or contract for service. They do not work for the government, they instead form the government. They are not appointed by the government of India, rather they are elected and the Election Commission sends in a notification to the Lok Sabhasecretariat accordingly.\(^{268}\) In *M. Karunanidhi v. Union of India*\(^ {269}\) the court categorically held that MP’s and MLA’s are public servants, though the employer-employee relationship will not apply to them. They draw their salary from the consolidated fund of India but this does not even remotely present the idea that they are government employees, even the CJI draws salary from the Consolidated Fund of India. Further their salary is taxable under the head income from other sources and not under the head income from salaries as they are not employees any more than working partners of partnership firms are. They are co-owners and in recognition of this fact they cannot pay salary to themselves.\(^ {270}\)

Rule 52 states that “nothing in these rules shall prevent an advocate from accepting after obtaining the consent of the State Bar Council, part-time employment provided that in the opinion of the State Bar Council, the nature of employment does not conflict with his professional work and is not inconsistent with the dignity of the profession. This rule shall be subject to such

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\(^{269}\) 1979 AIR 898.

directives if any as may be issued by the Bar Council of India from time to time.”

In the case of Dr. Haniraj L. Chulani v. Bar Council of Maharashtra and Goa the court held that a person qualified to be an advocate would not be permitted as one if he is in full-time or part-time service or employment, or is engaged in any trade, business or profession.

Firstly, this case dealt with the rules framed by state bar council and is not related to rule 49. It is further clear that in this case even part-time service or employment was not allowed which is contrary to rule 52 of BCI Rules and lastly, the services rendered by MP’s and MLA’s do not fall under the category of trade, business or profession.

Therefore, MLA’s and MP’s cannot be debarred from pleading in the court only on the basis of Rule 49, BCI Rules.

It has been argued that public servants cannot practice as an advocate but legislators are practicing which is a violation of Article 14 and 15 of the Constitution. This is in reality not the correct proposition because there has been no express provision barring MP’s and MLA’s who hold a degree in law from practicing profession. Further, they are different from other public servants like Judges, police personnel’s etc. who aid in the justice delivery system itself. There can be a reasonable classification between these. Section 32 of the Advocates Act,

CONCLUSION

The ‘office of profit’ concept which made way into the Articles of the Constitution of India came into being in the Morley-Minto reforms proposal of 1909. The principle behind this was to keep a check on the temptations that executive can provide to the legislature and to ensure the separation of powers. Judiciary has in its various decisions defined and discussed the scope of office of profit since it has not been defined either under the Constitution of India or the Representation of Peoples Act, 1951. An Act namely, Parliament (Prevention of Disqualification) Act, 1959 was enacted by the legislature which exempts certain offices as not to disqualify their holders for membership of Parliament. This was in addition to the legal provisions of the Constitution of India relating to office of profit. Various legal scholars argue that MLA’s and MP’s who practice as advocates are holding an office of profit and are thereby, violating Rule 49 of the Bar Council of India Rules. The contention put forward by them is incorrect as MP’s and

person may permit any person, not enrolled as an advocate under this Act, to appear before it or him in any particular case.”
MLA’s who practice as advocates do not fall under the disqualification of office of profit since they are not holding any office under the government of India when they practice as lawyers. Further, rule 49 deals with full time salaried employees but since legislators are not employees this rule is also not applicable to them and no question as to violation of Constitution rights arises. Therefore, MP’s and MLA’s who work as advocates are not barred from doing so under the provisions of any law whether express or implied.

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ARE WE READY? – PRIVACY, DATA PROTECTION AND GOVERNANCE

By Damini Krishan
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INTRODUCTION

“India has physical boundaries in terms of its geographic location with other countries, but there was no such ‘boundary’ in the cyber world. "Our cyber boundary is not (yet) defined. We have to protect our cyber boundaries also."

In Modern Cyber World, computers and internet have become a vital part of human life. They have been invented to make human life easy, but when you take each and every micro step towards making your life easy, the internet asks you to give away some part of your individual privacy. So now the main question arising here is, whether people are ready to give away some part of their privacy directly or indirectly on internet platforms and associated persons and organizations? The best example of above-mentioned situations would be giant companies like Facebook, Twitter, Instagram, true-caller, and other organization which always seek some sort of confidential information from the concerned users upon accessing their websites, like true-caller always asks the concerned users to access their phone contacts, messages, etc.

In United Kingdom (UK), Minister of state for Digital, Culture, Media & Sports (DCMS) spoke about the new Data Protection Law (DPL) which would include the concept of ‘Right to Forgotten’ by companies. Thus, these giant corporates would no longer be able to reuse people’s data submitted and consented by people for their one-time service. The said bill also expanded the ambit of “Personal Data” to include IP address, internet cookies, and DNA. The Legislature of UK will also give the power to Information Commissioner’s Office to impose fines of up to 17 million Euros or 4% of the global turnover of the concerned entity along with criminal liability, for breach of the new DPL. This law envisages to meet the parameters of this contemporary cyber world so that interest of citizens can be protected by not endangering their privacy.

FACEBOOK TERMS AND CONDITIONS

In the “Statement of rights and responsibilities” of Facebook, clause 2 (1) says that

“For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-


licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when the concerned user deletes his IP content or his account unless his content has been shared with others, and they have not deleted it.”

It is well-known fact that Facebook is the biggest player in the field of social networking and it uses third party applications and has partnerships with other global companies. Clause 2(1) gives a right to Facebook to use content uploaded by users on its platform in a manner as it deems to be fit. Further, it extends authority to Facebook to transfer user’s data to any other organization as it considers appropriate. If the user wishes to delete any content from Facebook, first the user would have to delete that content from his/her account and if the user has tagged someone then that concerned user also has to delete that content.

PRIVACY AN EMERGING CONCERN IN INDIA WITH RESPECT TO UK, USA AND EUROPE

Privacy was nowhere in the “news” with respect to India until the Aadhar Incident happened where thousands of cases emerged in relation to the leaking of sensitive information containing the biometrics of people. This incident has led to a 360-degree change in mindset of Indian citizen and now people are questioning the government about the security of their personal information with the government considering recent incidents like “Wanna Cry ransomware” which has already led to a lot of chaos in developed countries like UK, US, etc. by putting at stake the confidential information of the citizens of this country. India being a developing country is taking giant strides towards economic prosperity and growth which is being acknowledged by many of the developed countries. However, India still lags behind in relation to cybersecurity and data protection in comparison to the more technologically advanced countries of the world. A total 50 incidents of cyber-attacks affecting 19 financial organizations have been reported from November 2016 to June 2017 as stated by the Government of India. 276 These attacks have been reported majorly on paymen gateways or digital payment interfaces that include e-wallets like Paytm, Jio Money, etc. and these incidents have only been reported in relation to the financial sector. Many unreported incidents have also taken place in other sectors as well which haven’t yet come in front of the public eye. A report by India.com mentions that a total of 1.71 lakh cyber-crimes were reported in India in the last three and half years. This means at least one cyber-attack was reported every 10 minutes in initial six months of 2017.277

Reported by The Economic Times on 15 MAR, 2012, 05.15AM IST, ET BUREAU “About 112 government websites, including

277 One cybercrime in India every 10 minutes - Times of India The Times of India, https://timesofindia.indiatimes.com/india/one-cybercrime-in-india-every-10-minutes/articleshow/59707605.cms
those of Bharat Sanchar Nigam Ltd, Planning Commission and Ministry of Finance, were hacked in the last three months, minister of state for communications and IT Sachin Pilot said in the Lok Sabha.²⁷⁸

There is technology to obtain a person’s fingerprint, say from a book he/she is reading or from high-resolution images posted on the social media platform. In 2014, for instance, hacker Jan Krissler recreated the fingerprints of Germany’s defense Minister Ursula von der Leyen from close-up photographs in a government press release.²⁷⁹ Advances in technology means stolen prints can be used to make the three-dimensional facsimile.

Keeping all these attacks in mind our beloved PM has prepared an Information aquarium in which Biometrics and other confidential data of the citizens are stored. This information aquarium is also online with high cybersecurity. The question here is not why the government is collecting our personal data, however the question here is how secure is that Information Aquarium when cyber-attack like “Wanna Cry ransomware” have already breached the security level of the Indian government.

In respect of new cyber-attack that happened in 2017 like “Wanna Cry ransomware” which almost netted 52 bitcoins or about 130000$. Shadow Breakers is another infamous name in the domain of cybersecurity, this mysterious group 1st launched its identity in August 2016 claiming to have breached the spy tools of the elite NASA-Linked operation known as the Equation Group. Further, they also offered a sample of stolen data of NASA.²⁸⁰ On March 7 “WikiLeaks CIA Vault 7” another mysterious hacker group which published 8,761 trove documents allegedly stolen from the CIA that contains hacking tools. Revelation included iOS and Android vulnerabilities, bugs in windows, and the ability to turn some smart TVs into listening devices²⁸ⁱ

Acknowledging the above mentioned incidents and to ensure the protection of its citizen’s data, United Kingdom (UK) has decided to overrule its previous data protection law²⁸² i.e. Data Protection Act, 1998 by passing new Data protection law in 2018 this bill will include a high level of fine for breach of any data and also give the “Right to forgotten” to the citizens of UK.

Information and Technological Act 2000²⁸³ hereafter referred to as (IT Act) provides some sort of relief to Indian citizens. This

²⁸² UK data protection laws to be overhauled, BBC News (2017), http://www.bbc.co.uk/news/technology-40826062
act, however, does not provide proper armor to the Indian citizen to defend themselves from the hackers who are sitting outside the territorial jurisdiction of India. The main question that arises here is that, how would this act punish a criminal who is operating beyond the limits of India’s territorial jurisdiction and the IT Act?

In spite of having IT Act Aadhaar informations were leaked and one of the best examples of this would be Suvidhaa-Axis Bank Case on February 11, a YouTube clip illustrating such a replay attack was divulged online. On February 24, UIDAI lodged a criminal complaint, contending that an employee of SuvidhaaInfoserve had used Axis Bank’s gateway to UIDAI’s servers to conduct 397 biometric transactions between July 2016 and February 2017 using a stored fingerprint. Axis Bank representatives did not respond to requests for comment.

One of the solutions to tackle this type of situation is Bilateral extradition treaties with other countries. Till now India is only a part of 42 Bilateral extradition treaty out of 195 countries in the world. 284 India has Extradition Arrangements with 9 countries including Sweden, Italy, etc. The Extradition Arrangements with Italy and Croatia confine to Crimes related to Illicit Traffic in Narcotics Drugs and Psychotropic Substances owing to the fact that India, Italy, and Croatia are parties to the 1988 UN Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances. 285

AN ANALOGY BETWEEN THE LAWS OF UK, US, EU & INDIA

Creating an analogy and comparison between the laws of developed countries like the UK, EU, and India, gives a vivid picture of Indian scenario that Indian legislature needs to acknowledge that India needs a Data Protection Act to maintain the law and order in this contemporary world. We all can acknowledge that UK has its Data Protection Act of 1998 which is solely designed for the protection of privacy and data of the UK citizens furthermore it is announced by the UK Minister for state for Digital, Culture, Media & Sports (DCMS) to overrule its previous Data Protection Act to cop up with the requirement of this contemporary world. According to the UK Data Protection Act of 1998, the people and Organizations tangled in storing personal data shall have to register with the Information commissioner, who is appointed by the government as an officer of the government in order to keep a check and balance on the rules and regulations adopted by the Act. The Act provides a certain restriction in the gathering of personal and sensitive information. Any personal data or information can be demanded only for one or more lawful purposes and the same data or information cannot be further processed or used for multiple purposes apart from the task/tasks that it was required for. The personal data should not be excessive and the data or information which is being demanded should be relevant and correct and adequate for the purpose(s) it is needed and to be processed. It is quite appreciable and indispensable fact that UK, US, EU are trying to enhance their Data Protection Act so that no criminal can abscond from the law and justice can be delivered.

285 id
The US has quite a different approach when it comes to Data Protection of its citizen. They follow the sectorial approach in which sensitive data of their citizen are grouped in classes on the basis of their utility in the US, thus they have a concept of the mixed legislature when it comes to Data Protection. EU has its own Data Protection Act which is quite advance and have the capability to cope up with the requirements of this contemporary world. European Union Data Protection Act (hereafter referred as EUDPA) is applicable on all countries who are the member of EU, further; it is applicable on those company or countries who want to trade with EU. Hence it is indispensable fact that if India wants to do trade with EU then India needs to comply with the laws of EU. Recently EU official has published a list of adequate countries which includes Andorra, Argentina, Canada (commercial organizations), Faeroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland, and Uruguay but India still needs to work on its Data Protection laws to get enrolled in EU list. EUDPA says that "Personal data shall not be transferred to a country or territory outside the EEA unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data." 

India has only one law which partly serves some sort of data protection but India legislature should acknowledge the fact that IT act is not sufficient to deliver justice in this cyber advanced world. India needs a comprehensive and complete data protection act so that no criminal can abscond from the law and justice can be delivered.

The IT Act, 2000 is a general Act which has its main focuses on crimes like the digital signatures, cyber contraventions and offenses, e-governance, confidentiality. It is mistaken and is erroneously compared to the European Directive on Data Protection (EC/95/46), OECD Guidelines on the protection of Privacy and Transborder Flows of Personal Data and the Safe Harbour Approach of the US.

The fact is that the IT Act, 2000 deals with the issue of the Data Protection and privacy in a partial manner. There is a lack of actual framework in the IT Act, 2000 wherein the Data Protection Authority and quality and transparency of the data are considered. Even if the legislature of India tries to amend the IT Act, 2000 then also there would be some loop-holes for the actual framework and guidelines for data protection and privacy that should match the EU directive, OECD Guidelines or the Safe Harbour Principles.

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Because of the absence of Data Protection Laws, India is on a heavy loss to the outsourcing industry. Though it is a flourishing industry in India but we do not have a proper Data Protection Act. The customers in the US and the European Union are protected by the comprehensive privacy directive which focuses on the principle that the personal data should not be transferred to countries which do not have adequate protection policy. As a result, for European trade Union data protection is an indispensable requirement which has to be acknowledged in these international outsourcing companies. Hence this may lead to a slab in the outsourcing industry in India. Hence India needs to tackle this situation tactfully and should consider the importance of Data Protection Act.

CONCLUSION

In this contemporary cyber world, we have to acknowledge the fact that India is still lagging behind from European countries in terms of cyber laws and it's not a fortnight job to introduce a new cyber law in India. India is a growing economy where lots of data is transferred from India and there is an urgency of law and legal framework to monitor this data before it is too late for this booming economy. In this cyber world not to have an adequate Data Protection Act becomes a slab and this prevents India to become one of the developed cyber economies.

Till now there is no significant research has been done in respect of trans-border data flows. Indian legislature should be proactive and have to divert its concern on the urgency of law and legal framework required in this field. We all know India is a developing country one of the benefits of being developing nation is they don't have to start from zero. India can take into the consideration different laws and model of developed countries which already have stable Data Protection Act like UK and EU. Till now the only act which deals with some sort of Data protection in India is IT act but IT act is a general act and it is sometimes not able to punish the criminal because of loop holes in the act. So, before it becomes too late, India should introduce its new law for Data Protection so that in future no criminal can abscond from the law and justice can be delivered.

REFERENCES


4. One cybercrime in India every 10 minutes - Times of India The Times of India, https://timesofindia.indiatimes.com/india/one-cybercrime-in-india-every-10-minutes/articleshow/59707605.cms


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ONLINE FILING OF FIR Youth Bar Association of India v. Union of India

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INTRODUCTION

First Information Report (FIR) is a report of a crime pertaining to cognizable offence filed with the police to record and initiate the investigation process. It is a necessary document in a criminal case and can majorly support the case of the informant or the victim. However, this right is also been given to the person so accused provided by Sec.207 of The Code of Criminal Procedure, 1973.

FACTS

In the case of Youth Bar Association of India vs. UOI a Writ of Mandamus was filed by the petitioner before the Supreme Court of India, to direct the Union of India and the States to upload each and every FIR registered in all the police stations within the territory of India in the official website of the police of all States, as early as possible, preferably within 24 hours from the time of registration.

ANALYSIS

In the case, the learned counsel for the petitioner submitted that after registration of the First Information Report if it is uploaded in the official website of police that will solve many unnecessary problems faced by the accused persons and their family members. He contended that when the criminal law is set in motion and liberty of an individual is at stake, he should have the information so that he can take necessary steps to protect his liberty. He referred to the judgement of State of West Bengal and Ors. v. Committee for Protection of Democratic Rights, West Bengal and Ors. which clearly states that, State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence.

In another case of Som Mittal v. Government of Karnataka it was stated that, the right to liberty Under Article 21 of the Constitution is a valuable right, and hence should not be lightly interfered with. This was said in reference to the right of the accused to have the information on time so that he has a fair chance to protect his liberty.

The learned Additional Solicitor General appearing for Union of India on being asked suggested that directions issued by the High Court of Delhi can be applied with certain modifications. He also put focus on paragraph 4 of the affidavit filed in an interlocutory application in the present Writ Petition. It reads as, ‘it is respectfully

288 Youth Bar Association of India vs. UOI & Others [W.P. (CRL) No.68/2016]
289 West Bengal and Ors. v. Committee for Protection of Democratic Rights, West Bengal and Ors (2010) 3 SCC 571
submitted that Central Government is supporting all the States to set up a mechanism for online filing of complaints under the protect ‘Crime & Criminal Tracking Network & Systems’.

On having heard both the parties the Supreme Court laid down certain directions.

The court said that the FIRs have to be uploaded online on the police website and if there is no such website then on the official website of the State Government within 24 hours of the registration of the FIR unless it is a sensitive case like sexual offences, offences pertaining to insurgency, terrorism and of that category, offences under Protection of Children from Sexual Offences Act and such other offences.

The exception is provided in case of sensitive cases as it deals with the concept of right to privacy and in such cases FIR has to be filed with the Superintendent of Police or Commissioner in case of metropolitan cities. A committee will be setup by the commissioner and the grievance shall be dealt with in three days from the date of receipt of the representation and communicated the same to the grieved person. So looking at the nature of the FIR it has to be decided whether it has to be uploaded online or not.

The reason given for this online updating within 24 hours is that the accused person should also have a right to know of the charge filed against at the right time. For this if the FIR is timely updated online he can easily access it and file an appropriate application for redressal of his grievances before the court of law.

The only exception to delay in updating the FIR online could be geographical location for which time can be extended up to 48 hours and further maximum up to 72 hours.

But the court pointed out here that for whatever reason if the FIR is not uploaded online, it cannot be a ground to obtain the benefit under Sec.438 of The Code of Criminal Procedure Act, 1973. Section 438 provides direction for grant of bail to a person apprehending arrest.

CONCLUSION

The guidelines laid down by the court solve many unnecessary problems faced by the accused persons and their family members. The uploading of FIR online has many advantages to it. It will help enhance transparency as everyone will have access to the FIR. This will also help reduce chances of victimization of the accused and will also ensure justice to the accused if the FIR is a wrong and flimsy. This is also helpful to the victim. As the FIR is uploaded online it will ensure the victim lodge a case or apply for compensation timely. So it can be concluded that uploading of FIR will not only benefit the victim, the accused but also help in smoothening the whole process.

RECOMMENDATIONS

- There would be lack of skilled persons in rural areas with digital expertise. Training should be provided to such police officers.
- As the uploading of FIR online would curb their malpractices there could be laxity on part of the police.
- Connectivity issues in rural areas to be solved immediately for this system to be a success.
- To make this process a success there should be specialised separate department to upload FIRs in police stations.

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QUASHING OF A CRIMINAL PROCEEDINGS IN RESPECT OF NON-COMPOUNDABLE OFFENCES ON THE BASIS OF COMPROMISE.

By Debasmita Panda & Rucha Bhimanwar
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INTRODUCTION

The Criminal Procedure Code, 1973 makes a distinction between compoundable and non-compoundable offences, which is elaborated in Section 320 of Code. Compoundable offences are of a less serious nature than non-compoundable. The offences have been classified in accordance with public policy. The offences which are non-compoundable may be compounded if the Supreme Court and High Court exercise their powers under Article 142 of the Constitution of India and Section 482 of Code of Criminal Procedure respectively. The offences that may lawfully be compounded are those that are mentioned in Section 320 of the Code of Criminal Procedure. The offences other than those mentioned cannot be compounded. The offences punishable laws other than the Penal Code are not compoundable. Only the person named in the third column of Section 320 can legally compound an offence under Section 320 of the Code. Any person may set the criminal law in motion, but it is only the person specified in the third column who can compound the offence. A case may be compared at any time before sentence is pronounced even whilst the Magistrate is writing the judgment. The compounding of an offence signifies that the person against whom the offence has been committed has received some gratification, not necessarily of a pecuniary character, to act as an inducement for his desiring to abstain from a prosecution and Section 320 provides that if the offence be compoundable, composition shall have the effect of an acquittal.

The object of Section 320 of the Code is to promote approachability between the parties so that peace between them is repaired.

One must always keep in mind that there is a subtle difference between the power of compounding of offences given to Court under Section 320 of the Code and quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction conferred upon it under Section 482 of the Code. Once, it is found that compounding is permissible only if a particular offence is covered by the provisions of Section 320 of the Code and the Court in such cases is guided solitary and squarely by the compromise between the parties, in so far as power of quashing under Section 482 of the Code is concerned, it is guided by the material on record as to whether the ends of justice would justify such exercise of power, although the ultimate consequence may be acquittal or dismissal of indictment.

Such a distinction is coherently explained by a three Judge Bench of this Court in the case of ParbatbhaiAahir @ ParbatbhaiBhimsinhbhaiKarmur & Ors. v. State of Gujarat &Anr.291, where the Apex Court has given guidelines which is to be

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291 ParbatbhaiAahir @ ParbatbhaiBhimsinhbhaiKarmur & Ors. v. State of Gujarat &Anr., 2017 Cr.L.R. (SC) 961
kept in the by the High Courts while considering a plea for quashing an FIR or a criminal proceeding under section 482 of the Code of Criminal Procedure on the ground of settlement between the parties.

In this particular case the Appellants had sought quashing of the FIR filed against them on the ground had they had amicably and peacefully settled the dispute among themselves. The complainant had also filed an affidavit to that effect. Hearing the Appeal, the Supreme Court upheld the impugned order, after advertising to various precedents and summarizing broad guidelines. In which it specifically mentioned that “the invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provision of section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.”

These powers whether under Section 320 or under Section 482 of the Code of Criminal Procedure differ in their scope but have been bestowed upon the superior courts to enable them to do complete justice and punish the guilty.

In the case of *Gian Singh v. State of Punjab*292 subtle distinction between the power of compounding of offences given under Section 320 of the Code of Criminal Procedure and quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction conferred upon it under Section 482 of the Code was lucidly explained by a three-Judge Bench of the Apex Court293 Compounding is permissible only if a particular offence is covered by the provisions of Section 320 of the Code and the Court in such cases is guided solitary and squarely by the compromise between the parties, in so far as power of quashing under Section 482 of the Code is concerned, it is guided by the material on record as to whether the ends of justice would justify such exercise of power, although the ultimate consequence may be acquittal or dismissal of indictment.

**QUASHING OF NON-COMPOUNDABLE OFFENCE**

However, there are certain offences which predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to the victim and the offender and the victim have settled all disputes between them cordially, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or First Information Report (FIR) if it is satisfied that on the face of such settlement


In the case of Rajiv Saxena and others v. State (NCT of Delhi) and another the Supreme Court allowed the quashing of criminal case under Sections 498-A and 496 read with Section 34 Indian Penal Code by a brief order. It was observed that since the parties had settled their disputes and the complainant agreed that the criminal proceedings need not be continued, the criminal proceedings could be quashed and set aside.

Now in the case of Narinder Singh and Ors. v. State of Punjab and Anr. the guidelines were issued to quash the proceedings in cases where the offenses involved are non-compoundable. It was also held that there may be certain cases which are involving heinous crime with element of criminality against the society and not parties inter se. In such cases, the deterrence as purpose of punishment becomes paramount and even if the victim or his relatives have shown the virtue and gentility, agreeing to forgive the culprit, compassion of that private party would not move the court in accepting the same as larger and more important public policy of showing the iron hand of law to the wrongdoers, to reduce the commission of such offences, is more important. Cases of murder, rape, or other sexual offences, etc. would clearly fall in this category. Moreover in 2014 the Supreme Court in State of Madhya Pradesh v. Madan Lal held that no compromise can even be thought of in rape cases. The reasoning provided by the court was: “these are crimes against the body of a woman which is her own temple. These are offences which suffocate the breath of life and sully the reputation…… … The court could have come to a similar conclusion without stereotyping by simply holding that a compromise can generally not take place in a rape case because it is a serious offence against the body and thus, a compromise would be against public policy.”

Despite these judgments, the Punjab and Haryana High Court in Dalbir Singh & Ors v. State of Punjab & Ors on the 15th of September, 2015 quashed an FIR in a rape case on the ground that a compromise had been reached between the parties of the case and the accused had agreed to marry the victim. Allowing a compromise on this ground can prove disastrous for the woman. Moreover, she would be left with no remedy later as marital rape is not criminalised in India.

Now going to the one of the most recent judgement of the Supreme Court which is the case of the Central Bureau of Investigation v. Sadhu Ram Singla and Ors where the court after considered the facts and circumstances of the case, and also the law relating to the continuance of criminal cases where the complainant and the Accused had settled their differences and had arrived at an amicable arrangement, there was no reason to differ with the view taken in Manoj Sharma v. State and Ors and several decisions of the present Court delivered thereafter with respect to the doctrine of judicial restraint. Depending on...

297Central Bureau of Investigation v. Sadhu Ram Singla and Ors, (2017) 5 SCC 350
the attendant facts, continuance of the criminal proceedings, after a compromise has been arrived at between the complainant and the accused, would amount to abuse of process of Court and an exercise in futility since the trial would be prolonged and ultimately, it may end in a decision which may be of no consequence to any of the parties. The bench though dismissed the appeal, said it would be proper to keep the said point of law open.

Again in the case of ParbatbhaiAahir @ ParbatbhaiBhimsinhbhaiKarmur& Ors. v. State of Gujarat &Anr 299, the Supreme Court held that heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute.

**CONCLUSION AND RECOMMENDATION**

The High Court and the Supreme Court have rightly been bestowed with extraordinary powers to do complete justice as no written law, however detailed and well intentioned, can account for all situations. But with power comes responsibility. The courts cannot devise straight jacket formulae to decide in what cases the power can be used otherwise a question mark is put on the very justification of giving inherent powers to enable the courts to give decisions in the interests of justice.

Moreover, such exercise of power by the HC's and SC must be used in appropriate cases, be restrained and must not become a matter of routine. Unfortunately, this is not what is happening, sometimes power is either being used repeatedly and without restraint or the power is being declared to be non-existent.

No doubt, crimes are acts which have harmful effect on the public at large and consist in wrongdoing that seriously endangers and threatens the well-being of the society and it is not safe to leave the crime doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without the permission of the court.

In my opinion it is not at all justified in doing something indirectly which cannot be done directly. It would not be legitimate exercise of judicial power under Article 226 of the Constitution or under Section 482 Code of Criminal Procedure to direct doing something which Code of Criminal Procedure has expressly prohibited. So I think that it would ordinarily not be a legitimate exercise of judicial power to direct compounding of a non-compoundable offence. The Code makers have obviously thought of something before stating them as non-compoundable offence, so in my opinion it will go totally against the law.

**REFERENCES**

**LINKS/WEBSITES REFERRED:**

- Manupatra.com
- Scconline.com

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299 ParbatbhaiAahir @ ParbatbhaiBhimsinhbhaiKarmur&Ors. v. State of Gujarat &Anr., 2017 Cr.L.R. (SC) 961
http://www.livelaw.in/observe-judicial-restraint-quashing-non-compoundable-criminal-cases-sc/
http://www.thehindu.com/news/national/high-courts-can-quash-prosecution-for-noncompoundable-offences/article3670507.ece

BOOKS/ARTICLES/JOURNALS REFERRED:


STATUTES REFERRED:

- Code of Criminal Procedure, 1973 (India)
- Constitution of India

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PROTECTION OF CRUELTY— AGAINST S. 498A

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“All cruelty springs from weakness” – Lucius Annaeus Seneca

I. Introduction
The Indian family is generally viewed as an arena of love, cordiality, gentleness and solidarity. But not all families practice love. There are thousands of incidents every year where a family member is treated cruelly by her own. This poses a threat to the safety and security of that married woman and also to the institution of family.

The insertion of section 498A in the Indian Penal Code (IPC) in 1983 finally criminalized cruelty and harassment of married women by the husband or his relatives in any form. Specific objects and reasons were taken into consideration before adding this section to the IPC.

Ever since, there have been complaints and allegations by men’s rights activists, and a portion of the public, that alleged victims frequently misuse this provision to harass the husband and his family members. There are websites dedicated towards spreading awareness and preparing men against the abuse of S. 498A. There are accounts of law teachers asserting in class that S. 498A is the most misused provision in Indian law. It makes the section one of the most controversial provisions in the IPC. What follows is a study into the claim that S. 498A is the most “misused” provision in IPC.

Background to Section 498A
The Constitution of India provides for equality and protection of the dignity of women. India has also ratified international conventions like the Convention for elimination of all forms of Discrimination against Women (1979). As a result of these, Indian legislature has had to make special provisions to address the inequality against women. Provisions like section 113B, 498A and 304B of the IPC and enactments like the Dowry Prohibition Act and Protection of Women against Domestic Violence Act address different kinds of familial violence against women. These statutes also reveal that institutions such as marriage and family are not out of the reach of law.

In the decade of 1980, dowry deaths rose at an alarming rate in India. The Times of India on November 12, 1987, reported that in Maharashtra alone, there were 896 dowry and “accidental” deaths of housewives in three months i.e. from July to September, 1987. The increasing number of dowry deaths and instances of cruelty expressed the need to address these matters effectively. Various organizations all over the country pressurized and urged the government in providing legislative protection to women against domestic violence and dowry. The main objective was to facilitate rapid intervention by the state and prevent the murders of young

300 www.498a.org/contents/Publicity/498aSurvivalGuide.pdf

301 Crime Against Women, P.K. Giri
women unable to meet the unlawful demands of their in-laws.

With this object, the Indian Penal Code, 1860, was amended by way of the Criminal Law (2nd Amendment) Act, 1983, and the new section 498A under Chapter XX-A, “Of Cruelty By Husband Or Relatives Of Husband”, was inserted on the 26th of December, 1983. The amendment focuses on dowry deaths and cases of cruelty towards married women by their in-laws. IV. Subsequent amendments were made in the Code of Criminal Procedure, 1973 (CrPC), and the Indian Evidence Act, 1872, by the same amendment to solidify this provision. According to the British Broadcasting Corporation (BBC), an incident of domestic violence is reported in India about once every five minutes, under its legal definition of “cruelty by husband or his relatives” 302. India’s National Crime Records Bureau (NCRB) found that there was an increase of 26.7% in crimes against women from 2012303. In 2013, more than 8,000 women were killed in dowry-related crimes, and more than 1,00,000 were victims of cruelty by their husbands or relatives 304. These staggering numbers show how the situation of married women has only continued to worsen with time. Despite of the graveness of these offences, a study in 2015 by Claire Snell-Rood, a medical anthropologist at the Department of Behavioral Science with the University of Kentucky, revealed that 75-86% o women do not disclose that they are victims of abuse by their families305.

With such statistics in light, investigation into the claims of abuse of women protection laws is required. Section 498A has saved countless lives and flawed marriages. It remains to be seen just how much this provision is misused and why this “misuse” has garnered the attention of the public as well as the judiciary.

Fact Sheet of Section 498A
Since the very beginning, S. 498A has been targeted by claims such as “women are misusing this provision”, “misuse is reflected in the low conviction rate and high acquittal rate”, etc. However, it is an established fact that mere low conviction rate does not equate to the innocence of accused persons and misuse of the law. The higher acquittal rate may also result from inadequate investigation, benefit of doubt given to the accused, reconciliation between the spouses, etc. The NCRB statistics are used very casually to paint an ugly picture of women using the law to address the violence they face.

- Independent Research Conducted306:
  ‘Vimochan’, a women’s rights organization, conducted a study in Bangalore from 2012 to 2015 to understand the implementation and effectiveness of S. 498A and its sister provisions, like sections 3 and 4 of the Dowry Prohibition Act, 1961. The study was able to ascertain how defectively classified NCRB data is manipulated to portray a negative picture. Among other

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305 www.ecoi.net/en/document/1229781.html
306 thewire.in/166766/section-498a-domestic-cruelty-laws/
important conclusions, two major findings of the study were about arrests and suicides of married men.

The study revealed that over 70% of the accused persons had paid anticipatory bail and only about 24% of the accused were arrested in 498A complaints. The NCRB thus made a grave error by not distinguishing between persons apprehending arrest and persons arrested. NCRB statistics for the year 2013 state that 64,089 married men and 29,491 married women committed suicide that year. Prior to 2014, there was no separate category called “marriage-related issues” in the NCRB data. However, there was one called “family problems”. The category “marriage-related issues” was added only in 2014 and it accounts for 6,773 suicides, out of which 4,411 are women and over half of that number are men, i.e. 2,362. The NCRB reports mention that “economic” and “social” causes have led to most male suicides.

Based on the above analysis, it is irresponsible to assume that married men are depressed and traumatized in such large numbers because of criminal proceedings under S. 498A. There is no qualitative or quantitative data to back such allegations. Relying on this data to draw conclusions of this nature results in grave injustices to the women facing various forms of violence every day. It is put in better terms by the 243rd Law Commission Report on S. 498A — “In course of time, a spate of reports of misuse of the section by means of false/exaggerated allegations and implication of several relatives of the husband have been pouring in. Though there are widespread complaints and even the judiciary has taken cognizance of large scale misuse, there is not reliable data based on empirical study as regards the extent of the alleged misuse. There are different versions about it and the percentage of misuse given by them is based on their experience or ipse dixit, rather than ground level study.”

VI. Dangers of Relaxing these Laws
The guidelines of the Supreme Court in cases like that of Arnesh Kumar v State of Bihar & Anr. and Rajesh Sharma v The State of Uttar Pradesh state that complaints under S. 408A would now have to be referred to Family Welfare Committees, who would then submit their report to the District Legal Service Authority. That, there shall be no arrest of the accused persons until such conditions are satisfied, defeats the very purpose of S. 498A.

Flavia Agnes, women’s rights lawyer, observed regarding the judgment in Rajesh Sharma’s case — “No voices from the women’s movement were heard during the hearings. So, the judgment is perceived by many women’s rights activists as an exercise in male bonding.”

While many have welcomed the judiciary’s stance on S. 498A, critics of this approach have expressed concern over how...

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308 (2014) 8 SCC 273
309 (2017) SCC Online SC 821
regressive a step it is to necessarily put hurdles into the achievement of the object of S. 498A. Women who dare to register complaints under the section now may have to live in their marital homes with their alleged abusers until the charges against them are, if, accepted. Moreover, the number of suicides and “accidental” deaths of married women in India is much higher than that of the number of cases registered under S. 498A which are later declared to be false. This number of deaths will only keep on increasing if the dilution of women protection laws is not stopped.

The fact that women protection laws exist in a 21st century civilized country is evidential in itself that we, as a nation, need to keep on improving our laws to extend better protection to women. It is a setback to the process of social reformation to send the law a step behind.

VII. Conclusion
Terms like “women’s rights” and “feminism” often leave a bad taste in the mouths of a majority of the country’s population. The fact exists that women have been discriminated against and continue to be so. The rise in the voices demanding better lives for women and their security, or the development of women in different spheres of life, are phenomena to be proud of, not to be looked upon sourly. The laws that aim to provide better legal protection to these persons against gender-specific crimes are in place for reasons well-founded. Despite of modernization and “woman development”, there has not been any significant improvement towards reducing crimes against women. Specific provisions of law such as S. 498A secure to women the right to life under Article 21 of the Constitution, and the right to equality under Article 15. Denying the required protection of law to a specific sex is discrimination in its basest form.

There are allegations against the advocate community that they often advise women clients in marital distress to complain of cruelty and harassment by husband and his relatives. There has not been particular research done into this claim. If this is true, the blame lies with the lawyers who advise so. But the adverse effects are faced by the society at large. It directs the rage of wrongly accused persons and the general public towards women who are genuine victims and can make use of S. 498A to save their ramshackle marriage or to save their own lives.

A practical feature of the law is its possible misuse. Numerous provisions of law are abused to harass innocent people, S. 498A not being an exception. However, the amount of its misuse is not so significant that it can dwarf the positive change it has brought into society. Countless lives have been saved by this provision and a number of abusive marriages mended.

Relying on flawed data and public opinion to amend or render ineffective a life-saving provision of law cannot be a positive characteristic of judicial activism. While Indian law-makers express ambitions in the areas of liberalization and globalization, laws that fail to protect almost half the population of India serve as nothing but barriers. Women have been trying to break the glass ceiling for decades. It is a fair expectation that the judiciary should lend
them a helping hand, and not reinforce that barrier.

REFERENCES
1. Handbook on Crime Against Women – V. P. Shrivastav
2. Violence Against Women – M. K. Roy
3. Women and Criminal justice – Arvind K. Singh
5. Crime Against Women – P. K. Giri
8. ‘The Code Against Cruelty’ – Asmita Bakshi; India Today (dt. 25/08/2017)
9. 243rd Report on Section 498A of IPC

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TRIPLE TALAQ: A CRITICAL ANALYSIS

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SYNOPSIS

‘What is bad in theology was once good in law’ but after Shariat has been declared as personal law, whether what is Quranically wrong can be legally right is the issue which will be discussed in this paper. It will also reflect the gender biasness towards the Muslim women in our society. Today, the issues of women rights in Muslim Personal Law is highly debatable. Specially, Muslim women rights relating to Triple Talaq, inheritance, maintenance has got much attention now a days. However, Indian Constitution has guaranteed equality and freedom from discrimination based on gender or religion, but still there are various practices which have never come into light in spite of guarantee of the Constitution still Muslim women are subjected to discrimination. There is no safeguard on arbitrary divorce and second marriage by her husband during currency of the first marriage resulting in denial of dignity and security to her. As we know a large part of Muslim Personal Law is still uncodified and most of the legal decision pronounced by the courts are based on the norms mentioned in Quran and Hadith. The central debate on interpretation of Muslim personal laws has both positive as well as negative aspects. Some people has supported that, Muslim personal laws has given various rights to Muslim women such as choice in marriage, inheritance etc. In Hinduism and Christianity marriage has been traditionally viewed as a sacrament, under Muslim law, marriage is a civil contract based on consent as spelt out in the utterance of Qabul. Whereas, some are of the opinion that, there are various practices which is against the spirit of Indian Constitution like Polygamy, Halala, Maintenance, Triple Talaq.

In this line this research paper attempts to analyse the on-going debate on the implications of Muslim Personal Law in India and suggests various solution to empower Muslim women.

INTRODUCTION

The matter of triple Talaq found its way to the Constitution bench because of certain newspaper articles which a division bench of the court in Prakash v. Phulavati (2016) 2 SCC 36 adverted stating an important issue though not related to this case but has been raised by some learned counsel about rights of Muslim women. Discussion of gender discrimination led to this issue also. 311 It is said Shariat was enacted to put an end to the unholy, oppressive and discriminatory customs and usage in the Muslim community. Section 2 is most relevant in the face of the present controversy. Shariat have been declared to be Muslim personal law by 1937 Act. 312

311 Laws on equal rights of daughters over property is prospective: live law
312 Application of Personal law to Muslims.—Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions
Then what is Shariat?

It has been explained by a renowned author Asaf A.A.Fyzee in the book Outlines of Muhammadan law 5th edition 2008 ‘We have Quran which is the very word of god.Supplementary to it we have Hadith which is the traditions of Prophet the records of his action and his sayings from which we must derive help and inspiration in arriving legal decisions.If there is nothing either in Quran or Hadith answer the particular question which is before us we have to follow the dictates of secular reason in accordance with certain definite principles.These principles constitute the basic of sacred law or Shariat as the ‘Muslim doctors understand it’. There are four sources of law of Islamic law:-

1. Quran
2. Hadith
3. Ijma
4. Qiyas

Quaran is first source of law. This means other sources other than Quran are only supplement to be supplied with what is not given in the Quran.Islam cannot be Anti-Quran.Talaq is mentioned in three Suras(chapters):-

1.In Sura 2 it deals with social life of the community.
2.In Sura 4 it deals with decencies of family life and,
3.In Sura 15 it deals explicitly with Talaq. They are clear as far as Talaq is concerned.The Holy Quran has attributed sanctity and permanence to matrimony.However in extremely unavoidable situations Talaq is permissible but with an attempt for reconciliation and if it succeeds the revocation are the Quranic essential steps before Talaq attains finality.In Triple Talaq doors are closed hence triple Talaq is against basic tenets of the Holy Quran and consequently it violates Shariat.Triple Talaq which is known as Talaq-e-Biddat is an instant and irrevocable form of divorce.It allows man to legally divorce his wife by stating the word ‘Talaq’ three times in oral, written or more recently electronic form.Concept of triple Talaq should be understood as it is imperative to understand. under Islamic law divorce is divided into three categories:-

1.Talaq- Simple means of divorce instantly.
2.Khula- This divorce is at the instance of wife.
3.Mubaroat- This kind of divorce is done with the mutual consent of the parties.

Now as we mentioned Talaq above it is further divided into three kinds:-

**TALAQ-E-AHSAN**

This kind of divorce is proved by Quran and Hadith and is the most reasonable form of divorce.It is done by simple pronouncement of Talaq with abstinence.Period of abstinence is regarded as period of Iddat(period of waiting) it has duration of 90 days to 3 menstrual cycle.In case the wife is not menstruating then 3 lunar months.If there is intimacy within the period of Iddat then it is said to be revoked and if no intimacy is involved for 3 months then it becomes final and irrevocable.To resume they have to conduct a new Nikah and Mahr(money paid by the groom or his father to legalise the wife’s property)but before
remarriage the wife needs to marry another man and dissolve the marriage to get remarried to the previous husband. Muslims only agree that Talaq-e-Ahsan is only the proper form of divorce.

**TALAQ-E-HASAN**

It is same as the Talaq-e-Ahsan but in three successive pronouncement. If after the pronouncement there is cohabitation then within one month it is said to be revoked. Second Talaq needs to be pronounced after a month assuming there is no resumption and it is the last chance to revoke the Talaq. After third pronouncement it becomes irrevocable. After the Talaq there is a period of Iddat where the women cannot remarry and the rest process follows as in Talaq-e-Ahsan.

**TALAQ-E-BIDDAT (TRIPLE TALAQ)**

It is effected by one definitive pronouncement of Talaq or three pronouncement of Talaq utter at the same time simultaneously. Talaq-e-Biddat is irrevocable from the time of announcement. It is not included in Quran it is secured by the second century after the advent of Islam. It was recognized by few Sunni schools popular amongst Hanafi section Sunni Muslims even they say it as ‘sinful form of divorce’.

**Background with reference to Quran**

Muslims believe that Quran was revealed by god to the Prophet Mohammad over a period of 23 years beginning from 22.12.609 when Muhammad was 40 years old up to his death on the year 632. After his death Quran was completed by his companions who has either written it down or memorized it. Quran is divided into ‘Suras’ (chapters) each Sura contains ‘verses’ which are arranged into sections. Reference maybe first be made to Verse 222 and 223 contained in sec28 of Sura 2.

- Verse 222 has been interpreted to mean that matters of physical cleanliness and purity should be not only from man’s point of view but also women’s point of view. If there is danger of hurt to the women she should have every consideration. The Quran records the action of men towards women are often worst. It mandates that the same should be better with reference to the women’s health both mental and spiritual.
- Verse 223 says husband should be considerate to his wife and treat her the way that will not injure or exhaust her.

Verses 222-223 exhorts husband to extend every kind of mutual consideration which is required toward his wife.

- Verse 224 has a reference to many special oath some oaths become a problem of separation, division among husband and wife. The Quran ordains in general terms that no one should make an oath in the name of god as an excuse for not doing the right thing or for refraining from doing something which will bring people together. These Verses followed are in the context of existing law. In anger or caprice a husband may take a oath in the name of god not to approach his wife. This act will keep his wife tied and will not let her remarry even if the wife protested the husband will be bound by oath in the name of god. Quran disapproves thoughtless oaths and insists on a proper solemn and be a purposeful oath. The above Verses cautions a husband to understand an
The Verses of the Quran is imperative and is not conformity with the unambiguous edicts of the Quran and therefore cannot be as valid Constitution of Muslim Personal Law.

Why judicial review cannot be done on personal laws?

1. The court has already examined in Ahmedabad women action group v. UOI (1997) 3 SCC 573 about the following issues:
   - Whether Muslim Personal Law which allows polygamy is void as offending Article 14 and 15 of the Constitution.
   - Whether Muslim Personal Law which enables a Muslim male to give unilateral Talaq to his wife without her consent and without resort to judicial process of courts, is void as it offends Article 13, 14, 15 of the Constitution.
   - Whether the mere fact that a Muslim husband takes more than one wife is an of cruelty.

While considering the above issues the court declined to entertain the above mentioned issues stating that these were matters wholly involving issues of state policies with which the court will not ordinarily have any concern. The court also held that these issues are matters which are to be dealt with by legislature.

i. *Personal laws cannot be challenged as being violative of part III of the Constitution* - The board said in Krishna Singh v. Mthura Athir (1981) 3 SCC 689 has held that the part III of the Constitution does not touch upon the personal laws of the parties. High court in applying the personal laws of the parties could not introduce its own concepts of modern times but should enforce the law as derived from recognized and authoritative sources. Since part III of the Constitution does not touch upon the personal laws of the parties, the court cannot examine the question of constitutional validity of the practices of marriage, divorce and maintenance in Muslim personal law.

ii. *Personal laws of a community cannot be re-written in name of Social Reform* - The board submitted that in Sardar Sydena Taher Saifuddin Saheb v. State of Bombay AIR 1962 SC 853, Supreme Court observed that the exception carved in Article 25(2) of the Constitution of India to the Freedom of Religion enabling the state to enact laws providing for social welfare and reform was not intended to enable the legislature to “reform” a religion out of its existence or identity. According to the Board even while bringing in such a social reform it is not permissible to change the entire practise or acts done in pursuance of such religion.

iii. *Article 44 of the constitution which envisages a Uniform Civil Code is only a directive principle of state policy and is not enforceable* - Article 44 of the Constitution of India stipulates that the state shall endeavour to secure for the citizens a uniform civil code through out the territory of India. The board submitted
that the Uniform Civil Code is only a Directive Principle of State Policy and is not enforceable. Further, this paper by necessary implication recognizes the existence of different codes applicable to different religious in matters of Personal Law and permits their continuance until the State succeeds in its endeavour to secure for all citizens a Uniform Civil Code. It is also submitted that the framers of the Constitution were fully conscious of the difficulties in enforcing a Uniform Civil Code and thus they deliberately refrain from interfering with the provisions of the Personal Laws and laid down only a Directive Principle. Moreover, conflicting viewpoints on different religions on the issues of marriage, divorce, maintenance makes the vision contemplated in Article 44, a goal yet to be reached.

Muslim Personal Law provides for the practices to be followed on the issues of marriage, divorce and maintenance and these practices are based on holy scriptures- Al-Quran and sources are based on Al-Quran. The board on the issues arising in the present said the matter can only be decided as per Muslim Personal Law which derives its sanctity from the Holy Quran and Hadith. According to the board all the sources of Muslim Personal Law have been approved and endorsed by the Holy Quran and the practices of marriage, divorce and maintenance etc. are based on such sources all of which flow from the Holy Quran itself.

**MEASURES TO BE TAKEN:**

1. Implementation of Uniform Civil Code
2. Codification of Muslim Personal Laws

**UNIFORM CIVIL CODE AND TRIPLE TALAQ:**

Article 44 of The Indian Constitution speaks about Uniform Civil Code that, “The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India”. Under which all the personal laws based on the scriptures and customs of each major religious community in India will be replaced with a common set governing every citizen. Religion is the root of all these problems and if Uniform Civil Code is implemented then it can resolve all the contradictions that will arise from substitution of the present system with any other system that derives its sustenance and sanctity primarily from religion. If religion is continued to be treated as a supreme when it is about marriage, divorce or anything which directly affects the life of a woman, then the women of that society will continue to suffer from inequality and discrimination. And that has happened with the Muslim women, under the rule of Ostrich-like mentality of the AIMPLB. AIMPLB has always been against it, it was formed when the question of implementation of Uniform Civil Code arose in the early 1970s by the then law minister Mr H R Gokhale when Mrs. Indira Gandhi tried to control the dominance of Sharia Law of 1937. AIMPLB has consistently asserted that Sharia is beyond reach and scope of India’s courts of law, including the Supreme Court, as in its opinion, secular courts do not have the authority to either interpret or apply Sharia, which is based on the Quran and the Hadith, which are above any manmade law. In its self-appointed role as the sole arbiter of Muslim destiny in secular, democratic India, AIMPLB may have taken upon itself the onerous task of saving the minority Indian Muslims from the persecution of
majority Indian Hindus. The point is, once you remove the words ‘Muslims’ and ‘Hindus’, only Indians remain – with no majority or minority – but equal in every respect before law (today they are guided by different sets of laws) enjoying equal rights and privileges under the Constitution. That can happen once the Shariah is no longer allowed to control the lives of Indian Muslims and their freedom to worship and follow their religious practices are left to individuals, as in most religions. AIMPLB cannot allow it to happen, since it then loses its raison-d’etre. In no other religion and perhaps in no other country, least of all in any democracy, the clergy, or the mullahs, are allowed to wield so much power by the State.

In Mohd. Ahmed Khan v. Shah Bano Begum Case, when Supreme Court made a recommendation of Uniform Civil Code. The All India Muslim Board defended the application of their laws and supported the Muslim conservatives who accused the government of promoting Hindu dominance over every Indian citizen at the expense of minorities. The Criminal Code(under which the Shah Bano got justice which she rejected after sometime) was seen as a threat to the Muslim Personal Law, which they considered their cultural identity. According to them, the judiciary recommending a uniform civil code was evidence that Hindu values would be imposed over every Indian. The orthodox Muslims felt that their communal identity was at stake if their personal laws were governed by the judiciary. The members of the Muslim board, including Khan, started a campaign for complete autonomy in their personal laws. An independent Muslim parliamentarian proposed a bill to protect their personal law in the parliament. The Congress reversed its previous position and supported this bill while the Hindu right, the Left, Muslim liberals and women’s organizations strongly opposed it. The Muslim Women’s (Protection of Rights on Divorce) was passed in 1986, which made Section 125 of the Criminal Procedure Code inapplicable to Muslim women. The debate now centred on the divinity of their personal law. A Muslim member of parliament made a claim emphasizing the importance of the cultural community over national by saying that only a Muslim judge could intercede in such cases.

This clearly shows that AIMPLB will never let Uniform Civil Code happen but if it is implemented then there will be equal status to all the citizens, gender parity, accommodation to the aspirations of young population, national integration will be supported and it will bypass the contentious issue of reform of existing personal laws. Facing the difficulties like diverse nature of India and fighting against people like AIMPLB who consider UCC as encroachment on religious freedom, once is implemented all the worries and discrimination towards Muslim women will fly away.

Codification of Muslim Personal Law

According to a survey by Bharatiya Muslim Mahila Andolan, an overwhelming 83.3% women felt that their family disputes could be resolved if a law based on Quranic principles was codified and 89% wanted the government to intervene in helping to codify Muslim personal law.

The British enacted the Shariat Application Act, 1937 which was an attempt at applying Shariah law and not customary laws to the
Muslim community. This act states that the Muslim community will be governed by the Shariat and not customary laws. Although it states that Muslims will be governed by Shariat, it does not specify much on aspects such as the age of marriage, divorce, maintenance, custody of children, polygamy, etc. This is of no help to women as it does not list the various issues that they face. In practice, followers of different schools of thought continue to apply their own varied understanding and interpretation of the Shariat. There are, therefore, many conflicting views on several significant issues, especially those concerning divorce. The irony is that each view claims to be based on their respective interpretations of the Shariat. And the practice of unilateral oral divorce continues. Several Muslim countries have codified their laws and tried to ensure justice to women. Several socio-religious communities in India, including minorities, have codified personal laws as per their religious texts. But such a move has not been taken up for the Muslims owing to the politics over leadership.

The Dissolution of Muslim Marriages Act 1939 gave a Muslim woman the right to seek dissolution of her marriage on nine specified grounds. This is the only legislation enacted by the British, which introduced a substantive codification of the divorce law. However, although the act benefits women, it is rather piecemeal. It only lays down the grounds on which women can seek divorce. It does not lay down any procedure or a time frame within which she can get a divorce. The man can divorce his wife without assigning any reason and even in her absence. He may or may not approach the court or any authority to seek divorce. This act does not question or restrict the man’s unbridled right to oral triple divorce. The act deals only with divorce and not with related matters such as maintenance, custody of children, payment of Mehr, etc. For these matters, the woman has to file separate cases under other laws, sometimes in other courts. This law is a welcome measure but it needs more elaboration and matters under its purview. Our findings clearly indicate that it has not stopped Muslim women from being divorced unilaterally and instantly.

The latest development in recent times has been the Shah Bano controversy and the Muslim Women (Protection of Rights on Divorce) Act 1986. The Shah Bano case is one of the most significant lawsuits in the history of the Indian judicial system. The case pioneered the Muslim women’s fight for justice on the right to claim alimony. There was a huge uproar at the time over the right to maintenance granted by the courts to Shah Bano. It was dubbed “interference in religious matters” by some conservative male sections. In the aftermath, the Muslim Women (Protection of Rights on Divorce) Act 1986 was passed by Parliament. These three laws exist in India in the name of Shariat or Muslim personal law but these are highly inadequate in enabling justice for women in the matters of marriage and family. There is no codified law that covers all aspects of family and marriage matters.

In Muslim society there are multiple implementing agencies that dispense justice in family matters. There exist Shariat courts, qazis, muftis (religious clerics), jamaats (sect arbitration councils) that also take in cases of family dispute. These bodies are readily accessible and have closer contacts with the community unlike the secular court structures. Poor people find
going to a court expensive, cumbersome and time-consuming. The community mechanisms are accessible but are dominated by men who arbitrate and settle disputes, which more often than not go against the interest of the women. These individuals and institutions have adopted patriarchal, conservative and anti-women interpretations of the religious texts. In some cases there is little recognition of the Constitution and the values of justice and equality. Besides, the Muslim law being followed by these bodies is not homogeneous and its provisions vary according to the different sects and subsects.

Furthermore, it is an amalgamation of customary law and practices, statutory law and interpretations of the verses of the Quran. So while a Muslim woman is required to go to the court to seek divorce, a Muslim man is not required to do so. He can pronounce divorce thrice and terminate the marriage contract instantly and unilaterally. The presence of wife or witnesses is not required. These councils are mostly approached by men as most of these places may not be women-friendly. However, Muslim women do approach Shariat courts regularly with the help of male relatives or directly.

Clearly, the existing male-oriented community justice framework has not helped Muslim women to get justice in matters of marriage and family. It is important to understand the meaning of the popularly held perception about Indian Muslims being governed by Shariat in matters of personal laws. The secular democratic state has failed to enable fair representation for all sections of the population, including women, by only recognizing the conservative religious voice as the voice of the whole community. The conservative sections are unaware and unconcerned about the issues of Muslim women and therefore they cannot continue speaking for them.

Furthermore, Muslim women and girls face several challenges of safety, security, survival and dignity in modern times like women and girls from all other communities. They are gradually learning to cope with these challenges. The solution cannot be that of confining them to homes for their own safety and well-being. They have aspirations like other citizens and it is binding on both the government and the community to recognize and support their concerns. Muslim women cannot forever live with the threat of instant oral unilateral divorce or polygamy or post-divorce economic uncertainty. These must be resolved by evolving a just and fair legal framework based on the principles of the Quran.

Uniform Civil Code is one of the way by which the problem of all the inequalities, injustice and the obnoxious practices could be stopped that are going on in the name of religion whereas Codification of Personal Laws is the need of the hour of all the Muslim women as they believe that their family disputes could be resolved if law based on Quranic principles is codified. Both ways the society will be uplifted and the Muslim women will get justice.

India’s top court on Tuesday struck down the controversial Islamic practice that allows men to divorce their wives instantly by a 3:2 majority, deeming it “unconstitutional”.

The Supreme Court (SC) ruled that the practice of “Triple Talaq”, whereby Muslim
men can divorce their wives by reciting the word Talaq (divorce) three times, was both unconstitutional and Un-Islamic.

Victims including Shayara Bano, whose husband used triple Talaq to divorce her by letter in 2015, had approached India’s highest court to ask for a ruling.

A panel of five judges from India’s major faiths — Hinduism, Christianity, Islam, Sikhism and Zoroastrianism — said triple Talaq was “not integral to religious practice and violates constitutional morality”.

They said it was “manifestly arbitrary” to allow a man to “break down (a) marriage whimsically and capriciously”.

“What is sinful under religion cannot be valid under law,” said the judges.

Indian Chief Justice JS Khehar, who was a part of the panel, asked the government to bring legislation in six months to govern marriage and divorce in the Muslim community.

Judicial review was done by the court

It was said that triple Talaq does not fall within the sanction of the Quran. Even assuming that it forms part of the Quran, Hadis or Ijmaa, it is not something that is “commanded”. Talaq itself is not a recommended action and therefore Triple Talaq will not fall within the category of sanction ordained by the Quran. While the practice is permissible in the Hanafi jurisprudence, that very jurisprudence castigates triple Talaq as being sinful.313

2.a practice that is manifestly arbitrary is obviously unreasonable and, being contrary to the rule of law, would violate Article 14 of the constitution. If an action is found to be arbitrary and unreasonable, it would negate the equal protection of the law contained in Article 14 and would be struck down on this ground. Pointing out that triple Talaq is sanctioned under the Muslim Personal Law (Shariat) Application Act, 1937, it is said to be constitutionally invalid. “Divorce” breaks the marital tie which is fundamental to family life in Islam. Not only does it disrupt the marital tie between man and woman, but it has severe psychological and other repercussions on the children from such marriage. After the advent of Islam, divorce was permitted to a man if his wife by her indolence or bad character renders marital life impossible. In the absence of good reason, no man can justify a divorce for he then draws upon himself the curse of God. Indeed, Prophet Mohammed had declared divorce to be the most disliked of lawful things in the sight of God. The reason for this is not far to seek. It is clear, therefore, that Triple Talaq forms no part of Article 25(1) of the Constitution. This being the facts, the submission on behalf of the Muslim Personal Board that the ball must be bounced back to the legislature does not at all arise in that Article 25(2)(b) would only apply if a particular religious practice is first covered under Article 25(1) of the Constitution. If a constitutional infirmity is found, Article 14 will interdict such infirmity. It should conform to norms, which are rational, informed with reason and guided by public interest, etc. Applying the test of manifest arbitrariness to the case at hand, it is clear that Triple Talaq is a form of Talaq which is itself considered to be something innovative, namely, that it is not in the Sunna, being an irregular or heretical

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form of Talaq. Given the fact that Triple Talaq is instant and irrevocable, it is obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which is essential to save the marital tie, cannot ever take place. It is clear that this form of Talaq is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. Therefore, the 1937 Shariat Act, insofar as it seeks to recognize and enforce Triple Talaq, is within the meaning of the expression “laws in force” in Article 13(1) of the Constitution and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq.”

3. “What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well. Merely because a practice has continued for long, that by itself cannot make it valid if it has been expressly declared to be impermissible. The whole purpose of the 1937 Act was to declare Shariat as the rule of decision and to discontinue anti-Shariat practices with respect to subjects enumerated in Section 2, which include Talaq. Therefore, in any case, after the introduction of the 1937 Act, no practice against the tenets of Quran is permissible. Hence, there cannot be any Constitutional protection to such a practice.”

Banned in various Countries: Tradition dictates that religious laws should be preserved. Unlike India however, there are several Muslim majority nations where triple Talaq has been banned.\(^{314}\)

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1. Egypt:
   It was the first country to reform its divorce system in back 1929 with the accordance of the holy book Quran.

2. Pakistan:
   It was abolished after the recommendation by a 7 member commission on marriage and family laws in 1956 and the framed the legislation of marriage and divorce similar to Egypt, the husband must pronounce Talaq in three successive menstrual cycles.

3. Tunisia:
   As per Tunisian Code of Personal Status 1956, it enshrine that the institution of the marriage comes under the ambit of state and judiciary which cannot allow husband unilaterally to verbal divorce his wife without explanation of reason.

4. Sri Lanka:
   Although, it is not Muslim majority country but some Islamic scholars consider the Srilankan Marriage and Divorce (Muslim) Act, 1951 as the ‘most ideal legislation on divorce (Triple Talaq)’. This act envisages that if husband wants separation from his wife then he has to give notice of his intention to Qazi (Muslim Judge) along with the relatives of the partners, elders and other influential Muslims of the area, for attempting the provision of rethink, reconsider and reconcile.

5. Bangladesh:
   The process of divorce is very simple in Bangladesh just in three steps to divorce for both Husband and Wife (When power of

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giving Divorce has been delegated in the Kabin) wanting separation:

- Give Notice in writing;
- Face the Arbitration Board (Appeared or not doesn’t matter); and
- After expiry of 90 days take a registration certificate from a registered Nikah Registrar (Kaji).

6. Turkey:
The process of Talaq in Turkey can began only if the marriage was registered at the Vital Statistics Office. Then the entire process of Talaq will be done in civil court.

7. Indonesia:
Every divorce can only be executed by a court decision. An agreement to divorce between the husband and wife will not be constituted as a divorce, only a court decision may constitute a divorce. It is regulated under Law No. 1 of 1974 concerning Marriage (“Marriage Law”), which also further regulated under Government Regulation No. 9 of 1975 concerning The Implementation of Law No. 1 of 1974 concerning Marriage (“Marriage Regulation”).

8. Iraq:
It was the first Arab country to replace Sharia court from the government-run personal status court.

So, if these countries being the ‘Muslim dominant countries’ have banned it and are following the basics of Quran to dismiss any marriage then there is no doubt that banning triple Talaq in India will not be in accordance with the principles of Prophet Mohammed (may he live in peace).

CONCLUSION

India is a diverse country where every religion has its important and has the right to continue its practices. Muslims are the largest minorities in India and have been given various privileges to follow their religion and are not bound to do anything which against their religion or something which they are not allowed to do.

Triple Talaq, a practice that is being followed in India under the cover of religion and traditions has devastated results in our society. Suppress the right of other because of Religion is not acceptable. But this practice has gone against many rights enshrined in our Constitution. A husband divorces his wife over the phone just because he wanted a son; another person send a text on Whatsapp and ends the marriage, there and then only; another person ended his marriage with his wife in a drunken state, not even realizing the consequences of it. These instances clearly shows that this practice must be stopped, the aftermath of this inimical practice not only ruins the life of the wife but also shatters the dreams of the children and affects the future life of the husband. The wife looses trust in marriage, alumina, which is a must, is not provided to the wife because of which she and her kids have to live a life in poverty. Unemployment, illiteracy, criminal activities are few aftermaths of this practice. Husbands too take this practice for granted, they marry whoso ever they want to and for how short period they want to, at times they have a purpose behind it and when the purpose is over they leave the girl like that only.

There have been instances where courts gave judgements in the favour of wife and
asking the husband to state a reasonable cause (Dagdu v. RahimbiDagduPathan[23]), whenever they repudiate a marriage and if they fail to provide a valid reason there wasn’t any Talaq.

A 2015 survey of about 5,000 women across 10 states by the Bharatiya Muslim MahilaAndolan (BMMA) found that over 90% wanted an end Triple Talaq. Of the 525 divorced women surveyed, 78% had been given triple Talaq; 76 of these women had to consummate a second marriage so that they could go back to their former husbands.

In India we have arrived at this that women in marriage have less rights than men. Article 25 and 26 of are equally meant for men and women, whatever be the denomination. Triple Talaq is Against the Progressive spirit of Quran. It symbolizes the subordination, subjugation and suppression of human rights of women. The practice of triple Talaq is grossly injurious to the human rights of the Muslim women. This form of Talaq is infested with the malady of inequality which goes against equality which is enshrined in Article 14 of the Indian Constitution.

The Shariat law as practised in India falls short of meeting the evolved standards of gender equality and justice, now it is the society who has to change it. India has moved away from the clutches of orthodoxy and fanaticism, this era is an era of empowerment, literacy and freedom, and then why not gives women her due.

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INDEPENDENT DIRECTORS, CORPORATE GOVERNANCE AND COMPANY PERFORMANCE- INDIA

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Abstract
This paper is being submitted to a University for PhD in Commerce- in the Subject of Independent Directors Corporate Governance and Company Performance in India.
The paper covers three areas
They are
- Independent Directors
- Corporate Governance
- The Company performance in India where there are independent directors

This paper tries to analyze the present scenario in Indian Corporate Sector and examines the role of Independent Director in Corporate Governance, in particular and the Company Performance thereon and what is the impact on Company performance.
We are looking at the following
- Companies Registered in India
- how the role of Independent Directors brings about better corporate governance and
- whether this brings about improved company performance.

We are examining whether Independent Directors (IDs) play a critical role in implementing sound corporate governance practices in companies.

Introduction
There are various important stakeholders in a company. These are
- Customers
- Employees
- Investors
- shareholders
- Bankers
- Government

A company, being a Legal entity can attract huge capital (which is a scare resource) for doing business.
Company performance and Government economic policies are linked. Hence there is a need of Good Governance, that will result in better company performance and achievement of Government Economic goals. We are trying to prove in this paper the importance of every transaction in a company should be fair and transparent to its stakeholders. In my view, this is the essence of Good Corporate Governance. The Authority that directs this is an effective Board of Directors (the board which includes independent directors)

Companies which have good corporate governance track record, attracts investors, ensure investment, increases stakeholder wealth and has a big role to play in county building and social responsibility.
For all this to happen, there has to be sufficient independence of the Board of Directors of the Company.

We look at the current scenario in Indian Corporate Sector and examine the role of Independent Director in Corporate Governance, in particular.
For a long period of time research has grappled with the idea on whether maximizing shareholder value is the ultimate goal of corporate activity or whether the goal is some other broader societal “good.”

A Company regulated through the statutes Companies Act, 2013 (earlier `1956) and other relevant legislation and securities regulation through SEBI, Stock Exchanges. Shareholders are the first and most important stakeholders. They have enormous powers granted through the statute. There are independent directors. To know if a company governed well, it is important to know how independent these directors are and what is powers and responsibilities of shareholders.

With more emphasis on performance, a closely related issue that has emerged now is the balance in governance roles and responsibilities between shareholders and boards.

**Majority Family Owned Listed companies In India**

We are studying the India Scene, we find that there are a large number of Listed companies which are family owned, meaning that majority shares are held by Family.

So, we can say, in India, we can say that there two types of listed companies.

- Professionally Managed companies, where the shareholding is widely disbursed
- Family Owned, where the shareholding is concentrated with a family

**Example of Professional Board Listed Companies are**

- L & T
- HDFC Limited
- Tata
- Infosys

While it may be premature to state that there are very few Professional Board Listed companies in India, we find from this paper, that there are indeed lesser number of professional Board Listed entities. However, they appear to be growing in number, albeit, very slowly.

There are certainly a large number of Family Owned Listed companies. Some examples are

- Reliance Group
- Aditya Birla Group
- Bharti Group

If we analyze the number of listed companies, we will find that over 75 percent of listed companies in India are Family owned.

In the context of the above, we are looking to find out whether

- IDs to deliver on their responsibilities to enhance corporate governance standards, as stakeholders increasing rely on them
- There have recently been some sweeping changes in the legal and regulatory framework. Has the ID used these to enhance corporate governance?
- Under the new dispensation, the key responsibilities of IDs relate to (a) strategy, risk management and internal financial
controls, (b) related party transactions, (c) ethical and compliance oversight and (d) succession planning and executive remuneration.

• Is Board evaluation of independent directors effective, are the IDs properly trained?

IN the light of all the above, and constraints in the form of Family owned companies and Professional Board, we attempt our study. To begin with, we will study about Independent Directors, Statutory position, roles, duties and issues associated with the position.

Independent Directors
Independent Directors, as the name suggests, are expected to be independent from the Company management and act as the trustees of shareholders. Conversely, it can be stated that, independent directors are those who, are not subordinate to any other promoter director or activity related to the company.

Position under the statute
Companies Act, 1956 (which has been replaced by the Companies Act, 2013) does not contain any definition of Independent director.

So we had to rely on definitions given in Clause 49 of the listing agreement. Clause 49 states that ID’s are those who apart from receiving director’s remuneration do not have any material pecuniary relationships or transactions with the company, promoters, senior management, holding company or subsidiary or associates which affect their independence. Clause 49 has been amended to define independent directors as follows. As per revised Clause 49, a person shall not serve as an independent director in more than seven listed companies. Further, any person who is serving as a whole time director in any listed company shall serve as an independent director in not more than three listed companies.

Independent Directors – Evolution in India
The Kumar Manglam Birla Committee, formulated by Securities Exchange Board of India (SEBI) brought in the concept of “Independent Director” in the Indian corporate arena.

This was followed by introduction of Clause 49 in Listing Agreement between companies and stock exchanges by SEBI in 2001. Globally, things were changing at a very fast pace. Events which influenced more effective measures for Good Corporate Governance in companies were

a. The collapse of Enron company in USA,
b. World com failure in USA,
c. Introduction Sarbanes Oxley Act (SOX) in United States.

With these events in hindsight, the Ministry of Company Affairs (MCA, then known as Department of Company Affairs - DCA) constituted, the Naresh Chandra Committee, to study and report on the measures for Corporate Governance in India. Subsequently, in 2003 Narayan Murthy Committee was constituted by Securities and Exchange Board of India (SEBI). The terms similar to that of Chandra Committee, whose recommendations were incorporated in the Clause 49 by amending it in 2004. Definition of Independent Directors as formulated by the Chandra Committee was
accepted however, without the condition of nine-year term.

Some of the key responsibilities of Independent Directors relate to
(a) Strategy, risk management and internal financial controls,
(b) related party transactions,
(c) Ethical and compliance oversight and
(d) Succession planning and executive remuneration.

It will be appropriate to state, to effectively discharge their responsibilities, Independent Directors need to devote sufficient time, undergo training, focus attention on agenda setting, seek independent professional advice and ensure that the board evaluation process is effective.

It will be appropriate to state that having Independent Directors is a welcome step for corporate governance in India. It is slowly coming to be correct that Independent directors can ensure that companies do not become, NPA, or fall into the Insolvency and Bankruptcy net.

Though the Act, 2013 empowers the ID’s to have a definite ‘say’ in the management of a company, which would thereby immensely strengthen the corporate governance, we try to find out if the Independent Directors are in fact actually an asset to the company or not.

Minority Shareholders and Independent Directors
Independent directors are the first line of defense for minority shareholders.
We need to be sure of the following

✓ Do we know that independent directors are, really, acting independently of management and controlling shareholders to protect the interest of minority shareholders
✓ Do we know that independent directors are, in fact, monitoring controlling shareholders and management, or providing consultative input and guidance on key managerial issues

The regulatory environment in India provides a window to observe the inner workings of independent directors. For publicly traded companies listed on National Stock Exchange (NSE) and Bombay Stock Exchange (BSE), the Securities Exchange Board of India (SEBI) encourages that listed entities disclose independent directors’ dissent during board meetings. It may be better approach if the Regulatory Authorities make it mandatory for listed entities to disclose in the Board Minutes any Dissent by Independent Directors.

Role of Independent Directors & Corporate Governance
It has been provide globally through various research, that Independent Directors (IDs) play a critical role in implementing sound corporate governance practices in companies.

Stakeholders are nowadays increasingly relying on Independent Directors to deliver on their responsibilities to enhance corporate governance standards and thereby increase stakeholders wealth.

Corporate management in India tend to think them representing the Corporation rather
than representing the shareholders. In the goal of the company it is not to maximize the shareholder wealth, but to ensure corporate growth by balancing the claims of all important stakeholders viz., employees, suppliers, local communities and of course shareholders as well. Corporate raiders and hostile takeovers are still a rarity in India.

Independent directors - an overview of their powers or deficiencies in law

Section 118. Minutes of proceedings of general meeting, meeting of Board of Directors and other meeting and resolutions passed by postal ballot. —

(1) Every company shall cause minutes of the proceedings of every general meeting of any class of shareholders or creditors and every resolution passed by postal ballot and every meeting of its Board of Directors or of every committee of the Board, to be prepared and signed in such manner as may be prescribed and kept within thirty days of the conclusion of every such meeting concerned, or passing of resolution by postal ballot in books kept for that purpose with their pages consecutively numbered.

(2) The minutes of each meeting shall contain a fair and correct summary of the proceedings thereat.

(3) All appointments made at any of the meetings aforesaid shall be included in the minutes of the meeting.

(4) In the case of a meeting of the Board of Directors or of a committee of the Board, the minutes shall also contain— (a) the names of the directors present at the meeting; and (b) in the case of each resolution passed at the meeting, the names of the directors, if any, dissenting from, or not concurring with the resolution.

(5) There shall not be included in the minutes, any matter which, in the opinion of the Chairman of the meeting,— (a) is or could reasonably be regarded as defamatory of any person; or (b) is irrelevant or immaterial to the proceedings; or (c) is detrimental to the interests of the company.

(6) The Chairman shall exercise absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes on the grounds specified in sub-section (5).

(7) The minutes kept in accordance with the provisions of this section shall be evidence of the proceedings recorded therein.

(8) Where the minutes have been kept in accordance with sub-section (1) then, until the contrary is proved, the meeting shall be deemed to have been duly called and held, and all proceedings thereat to have duly taken place, and the resolutions passed by postal ballot to have been duly passed and in particular, all appointments of directors, key managerial personnel, auditors or company secretary in practice, shall be deemed to be valid.

(9) No document purporting to be a report of the proceedings of any general meeting of a company shall be circulated or advertised at the expense of the company, unless it includes the matters required by this section to be contained in the minutes of the proceedings of such meeting.

(10) Every company shall observe secretarial standards with respect to general and Board meetings specified by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980 (56 of 1980), and approved as such by the Central Government.
(11) If any default is made in complying with the provisions of this section in respect of any meeting, the company shall be liable to a penalty of twenty-five thousand rupees and every officer of the company who is in default shall be liable to a penalty of five thousand rupees.

(12) If a person is found guilty of tampering with the minutes of the proceedings of meeting, he shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

Additional requirements for IDs under the Companies Act, 2013 is as follows:

The ID should be a person of integrity and possess relevant expertise and experience. The ID will be initially appointed for a period of five years and be eligible for reappointment subject to certain conditions for two terms. Thereafter, the ID shall be eligible for reappointment after a cooling-off period of three years.

Nominee directors shall not be considered as IDs.

An ID will not be entitled to any stock options in the company.

A person cannot serve as an ID in more than seven listed companies, and if such person is a whole-time director in any listed company, then the limit on independent directorship gets reduced to three listed companies.

At least one ID on the board of directors of the holding company shall be a director on the board of directors of a material non-listed Indian subsidiary company.

The ID should not be less than 21 years of age.

The ID should not have any business relationship with the company such as being a material supplier, service provider or customer or a lessor or lessee of the company.

**Manner of selection and appointment of independent director**

To find out the impact of Independent Director on corporate Board and their independence in discharge of duties, the following parameters have been examined:

- Qualification of Independent Director;
- Experience of Independent Director;
- Types of remuneration received by the Independent Director;
- Number of Other Companies in which Independent Director holds position;
- Past Relationship with the Company;
- Board Meeting attended by Independent Director during the year.

**Independent Directors and Board Independence**

The ultimate aim of Independent Directors is to ensure Board Independence. The two terms Independent Directors and Board Independence are different terms. So there may no independent Directors but there could be Board Independence. And Vice Versa too,

What would the implications be, if greater board independence does not improve, and may reduce, firm performance? Steps like insisting that independent directors own more shares, or that they be more completely independent, could be worth trying.

**Current India Scenario**
India a large percentage (approximately 75%) of companies that are traded in the Stock Exchanges are family owned, promoted and managed. (Source: Stock exchange data & Annual Reports of Companies, available in public domain)

This high percentage makes it that nearly two third of the Sensex/ Nifty fifth companies are family promoted, controlled and managed. These companies are very large, and have grown to this through family control. Some of the these family companies have recently listed and opened up Eg Godrej group.

So from our perspective, this large percentage of listed entities in India being family owned is a major point of difference with the western world.

It will be interesting to know more about the characteristics of family owned listed companies in India, which are as follows:

- The promoters are actively involved in the day-to-day management and run the enterprises as their private property.
- It is interesting to note that, this attitude is prevalent even when their holding is low in comparison with outside holdings.
- Generally, most family owned companies have a Family Constitution / Charter document.
- It is believed that this Family Charter has the following provisions:
  - Provides the Family Constitution
  - It describes family values and beliefs
  - It documents a code of conduct for family
  - Generally provides a path forward for a Succession Plan

- Family’s reputation inspires investors to invest in the business
- Commitment to family values and beliefs
- Emotional attachment to business
- Benevolent dictatorship
- Professional management: Only competent, decided by the Senior Most family group or member are inducted in the business; Other qualified Professionals in areas as finance, corporate law, strategy etc are inducted to fill in business; in skills, knowledge and experience
- In a Family Owned Listed Company, which do not have good family councils and management skills, Independent Directors may often end up in the following:
  - Lack of motivation
  - Lack of liquidity: This could lead to several litigations, deadlock in management
  - Independent Director could be subordinate to family’s interest
  - If family governance is good, Corporate governance could be good too.
- In the Succession Plan, there is either no role or limited role of Independent Director
- Often Family will decide for Induction of younger members without consideration of competence
- Given these situations, the Independent Director have to navigate to succeed
- Based on the Annual Reports Data, filings in statutory authorities and with
Stock Exchanges, the following analysis has been made

- The lead independent director should first be a friend of the family, who enjoys their trust and confidence. So additionally ID is also a philosopher and guide.
- The ID should be sensitive to the family aspirations, in particular the aspirations of the new generation.

**What is the role and duties of independent directors**

The role of an ID is considered to be of great significance. The guidelines, role and functions and duties and etc are broadly set out in a code described in Schedule IV of the Act, 2013. The code lays down certain critical functions like safeguarding the interest of all stakeholders, particularly the minority holders, harmonizing the conflicting interest of the stakeholders, analyzing the performance of management, mediating in situations like conflict between management and the shareholder’s interest and etc.

**Role of independent directors in company meetings & committee meetings**

- The Act, 2013, requires the entire ID’s to meet at least once in a year. The meeting must be convened without the presence of the non-independent directors and members of the management.
- An ID would also evaluate the performance of the chairperson of the company. Also, the Act, 2013 requires an ID to review the performance of the non-independent directors and the Board as a whole of the company. These measures would immensely aid in ensuring the smooth and proper functioning of the Board of Directors of a company.

- The Act, 2013 has also emphasized on the appointment of an ID as a member or as a chairperson in various committees. Committee consisting of a chairperson who shall be a non-executive director and such other members as may be decided by the board.

**Liability of an independent director**

Under the Act of 2013, the liabilities of the independent directors have been reduced, and are limited: “only in respect of acts of omission or commission by a company which had occurred with his knowledge, attributable through board processes and with his consent or where he had not acted diligently”.

Importantly, Statutes and Legal and regulatory framework that Independent Directors must look into to ensure better corporate governance

**Implementation Mechanism of the Corporate Governance in India**

In India, the Corporate Governance Code is implemented by seeking adherence to the various laws, procedures, practices, rules, etc. relating to corporate functioning in our country.

The main elements which are used for implementation are as given below:

a. The Companies Act, 2013: board of directors, meetings, management, conduct of meetings, appointment or removal of auditors or directors, corporate restructuring, mergers, intercorporate activities,

b. The Insolvency and Bankruptcy Code, 2016

c. The Foreign Exchange Management Act, 1999: Implemented to regulate, control and monitor foreign
investments, investors and flow of foreign funds
d. Securities & Exchange Board of India Act, 1992 and Rules and Regulations made there in
e. Listing Agreements with Stock Exchanges
f. Securities Contract Regulation Act, 1956
g. Competition Law, 2002

Corporate governance a simple definition
It was often understood corporate governance to mean “protection for minority shareholders”, which is another subject. Even people who understand what corporate governance means tend to mix up American theory with our reality. Some Simple Definitions of Corporate Governance:
“Corporate governance deals with the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment”

Why is corporate governance required
Throughout the world the joint stock Limited-liability Company has become the preferred vehicle for running business. It has proved its worth in providing employment, generating wealth, and contributing to economic and social development. The original concept of the company, which stems from the mid-nineteenth century, has proved immensely innovative, elegantly simple and superbly successful.

Company – limited liability
It is worth reminding our-selves that in the limited liability company, the business is incorporated as an independent legal entity, separate from its owners, whose liability for its debts is limited to the amount of equity capital they have agreed to subscribe. In law the company has many of the rights of a legal person - to buy and sell, to own assets, to incur debts, to employ, to contract and to sue and be sued. The company has a life of its own. Although this does not guarantee perpetuity, it does give the company an existence independent of the life of the proprietors, who can transfer their shares to others.

Why is Corporate Governance needed:
Globally in all jurisdictions, ownership is the basis of power over the company? The shareholders have power to nominate and elect directors, (including independent directors) who run the enterprise on their behalf. The directors are the stewards of the business’s resources and demonstrate their accountability to the shareholders, in the form of regular financial account and directors’ reports. Regular shareholders’ meetings provide an opportunity for the directors to report and answer shareholders’ questions.

Evolution of Corporate Governance
As with countries, companies need to be governed as well as managed. Corporate governance is concerned with this process. The Board of directors is central and its structure and processes are fundamental; so are the board’s relationships with the company’s shareholders, regulators, auditors, top management and other legitimate stakeholders

Corporate Governance today
Originally, the basis of corporate governance was shareholder power of management. Shareholders were relatively few and close enough to the board of

directors to exercise a degree of control. Indeed in several of smaller, tightly-owned companies around the world that is still the situation today. But there are several large companies which have huge shareholder base (eg Reliance Industries Ltd). The corporate governance model here is different from that of the smaller companies.

The distinction between governance and management
The board of directors seldom appears on the management organization chart: yet it is the ultimate decision making body in a company. The role of management is to run the enterprise: management operates in hierarchy.
The role of the board is to see that it is being run well and in the right direction, whereas the Board does not operate as a hierarchy.

Corporate Governance – Position in India
The Indian corporate sector is evolving as far as legal structure and internal management, control and administration of corporations is concerned. It is faced with numerous issues demonstrating the ineffective implementation of laws and code of business ethics.
Since many Indian Companies are expanding to overseas market, there is better awareness to maintain good standards of Corporate Governance. Qualitative improvement in Corporate Governance in our country based on a code of good corporate practices and meaningful disclosure of information to shareholders, hold the key to corporate success. This is necessary in the context of changing profile of corporate ownership, with the increasing flow of foreign investment, preferential allotment of shares to the promoters of companies and the new role being given to mutual funds. This means better governance and management of corporate bodies, prompt compliance of legal and financial obligations and adherence to ecological and environmental standards. The benefit of such a governance must accrue to the investors, customers, lenders of finance and to the society at large.

In India, the importance of Corporate Governance and its relation with Independent Directors (referred as “ID’s”) is now well recognized with the introduction of corporate governance clauses in Listing Agreements, and SEBI guidelines and regulations. The Companies Act, 1956 (referred as “the Act, 1956”) do not directly talks about ID’s, as no such provision exists regarding the compulsory appointment of ID’s on the Board. However, Clause 49 of the listing agreement which is applicable on all listed companies mandates the appointment of ID’s on the Board. A need has been felt to update the Act and make it globally compliant and more meaningful in the context of investor protection and customer interest.
The Companies Act, 2013 (referred as “the Act, 2013”) came into force as Act no. 18 of 2013 after obtaining the assent of the President on August 29, 2013. The Ministry of Company Affairs (referred as “MCA”) enforced the 98 sections of the Act through the notification dated September 12, 2013. Section 149 of the Companies Act, 2013 deals with the appointment and qualification of ID’s on the board of the Company and their importance in good corporate governance in the Company.
Some recent codes and regulations which have an impact on independent directors and corporate governance in India

In India the concept of Independent directors came into being with the introduction of Clause 49 to the Listing Agreement. This came into being in 2006.

The importance of the role of an Independent Director is of great significance. The guidelines, role and functions and duties and etc. are broadly set out in a code described in Schedule IV of the Companies Act, 2013.

The code lays down certain significant functions like safeguarding the interest of all stakeholders, particularly the minority holders, harmonizing the conflicting interest of the stakeholders, analyzing the performance of management, mediating in situations like the conflict between management and the shareholder’s interest, etc.

The independent directors are also expected to attend the general meetings of the company and to keep themselves aware of the matters which are going on in the company.

Factors that could determine Independent Directors and Corporate Governance

(1) Why does an independent director dissent, i.e. how does an independent director justify his or her dissent?
(2) What is the position of Independent Director briefly under Co Act
(3) When is an independent director more likely to dissent and who is more likely to dissent? And
(4) Does dissent matter sufficiently to affect independent director’s career and the company’s performance and impact Corporate Governance?

(Note: Since most India Listed companies are Family Owned, the above analysis is made much harder), Independent directors have various roles to fulfill in their official capacity to ensure corporate governance. Following, in my opinion, are the most important ones:

Firstly, they must discharge their duties and must try to bring transparency in the working mechanism of the company. Since shareholders, especially the minority shareholders, are usually not equipped to look into those affairs of the company, and thus they look forward to independent directors so as to provide such transparency.

Secondly, they are required to review the related party transactions and also to ensure the efficiency of “Whistle Blower”.

These, essentially, safeguard the interests of the stakeholders.

Thirdly, The Companies Act, 2013, provides for mandatory appointment of independent directors in following committees so as to meet the corporate governance requirements:

Nomination committee
Remuneration committee
Committee related to investor relations,
Audit committee.

Responsibilities of independent directors for a good corporate governance

Being a member of the Board, their role and responsibilities are very much similar to any other director of the Board. The fiduciary
duties of care, diligence and acting in good faith apply equally to independent directors as to other directors.

**Role towards the Board**

It is the duty of the independent director to ensure that all those concerns that are important for the company are properly addressed by the board of directors. The objectives and duties of the independent directors are same as that of the executive directors. However, as compared to the executive directors the time that is needed to be devoted by the independent director and the degree of skill and care required for the company, both are less.

How many independent directors:

Where there is executive chairman, 50% of the Board has to be independent directors. Otherwise it is 1/3 of the total board should be independent directors.

**Source:** Filings of Companies in Stock Exchanges through their annual reports, public notices and shareholding pattern

**Findings**

Based on some important responsibilities to be performed by Independent Directors, the following findings emerge.

Prior research on board composition *It is important to note here that prior research does not establish a clear correlation between board independence and firm performance.*

Does board composition affect firm performance?

Prior studies of the effect of board composition on firm performance generally do not affect firm performance after at certain threshold.

**Conclusion**

The corporate governance regulations in India are supposedly stringent. However, since majority of listed companies in India are family owned, the impact of the Corporate Governance Regulation, Independent Directors and Company Performance is not clearly visible.

Have Independent directors enabled corporate governance in India?

Given this argument, we look at whether Independent Directors have enabled better Corporate Governance in India. The need for the independent directors can be established by the fact that they are expected to be independent from the management and act as the trustees of shareholders. This implies that they are obligated to be fully aware of the conduct which is going on in
the organizations and also to take a stand as and when necessary on relevant issues.

In India the concept of Independent directors came into being with the introduction of Clause 49 to the Listing Agreement. This came into being in 2006. The importance of the role of an Independent Director is of great significance. The guidelines, role and functions and duties and etc. are broadly set out in a code described in Schedule IV of the Companies Act, 2013. The code lays down certain significant functions like safeguarding the interest of all stakeholders, particularly the minority holders, harmonizing the conflicting interest of the stakeholders, analyzing the performance of management, mediating in situations like the conflict between management and the shareholder’s interest, etc.

The independent directors are also expected to attend the general meetings of the company and to keep themselves aware of the matters which are going on in the company.

What does the study reveal and when necessary on relevant issues.

Recourse to independent directors by private equity investors per se is not tied to performance increases. Our study also shows that independent directors impact the rate of return only on deals which require very specific skills, i.e. turnaround and buyout investments.

Besides, busy independent directors do not seem to affect negatively the internal rate of return.

Finally, independent directors tend to resign when performance is unsatisfactory and consent to shave losses when performances are negative.

<table>
<thead>
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<th>The key responsibilities of IDs relate to broadly 4 categories:</th>
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<tbody>
<tr>
<td>Strategy, risk management, internal financial controls</td>
</tr>
<tr>
<td>Strategy: Information about other companies, their strategies and industry trends. Risk (a) compiling a risk inventory, (b) formulating assessment techniques and risk response strategies, (c) creating a risk appetite and improving tolerance levels, (d) ensuring effective communication and monitoring and (e) integrating ERM with operational systems.</td>
</tr>
<tr>
<td>Results vary. Large entities follow these, but medium and smaller units do not follow this process. In FMC, the role of Independent directors in this area is restricted and hence, to that extent it impacts Corporate Governance and ethics.</td>
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www.supremoamicus.org 180
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<tr>
<th>Related party transactions</th>
<th>By and large, most professional companies follow this process (For eg L&amp;T Limited, HDFC Limited). On the other hand, there is no guarantee that FMC follow this process and the Independent Director has no say in this matter. Briefly, the ID has to fall in line. ID can only ensure that there is no breach of the Act on this matter.</th>
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<tr>
<td></td>
<td>2. Prior research on board composition</td>
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<td></td>
<td>Ethical and compliance oversight</td>
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</tbody>
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systems and disciplinary actions. In certain cases, they may even request for audits by the internal or external auditors to satisfy themselves that the programs are running effectively.

Succession planning and executive remuneration

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<th>Succession planning and executive remuneration</th>
<th>Remuneration committee</th>
<th>Nomination committee</th>
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<tr>
<td></td>
<td>Most companies have independent directors on these two committees, but there appears to be no movement forward on leadership issue, unless it is a purely professional company as compared to family listed entity. In FMC, ID has a relatively minor role in this part as the Promoter decides.</td>
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Hence, we can confidently say that full compliance with clause 49 yet to be achieved. Almost a decade after Clause 49 of the SEBI Listing Agreement was implemented; compliance has not yet been fully achieved. Clause 49 of listing agreement states that the board of directors of the company shall have an optimal combination of executive and non-executive directors, with no less than 50% of the board comprising non-executive directors. It also states that where the chairman of the board is a non-executive, at least one-third of the directors should be independent and in cases where the chairman is an executive, at least half of the board should be independent director.

Non-executive directors remuneration- The average total remuneration received by non-executive directors was INR 2.9 mn in 2015, compared to INR 2.5 mn in 2014. The minimum sitting fees per meeting paid to non-executive directors in 2015 was INR 20,000. In the companies surveyed, non-executive directors received an average commission of INR 4.2 mn in 2015, compared with INR 4 mn in 2014.
In India context, we could study Corporate Governance, Firm performance from two angles

They are

Professionally Managed Listed Companies

Family owned Listed Companies

From the table provided below (Source: Business India), of the top 20 companies in Assets value, only a handful few (3) are Professional Managed Listed Companies and the remaining are Family Own Listed Companies.

According to a Report published in Press Trust of India, November 3, 2011 Family controlled listed companies - India leads in Asia.

**Illustrative list of some of the important family owned Companies are**

The Tata Group

The Reliance Group

The TVS Group

The Jindal Group

The Birla Group (there are several Birla family group, significant among them is Aditya Birla Group)

The Rane Group (engineering)

The Reddy Group (Pharmacy)

Wipro Group

**Illustrative List of some Professional Managed Listed Companies are**

Larsen & Toubro Limited

ICICI Limited

Mphasis Limited

With increasing awareness, investors dependence on regulators to protect them has substantially reduced. Investors on make their decisions with the ultimate aim which is to maximize shareholder value.

The key differentiator, with everything else being common, will be the ability to create self-driven, self-assessed, self-regulated organization with a conscience. That is when there is a Good Corporate Governance and this is all organization’s need to look to.

Since Corporate performance is closely linked to the government's economic policies, the government has every right to monitor it. However, there is also a need to monitor the functioning of corporates vis-a-vis guarding the interests of investors and creditors.

**Measures that may help**

- Dissent of Independent Directors should be recorded in the Minutes.
- In the absence of recording the dissent expressed by Independent
Director, it will not be appropriate to look at the Corporate Governance Philosophy in the company

- Independent director should be made to head Sub committees of Directors relating to remuneration, accounts and audit and any special projects.

<table>
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<th>independent directors</th>
<th>Mandatory tenure for Independent Directors.</th>
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<tr>
<td>Meetings attendance</td>
<td>Under the Act, an independent director can have a maximum of two tenures of five consecutive years (a total of ten years), with a cooling off period of three years.</td>
</tr>
<tr>
<td>Presence in Committees</td>
<td>Listing agreement Clear demarcation of the roles and responsibilities of the Chairman of the Board and that of the Managing Director/CEO.</td>
</tr>
<tr>
<td>Better Corporate Governance</td>
<td>There is no clear demarcation on the roles and responsibilities of Chairman and CEO.</td>
</tr>
<tr>
<td>Increased Profitability</td>
<td>The Roles of Chairman and CEO should be separated to promote balance of power.</td>
</tr>
<tr>
<td>Increased shareholder returns</td>
<td>Mandatory Induction training for Independent Directors</td>
</tr>
<tr>
<td></td>
<td>The board should undertake a formal and rigorous annual evaluation of its performance and that of its committees and individual directors..</td>
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<tr>
<td></td>
<td>Disclosure</td>
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<td>Remuneration policy for the members of the</td>
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<td>Remuneration policy as per KMP</td>
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CONCLUSION

It can be concluded as follows in India, (based on above said measures)

A good number of Family owned companies have broad based their Boards and have given a positive listening ear to advise and role of Independent Directors

The Professional Managed companies have benefited by Independent Directors, eg recent Corporate Governance issues in a well-known IT company

Corporate Governance has improved vastly across all forms of listed companies

There is room for further improvement in the areas of Corporate Governance, Minority Interest Protection, Statutory Compliance.

However, as over the next couple of years, there will be more benefits that accrue to Companies.
| Board and Key Executives should be clearly laid down and disclosed. | Report. Adoption of Whistle Blower Policy should be made mandatory, to begin with, for listed companies. A model policy in this regard may be specified covering important clauses that protect employees' interests. |
| Directors' Responsibility Statement should include a statement that the directors had devised proper systems to ensure compliance of all laws applicable to the company and that such systems were adequate and operating effectively. | The Audit partner/Firm should be rotated on the ground such as: 1. to maintain independence of Auditors. 2. to look at an issue (which may be financial or non-financial) from different perspective. 3. to carry out an Audit exercise with different mind set i.e. when the same person does an Audit continuously, he is bound to have a fixed mind set towards the company. |
| Secretarial Audit should be made mandatory in respect of listed companies and certain other companies. The Secretarial Audit be conducted by a Company Secretary in Practice. The report on the audit of secretarial records shall be submitted by the secretarial auditor to the Corporate Compliance Committee of the Board of Directors of the company. The Secretarial Audit Report should form part of the Board's Report. | Periodicity of Rotation: Audit Partner - Once every three years Audit Firm – Once every six years |
References

- NSE and BSE websites
- MCA websites
- N.R. Narayan Murthy Committee on Corporate Governance, 2003
- The Companies Act, 2013
- The Companies Act, 1956
- Kumara Mangalam Birla Committee on Corporate Governance, 1999
- Listing Agreement
- FEMA, 1999
- Cadbury Committee on Corporate Governance

Annual Reports of Listed Companies provided in the NSE / BSE Portals, and the companies respective websites


SSRN: https://ssrn.com/abstract=2219848 or http://dx.doi.org/10.2139/ssrn.2219848
MERCANTILE LAW

By Harshika Kapoor & Vineet Kumar Srivastava
From UPES, Dehradun

As a result of increasing complexities of business environment, innumerable contracts are entered into by the parties in the usual course of carrying on their business. CONTRACT is the most usual method of defining the ‘give and take’ rights and duties in a business transaction. This branch of Private law is different from other branches of law in a very important transaction. The law relating to contracts is contained in the Indian Contract Act, 1872. This module contains the general principles of the Law of Contracts. In these wide prospects, a contract is an exchange of promises of two or more persons that is an agreement creating an obligation to do or to refrain from doing a particular act, which is enforced by law.

WHAT IS CONTRACT?

According to Section 2(h) of the Act, the term contract is defined as “an agreement enforceable by law”. On analyzing the definition we find that, the contract is consist of two essential elements:

- An agreement, and
- Enforceability by law.

Agreement= Offer/ Proposal + Acceptance

Enforceability by law- An agreement to become a contract must give rise to a legal obligation, which means a duty enforceable by law.

Contract= Accepted proposal + Enforceability by law.

ESSENTIAL ELEMENTS OF A VALID CONTRACT:

According to Section 10 “All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.” The following essential elements must co-exist in order to make a valid contract:

1. Proper offer and proper acceptance with intention to create legal relationship.
2. Lawful Consideration and lawful object.
3. Capacity to contract.
5. Agreements not declared void or illegal.
6. Certainty of meaning.
7. Possibility of performance of an agreement.

Certainty of meaning: The agreement must be certain and not vague or indefinite.

OFFER AND ACCEPTANCE:

- Offeror undertakes to do or to abstain from doing a certain act if the offer is properly accepted by the offeree.
- Offer may be expressly made or may even be implied in conduct of the offeror, but it must be capable of creating legal relations and must intend to create legal relations. The terms of offer must be certain or at least be capable of being made certain.

Communication of Offer and Acceptance, and revocation thereof:

- Communication of an offer is complete when it comes to the knowledge of the offeree.
• Communication of an acceptance is complete: As against the offeror when it is put in the course of transmission to him as against the acceptance, when it comes to the knowledge of the offeror.

• Communication of revocation of an offer or acceptance is complete: It is complete as against the person making it, when it is put into a course of transmission to be out of power of the person making it and as against the person to whom it is made, when it comes to his knowledge.

CONTRACT FOR SALE:
Contract for Sale of Goods is a contract between buyer and seller intending to exchange property in goods for a price. Section 4(1) of the Sale of Goods Act, 1930 defines the term “Contract of Sale” as—an agreement between the seller and buyer in consideration of which the seller transfers or agrees to transfer the property in goods to the buyer for a price.

The definition mentioned above reveals important elements of transfer of ownership for a price. Here, two parties to a contract are willing to exchange their goods or services to gain a mutual benefit called price.

Essentials of Contract of Sale:
The following elements must co-exist to constitute a contract of sale of goods under the Sale of Goods Act, 1930:

• There should be at least two parties, the seller and buyer.
• The subject matter of the contract must necessarily be goods covering only movable property.
• It may be either existing goods, owned or possessed by the seller or future goods.
• A price in money should be paid or promised.
• A contract of Sale must be absolute or conditional.
• A transfer of property should take place between sellers to the buyer.
• All other essential elements of a valid contract must be present in the Contract of Sale.

Thus, whether a Contract of Sale of Goods is an absolute sale or an agreement to sell, depends on the fact whether it contemplates immediate transfer from the seller to the buyer or the transfer is to take place at a future date.

FORMALITIES OF CONTRACT OF SALE:
Section 5, lays down the rule as to how a contract of sale may be made and has nothing to do with transfer or passing of the property in the goods.

A contract of Sale may be made in any of the following modes:

• There may be immediate delivery of the Goods,
• There may be immediate payment of price, but it may be agreed that the delivery is to be made at some future date;
• There may be immediate delivery of the goods and an immediate payment of price;
• It may be agreed that the delivery or payment or both are to be made in installments;
• It may be agreed that the delivery, payment, or both are to be made at some future date.
STIPULATION AS TO TIME
(SECTION 11)
As regard time for the payment of price, unless a different intention appears from the terms of contract, stipulation as regard this, is not deemed to be of the essence of a contract of sale. However, delivery of goods must be made immediately. Price for goods may be fixed by the Contract or may be agreed to be fixed later on in a specific manner.

ASCERTAINMENT OF PRICE:
Price means the monetary consideration for sale of goods
By virtue of Section 9, the price may be
- Fixed by the Contract, or
- Agreed to be fixed in a manner provided by the Contract, e.g., by a value, or
- Determined by the course of dealings between the parties.

CONSIDERATION:
Section 2(d) defines consideration as follows: “When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing promises to do or abstain from doing something, such act or abstinence or promise is called the consideration for the promise.”

VALIDITY OF AN AGREEMENT WITHOUT CONSIDERATION:
- Nature Love and Affection
EXAMPLE: A, being the husband, has promised his life partner to pay his earning. Held that agreement between the two is without consideration, out of love and affection, it is a valid contract.
- Compensation for Past Voluntary Services
- Promise to pay time barred debt
- Agency: According to section 185 of the Indian Contract Act, no consideration is necessary to create an agency.
- Completed gift
- Bailment
- Charity ii: if the promisee undertakes the liability on the promise of the person to contribute to charity, there the contract shall be valid.

CAPACITY TO CONTRACT:
Capacity refers to the competence of the parties to make a contract. It is one of the essential elements to form a valid contract.

LAW RELATING TO MINOR’S AGREEMENTS/POSITION OF MINOR’S
- A contract made with or by a minor is void ab initio
- No ratification after attaining the majority
- Minor can be beneficiary or can take benefit out of a contract
- A minor can always plead minority
- Contract for supply of Necessaries
- Contract by guardian - how far enforceable

FREE CONSENT:
Two or more persons are said to consent when they agree upon the same thing in the same sense (Section 13).
- Coercion: The committing or threatening to commit any act, forbidden by the Indian Penal Code or the unlawful detaining, any property, to the prejudice of any person with the intention of causing any person to enter into an agreement. A contract induced by Coercion is voidable at the option of the aggrieved party.
- Undue Influence: When one party to a contract is able to dominate the will of the other and uses the position to obtain an
unfair advantage, the contract is said to be induced by undue influence. Such contract is voidable, not void.

- Fraud: Fraud exists when a false representation has been made knowingly with an intention to deceive the other party. Contract will be voidable in this case.
- Misrepresentation: Means a misstatement of a material fact made believing it to true, without an intent to deceive the other party. Contract will be voidable in this case.
- Mistake: When both the parties are at mistake to a matter of fact to the agreement, the agreement is altogether void.

LAWFUL OBJECT AND CONSIDERATION:
An agreement where the object or the consideration is unlawful is void. Object or consideration is unlawful if law forbids it, it would defeat the provisions of law or is fraudulent; or involves injury to the person or property of another; or is immoral; or is opposed to public policy.

Besides the above said agreements, certain agreements have been expressly declared void by the Contract Act such as – wagering agreements, agreements with uncertain meaning, agreements where consideration is unlawful in part etc.

Liability for Damages:
Breach of Contract entitles the injured party to file a suit for damages, which are the monetary compensation awarded to a person by the court. Thus, the liability for the damages may be classified as under,

- Liability to pay vindictive or exemplary damages
- Liability to pay nominal damages
- Damages for deterioration caused by delay

In case of breach of contract by one party, the other party need not perform his part of the Contract and is entitled to compensation for the loss occurred to him. Damages for breach of Contract must be such loss or damage as naturally arise, in the usual course of things or which had been reasonably supposed to be in contemplation of the parties when they made the contract, as the probable result of the breach. Any other damages are said to be remote or indirect damages, hence, cannot be claimed.

Besides claiming damages as a remedy for the breach of Contract, the following remedies are also available:
1. Recession of Contract
2. Suit upon Quantum Merit
3. Suit for Specific Performance
4. Suit for Injunction

TYPES OF QUASI-CONTRACT:

- Claim for necessaries supplied to persons incapable of contracting
- Right to recover money paid for another person
- Obligation of a person enjoying benefits of Non-gratuitous act
- Responsibility of a finder of goods
- Liability for money paid or thing delivered by mistake or under Coercion.

CONTRACT FOR SALE
Contract of Sale of Goods is a contract between buyer and seller intending to exchange property in goods for a price.
Contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. Here, two parties to a contract are willing to exchange their goods or services to gain a mutual benefit called price.

ASCERTAINMENT OF PRICE:
The price may be:
- Fixed by the Contract
- Agreed to be fixed in a manner provided by the Contract
- Determined by the Course of dealings between the parties.

Price of goods may be fixed by the Contract or may be agreed to be fixed later on in a specific manner. Stipulations as to time of delivery are usually of the essence of the contract.

Acceptance of Delivery of Goods:
- Intimates to the seller that he had accepted the goods;
- Does any act to the goods, which is inconsistent with the ownership of the seller;
- Retains the goods after the lapse of a reasonable time, without intimating to the seller that he has rejected them.

Delivery of goods denotes the voluntary transfer of possession, which may be actual or even in some constructive form and which is again subject to various rules, which help in deciding when the delivery becomes effective.

An important rule regarding passing of title in goods is that the purchaser does acquire no better title to the goods than what the seller had.

Remedies of Buyer against the Seller:
- Damages for non-delivery
- Suit for specific performance
- Suit for breach of warranty
- Suit for damages for repudiation of Contract by the seller before the due date
- Suit for interest

ESSENTIAL ELEMENTS OF PARTNERSHIP:
- Agreement
- Sharing profits of business
- Business carried on by all or any of them acting for all

MUTUAL RIGHTS AND DUTIES OF PARTNERS:
- Right to take part in the conduct of business
- Right to be consulted
- Right of access to books
- Right to remuneration
- Right to share profits
- Interest on capital
- Interest on advances
- Right to be indemnified
- Right to stop admission of a new partner
- Right to retire
- Right not to be expelled
- Right to be dissolved

*****
ADULTERY AND CRIME

By Jayashree Deshpande
From CMR Law School

In order to understand the meaning of criminal justice, one must understand the meaning of the word crime. The definition of the word crime is a debatable issue. There are many definitions given by many of the scholars. According to Blackstone “an act committed or omitted in violation of public law forbidding or commanding it”.

According to Kenny “crimes are wrongs whose sanction is punitive and in no way remissible by a private person, but remissible by crown alone, if remissible at all”.

Crime is an act which completely blows the mind of the society, in case of serious offences. Whereas an act which is less serious the impact on the society is not as much as in the case of serious ones.

In the ancient times there was no distinction between the civil wrongs and the criminal offences. So, crime is an act which harms the individual and also to some extent the society, the act is termed as CRIME. As the society is made up the individuals, crime can also be termed as a conduct against the society. In early Rome, any conduct which harmed the society, which is destructive in respect of the interests of the people and also which is punishable by the sovereign power i.e. the STATE was termed to be a crime. And when these crimes were taken to the court, it was termed as “criminal proceeding”.

“Even in gravest and least grave forms of crimes there was no legal distinction between the crimes. These crimes were generally classified as a) treasons b) felonies c) misdemeanors. For the guilt of even the slightest share was regarded as so heinous that it was needless to distinguish it from still deeper shades” ii The crime can be committed either by an individual or a group of individuals. And hence, the question as to what is liability of the offenders and who should be considered as the principal offender arose. Therefore the offenders were categorized as A) principle in the first degree. B) Principal in the second degree. C) Accessory before the fact. D) Accessory after the fact. The accessories were left free as the principle offender fled the country, had pardon or died. This system was relaxed though series of legislative enactments.

The different kinds of laws are a) Substantive laws and procedural laws b) public law and private law c) civil law and criminal law. Whereas procedural law provides for the procedure to be followed when a suit is filed before the court, substantive law defines the rights and obligation of an individual. Examples of substantive laws in India are: INDIAN PENAL CODE, LAW OF CONTRACTS, PROPERTY LAW etc. Examples of procedural laws in India are: CRIMINAL PROCEDURE CODE, CIVIL PROCEDURE CODE, LAW OF EVIDENCE etc.

ADULTERY IN OTHER COUNTRIES
It is interesting to know that in most of the western countries adultery in itself is not an offence. This has been following from 19th century. In earlier times for the persons who committed adultery were subjected to severe punishments, such as mutilation, capital punishments or with tortures. This punishment was not only for women who were indulged but also for women.

When speaking about adultery, there have been many contentions on decriminalizing the same. In most of the European nation, commission of adultery is not an offence. In other words it means, the countries have decriminalized adultery. Many argue that criminalization of sexual relations between the consenting adults is the violation of right to privacy. Even though there is decriminalization, it may have legal consequences i.e. to say it may become a ground for divorce.

**LAWS AROUND THE WORLD:**
Adultery is more of complications, as each one has different views about the same. While some say that it must be legalized and the others say in contrary to that. When we think about in depth, it becomes clear that there are many consequences of the said offence. one such act may be that, adultery may result in honor killing. There must not be any differences between a man and a woman as these both have been equally involved in the said act.  

"Provisions in penal codes often do not treat women and men equally and establish harsher rules and sanctions for women,"" As said earlier, adultery is not an offence or that it has been decriminalized in many countries and some of those countries include:

a) SOUTH KOREA. Earlier in this country adultery was an offence which attracted a punishment with description up to two years’ imprisonment. Later it revoked the said law. There has been an issue regarding the revoking the law. The supporters of the law say that it is paramount to keep the families together.

b) In European countries like, Italy, Portugal, Greece, Belgium, Switzerland, and France etc.

c) In most of the communist countries adultery was not a crime. In countries like Paraguay, Chile, Argentina Brazil, basically the Latin American countries have decriminalized adultery.

Talking about the countries which criminalizes adultery, includes:

a) Even in countries following ISLAMIC LAW, such as PAKISTAN, SAUDI ARABIA, and SOMALIA prohibits the practice of adultery which they term as “ZINA”.

b) U.S.A: adultery is still illegal across 21 states in America.

c) ARIZONA: adultery is punishable up to 30 days imprisonment.

d) FLORIDA: imprisonment up to two months and fine of $500.

e) NEW YORK: imprisonment up to three months.

f) MISSISSIPPI: “shall be fined in any sum not more than $500 each, imprisoned in the country jail not more than six months”
g) NORTH CAROLINA: can send to slammer for anywhere from six months to a year, or fine up to $500 to $1000.

ADULTERY IN INDIA
With the Supreme Court giving its verdict on triple Talaq, which was discriminative in nature, the time has come to take into view another law, which is adultery. India has also made adultery an offence and also a ground for obtaining divorce. This right has been given both to husband and wife but in case of the punishment only a man is subjected to punishment.

It is important to note the fact that even though adultery is not a serious offence in many countries it is considered to be sin and a plays a chaos in the lives of the people thereof. Indian society considers marriage to be a sacramental relationship between a man and a woman and it is believed that their relationship is knotted for seven births. In such a scenario if adultery is decriminalized or made legal the essence of the marriage would diminish. Whatever may be the extent of development in the Indian society, there are people who still believe in various customs and traditions. Such kind of an act affects the society particularly Indian society adversely.

ADULTERY AND HINDU LAW
Adultery has been defined as ‘having voluntary sexual intercourse’ with a person other that the spouse. The word “adultery” has been derived from the Latin word “adulterium” and considered to be as a sin by all religions. Under marriage laws (Amendment) 1976, the expression “living in adultery” has been dispensed with. This means to say, either of the spouse shows before the court that the spouse has been living in adultery for a continuous period, he or she can approach the court for divorce. Adultery is such an act which happens behind the four walls, and it is an arduous process to prove the same. Hence this complexity has been lessened by the amendment act in 1976, which says, even a single instance of adultery is sufficient to constitute as a ground for divorce.

The essentials to constitute adultery as a ground for divorce,

a. The sexual intercourse complained must have been taken place after the solemnization of the marriage.

b. That the sexual intercourse must be with the person who is other than the spouse of his/her.

In a case the wife was seen in a half-naked position in a hotel with a stranger, the court held that unless it is not proved beyond reasonable doubt, adultery cannot be used as ground for obtaining matrimonial relief. In this case, the court did not consider the above act to be sufficient for a person to obtain divorce.

In another case, the wife used to normally be absent from the house. Once she was found in company with others. The facts also provide that she was also found in a hotel room with those strangers. The husband filed divorce petition before the court. The court granted the decree of divorce.

ADULTERY AND MUSLIM LAW IN INDIA:
Under Muslim law, “Adultery is defined as sexual intercourse by a person whether man
or woman, with someone to whom they are not married.” It has been always said that extra-marital physical relationship between a man and a woman, diminishes the value of the marital bond and also that it has been condemned by ALLAH in religious books of Muslims the QURAN.

In Muslim law adultery is termed as “ZINA” which is an Arabic term. Under muslim law ZINA has been termed as a heinous crime and that the offenders must be punished harshly. “Do not go near adultery. Surely it is a shameful deed and evil, opening roads to other evils.” “Say, ‘Verily, my Lord has prohibited the shameful deeds, be it open or secret, sins and trespasses against the truth and reason’.

Brutal punishments are given to the offenders. According to Islamic law adulterers are stoned to death. “When adultery and promiscuous behavior becomes rampant in a nation ALLAH will expose them to His chastisement and He will send upon them such (strange) diseases that their own ancestors never heard of.” It is indeed very interesting to make a point that Islam stands for sexual purity. Islam also considers that physical contact with a person other than the spouse is regarded as sinful. For Muslims Quran is the ultimate source because people believe that it has the integrity by ALLAH.

The point to be observed is that, under Muslim law any person who is indulged in “ZINA” or the offenders are subjected to stoning (RAJM). They would be given the death by stoning. Quran prescribes flogging as a punishment. In other words trashing or belting the offenders. Another interesting point is that, Quran never mentioned the word “STONING” or “DEATH BY STONING”.

Verse24-2 says: "The woman and the man guilty of adultery or fornication flog each of them". ii 8805 says: "A married man from the tribe of Bani Aslam who had committed illegal sexual intercourse and bore witnesses four times against himself was ordered by the Prophet (s.a.s.) to be stoned to death". ii

By observing all the above points, it can be said that adultery i.e. “ZINA” is a sinful act for which the punishment are as prescribed in QURAN. Even though the marriage in a Muslims termed to be a contract, it is said to be of sanctity. People believe in the customs and traditions which had been following since decades may be with few changes. These changes may be because of development of the society. When people involve in act of adultery, their families will have to face off many issues arising as a consequence of the same.

ADULTERY AND IPC
It is indeed an interesting topic and which is a debatable issue. Adultery is referred to as a crime and is punishable under IPC, 1860. S. 497 of the code defines adultery and also prescribes the punishment for the same. S.497: “whoever has sexual intercourse with a person who is and whom he knows or has reasons to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be
punished with the imprisonment of either description of a term which may extend to five years, or with fine, or with both. In such cases the wife shall be punishable as an abettor”.

What draws the attention of this section is that, this section punishes only a man and not woman even the consent of hers has been taken. This section lays emphasis on having an extra-marital sexual-intercourse with a married woman. So it can be said that adultery is an offence committed by a third person against a husband with respect to wife. This section also points out that the adulterer must know whose wife the woman is but it is sufficient for him to have knowledge that the woman is a married woman. The section provides that wife is not punished as an abettor. From the plain reading of the section, it is evident that only a man can be proceeded and punished for the offence. Hence, the mere fact that the person is a woman she exonerated and is also immune from any kind of punishment and also that she cannot be proceeded or tried in the court.

The essential ingredients of this section are:

a. Sexual intercourse by a man with a woman, who is and whom he knows or reasons to believe or has reasons to believe to be a wife of another man;

b. The sexual intercourse must be without the consent of her husband

c. Such sexual-intercourse must not amount to rape.

The public humiliation of a woman by stripping and beating her was a punishment adopted in a village in Kharagpur district for adultery.

As talked earlier, many countries criminalize the act of adultery. In the set of those countries include INDIA. Specialty about this law is that only men are punished for the act of adultery even though the consent of the wife of is obtained. Adultery may not be a serious crime in many of the western countries, but in country like India it is considered to of a serious kind. It can be observed that the law holds the woman to be the property of her husband. In this section physical relationship with an unmarried woman or a widow is not valid, and also that, if the consent of the husband is taken, it does not amount to adultery.

One may think that what might be the intention of the framers of the code. The intention one can think about may be that, at the time of enforcement of this code, polygamy was deep rooted in the society. This section is biased on the basis of gender. When an analysis is made we can understand that, it not only discriminates against men, but also against the woman. Under this section the husband of the unfaithful wife can sue the man with whom she slept with. Woman can neither file a case against her unfaithful husband nor can she be proceeded on the grounds of adultery. She is free from all of it.

Section 198 of the Code of Criminal Procedure, 1973, says only the husband of the married woman, who had sexual intercourse with another man, could file a case against the male who indulged in the act with her.
Even though there is modernization in the society, the cases of adultery hit culture and traditions of the country. The main aim of this section is to deter the offenders by way of punishment.

In the modern times, women have grown up in all the fields and have also shown that they are not less than men around. Men and women are equal in as respects and should be treated as the same. Whether managing home affairs or handling and managing the company, or being an entrepreneur, she has been consistently doing a great job. And it is much appreciable.

Where there is a time where men and women are treated to be equal why not in the case of punishments for the crime committed by them. It was the time for judiciary, to look up to the section 497 of IPC regarding the discrimination between men and women.

CONSTITUTIONALITY OF SECTION 497 OF IPC
A case came to the court contending that there was a violation of the fundamental rights as enshrined in Art 14 and 15 of the Indian constitution.

YUSUF ABDUL AZIZ V. STATE OF BOMBAY
The appellant was prosecuted for adultery under 497 of IPC. This judgment was delivered by Bose J. the issues that came up to the court was that whether Section 497 of the IPC violative of Art 14 and 15 of the constitution of India.

The Supreme Court said that Art 14 reads out that “State shall not deny to any person equality before law and equal protection of law”. Article 15 (1) and (2) prohibit the state from discriminating any citizen on ground of any religion, race, caste, sex, place of birth or any of them.

The Supreme Court said that on reading Art 15 (3) it overlooks the above articles. This article provides that “Nothing shall in this article prevent the state from making any special provisions for women and child.” In this regard this section is a special law which is mainly made for the protection of women.

JUDGEMENT: the appeal was rejected.
This section was not violative of the fundamental rights guaranteed.

SOWMITRI VISHNU V. UOI
Even in this particular case the contention was that, this section was violative of Art 14, which provides for equality before law and equal protection of law. They also contended that there was an irrational classification of men and women. The court in its judgment said “The legislature is entitled to deal with the evil where it is felt and seen most”. The court also held that “such arguments go to the policy of the law, not to its constitutionality, unless while implementing the policy, any provision of the Constitution is infringed”....

Sub- section (2) of section 198 of CrPC provides that, for the purposes of subsection (1), “no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the Penal Code”. The important line said by the court was that it is the man who is the seducer and the
woman. It also said that it was for the legislature to take a call upon.

JUDGEMENT: held not violative of Art 14 and 15 and the petition was dismissed.

CONCLUSION:
The law of adultery is not less crime than crime of house breaking. There is always a debate on that the ADULTERY as crime should be decriminalized. In India the marriage between man and a woman is considered to be sacrament one. There is religious sentiment which is being attached to it. If at all it is being decriminalized there would not be any value to the concept of marriage and religious sentiment attached to it would be completely destroyed. Though in modern times people have less faith in the concept marriage the sacrament attached to it would remain the same.

Coming to the violation of this section, it does not only violate the rights of a man but also to that of a woman. While in respect of a man, only he can be prosecuted and not the woman with whom he had slept. In respect of a woman, a) it provides a man to prosecute the other man with whom his wife had slept, but not vice-versa. b) it does not provide a right to a woman, to prosecute her husband, with whom he had slept with c) this section does not takes into consideration the cases in which the husband had a extra-marital affair with an unmarried woman or a widow.

There is the criminalization of this offence to deter the offenders. There are punishments prescribed so as to alert the people of the society.

It is interesting to know that the supreme court has taken in to consideration about the section.

BIBLIOGRAPHY

I. BOOKS REFERRED:
1. The HOLY QURAN
2. CONSTITUTION OF INDIA by DD BASU.
3. CONSTITUTION OF INDIA by J.N PANDEY.
4. THE INDIAN PENAL CODE by MISHRA.
5. CRIMINAL PROCEDURE CODE
6. HINDU LAW by AGARWAL.
7. MAHOMEDEAN LAW by MULLA.
8. KENNY’S OUTLINE.

II. WEBSITES REFERRED:
A. https://indiankanoon.org/doc/449750/

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NON-PATENTABILITY ON THE BASIS OF ‘ORDRE PUBLIC’ AND MORALITY

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Abstract: Inventions which are contrary to public order and morality should not get patented otherwise it might be harmful to national security and could lead to the extinguishing of moral principles of the people. These moral principles and public order vary from country to country, but the question which arises is that these set code of conduct by respective countries need to be followed or the advancement of technology should be seen or it should be weighed upon on by the exercise of balance.

Introduction

States have the right to protect the public interest, and patent law is not an exception to this general principle. Based on a long established tradition in patent law (particularly in the European context), TRIPS allows (but not mandates) two possible exceptions to patentability, based on ‘ordre public’ and morality. The implementation of these exceptions, which need to be provided for under national law in order to be effective, means that a WTO Member may, in certain cases, refuse to grant a patent when it deems it necessary to protect higher public interests. The term “ordre public”, derived from French law, is not an easy term to translate into English, and therefore the original French term is used in TRIPS. It expresses concerns about matters threatening the social structures which tie a society together, i.e., matters that threaten the structure of civil society as such. “Morality” is “the degree of conformity to moral principles (especially good)”. The concept of morality is relative to the values prevailing in a society. Such values are not the same in different cultures and countries, and change over time. Some important decisions relating to patentability may depend upon the judgement about morality. It would be inadmissible that Patent office’s grant patents to any kind of invention without any consideration of morality.

There are various theories given by different persons to explain the claim and justification of patent system. Among these various theories “incentive” or the “reward theory” are the most common. To simplify patents are rewards in the form of monopolies granted to persons who has developed new, inventive and useful products or processes and in return it is expected that such rewards will foster inventors to come up with useful inventions at higher rate. However this is a debatable issue that whether patent system has fostered a higher rate of new useful inventions.

In developing countries, patent system is not just only to increase the innovation, but is attuned to take into accounts the concerns of “access” to technology most significantly in the field of pharmaceuticals and public health. Hence it is evident that the patent regime cannot be segregated from other public policies such as moral values and health. Right from start there is conflict
between the patent rights on one hand and the public policies, social values and fundamental rights on the other. The issue is to balance out between these conflicting and competing concerns and to come up with a regime that would, while promoting innovation, does not erode important issues.

**Public Order and Morality: The Concept**

The exclusions of ‘public order’ or ‘morality’ from patentability vary from country to country as the scope of application of these exclusions largely depends upon local cultures and practices. What is considered as immoral in one country can be considered as normal practice and comes under public order. The terms ‘public order’ or ‘morality’ are full of ambiguity and vary according to the practices of the particular state. Looking into the issue that whether law is a reflection of morality or the same can be divorced from the former, the positivist school of law states that the law should be separated from morality and should be based on logic and reasons. However the school of natural law argues that law reflects the morals and norms of the society and it cannot be based purely on rules of reason and logic. Accordingly the positivist will argue that the patent shall be granted as long as the invention in novel, inventive and useful and morality should have no role to play in the grant of the patent. On the other hand school of natural law will present opposite views that an invention which offends society’s morals should not be granted patents reason being the natural schools fundamentals principle that the law is a reflection of morals of the society and something which offends morality of society cannot be given a legal character.

There is no universally accepted notion of ordre public. Member countries have some flexibility to define which situations are covered, depending upon their own social and cultural values. Under the TRIPS agreement also, ordre public is one of the recognised grounds for exceptions from patentability.

Article 27.2 of TRIPs states that:

“Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law”.

The words “ordre public” and morality exclusions as provided in Art. 27.2 are not easy to define. According to one interpretation ordre public means “expresses concerns about matters threatening the social structures which tie a society together i.e. matters that threaten the structure of civil society as such” and morality means “degree of conformity of an idea to moral principles”. Both ordre public and morality are reflective of the prevailing principles, socio-cultural and religious values of member countries thus it is not possible to provide objective definition of the same.

As we can see there is no specified definition of public order and morality and...
there can’t be one because it is such a thing which is wide open to the perception of people of country and it totally depends upon on the nature of a country, order and moralities are such a thing which vary from country to country as each countries need, demands, culture, perspective is different and so the people is different. One thing might be moral in one country and immoral in another so there can’t be any defined meaning of this subject matter.

Even though we specify the meaning of public order and morality for all but we can understand the meaning of same as the basic understanding of these term will be same for all. And what I understood from public order is anything which is concerning the public as a whole, normal standards and operations of society. Morality could be understood as a system of moral conduct, anything which people follows and they have belief in. Anything in contravention of which might hurt the sentiments of the people. That’s why they have categorised the ideas in good and bad conduct.

Where some standards, conduct, principles, order has already been set by the people of any society and they are following it without any logic or reason or their might be a valid reason for such action but a thing need not only be against the law for raising an issue, even when it affects the beliefs, sentiments and already set principles of the people that could also raise a problem be it in any area of subject.

Patent law also deal with such issue, where a patent is given on any kind of invention where it fulfils the criteria of novelty, non-obviousness and industrial application but it could also be stopped from being patent even after fulfilling such required conditions where it contravenes the public order and morality. No invention could be as important if it affects the already set standards and mode of conduct of the people. Not only national law, it is recognised by international law as well. As we have already seen above that it has been included in TRIPs as well that inventions will not get patent exploitation of which is necessary to protect ordre public or morality.

**Practice at the European Patent Office**

The EP does not provide definition of ‘ordre public’ or morality. The board of Appeal has indicated that they are to be construed narrowly. ‘Order public’ should be taken to mean the protection of public security and the physical integrity of individuals as part of society. The concept encompasses the protection of the environment. As for morality, the board said that in the context of Art. 53(a) morality is founded on the totality of the accepted norms which are deeply rooted in European society and civilization. Neither ‘order public’ nor morality is susceptible of being determined by surveys or opinion polls.

The Paris convention provided that the patentability of an invention must not be affected by the fact that a particular patented product (or product must be obtained by the process) is subject to restrictions or limitations resulting from domestic law. Both the Paris convention and TRIPS agreement only prohibit excluding patentability on the grounds that a particular invention is contrary to domestic law; so
where something contravenes international law it may be non-patentable on the ground of order public and morality\textsuperscript{ii}. The words ordre public are intended to convey the fact that an invention contrary to national law would not necessarily be contrary to ordre public. To be excluded the invention must offend a fundamental principle of society. The concept of morality was purposively not left to contracting states; rather a centralised view was to be taken by the EPO; although it was acknowledged that this would lead to a concept at variance with that adopted in contracting states\textsuperscript{ii}.

A European patent application cannot contain matter which is contrary to ordre public and where it does this need not be published so as to ensure that the ordre public exclusion is not illusionary.

The EPC provides at art 53(a) that\textsuperscript{ii}:

“Inventions the commercial exploitation of which would be contrary to ordre public” or morality such exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the contracting states.”

The meaning of morality was first considered in EU in the 1989 Onco-mouse decision\textsuperscript{ii} in that case, the question of patentability of mice had come up consideration that had been genetically modified so that they develop cancer; a result that the applicants hoped would be useful in cancer research for humans. After its initial rejection, the Board of Appeal expressed the view that careful weighing up of the suffering of animals and possible risks to the environment should be weighed against the invention useful to mankind. Applying this utilitarian balancing act, on remission of the case, the Examining division held that the subject matter could be patented\textsuperscript{ii}. In US it was earlier granted patent.

Developments in technology have associated risks. Genomes are discovered by research into disease. Patent for such inventions can raise legal, ethical and moral issues. The issue of patenting of genomes has become highly controversial in the context of application for patenting human genomes.

This exception is not related to whether the patenting of the invention is contrary to ordre public or morality, what is important is its exploitation. In plant genetic systems/glutamine synthetase inhibitors\textsuperscript{ii} the invention related to the genetic engineering of plants and seeds in order to make them herbicide resistant. The opponents argued that the invention was not patentable by reason of article 53(a) EPC. It is generally accepted that the concept of ordre public encompasses also the protection of the environment.

In the board’s judgement, none of the claims of the patent on suit refer to the subject matter which related to a misuse or destruction use of plant biotechnological techniques because they concern activities and products, which cannot be considered to be wrong as such in the light of conventionally accepted standards of conduct of European culture. Alleged environmental consequences due to these activities will have to be considered against the background of the ordre public issue\textsuperscript{ii}.
On this basis it was concluded that where the exploitation of the invention was likely to prejudice the environment, the invention would be excluded from patentability under article 53(a). The board at the same time rejected that a balancing exercise was not the only way of patentability, while holding that although the morality provision is to be construed, it should not be disregarded. This is the case even if it is difficult to judge, whether the claimed subject matter is contrary to ordre public or morality.

The fact that exploiting an invention is unlawful in a contracting state is immaterial to determining whether it is contrary to morality or ordre public. The exclusion should be narrowly construed and should reflect the current views of society in relation to morality and technology. The threshold has even been expressed for morality as something which is universally regarded as outrageous. Such views, however, cannot be obtained from opinion polls or the like as they do not reflect the right standard.

The rule under the Patent Act 1977 is that a patent shall not be granted for an invention the commercial exploitation of which would be contrary to public policy or morality. The exception is restricted to the exploitation of the invention and no longer includes publication, but it is reasonable to the invention and no longer includes publication of an immoral invention would lead someone to exploit it.

The ethical status of biotechnology inventions was addressed by EU biotechnology directive [also to conform to TRIPS agreement article 27(2)]. Article 6(1) of directive, taking a middle ground affirms the relevance of ethical considerations in so far as it provides that inventions shall be unpatentable where their commercial exploitation would be contrary to order or morality. It however adds that exploitation shall not be considered to be contrary to morality because it is prohibited by law or regulation.

Article 6(2) of the above directive however gives specific examples of types of inventions not patentable. The excluded inventions are:

- Process for cloning human beings
- Process for modifying the germ line genetic identity of human beings
- Use of human embryos for industrial or commercial purposes
- Processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial benefit to man or animal and also animals resulting from such processes.

The biotechnology directive has been incorporated into the EPC and it applies to all patents and for this purpose the directive and its recitals can be used for the interpretation of the convention. Where an invention offends art 6(2) of the directive as incorporated into the convention, it is automatically contrary to art 53(a). The list in art 6(2) is only exemplary, rather than exhaustive, therefore where a biotechnological invention is not that list it is necessary to go on and consider art 53(a) substantially.
R. v. Leland Stanford/modified animal\textsuperscript{ii} the patent for an immune-compromised chimeric mouse was upheld and the EPO ruled that the controversial nature of the technology did not act as a bar to patenting. In the opposition proceedings, the patent was amended to exclude human or animal embryonic cells. The case involved an immune comprised mouse that had been implanted with human tissue. The production technique involved the use of cells and tissues from aborted foetuses or children below the age of three years to create an animal-human chimera. The claim extended to any “chimeric non-human mammalian host” comprising certain stated elements. The case was fought on issues of novelty, inventive step, sufficiency of disclosure and ordre public and morality.

On the issue of ordre public and morality, the opposition division carried out the balancing test and noted that the claimed invention provided the only animal model for HIV-1 infection and could be used to test potential anti-AIDS therapies before human trials were undertaken. Other benefits included the promise of a supply of human cells and organs of transplant in the future. The opposition division dismissed the hypothetical potential risks associated with the invention. In order for risks to be taken into account, they had to be conclusively documented hazards and not just possibilities. Further the opposition division noted that “as long as claimed invention has a legitimate use, it cannot be the role of the EPO to act a moral censor and invite the provisions of morality\textsuperscript{ii}.

The Indian Position

An invention should not be excluded as being not patentable merely because a technology is dangerous. There is a general perception that new technologies will involve new risks. In determining the merit of new technology there must be a careful weighing up of the risks vis-a-vis positive aspects. The issue of morality will come into play in cases of new technology involving higher life forms where not only should the risk be considered, but also the possible harm which is done to such higher life forms. As section 3 excludes a number of inventions as being not patentable, the question of morality has to be determined for each invention before the grant. The invention has to be examined, and the possible detrimental effects and risks have to be weighed and balanced against the merits and advantages promised\textsuperscript{ii}.

Patent eligibility means the subject matter that is open to patenting. Patents are granted to inventions that satisfy the statutory requirements of novelty, inventive step and industrial application. The Indian patents act corresponds to the negative method of excluding the categories of invention that are not patent eligible. The Indian Patent Act, 1970 contains a non-exhaustive list of things which shall not be regarded as inventions\textsuperscript{ii}.

Section 3(b) states that:

“an invention the primary or intended use or commercial exploitation of which could be contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment”.
For better understanding some of the example could be an apparatus for injecting opium into human body for faster absorption would not be patentable as it would affect human health. Furthermore, a machine for polluting air would not be patentable as it would be prejudicial to the environment. Moreover, a camera that can capture naked pictures of dressed persons might also not be patentable because it would be contrary to public order and morality.

This section has not been invoked by the patent office too often, except in the cases pertaining to public health concerns; however, one of the recently decided applications i.e., Application no. 1375/DELNP/2009 was refused by the patent office on the basis of section 3(b) catches an obvious attention. The invention was related to a method and device for controlling the position of numbering wheels of a numbering device as used in printing presses for carrying out numbering of printed documents, especially bank notes and the like securities. According to the Applicant, a particularity of this numbering device resides in that each numbering wheel of the numbering device is driven into rotation by its own independent driving mechanism and can be set to any desired position independently from the other numbering wheels.

The application had independent claims on the device and the corresponding method respectively. Subsequently, the examination report/s raised objection under section 3(b) and the novelty and inventive step of the invention in view of few patent prior arts. The Controller majorly refused to allow the patent for grant in view of the restriction posed by section 3(b).

The Controller observed that the invention used in printing presses for carrying out numbering of printed documents, especially bank notes and the like securities could be contrary to public order or morality as per section 3(b). It seems that the Controller has taken a narrow view by dismissing the said application on the basis of section 3(b).

It is noticeable that the same patent is granted in Europe, Japan and China. On the face of it, the grant of patent would not imply that the Applicant will make use of the said invention for wrongful purposes such as printing currency, bank securities without authorization. In any case such use would attract penalties under the Indian Penal code and thereby granting patent may have its own consequences. Nevertheless, it would be difficult to see advancement in technology if the protection scheme falls short of taking care of the technology in such sensitive areas.

In India, for biotechnology inventions, which describe biological material in the specification, the law provides for deposit of such biological materials at a recognized depository. The manual of patent practice and procedure requires the invention to be described completely in the specification to enable a person skilled in the art to be able to carry out the invention by reading the specification. However, there are no cases in India that talk about differing written description or enablement standards for biotechnology inventions. The Draft Manual of Patent Procedure, 2010 provides that Any
biological material and method of making the same which is capable of causing serious prejudice to human, animal or plant lives or health or to the environment including the use of those that would be contrary to public order and morality are not patentable. It further provides that the processes for cloning human beings or animals, processes for modifying the germ line, genetic identity of human beings or animals, uses of human or animal embryos for any purpose are not patentable as they are against public order and morality. The Indian Patent Law has strong prohibitions against patenting of biotechnology inventions based on morality and public order.

**Conclusion**

Public order, in simple sense can be understood as social structure of society or protection of public security and morality as we all know are moral principles or accepted norms by the people. TRIPS art 27.1, EPC art 53(a) and sec 3(b) of Indian patent Act all have the same concept which states that any invention, commercial exploitation of which is in contravention of public order and morality is not patentable. Paris convention also states that any invention should not affect the laws of any nation. European Appeal Board even said that balancing exercise cannot be the way of patententability where it is prejudice to environment or conduct of European culture.

Any product or process which could be commercially exploited and is against public order and morality should not get patented as it is against the will of the people and might harm the feelings, beliefs and sentiments of the people. Such as patent for machine which could counterfeit the currency or any such goggles which could see a person naked. These things should straight away be rejected. But now the question arises whether such things which is beneficial to the nation but against the public order and morality should get patented or not, as what have discussed as balancing out exercise.

In my opinion even though the invention is advancement of technology but it should always be weighed on the machine of public order and morality as nothing is as important as the moral principles of the people and set standards of the society.
A CRITICAL ANALYSIS ON BOOK CENSORSHIP IN INDIA

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Abstract
This article focuses on a specific type of censorship that is imposed on publishers, authors, writer, poet, philosophers, lyricist or any person whose work is associated with writing termed as “Book Censorship”. Book Censorship is the way by which government or people duly authorized under it have the power to ban or limit the contents of books, articles or any document in order to stop that piece of written material spread across the country. There can be many reasons to ban such content which include religious hurt to community, sedition, against Hinduism or political leader or any political reason etc. The role of government, political parties and religious groups in book censorship and the impact they have brought to the persons who are censoring the books. The author also checked whether such censoring is encroaching the rights of the citizens of India. The Impact of the censoring on the students through the censoring of the material form their academic books is seen. Many cases have been analyzed to see the effect in the light of the judicial provisions and the facts of the case. Reasonableness and justness of the censoring of the material is checked. This Article deals with the deep analysis of several cases, decisions, judgments, appeals, case laws, judicial provisions, sections which will answer several questions which includes, Is there a need to ban books as people these days access such content online very easily using technology and that content becomes viral, Whether our laws and judicial system are structured properly to deal with such disputes, What are the impact of such ban on publishers and people. This article will put light on such questions and will cover each and every aspect related to Book Censorship which will be very beneficial in order to get a horizontal and vertical analysis of the topic. Also there are several argumentative questions that have appeared during the course of this research which points out several loopholes in existing system.

Keywords: Censorship, Book Censorship, government, books, authors

I. Introduction
Books are considered to be man’s best friend. From the very beginning when a child starts his school journey, he is introduced with this new friend, to know a whole new world. Books play a very significant role in overall development of person’s personality. Books are packed with knowledge, values and morals which can enhance the imagination, cognitive thinking and vocabulary building. Book is a platform where different authors present their views, thoughts, ideas and beliefs by using their fundamental right of freedom of speech and expression. Books are the most trusted source of knowledge by parents for their children so, the content of book should be properly perpetuated by also giving author his space of creativity.
India is the country of several religions, traditions, customs, cultures and practices where people are divided into different groups on the basis of their culture and tradition. This is the main reason why Indian government make laws in order to prevent the conflicts and arguments between different religious communities and to achieve unity in diversity. Indian constitution was made after the independence to lay down fundamental rights and duties of citizens of India and powers, duties and structure of Government.

One of the most precious right given to the citizens of India is “right to freedom of speech and expression”. People started misusing this right for defaming political leaders, breach terms of national security, do religious hurt, hate speech, child pornography and spread other obscene material across the nation. Here comes the role of Censorship to control and limit such content which is objectionable and harmful for the society.

This paper strictly focuses towards censoring of the literary work which is known as books censorship. In India, the concept of the books censorship was taken from the Britishers which shows till that time there is no restriction on literary work in India. The idea of books censorship limits the freedom of the authors and put them inside the umbrella of Indian laws if their thoughts and views move out of the umbrella their book will be censored to maintain public order and morality.

2. Judicial provisions related to censorship

Government get its power to censor the content of any book from section 95 of Code of Criminal Procedure, 1973 by which Government can forfeit the copies of any newspaper, magazine, book or any document which appears to violate the sections of Indian Penal Code, 1860 which includes section 124A (Sedition), section 153A or 153B (Communal or Class Disharmony), section 295A (Insulting Religious Beliefs). The remedy of the section 95 is given under section 96 by which they can approach to High Court to set aside declaration of forfeiture which is very time consuming and expensive. Also, books cannot enter in the market until the High Court removes the ban, which results in huge loss during the proceedings.

Section 20 of the Indian Post Office Act, 1898 prohibits the transmission of anything indecent through book. Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986 which prohibits publication or sending by post of books containing indecent representation of women. Section 292 of the Indian Penal Code, 1860 deals with the obscenity stating that selling, lets to hire, publicly circulate or distribute any book which contains any obscene material is prohibited unless it is justified under section 262 of the Indian Penal Code, 1860.

3. Impacts of Book Censorship

3.1 How Book Censorship affects Publishing Houses and Authors:
Publishers and Authors often becomes prey to government authorities which impose ban on the content and become predators. After censoring content of the book, without giving a reasonable
reason to do so, it cannot be introduced in market this results in huge loss to publishers and hurt the feelings of author that his piece of art is getting defamed instead of getting appreciated. For removing such ban or forfeiture, authors have to approach in High Court and the proceedings are costly and time consuming.

Very unfortunate thing happened with Priyanka Pathak Narain’s new book on Baba Ramdev, titled “Godman to Tycoon” in which Karkardooma’s civil judge granted injunction to ban this book without hearing the writer or publisher. Judge presume the ground of defamation of Baba Ramdev without even hearing the other party and banned the book using section 95 of Code of Criminal Procedure, 1973. Later High Court of Delhi Considered the Civil Judge’s decision to be unfortunate and wrong as the provision of freedom of speech and expression have to be presumed and taken into account under article 19(1)(a) of the constitution. Jharkhand’s government imposed ban on the Sahitya Akademi awardee Hansda Sowvendra Shekhar’s 2015 book, “The Adivasi Will Not Dance”, for portraying the Santhal community in bad light. The people who protested against the book said the book had insulted Santhal woman. Book censorship in India is very easy as Indian legal structure is in such a way that achieving censorship through law is an almost costless enterprise for anyone inclined to try and also there is no such strong remedy for the counteract available in the interest of publishers.

3.2 Banning of books directly affectstheknowledgeofthepersonwhoisunabletoread

If we talk of new budding minds which are students, banning the books or protecting them from reading certain kinds of material in anyway strictstheirknowledgeandpushsthemtotake ethicsinformationfrom Internet. Internet the most informed source but it is the most misleading source of information as well. Searching such topics on the internet might infect their innocent minds. On the other hand if such subjects are taught in the classroom they could have a better understanding of such topic. By censoring the books, we are stopping the students to learn about the sensitive and controversial topics in the safe environment like classroom.

3.3 Other Negative Impacts

- Asking right questions on wrong things is often taken as obscene content which is subjected to ban, for example Nirbhaya’s rapist on 16th December gave a statement “death of rape victim could be avoided if she would have cooperated, hence she is also responsible for her own death”. Such pungent comment shows the mindset of rapists, it needs to be presented in front of society. It will make judicial system to understand mindset while framing antirape laws, criminal psychologists to determine the behavior of rape criminals.

- The content which shows the bad face of the society is necessary, to show a mirror to
the society and continuously cleanses it from deformities. If such content is banned then it will lead to underdevelopment and unawareness of the society.

- By banning the books, documentaries and articles which talks about conflicting statements given by famous gurus, politicians such as suggesting women to wear full clothes or living in four walls clearly shows patriarchal mindset of our society. So by banning such kind of presentation we can’t change the ideology of these people but instead by showing this they can be made to realize that their thinking is in same tune of rapists and other criminals.

- After getting a notice of ban by the state government under section 95 of Code of Criminal Procedure, 1973, the aggrieved publication seeks remedy from High Court under section 96 of Code of Criminal Procedure, 1973 and remove such ban. But this whole process consumes the time of Courts as well as of writing houses.

4. Some famous cases which deals with the irrelevant ban on contents of books, essays, papers and articles:

In the famous case of “Dwikhandita” written by a Bangladesh writer, Taslima Nasreen in which the book was banned by using the power of section 95ii of Code of Criminal Procedure, 1973 as it has two paragraphs that "promote, or attempt to promote, enmity between different groups on grounds of religion, or disharmony, or feeling of enmity, hatred or illwill between different religious groups which is prohibited under section 153A of Indian Penal Codeii. But later it was observed that the writer herself is Muslim so the writer cannot be held guilty of promoting hatred or enmity between different groups on grounds of religion. Also court did not gave the opportunity to be heard to the author and injunction made was partial in the context of law. Our law is taken from Common lawii from British law where they give opportunity to both the parties to be heard then give the orders to ban but in India authors and publishers are not given opportunity to be heard.ii

In 2008, A K Ramanujan’s Collected Essays was attacked by the Hindu Right because of a particular chapter in it, Delhi University just gave in. Against the will of professors, the book was scratched off from the curriculum by considering it as obsolete. Bombay University also made a shameful move when it reneged on its duty and pulled a Rohinton Mistry book out of its reading list. It was an act of betrayal by administrative authority. Later Ramanujan won the legal battle but his book was unavailable for a long time which result in great loss and he have to tackle the time consuming proceedings, which is very frustrating for authors. There was a time when the first four volumes of the Harry Potter series were banned in several American states for they purportedly supported witchcraft. In India, we are still marching to an ancient drum. While other democracies are stepping out to protect their authors, we are going in the opposite direction and promoting the protesters.

5. Some books that are banned in India or once faced such ban:

The most famous movie “The Da Vinci Code” was released across the world and becomes the global hit. Strange thing is that this movie was based on a novel “The Da
“Vinci Code” by Dan Brown which was banned by the government of Nagaland for allegedly containing blasphemous remarks about Jesus.

The book “Mysterious India” by Moki Singh cannot be imported into India. The book purportedly contained stereotypes. Also the most controversial book “Who killed Gandhi” by Lourenço de Salvador is also banned and cannot be imported to India on the ground that this book is inflammatory and ill researched.

There were several books which were banned due to factual errors in it which includes “Early Islam”, “Nehru: A Political Biography” and many more. There are several books which are specially prohibited to be imported in India such as “Ceasefire” by Agha Babar, “Khak or Khoon” by Nusseim Hajazi, “Chandramohini”, “Nepal” by Toni Hagen, “Ayesha” by Kurt Frishler and many more which are originally in Urdu are specially restricted to be in India.

Most famous author’s content were also banned at some point like Subramania Bharati’s short story “Aaril Oru Pangu” was banned and at that time it was self-published in three anas and this was the first short story in Tamil Language. Arundhati Roy’s book “The God of Small Things” was also challenged by a lawyer named Sabu Thomas from Kerala claiming that chapter 21 of this book contains obscene material. The never ending list of such banned or challenged books goes on.

6. Things you can do with the banned book

- Reading of the books
  The Indian laws are silent upon whether a banned book can be read so we can read the banned books. But still in there are several books threat the Indians are not allowed to read.

- Possession of the books
  Again there in no where written that a banned book cannot be possessed by any person which makes the possession totally legal.

- Printing or publishing of banned books
  The publication of the books containing which is punishable under section 124A or section 153A or section 153B or section 292 or section 293 or section 295A of the Indian Penal Code as given under the section 95 of the Cr.P.C. is prohibited.

- Downloading the banned books
  Downloading any book from the internet cause the interference of Information technology act which overrides all the acts when talking about the work done over the internet and in this act it is no where written that the person cannot download a banned book.

- Export or import of Banned books
  The export of banned books is not restricted by any law. According section 11 of the customs act, 1962 which prohibits the export of certain things, there is no where written in it about the prohibition of banning books being exported. But according to the same law import is restricted to protect “the maintenance of the security of India” and “the maintenance of public order.

Conclusion:
Despite of many benefits of Book Censorship which includes limiting the obscene and objectionable content to spread across the people, there are many
deprivations and harms of Book Censorship which affects the society one or the other way. As we know people of India are very serious about their religion, if a little statement is made over some people or thing related to culture, religion or tradition. People start protesting against it and thousands of voices are raised in order to ban such content and this scenario can take a very violent face which can disturb the internal peace and intense the environment. In order to avoid such situation, there was introduction of “Censorship” to limit the content which causes religious hurt or spread the hatred amongst the society. Book Censorship is very fruitful in order to prevent the obscene and politically wrong material spread across the society and influence the society in a wrong way. But from this research few things emerges out which is very disappointing from the context of justice. These days’ people are protesting more for such matters, where a little statement is made on religion or tradition. In a country of more than billion people which are divided in different religion, customs and traditions. Some people have a very narrow mindset, if right contents are made on wrong things then, people take this as an inflammatory statement and start doing riots and uproars. There are more serious matters in which there is a burning need to raise voice, such as rape cases, children getting stabbed, harassment, sexual assault and other serious offenses. These days several artworks and contents are at controversies of banning where people take these things so serious that they start doing violent public disturbance such as for movie “Padmavati”. Where people and Radicals are protecting a queen they have never seen and attacking a movie they have not yet seen. If such content is banned then it will lead to the underdevelopment and unawareness of the society.

In recent years we have seen censoring of books by governments of India on the pretext of hurting sentiments of certain section of population or defaming the country. Such bans are not even mentioned in the restrictions of article 19(1) (a) and still judges give injunction order of ban without giving opportunity of being heard to publishers and authors. Judges and other legal authorities ban books without getting the details and idea of the content, by misusing their extreme powers under sec 95 of Code of Criminal Procedure, 1973. These bans and prohibition are not justified from the context of law and there is a need to introduce new laws related to Book Censorship in order to stop exploitation, injustice which publishers and authors have to bear which results in huge loss of money, reputation and time. So there should be introduction of strict provisions in order to inhibit the power of section 95 of Code of Criminal Procedure, 1973, which accord State enormous powers. If it “appears” to state that the written content is objectionable merely on any ground then, they can order to forfeit the copies of such content. Also judges who decide such case should have knowledge of literature, writing, compositions, literary texts etc. so that they can analyze every aspect of the case and come up with the most appropriate decision by keeping provisions of article 19(1) (a) in mind. Currently, existing structure of our judicial system have flaws and loopholes which are already discussed in the pretext of
this article and can be conquered by making changes which will surely benefit the society, authors, publishers as well as such authorities related to censorship.

References
6. Indian Penal Code, 1860

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MULTI – TIER ARBITRATION
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INTRODUCTION

Alternative Dispute Resolution (ADR) is the process where parties in a dispute come to a compromise or settle their dispute without going to court with the help of a neutral third party. ADR is also known as external dispute resolution as parties settle their dispute without actually going to courts. The mechanism of ADR provides for an additional forum in settling of a dispute. Certain ADR techniques are well established and frequently used in today but then also ADR has no fixed definition and no jurist is able to give a proper explanation to what actually ADR is. ADR includes a wide range of processes, all with something in common except that each is an alternative to full-blown litigation. The definition of ADR is constantly expanding to include new techniques daily.

ADR is a bouquet that consists of various techniques being utilized to determine disputes involving a structural process with third party intrusion. This process is an alternative to formal justice system purported to be conducted by “real human beings” rather than lawyers. In reality, less than 5% of all lawsuits filed go for trial, the other 95% are settled or otherwise concluded before trial. Thus, it would be more accurate to say that now litigation has become an alternative and ADR is the norm.

Back to the year 1980, experts and executives found ADR as a sensible, cost-effective, and an expeditious way to keep corporations out of court and away from the kind of litigation that devastates winners almost as much as losers because of the delay in the judgements and expenses on the litigation. Now, more than 600 large corporations have adopted the ADR policy statement suggested by the Centre for Public Resources, and many of these companies reported considerable savings in time and money. In other countries, particularly in USA the settlement rate have increased to 94%.

The Law Commission of India in its 14th report, suggested devising of ways and means to make sure that justice should be uncomplicated, swift, easy on the pockets of the people, effectual and substantial. In its 77th report, Law Commission observed that Indian society is an agrarian society and is not refined enough to comprehend the technical and awkward procedures pursued by the Indian courts. We would like to quote from report prepared by Justice Rankin, in which he said that:

“Unless a Court can start with a reasonably clear slate improvement of methods is likely to tantalize only. The existence of mass of arrears takes the heart, out of a Presiding Judge. Till such arrears exist, there will be temptation to which many Presiding Officers succumb, to hold back the heavier contested suits and devote their attention to the lighter ones. The turnout of decisions in contested suits is thus maintained somewhere near the figure of institution,
while the real difficult work is pushed into the background.”

This report appear to be prepared only yesterday, but in fact it was prepared way back in 1925. The situation has yet not changed over the last 90 years and that is why some non-conventional methods have to be adopted to tackle the huge pendency of cases and one of these methods is ADR. The judicial system of India is bursting out at the seams and may collapse anytime unless the authority takes up an immediate remedial measures are adopted not only by the judiciary but also by the legislature and the executive of the country. ADR was at one point of time considered to be a voluntary act on the part of the parties which has now obtained a statutory recognition in terms of Code of Civil Procedure under section 89, Arbitration and Conciliation Act, 1996, Legal Services Authority Act, 1987 (ii) and Legal Services Authority Amendment Act, 2002.

DIFFERENT METHODS UNDER ADR

In India there are several grades of ADR, some of them are as follows:

1. **Arbitration:**
   In this mechanism the parties agree to voluntarily participate for the resolution of the conflict through a third impartial party known as arbitrator, which gives a decision which would be binding on the parties in accordance with the agreement. The function of an arbitrator is similar to that of judge who is an expert in his own field who gives a decision in accordance with the certain rules mentioned in the arbitration act.

   Arbitration is further classified into two types:
   (i) **Ad hoc arbitration** - It does not include the influence of any institution and holds its proceeding completely on the basis of the rules made by the parties. The terms of the proceeding are completely discretionary.

   (ii) **Permanent institution arbitration** - In this type, a permanent institutions organise arbitration, which is more likely to be governed by the rules made by such institutions involved. This type of arbitration is more formal.

2. **Mediation:**
   In this form of ADR, a neutral third party resolves conflict between two parties which agree voluntarily to reach a settlement. This involves determination of interests which hold importance to the parties involved, if a dispute is settled then an attempt would be made to satisfy the interests of both the parties, which would be acceptable to both. It is a flexible, non-binding procedure, in which parties mutually agree for the settlement of a dispute. The mediators are impartial they
help in giving a decision or guidance to the parties involved. The process involves confidentiality wherein parties in the mediation are not allowed to expose information, not even in court or in other legal institution.

Typically, this process is limited to civil cases which can include non-violent criminal acts such as harassment which can be resolved through mediation between the concerned parties.

3. Conciliation:
It is a process in which the two conflicting parties are brought to a compromise. This process is similar to mediation, it is flexible, non-binding on the parties. The process involves a neutral third party named conciliator which asks the parties to make a list of the things they want in sequence with their line of preference. Then the conciliator goes back and forth asking each party to give on the objectives one at a time. The parties rarely have same priority sequence and sometime even some priorities are not mentioned in the list. In this way the conciliator can quickly attain its objectives and build an atmosphere of trust.

Like mediation process, the decision to comply with the settlement is with the parties only. It is not obligatory.

4. Negotiation:
Negotiation has been defined as “the process through which the needs of the parties are satisfied while someone else control their wants”. It is a non-binding process which involves interaction of the disputing parties in order to negotiate a settlement between them. This process requires a co-operative attitude, objectivity and willingness among both the parties in order to reach to a consensus. In this process the parties have choice they can either appoint a team of negotiators or a single negotiator.

These are some methods under ADR which parties can adopt while settling their disputes. Nowadays these methods are more prevalent, and people prefer these more over the actual judicial proceedings.

MULTI-TIER ARBITRATION
At least two different forms of dispute resolution procedures used, which are called ‘multi-tier’ dispute resolution are the arbitration Clauses. These clauses are envisaged for an escalation of the dispute. They are also known as ‘escalation clauses’ as the dispute escalates in complexity and formality of procedure from one stage to another and ultimately reaches the final stage of arbitration. Multi-tier arbitration clauses are generally of two kinds: parties to an arbitration agreement may decide that, prior to submitting any dispute to arbitration, they want to attempt an amicable settlement of the matter (pre-arbitration clauses) or post arbitration proceedings the clause should provide for second tier of arbitration proceedings (post-arbitration clauses)[2]. It is totally based on parties to the agreement which form of multi-tier arbitration they want to go for.

These include set of conditions which has to be fulfilled by the parties before going to arbitration. This has number of benefits it
compels the parties to sit and discuss their point of interests and can prevent adversely consequence coming out of arbitration which can harm their relationship. They are given chances at different stages of arbitration before going to actual courts. The benefit it beholds is that it would save time and money of the parties arising from indulging in litigation or arbitration if executed properly. 

On the other hand a poorly drafted clause can prolong the needed arbitration and increase the cost on such conflict. So it is very important to frame the clauses of arbitration properly.

Conditions necessary for enforceability of pre-arbitral steps in a multi-tiered clause

The enforceability of the pre-arbitral steps in a multi-tiered dispute resolution clause depends on the language of the clause as well as the conduct of the parties to the agreement.

Factors on which it depends are as follows:

a. Language of the clause

It is very important for the parties to frame the arbitration clause properly and these clauses should be framed with a proper mechanism. Language used for the clause should be clear and simple and both the parties must agree to it.

In Sushil Kumar Sharma v. Union of India (AIR 1999 Ker 440), it was observed by the Court that “Nature of clause in an agreement has to be seen. If the clause is mandatory with regard to the steps preceding arbitration, then the procedure ought to be followed, no party can go against the mentioned procedure. Without having followed the steps, the Arbitral Tribunal does not have jurisdiction to entertain it.”

b. Conduct of the parties

In Visa International Ltd. v. Continental Resources (USA) Ltd ((2009) 2 SCC 55), the Hon’ble Supreme Court of India had the occasion to reflect upon a clause in the agreement, which contemplated a pre-arbitral step before the invocation of arbitration. The agreement between the parties in this case had a multi-tiered dispute resolution clause which reads as follows, 

Any dispute arising out of this agreement and which cannot be settled amicably shall be finally settled in accordance with the Arbitration and Conciliation Act, 1996.”

The Court observed that the precondition for referring any dispute to arbitration in the agreement between the parties was that the dispute should not be able to be “settled amicably” and not otherwise. It was contended on behalf of the counsel for the respondent, that in order for a dispute to be endeavoured to be settled amicably, there must be formal conciliation between the parties and that the agreement was contingent upon the failure of such conciliation. He further contended that since the applicant had not formally initiated conciliation proceedings, therefore the application for the appointment of arbitrator was premature and thus it ought to be dismissed according to the clauses of the agreement. The Supreme Court observed that there were several letters and correspondences which had been exchanged between the parties and these correspondences ranged over a period of months. In the view of the Court, these
clearly established that the dispute between the parties could not have been amicably settled. In view of the same, the case was ripe for reference to arbitration and thus the request for appointment of arbitrator was duly granted.

From this case, we can conclude that for the multi-tier arbitration conduct of the parties is kept in mind.

c. Time limits
It should be ensured that the provision allows for the parties to commence litigation and/or arbitration within a specified period of time. For example, an open-ended obligation to resolve the dispute through mediation before the parties are entitled to refer the dispute to arbitration is unlikely to be enforceable.

MULTI-TIER ARBITRATION IN INDIA

In India the whole system of ADR is not fully matured as in western countries, due to which the Indian lawyers do not come across to multi-tier arbitration cases, but a rapid change can be seen in this field and courts have also recognised it in cases in the last decade. It can be said that it is one of the contemporary developments in India.

The supreme court of India, after a long drawn dispute has firmly established that multi-tier arbitration clauses in an agreement are valid and not against public policy. If parties to an agreement agree to this form of litigation then judicial institutions are at no lining to stop them from doing so. The landmark judgment in this regard is

Case: Hindustan copper limited vs Centro trade Minerals and Metals (AIR 2005 Cal 133)[3]

Judgment was given by, the honourable Mr. Justice Ajoy Nath Ray & the honourable Mr. Justice Arun Kumar Mitra

This case has an extensive history and it begun when the parties entered into a contract for sale of 15,500 DMT copper concentrate and to be delivered at Kandla Port in the State of Gujarat in two separate consignments. The said goods were ultimately required to be used at the Khetri Plant of HCL situated in the State of Rajasthan. The seller as mentioned in the contract was required to submit a quality certificate from an internationally reputed assayer, mutually acceptable to the parties. After the consignments were delivered, the payments therefore had been made. However, a dispute arose between the parties as regard with the dry weight of concentrate copper.

According to the clause 14 of the contract which contains an arbitration agreement which reads as under:

"All disputes or differences whatsoever arising between the parties out of, or relating to, the construction, meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the rules of
conciliation and arbitration of the International Chamber of Commerce in effect on the date hereof and the results of this second arbitration will be binding on both the parties. Judgment upon the award may be entered in any court in jurisdiction."

Respondent invoked the arbitration clause mentioned in the agreement. The Arbitrator appointed by the Indian Council of Arbitration made a NIL award in favour of the respondent. Respondent then invoked the second part of the said arbitration agreement on 22nd February, 2000. An award was made pursuant thereto.

During pendency of the proceedings HCL filed a suit in the district court at Khetri in the State of Rajasthan questioning about the initiation of the second arbitration proceeding before International Chamber of Commerce inter alia contending that the provision for second arbitration was void and a nullity. No interim order was passed therein despite having been prayed for, whereupon an appeal was preferred by HCL before the District Judge, which was also dismissed. In a revision filed by HCL, the High Court granted an injunction in favour of plaintiff. In the meanwhile the sole arbitrator had commenced arbitration proceedings. Centro trade filed a special leave application before the Court questioning the said order of injunction passed by the Rajasthan High Court and by an order dated 8th February, 2001, the said order of interim injunction was vacated.

Arbitrator held his sittings in International chamber of commerce, London. HCL, in a series of letters to the International Court of Arbitration and to the Arbitrator, maintained that the arbitration agreement was void and was being opposed to public policy. Despite the same, they, through their attorney, consulted about the procedural aspects of the arbitration and had asked for their submissions in relation to the procedure, progress and substance of the dispute. HCL also received copies of all correspondence passed between Centro trade and the Arbitrator and of all submissions made. They had been given every opportunity to take any point which they wished to take in their defence. Centro trade served their submissions and supporting evidence by the orders made by the Arbitrator. When no defence submission or supporting evidence was produced by HCL within the prescribed time, fax was sent to them by the learned Arbitrator giving them one last opportunity to inform him by return of any intention on their part to put in a defence and to seek an extension of time for doing so. HCL argued that the arbitration clause is itself invalid and on the ground that the successive arbitrations are not permitted at all in India took the matter to the Apex Court of India. There is no proof that the respondent ever objected to the rules and procedure followed by the arbitrator or that the arbitrator followed a procedure not contemplated in the agreement. Since no reply was made by them so arbitrator gave a time extension of three more weeks, after the time given arbitrator received the supporting evidences. In making the awards however, the Arbitrator considered the submissions made by HCL.

The award passed by the said Arbitrator contains following reliefs:

(i) The arbitration clause contained in clause 14 of the agreement is neither unlawful nor invalid according to the laws.
The Arbitrator had jurisdiction to decide his own jurisdiction in terms of Article 8.3 of the ICC Rules as also Section 16 of the 1996 Act.

a. The claim of Centro trade based on the report of Inspectorate was just. The arbitration award dated 15th June, 1999 was wrong. There is no dispute about the actual figure of loss claimed by Centro trade. There is no dispute as to the demurrage owing which, in accordance with Clause 9.2 of the contract, is to be calculated on the basis of a discharging rate of 1600 MT per WWD of 24 consecutive hours.

b. Centro trade is entitled to interest as well as costs of the goods.

It was directed that:
"(1) HCL will pay Centro trade the sum of $152,112.33, inclusive of interest to the date of the award in respect of the purchase price for the first shipment.
(2) HCL will pay Centro trade the sum of $15,815.59, inclusive of interest to the date of this Award in respect of demurrage due on the first shipment.
(3) HCL will pay Centro trade the sum of $284,653.53, inclusive of interest to the date of this Award in respect of the purchase price on the second shipment.
(4) HCL will pay Centro trade their legal costs in this arbitration in the sum of $82,733 and in addition the costs of the International Court of Arbitration, London the Arbitrator's fees and expenses totalling to $29,000.
(5) HCL will also pay Centro trade compound interest on the above sums from the date of this Award at 6% p.a. with quarterly rests until the date of actual payment."

After the award granted by the arbitrator, HCL filed an application purported to it under Section 48 of the 1996 Act in the Court of District Judge, Alipore, Calcutta. HCL also filed a suit before the Civil Judge, Senior Division, Alipore praying for a declaration that the ICC award is void and a nullity, and also for permanent injunction and damages against the respondent.

In the meanwhile, Centro trade filed an application for enforcement of the said award in the Court of the District Judge, Alipore. Upon an application made in terms of Clause 13 of the Letters Patents of the Calcutta High Court by Centro trade, the said execution case was transferred to the Calcutta High Court.

A learned Single Judge of the said court by a judgment and order allowed the said execution petition. Aggrieved by and dissatisfied therewith, HCL preferred an appeal which was allowed by reason of the impugned order. Both the parties questioned the correctness of the said judgment.

The Supreme Court records its satisfaction that the foreign award is enforceable, and it shall be deemed to be a decree and also accepted multi-tier arbitration as an integral part of arbitration in India, however there will still remain open loops in this regime.

COMPARATIVE ANALYSIS

Multi-tier arbitration is taken differently in different counties. Every country has their
own view related to the same. Some countries has accepted this quite earlier but some have till now not accepted it. In this paper, we are comparing the condition of multi-tier dispute resolution clauses by national courts of different countries with India.

**England**

Initially the courts in England were reluctant to encourage the mechanisms involved in multi-tier arbitration, and this could be analysed through the various case decisions like: *Walford v miles*, where a bare agreement to negotiate enough was made and it was considered that such agreement will be treated as mere agreement to agree and nothing else.

In another case, *Sulamerica CIA Nacional de Seguros v. Enesa Engenharia and Tang Chung v grand Thornton international*: In which both the parties were to referred to alternate dispute resolution other than arbitration but one of the parties landed up to the tribunals directly without referring to mediation and conciliations respectively, the question involved was whether these resolution were pre conditions before commencement of arbitration the court held that it is not required in order to refer the case to arbitration.

**Emirates Trading Agency LLC v. Prime Mineral Exports Private Limited:**

The multi-tier arbitration clause had a provision of negotiating 4 weeks prior before commencing arbitration as mentioned in the agreement. One of the party went for arbitration without negotiating, the court’s decision was found contradicting to that of Sulamerica’s case in which it was held the negotiation was one of the conditions required before going on to arbitration but in the above case the facts indicated that parties have sufficiently negotiated before reaching the tribunal for arbitration.

**United States**

The prevailing trend in the United States, is that the pre-arbitral steps in multi-tier clauses will not constitute jurisdictional conditions precedent to the commencement of arbitration, unless the multi-tier clause at issue expressly includes language to the contrary of the same[4].

In this view the courts through its decisions said that the matter involved would be beyond jurisdictional provision only if the clause expressly states in its language to contrary. *BG group v Republic of Argentina*: it was held that not being able to comply with pre arbitration steps by the parties does not deprive the tribunals from providing arbitral remedies.

*Sulamerica CIA Nacional de Seguros v. Enesa Engenharia:* The court held that in the tier clause it was clearly stated that mediation has to be pre condition to arbitration and that it was difficult to imagine a more plain language in which it can be stated. Similar type of outcome was reached in the case of *Ponce Roofing Inc. v. Roumel Corp.*

The condition in both the countries are quite similar but in India multi-tier arbitration is accepted quite late and even till now Supreme Court has not given any proper decision nor any legislature has been framed till now.

**CONCLUSION**
The arbitrating laws have gone through a drastic change ever since the first legislation on arbitrating was made in India. From time to time there have been a huge shift in the approach with regard to the proceedings of arbitration. The concept of multi-tier arbitration though new for the Judiciary of India but in other countries it is a part in almost every business contract like construction contracts or partnership contracts which constant cooperation between the parties. Even though there is no proper statute related to multi-tier arbitration but still could survive under the 1996 act. The multi-tier arbitration clauses included in the agreement is to avoid the cost of arbitration and to minimise any upset to the parties ongoing relationship that would result from escalated proceedings. Despite all these benefits that flow from these clauses, consideration must be given to whether a multi-tier clause warrants inclusion in an agreement, particularly if both parties are sophisticated, and are likely to engage in settlement negotiations irrespective of the presence of a multi-tier clause[5].

The assessment as to whether the multi-tier clause is to be included in an agreement must be taken into account the risks that may arise from the failure to comply with such a clause. While most of the courts and arbitral tribunals have generally shown a reluctance to finding multi-tier clauses as jurisdictional conditions precedent to arbitration, there is a risk that a failure to comply with them may have jurisdictional consequences. Accordingly, multi-tier clauses should not be treated as boiler-plate provisions whose inclusion in an arbitration agreement can be treated as an afterthought.

Nor should multi-tier clauses be ignored in the lead-up to an arbitration[6].

REFERENCES

[1] Book on Arbitration law- Dr Anupam Kurlwal
[5] Ibid as 3
[6] Ibid as 3 and 4
AADHAR DEBATE: PRIVACY REMAINS CENTRAL CHALLENGE

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Aadhar a 12 digit unique identity number given to every Indian citizen by the initiative of BJP government, this paper examines the official justifications for aadhar and the concept of Right to Privacy. As for the present Modi government, aadhar is the tool used for “development”. Aadhar is facilitating India’s transition into a society where critics are enemies rather than a necessary part of democracy. Aadhar project is one of the significant projects in India to bring the universal trend of digital innovation. The launch of this project was focused on the interoperability of various e-governance functionalities to ensure the optimal utilization of Information, Communication and Technology Infrastructure. Towards this Government of India has recently made aadhar card mandatory for many government schemes and also has promoted aadhar enabled transactions. There are many issues related to security of the aadhar data that need to be addressed and touched upon. This paper highlights such cases.

RIGHT TO PRIVACY: FUNDAMENTAL RIGHT OR NOT?

Article 21 reads as: “No person shall be deprived of his life or personal liberty except according to a procedure established by law.”

As per Black’s Law Dictionary, privacy means “right to be let alone; the right of a person to be free from unwarranted publicity; and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned”. Right to privacy is not a right expressly given by the Indian Constitution but a ‘penumbral right’ i.e. a right that has been declared by the Supreme Court as integral to the fundamental right to life and liberty. The country could not have got a better gift from the judiciary for its 70th year of independence. According to Justice Dr. DY Chandrachud the essential nature of privacy and informational privacy has three major requirements, i.e. Legality, the need for a legitimate aim and proportionality. The nine judge bench of the supreme court has unanimously conveyed its judgment in equity K.S. Puttaswamy v. UOI holding that security is a naturally shielded right which not just rises up out of the certification of life and individual freedom in article 21 of the constitution, yet additionally emerges in differing setting from alternate aspects of opportunity and nobility perceived and ensured by the major rights contained to a limited extent in part III of the Indian constitution.

In PUCL v. UOI, the Court ruled 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”. The court has further ruled that Telephone conversation is an important facet of a man’s private life. Right to privacy would certainly include telephone conversation in the privacy of one’s home or office. Telephone tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law. The procedure has to be just, fair and reasonable.”

INTRODUCTION TO AADHAR LINKING

The Unique Identification Authority of India (UIDAI) is a statutory authority established under the provisions of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 (“Aadhaar Act 2016”) on 12 July 2016 by the Government of India, under the Ministry of Electronics and Information Technology (MeitY).

Prior to its establishment as a statutory authority, UIDAI was functioning as an attached office of the then Planning Commission (now NITI Aayog) vide its Gazette Notification No.-A-43011/02/2009-Admn.I) dated 28th January, 2009. Later, on 12 September 2015, the Government revised the Allocation of Business Rules to attach the UIDAI to the Department of Electronics & Information Technology (DeitY) of the then Ministry of Communications and Information Technology.

UIDAI was created with the objective to issue Unique Identification numbers (UID), named as “Aadhaar”, to all residents of India that is (a) robust enough to eliminate duplicate and fake identities, and (b) can be verified and authenticated in an easy, cost-effective way. The first UID number was issued on 29 September 2010 to a resident of Nandurbar, Maharashtra.

Under the Aadhaar Act 2016, UIDAI is responsible for Aadhaar enrolment and authentication, including operation and management of all stages of Aadhaar life cycle, developing the policy, procedure and system for issuing Aadhaar numbers to individuals and perform authentication and also required to ensure the security of identity information and authentication records of individuals.

The objective of this section is to highlight the scope and advantages of linking Aadhaar card to various systems. The government of India has been linking the Aadhaar card with various government schemes such as for cooking gas subsidies, house allotments, school scholarships, admission into remand and welfare houses, passports, e-lockers (eg. Digilocker), for archiving documents, bank accounts under PMJDY (PrandhanMantri Jan Dhan Yojana), provident funds account, pensions, driving license, insurance policies, loan waivers and many more. Recently it has also been made mandatory for ATM Cash Transaction, railway reservation and applying PAN (Permanent Account Number) card, and filing income tax returns.

AADHAAR CARD: CHALLENGES AND IMPACT ON DIGITAL TRANSFORMATION
The objective of this section is to highlight the scope and advantages of linking Aadhaar card to various systems. The proposal for national identity card was first floated in 1999 by the Kargil Review Committee, set up to study national security in the aftermath of the Kargil war. In May 2001, a group of Ministers headed by the then Home Minister L.K. Advani, accepted and expanded this recommendation, suggesting that a “multi-purpose national identity card” be issued to every citizen. In December 2003, the Citizenship (Amendment) Bill, 2003 was introduced in the Lok Sabha by the Home Ministers, with a clause empowering central government to “compulsorily register every citizen of India and issue National Identity card to him.”

As the major concern is the security and privacy of the data, UIDAI soon going to adopt a new encryption standard on the Aadhaar biometric devices from June 1, 2017. The new encryption standard would be added as a third layer of security. First layer is the encryption from merchants/agency side and second layer is from UIDAI itself. Third layer which is being added is implemented in the biometric device itself. UIDAI officials have informed the vendors and merchants to let their device go through the STQ (Standardization Testing and Quality) certification. Therefore, UIDAI ensured that only registered devices are allowed to make Aadhaar transaction. The objective is to tighten the security as devices are set to take biometric-based digital payments. Although the UIDAI going to take good initiatives but still there are some questions over the accuracy of biometrics, as thumb impression and iris of citizens may get changed or damaged who are involved in casual labour, and the chance of a false positive in India is 0.057%. A large portion of Indian population is involved in casual labour so it may result lakhs of false results. In fact some reports from Rajasthan and other states of India have already been received that biometrics scans are not showing a match. Therefore the usage of biometric may also lead to major security threats. However the government of India has already spent a lot of money on the Aadhaar project, and the findings of the paper entitled ‘A cost-benefit analysis of Aadhaar’ published by The National Institute of public finance suggest that the benefits of the Aadhaar project will surpass the costs.

**EVOLUTION THROUGH CASE LAWS**

Big brother calling the wrong number, aadhaar. This digital mapping of all Indian citizens is violating the article 21 of the Indian Constitution as stated recently in the K.S.Puttaswamy case where the judgement delivered by a nine-judge bench in the Supreme Court is that; Aadhaar identification programme violates an individual’s fundamental right to privacy. It was in 2012 when former High Court judge, K S Puttaswamy, files a petition contending that Aadhaar violates fundamental rights of equality and privacy. Several more petitioners—including activists Aruna Roy, Bezwada Wilson and Nikhil Dey—had moved to the court with the petition so the apex court decided to link all the 20-plus Aadhaar-related petitions to this case. The petitioners also objected not only the privacy but also the national security by virtue of unpredictable enrolment of illicit foreigners. In September 2013 the Supreme
Court passed an interim order that the unique identification number cannot be made mandatory for gas connections, scholarships, vehicle registrations, marriage registrations. To outweigh the mandatory clause the UIDAI claimed that PSU oil companies have detected duplicate connections of around 45,000 people only with the help of aadhaar. In March 2014 the apex court ordered the centre to withdraw all instructions which make aadhaar mandatory. The court questioned the centre on how can they still make aadhaar mandatory after an interim order passed not allowing to make it mandatory. In 2015 the Centre argued that the constitution makers did not intend to make right to privacy a fundamental right, they added to it that privacy could not also be given as an absolute right as we live in an era of terrorism and forgery, hence the petitions under article 32 of the Indian Constitution should be dismissed. By the year ending 2016 several more petitions relating to aadhaar and its constitutional validity were filed in the Supreme Court. In February 2017 the parliament challenged the judiciary had no jurisdiction to encroach on legislative procedure in parliament, where the speaker was the final authority. To which the Chief Justice J.S Khehar countered that “if the speaker says red is green, the judiciary will tell her that red is not green it is red”. In April 2017 senior advocate Shyam Divan humbly submitted before A bench of Justices A.K. Sikri and Ashok Bhushan the newly-inserted Section 139AA in the Income Tax Act, which mandates the linking of Aadhaar with PAN, is a "Faustian bargain" i.e., a deal with the devil! . Mukul Rohtagi –Attorney General stated that taking fingerprints and iris impressions for Aadhaar is not an invasion of a citizen's body. Mukul Rohtagi also included that the preoccupation of assets to shell companies through PAN cards can only be prevented by making aadhaar card a mandatory one. In May 2017 Magsaysay award winner and the former chairperson of National Commission for Protecting Child Rights Shanta Sinha’s petition against 17 government notifications making aadhaar a mandate for all welfare schemes and benefits. Aadhaar is not uncertain, problematic, pointless and wrong innovation venture, which is being foisted on the most defenseless segment of India and is debilitating their sacred and legitimate rights and privileges each day. The apex court upholds Section 139AA of the Income Tax Act. The Supreme Court says that the new provision that makes Aadhaar mandatory for income tax assesses is not in violation of the fundamental right to equality, or the fundamental right to practice one’s profession or trade. Also in the hearing of petition by Ms. Shanta Sinha the court held that there will be no freeze on the government notification of making aadhaar mandatory even for mid-day meals scheme. The Supreme Court delivered its historic Judgement quoting that right to privacy is “intrinsic to life and liberty" and is inherently protected under the various fundamental freedoms enshrined under Part III of the Indian Constitution. West Bengal now enters the aadhaar arena by filing a petition against the centre’s challenging its push to make aadhaar mandatory. The court hauls up the state government by saying that how can a state challenge parliament’s order, to which state countered that a chief minister can file a petition in his own
capacity. Another petition now lined up which challenged the provision of Money Laundering Act, which made compelled RBI to link all bank accounts with aadhaar. After all the 27 petitions in all filed in the Supreme Court the historic judgement delivered will be delivered as quickly as time permits and this will be a gift to the entire nation in its 70th year of independence.

Other cases where previously the apex court held that there was no fundamental right expressly given in the constitution are i) Kharak Singh v The State Of U. P. & Others where the verdict given by a six-judge bench was that there is no such fundamental right is the correct expression of constitutional provisions. ii) M.P. Sharma v Satish Chandra wherein verdict given was that, “at the point when the Constitution creators have figured out not to subject such control to constitutional limitations by acknowledgment of the fundamental right to privacy there is no defense for bring in into it, a totally different fundamental right by some process of strained construction.”

The space and the freedom to do mischief, to provoke, to instigate, or indeed to be idle will not be snatched away and there can be larger number of projects brought under the Aadhaar umbrella.

**DISCUSSION AND CONCLUSION**

Data Privacy and Data protection are rights for every individual residing in this country and every citizen must be aware of that. Every IT technician’s main focus is to implement the strongest security which no one can breach. However a Network may not be 100% secure but if one cannot make it 100% secure, there should be a legislation or system to deal with data breach cases. In India some of the Data Privacy and Protection laws are somewhat included under the sections of ‘IT Act (2008)’, and many are yet to be implemented and are under consideration. In Aadhaar act there are also some issues need to be understood. This section deals with such issues. It is to be noticed that Aadhaar is not a unique identity card, it’s just a number. It does not contain any security feature like PAN card and Voter ID does. Multiple copies of Aadhaar can be downloaded from their SSUP portal. Yet, it is used as valid proof of identity in some places. Aadhaar is used as proof of address. UIDAI doesn’t even verify the address of the applicants. Still, Aadhaar has been accepted as a proof of address in banking sector and telecom companies. Aadhaar cannot be used as a proof of citizenship as Clause 9 of Chapter III Aadhaar Act 2016 which states that “The Aadhaar number or the authentication thereof shall not, by itself, confer any right of, or be proof of, citizenship or domicile in respect of an Aadhaar number holder.” Also, Aadhaar Act 2016, Chapter I Clause 2(v) states that “If a resident who has resided in India for more than 182 days or more than that is applicable to enrol for Aadhaar”. For applying passport, Aadhaar can be used as a valid document for proof of concept and on the other hand, passport becomes a proof of citizenship which has lead to various immigrants from Nepal, Bangladesh, Bhutan etc. to get valid documents for Indian Citizenship. Recently, twitter’s top story was MS Dhoni Aadhaar data got leaked which also depicts some flaws in Aadhaar
Act which is Chapter VI Clause 4 of Aadhaar Act 2016 depicts that “No Aadhaar number or core biometric information collected or created under this Act in respect of an Aadhaar number holder shall be published, displayed or posted publicly, except for the purposes as may be specified by regulations.” Also Clause 30 of IT Act 2000 states that biometric or demographic data are recognized as an ‘electronic and sensitive data of an individual’ and Chapter VII Clause 37 of Aadhaar Act 2016 states “Whoever, intentionally discloses, transmits, copies or otherwise disseminates any identity information collected in the course of enrolment or authentication to any person not authorised under this Act or regulations made there under or in contravention of any agreement or arrangement entered into pursuant to the provisions of this Act, shall be punishable with imprisonment for a term which may extend to three years or with a fine which may extend to ten thousand rupees or, in the case of a company, with a fine which may extend to one lakh rupees or with both”.

As the major concern is the security and privacy of the data, UIDAI soon going to adopt a new encryption standard on the Aadhaar biometric devices from June 1, 2017. The new encryption standard would be added as a third layer of security. First layer is the encryption from merchants/agency side and second layer is from UIDAI itself. Third layer which is being added is implemented in the biometric device itself. UIDAI officials have informed the vendors and merchants to let their device go through the STQ (Standardization Testing and Quality) certification.

Therefore, UIDAI ensured that only registered devices are allowed to make Aadhaar transaction. The objective is to tighten the security as devices are set to take biometric-based digital payments. Although the UIDAI going to take good initiatives but still there are some questions over the accuracy of biometrics, as thumb impression and iris of citizens may get changed or damaged who are involved in casual labour, and the chance of a false positive in India is 0.057%. A large portion of Indian population is involved in casual labour so it may result lakhs of false results. In fact some reports from Rajasthan and other states of India have already been received that biometric scans are not showing a match. Therefore the usage of biometric may also lead to major security threats. However the government of India has already spent a lot of money on the Aadhaar project, and the findings of the paper entitled ‘A cost-benefit analysis of Aadhaar’ published by The National Institute of public finance suggest that the benefits of the Aadhaar project will surpass the costs.

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TRIPLE TALAQ AND UNIFORM CIVIL CODE

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Introduction:
It has been rightly said that, “Man is a social animal”. Every person needs a company to live the life to the fullest. Marriage is one such social institution which has been prevalent since times immemorial. Every society has defined this institution with respect to their beliefs. Talking about the Muslim law, marriage is considered to be a civil contract whereby the dominant position is accorded to the husband whereas the wife has a subordinate role. The husband has the unilateral right to divorce his spouse while the wife has the right only under certain circumstances as mentioned in the Holy Quran. Although the Quranic law restricts divorce as involving the upper hand of the husband yet at the same time does not undermine the position of women owing to the detailed procedure involved in the process of divorce. But with the passage of time, the Quranic verses, known as Ayat have been wrongly interpreted which eventually leads to the degradation of Muslim women in the hands of male chauvinists Muslim scholars.

Concept of ‘Talaq’ and the evolution of ‘Triple talaq’ as put forward in Quran:
Talaq is Arabic word which means “to release” or “taking off any tie or restraint” or “removal of the restrictions of nikah”, thus in Mohammedan law talaq is equivalent to dissolution of marriage i.e. divorce. In the pre-Islamic state, the Arabs took even the most important and significant decisions in a hasty, unjust and frivolous manner. As far as the divorces were concerned, these unscrupulous Arab men exercised unbridled power to get rid of their wives. The right to divorce was solely vested in the hands of men while the women were subjected to maltreatment, torture and humiliation. With the rise of Prophet Mohammad as the righteous messenger of Allah, tremendous efforts were put to bring women on equal footing with men in order to regulate the male authoritarianism as prevalent in the pre-Islamic state. In this respect, Ameer Ali has said “he (the prophet) restrained the power of divorce possessed by the husband and towards the end of his life went so far as practically to forbid its exercise by the men without the intervention of a judge.”

HUSBAND’S RIGHT TO DIVORCE:
The Quranic law recognizes talaq-i-sunnat as the most approved form of divorce. It exists in two forms i.e. ahsan talaq and hasan talaq. It is a well known fact that talaq-i-sunnat is the most appropriate, reasonable and meaningful mode of repudiation of bridal bond sanctified and warranted by the holy Quran. Talak-i-sunnat may be pronounced either in ahsan or in hasan form as engrafted in holy Quran. In the form of talaq-i-ahsan there is a single pronouncement of talaq during the period of purity (tuhr) followed by no revocation by husband for three successive periods of purity. After the single pronouncement, the wife is to observe iddat of three monthly courses and during iddat there should be no
revocation of talaq by the husband but during this period if there is cohabitation, this will amount to revocation and reconciliation between husband and wife. Talaq-i-ahsan has been based on the verses mentioned in sura II verse 228 of the Quran which reads as follows: “and the divorced women should keep themselves in waiting for three courses”. However, talaq-i-ahsan is also regarded proper and approved form of talaq and has provision of revocation. In hasan talaq word of talaq is to be pronounced three times in the successive periods of purity. It is immensely important to note that the husband may revoke the first and second pronouncements either expressly or by resuming conjugal capacity of cohabitation and consummation and same tantamount to as if no talaq was made at all. In case third pronouncement is made, then the talaq becomes final and is irrevocable.

Talaq-i-ahsan has been mentioned in Quran in the following verses: “divorce may be pronounced twice, then keep them in good fellowship or let (them) go kindness”(II:229). “so if he (the husband) divorces her(third time) she shall not be lawful to him afterwards until she marries another person” (II;230).

Another mode of divorce followed by some prominent schools of Muslim jurisprudence is “Talaq-i-biddat”. Although there is no substantial proof with regard to its approval in Quran, it has gained much popularity in the modern times especially in India. It is the most detestable and inhuman form of divorce which subjects the women to mental torture and immense humiliation. It is a plight that some of the even most influential and dominant schools as well as Muslim scholars have given recognition to it. For instance, the Hanafi School and majority of the Sunnis have been advocating Talaq-i-biddat for more than 1400 years approximately. Thus, it can be said that gradually it has taken force of a recognized form of divorce in the contemporary Mohammedan law.

The talaq-i-biddat did not exist at the time of Prophet. It came into picture after it was granted sanction by Ummayid monarch caliph Umar. However it was introduced merely as a temporary solution to deal with the torture and humiliation faced by the Muslim women. The reason why this form of talaq came into force goes back to the time when Arab invaded Egypt, Syria, and Iraq. The male chauvinist Arabs found the women of the foreign land more beautiful than their own wives and wished to marry them. On the other hand, the women of these countries wanted them, firstly, to nullify their existent marriages and then marry them. As a result the men began to search for easier and more convenient ways to break off their marital ties which further deteriorated the already degraded condition of their wives. When frequent occurrence of such incidents began, then Caliph Omar, in order to safeguard the wives of these Arabs from unreasonable torture and suffering and to prevent the misuse of religion, ruled that anybody pronouncing Talaq thrice in one sitting would result in irrevocable dissolution of marriage. This was introduced as a temporary administrative measure, keeping in mind the circumstances which had arisen during that period. It is really deplorable that this concept which was introduced centuries ago continues even
today, despite being contradictory to the ideals of contemporary world.

WIFE’S RIGHT TO DIVORCE:
The Holy Quran mentions the grounds on which a wife can seek divorce. Prophet Mohammed had never wanted women to be exploited and hence vested in them the right to seek divorce. There are three forms in which a women can ask for divorce from her husband:

a) When the power of divorce has been delegated to her by the husband (Talaq-i-Tafweez): The exercise of delegated power to divorce is valid both in cases of pre-nuptial as well as post marriage agreements. Once the power is delegated to her, it is entirely on her to exercise it, or not to exercise it; when she exercises it, consent or dissent of the husband is immaterial.

b) Khul or Khula: Khul or Khula in case of wife is equivalent to what “Talaq” is in case of the husband. It is the divorce which is initiated by the wife herself. In an early case, the Privy Council said; “A divorce by khula is the divorce with the consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case the terms of bargain are a matter of arrangement between the husband and wife, and the wife may, as a consideration, release her mahr and other rights, or make any other agreement for the benefit of the husband.”

c) Judicial Divorce (Turkaf): Muslim lawgivers also provided for the dissolution of marriage by a decree of the court. It is called Turkaf which means separation.

Thus, it can be clearly seen that the verses in Quran have mentioned the procedure of divorce with respect to both men and women and no kind of discrimination has been laid down. Further, in our paper we will discuss about the most controversial form of talaq i.e. talaq-i-biddat popularly known as the triple talaq, how it is demeaning to women, why it is rendered to be unconstitutional and the need of Uniform Civil Code.

NEED TO ABOLISH THE EVIL OF TRIPLE TALAQ:
Triple Talaq is certainly an unreasonable and inhuman concept. It has gained acceptance and popularity over the period of time despite being against the modern civilization. It has subjugated and subordinated the position and status of Muslim women whereas their counterparts are in a better position in the society. The former have to bear the brunt of Triple Talaq which is a deadly weapon in the hands of the husbands. They live their life fearing that they may have to face this injustice someday. The presence of the spouse who is being divorced is totally immaterial. Triple Talaq pays no heed to any possibility of reconciliation between the spouses and is effective from the moment ‘Talaq” is pronounced thrice in a sitting. With the advent of technology and more efficient ways of communication, this custom which has now apparently gained the force of law, has become even more popular. The husbands nowadays divorce their wives via telephone, telegram, letters or even whatsapp. This in itself is a pity and mars the very existence and sanctity of marriage. Triple talaq not only declines to a Muslim
woman the rights which are guaranteed under the Holy Quran but also makes them a puppet in the hands of their husbands. Triple Talaq is in no way a constructive practice but causes the male authoritarianism to grow manifold. It strengthens the male dominant society which attacks the interests of the women and makes them a “weaker vessel”. It undermines the principle of gender equality. Even the majority of Muslim countries all around the world have enacted laws to abolish the horrendous practice of triple Talaq. It is indeed a shame that India still continues to acknowledge it as an approved form of divorce. It is the need of the hour that the Muslim organizations at the position of authority namely Jamiat Ulma-I-Hind and AIMPLB (All India Muslim Personal Law Board), who enjoy the privilege of influencing the masses, come to the forefront and do away with the prevalent practice. The Muslim population is so deeply engulfed in this derogatory practice that only the involvement of their own religious leaders can bring out the desired outcome of eradicating Triple Talaq. It is of utmost necessity to curb it otherwise the womenfolk will continue to remain downtrodden and looked down upon. Not only the rights of the women as enshrined in the Holy Quran are violated, but also the Fundamental Rights guaranteed under the constitution. The Triple Talaq is directly an infringement of the Fundamental Rights i.e. Article 14, 15, 21 and 25. These are the basic human rights that every citizen of the country is entitled to. In a plethora of cases; the courts too have found this form of Talaq to be derogatory and in violation of the above mentioned rights. It would be no exaggeration to say that the abolition of Triple Talaq would certainly pave the way for many more positive changes or transformations which need to be brought about keeping up with the ideals of the modern era.

Realizing the necessity to abolish triple talaq, many organizations have openly come forward to fight for the cause. One such organization which needs a special mention is BMMA (Bhartiya Muslim Mahila Andolan).

BMMA: It is an autonomous, secular, rights-based mass organization led by Muslim women which fights for the citizenship rights of the Muslims in India and was formed in January, 2007. A laudable initiative was taken by BMMA in 2016 with the formation of Women Qazi Training Institute: Darul Uloom Niswaan. It focuses on training the Muslim women to take the position of a Qazi in a Muslim society (there is no ban on women Qazis as per the quran). It is a commendable initiative as it is a step towards regulating the dubious and orthodox role of the Qazis in the present scenario. The imparting of the knowledge and appropriate interpretation of the Quranic verses to the Muslim women is a win-win situation. It will make them aware of the practices being interpreted wrongly and being imposed on the women in the name of Islamic faith. Darul Uloom Niswaan strives to make the women more self-reliant so that they can draw the interpretations correctly and put an end to the unislamic practices like Triple Talaq as well as Nikah Halala.

Despite the establishment of many such organizations, it needs to be kept in mind that these organizations are still at their infancy and if drastic change is expected
then collective efforts are to be made in this direction.
What we need to keep in our minds is that:
“Why does it have to be deemed too difficult and hyped to eradicate this evil in India, when the other Muslim nations around the world have been successful in doing so?”

**Triple Talaq: Whether an infringement of fundamental rights or not?**
It would be really improbable and unjustified to state that Talaq-i-biddat is in conformity with the Fundamental Rights enshrined in Part III of the Constitution. Firstly, it stands completely in conflict with the spirit of Article 14 i.e. Right to equality. It is quite evident that Triple-Talaq causes a severe blow to the equality as it is a gender biased concept. It is an arbitrary and unilateral power only vested in the Muslim men and the women have absolutely no say in the matter. It also violates the provision mentioned in Article 15 i.e. right against discrimination which states that no person shall be discriminated on the grounds of caste, sex, race, place of birth, religion whereas Talaq-i-biddat is discriminatory on the basis of sex. Article 21 which provides to the citizens the right to life and personal liberty also stands violated. However due to this improper form of divorce, the interest of the women who have been discarded by their husband’s are not being protected and are just dumped without any source of justice. Triple Talaq takes away the honorable position of the women in the society and leaves them in dark with no justice given to them.

 Many a times people have taken the protection of Article 25(1) [to profess, practice and propagate religion] in order to justify their actions in the name of religion. But it is not an absolute right and is subject to restrictions, for instance public order, morality and health. Moreover, the alleged party cannot challenge the state’s right to regulate various activities associated with religion unless it is sacrosanct or quintessential to the religion itself. In umpteen numbers of cases, the courts have voiced strong opinion that Triple Talaq is not integral to the Islam and is merely a custom which has gained the force of law. Hence abrogation of Triple Talaq does not violate Article 25(1).

**Landmark Judgements:**
Let us discuss some landmark judgements delivered by the learned judges:

**Yousuf Rawther v. Sowramma**: “..the view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions..it’s a popular fallacy that a Muslim male enjoys, under the Quranic law, unbridled authority to liquidate the marriage...however, the Muslim law, as applied in India, has taken a course contrary to the spirit of what the prophet or the holy Quran laid down and the same misconception vitiates the law dealing with the wife’s right to divorce...”

**Shamim ara v. State of U.P.**: In this case, the learned judge expressed disapproval of the statement that “the whimsical and capricious divorce by the husband is good in law, though bad in theology” and observed that such a statement is based on the concept that
women were chattel belonging to men which the Holy Quran does not brook. The correct law of Talaq as ordained the Holy Quran is that Talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters – one from the wife’s family and the other from the husband’s, if the attempts fail, Talaq may be effected.

Shayara Bano v Union of India\[ii\]:
The learned counsel for the petitioners put forward the following arguments:
1. Violation of the fundamental rights guaranteed under Article 14, 15 and 21 of the Constitution.
2. Ban on Triple Talaq in the Muslim majority nations around the world.
3. Talaq-i-biddat should be banned the same way the practices of Sati, Devdasi and Polygamy amongst Hindus were banned despite being prevalent for centuries.
4. Talaq-i-biddat gives to the husband the unilateral and unbridled power to divorce their wives and the latter have absolutely no say in the matter. This contention was supported with reference to the tradition of Sunni Muslims:

“Mahmud-b, Labeed reported that the messenger of Allah was informed about a man who gave three divorces at a time to his wife. Then he got up enraged and said, ‘Are you playing with the book of Allah who is great and glorious while I am still amongst you? So much so that a man got up and said; Shall I not kill him.’”
5. It was submitted, that the Universal Declaration of Human Rights, 1948, The International Covenant of Economics, Social and Cultural Rights 1966 emphasized on equality between men and women. It was also submitted that the Government of India ratified the Vienna Declaration and Convention on the Elimination of All Forms of Discrimination against women (CEDAW) on 19-6-1993. Keeping in mind the above mentioned conventions, dealing with the concepts of equality, it becomes essential to abrogate the Triple Talaq which is not in conformity with the spirit of these conventions.

The rebuttal of the petitioner’s contention’s:
1. The Hanafi School of Sunni Muslims, who form the majority in India, has ardently followed Talaq-i-biddat over centuries. It is considered to be a part and parcel of their personal law. This contention was supported with reference to a Sunni tradition:

“a man met another playful man in medinah. He said, “did you divorce your wife?” He said,”yes”. He said, “how many thousands?” so he was presented before Umar. He said so you have divorced your wife? He said I was playing. So he mounted upon him with the whip and said out of these three will suffice you. Another narrator reports Umar saying : “Triple Talaq will suffice you”.(musannaf abd al-razzaq, kitab al-Talaq , Hadith no.11340)
2. Having put forward the contention, that talaq-i-biddat is the part and parcel of their personal law and religious faith, it is unjustified to say that this practice violates articles 14,15 and 21 of the constitution. Instead the question arises regarding the violation of article 25 (right to religion).
3. It was contended that the Special Marriage Act (1954) was enacted so that the people of different faiths could get their
marriage registered under this act without any interference of their personal laws. Thus, it was submitted that all those who despise this practice of Talaq-i-biddat always have an option to escape it by getting married according to the secular provisions laid down under the said act.

4. It was further contended that a wife while executing the ‘nikahnama’ (marriage deed) is free to include a condition restricting the husband’s right to pronounce triple Talaq.

5. It was pointed out that the matters of faith should best be left to be interpreted by the community itself, in the manner in which its members understand their own religion. Hence the court should not interfere in the matters of interpretation of their personal laws. Moreover, it was stated that the interpretations relied upon by the petitioners were mostly of the scholars who were alien to Sunni faith and were therefore irrelevant.

After considering the contentions put forward by both the parties, the Supreme Court with the majority of 3:2 ruled in favor of the petitioners and declared Triple Talaq unconstitutional.

As far as the question of uniform civil code is concerned, supreme court is of the view that this concept needs to be understood in its “true purport and substance”. The court also took into consideration the contentions submitted by both the counsels in relation to the debates held amongst the members of the Constituent Assembly while the drafting of the constitution. After the detailed analysis of the matter, the court stated that, “...all religious practices should remain, beyond the purview of law...all this leads to the clear understanding, that the Constitution requires the State to provide for a Uniform Civil Code to remedy and assuage, the maladies expressed…”

Mohd. Ahmed Khan v. Shah Bano Begum:

It is one of the most important landmark cases of all time dealing with the complexities of Muslim Law. Although the case mainly dealt with the obligation of the husband to maintain his wife after the divorce and the question was raised as to whether there exists a conflict between the Muslim personal laws and the CrPC on the matter of maintenance. The judgement was delivered in favor of Shah Bano Begum and it was held that, here, as per the facts of the case the provision under CrPC will override the legal position under Muslim Law.

The Court strongly felt a need to abolish Triple Talaq and introduce Uniform Civil Code in the country. It observed that:

“Article 44 of our constitution has remained a dead letter. There is no evidence of any official activity for framing a common civil code for the country. A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. It is the state which is charged with the duty of securing a uniform civil code for the citizens of the country and, unfortunately it has the legislative competence to do so. A beginning has to be made if the constitution is to have any meaning…”

UNIFORM CIVIL CODE: A RAY OF HOPE:

Article 44 of the Indian constitution provides that the state shall endeavor to secure for all citizens the uniform civil code
throughout the territory of India. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.

While drafting the Constitution, Dr. B.R. Ambedkar was in favor of introducing the Uniform Civil Code for the whole territory of India. However, due to the conflicting views between the members of the Constituent Assembly it was merely included in the part IV of the constitution i.e. Directive Principles (not enforceable by any court of law). It has always been a sensitive issue since its introduction in the Constituent Assembly. With the passage of time, the complexities in litigation have increased manifold due to the conflicts arising between the personal religious laws and the other statutes legislated by the government. Thus, it is high time that a Uniform Civil Code regulating the marriage, divorce, inheritance, adoption and maintenance laws for all religions without any discrimination be enacted. It will help in strengthening the solidarity and integrity of our nation.

The courts too have laid emphasis on having a Uniform Civil Code, so that the citizens are not prejudiced on account of the conflicts between personal and public law.

Justice Kuldeep Singh also opined that Article 44 has to be retrieved from the cold storage where it is lying since 1949. The Hon’ble justice referred to the codification of the Hindu personal law and held, “where more than 80% of the citizens have already been brought under the codified personal laws there is no justification whatsoever to keep in abeyance, any more, the introduction of the ‘uniform civil code’ for all the citizens in the territory of India.”

It is shameful that despite many judgements ruling in favor of implementation of uniform civil code, the government has failed to legislate on this matter even after 70 years of independence. Unless and until the legislative body takes a pragmatic approach, all the debates, controversies and discussions regarding Uniform Civil Code are futile.

CONCLUSION:
In a nutshell, it can be concluded that Triple Talaq is an obstacle in the progress of any society. It needs to be done away with for the uplifting and betterment of women folk. Every possible effort should be made by the authorities concerned so that the very foundation of patriarchy can be uprooted and the pillars of gender equality and harmony be established.

To cut the long story short, let us drown ourselves in the rage and enthusiasm with which Swami Vivekananda said, “There is no hope of rise for that family or country where there is no estimation of women, where they live in sadness.”

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THE CHINA PAKISTAN ECONOMIC CORRIDOR AND ITS IMPLICATIONS

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ABSTRACT

Since the partition between India and Pakistan, both countries have primarily fought four wars in 1947, 1965, 1971 and 1999 respectively. Sino-Indian relations also saw strains during this era which resulted due to the 1962 and the 1967 wars. Over the period, these countries have tried to create their own hegemony, both physical and economical, in the South Asian continent. India’s enmity with Pakistan has strengthened both economic and military relation with china, thus emphasizing the notion of “enemy of my enemy is my friend”.

This Sino-Pak relation now has a new manifestation, namely “The China Pakistan Economic Corridor”. The china Pakistan economic corridor is a framework of regional connectivity aiming at improving geographical linkages between the two countries and will in turn result in an enhancement of co-operation between the countries by leading to the creation of a win-win model by taking a large leap towards economic regionalization in the South East Asian Region.

Such a project ought to have legal implications as it passes through the PoK (PAKISTAN OCCUPIED KASHMIR), a disputed area between India and Pakistan, which both countries claim it to be theirs and also owing to the presence of India between these two nations and because of the history of hostility amongst all the nations. India is a little wary of the project, since a combined foe is something which the country does not want at its doormat. The Corridor is also being constructed in Baluchistan, which is problematic as the area is chock full of human rights violations being carried out by the Pakistani military and the CPEC is bound to create more issues and could also spell trouble for India and Pakistan in the future, something which can only be speculated about at this point of mine.

The China Pakistan Economic Corridor and its Implications

Introduction:

Since the advent of the Industrial Revolution, the economic and business drive of man progressed by leaps and bounds. People started doing business with each on an international scale, which led to the development of international trade. Over a period of a century, this thirst to trade on a global scale increased drastically as it presented a huge number of opportunities and growth prospects, so much so, that nations started promoting a global marketplace and started aiding each other in many ways to arrive at a nexus of global economic collaboration. An example of this cooperation is the upcoming China Pakistan Economic Corridor (henceforth, CPEC).

The CPEC is a joint venture being carried out by The People’s Republic of China and Pakistan together. The project includes the
creation and overhaul of various infrastructural projects, setting up of special economic zones and better supply of power in Pakistan and ultimately link the two countries through the Pakistan-Chinese Border in the PoK (Pakistan Occupied Kashmir) region, where there is little confluence of the unofficial borders of both the countries. As of 13th November, 2016, the Corridor is partially functional and China transported some cargo using the corridor to the Pakistani Gwadar Port for further maritime shipment to West Asian nations and Africa.

To further expound on the planned projects under the CPEC, a brief summary of the various projects has been provided below:

- The primary project is to link the Pakistani port city of Gwadar to its major economic hub of Karachi and ultimately to the Chinese North Western Region of Xinjiang. The aforementioned shall be done with the aid of creation of a comprehensive rail and road network. The flagship in this network is the construction of a motorway spanning a distance of 1,100km, connecting Karachi and Lahore. Another significant project is the total revamp of the Karakoram Highway and the Karachi-Peshawar railway line. The expenditure on the creation of this vast network of roads and railways is estimated at $11 billion and it is being funded by major Chinese banks, like the Industrial and Commercial Bank of China, the Exim Bank of China et al, with the provision of heavily subsidized bank loans, i.e. loans with extremely low interest rates so as to make it easy for the Chinese and the Pakistani government to repay the banks.

- Apart from the ground interconnectivity, the project also aims to improve other infrastructural aspects present in the country. A prime example of this is the creation of energy infrastructure to the tune of $33 billion to ensure that Pakistan is able to overcome its chronic lack of electricity. The proposed plan wants to bump up the energy production in Pakistan from 4,500MW to approx. 15,000MW by 2018, which shall be imperative in order to have the CPEC functioning at maximum efficiency and effectiveness. Further, to aid the process, the construction of one of the world’s largest solar farm and wind farms is also in the talks.

The CPEC also aims to make the availability of natural gas a must in Pakistan as it can aid in the functioning of the various planned projects in the country, and to facilitate this, pipeline worth almost $2.5 billion is being constructed to link Gwadar and Nawabshah, so as to transport natural gas from Iran in the future.

Above is a concise presentation for what the CPEC project has in mind for Pakistan in the years to come. The Corridor is being considered one of the biggest foreign direct investment plans laid down in history, and Pakistani officials consider it the godsend they have been waiting for in order to turn around the economic and social condition of their nation. However, such a project shall have implications, both positive and negative, primarily, owing to the presence of India between these two nations and because of the history of hostility amongst all the nations. Thus, India is a little wary of the project since
a combined foe is something which the country does not want at its doormat. A detailed outline of the implications has been provided below, which studies the impact the Corridor shall have from various perspectives.

**Implications and Reasons for the CPEC:**

- **Nation-wise Implications:**

  Primarily, the CPEC project has direct impact on Pakistan and China only, but, India is also included in the fray owing to the fact that this act would strengthen the bond between Pakistan and China and could spell danger for India in the future. Further, the plan impacts Iran as well, since Iran shall be tapped into for the supply of natural gas and it has shown interest in the same. Below is a distribution highlighting the impact of the CPEC on various nations with a stake involved in the project:

  a) **China:** The reason why China is building the CPEC in Pakistan has both geopolitical and economic reasons, however, the economic criterion supersedes the geopolitical one. Since the creation of The People’s Republic of China, China has aimed to be a superpower through heavy industrial growth and trade. The same has been accomplished by China through a great deal of investment in its Eastern front and in its mainland. However, the Western Chinese region has not been exploited by China until now. The region is rich in natural resources and is ripe for development purposes. The creation of the CPEC corridor shall enable China to shift its focus to the Western front as well, which shall foster further economic growth in the region and for the country. However, this is not the main impact that China is hoping for through the creation of the CPEC. Currently, when China has to import to export goods, it has to take the long and arduous route through the Strait of Malacca which increases its operational costs tremendously, and spells more efforts for the whole process. However, with the establishment of the Corridor, China shall have direct access to the Arabian Sea, making it easy for the nation to export and import goods from European and African nations. This shall be a boon for China as this shall foster global trade and take its market to new levels while simultaneously reducing the cost it incurs on trade as well. Also, with rising international diplomatic hostilities regarding the South China Sea, China is aiming to have another route to facilitate international trade, which the Corridor has the capacity to do.

  Another reason why China is fostering the construction of the Corridor at its Western front is to quell the disturbances and revolts ongoing in the region through the creation of employment opportunities in the region. The unrest in the Xinjiang region is mostly because of separatist sentiment prevalent in the region, but China wants to retain its hold over the nation by making its people economically invested in the country, making it harder for them to leave the People’s Republic of China.

  A geopolitical reason as to why China is looking forward for the establishment of the Corridor is because of its hostility towards India in the past. It is evident that China and India have had bad blood in the past and their economic ties are not top
notch as of now. Thus, the country is seen honeying up to Pakistan in order to cover all of its fronts, should there be a war like situation in the future. Many analysts view the CPEC as a method for rapid troop movement for China to aid its ally in case of any disputes and they also believes that China can position their troops in Pakistan under the guise of providing protection to the Corridor.

b) Pakistan: Pakistan today is starved for Foreign investment due to its security situation, there is a huge negative perception with regards to its capability and ability as a sourcing destination for goods and services. Many Foreign companies might set up distribution networks in future to cater for domestic demands but hopes for it being an export hub is little next to none.

c) The government of the day needs to change the perception and make a start somewhere, however exorbitant the cost is, CPEC is that start. If they manage to ope-rationalize it successfully then it will be a signal that Pakistan is truly open for business and its cheap labor and young educated demographic is an alternative to India/Bangladesh/South East Asia and likes. CPEC thus is an entry ticket to get into the economic prosperity game and not about winning the winning the game. In addition, CPEC is a useful tool to convince the domestic population of Pakistan that the Nawaz Sharif Government is not wasting time and is doing work for their benefit of the Pakistani people.

d) After the withdrawal of complete withdrawal of NATO forces from Afghanistan no major power will have any stake in Pakistan. However, CPEC changes that not only it guarantees a permanent Chinese presence in Pakistan, it also ensures Pakistan’s stability. This massive Chinese investment in Pakistan will forge a strong China Pakistan nexus in addition to granting Beijing a way to insert themselves into the Indo–Pakistan Equation which is a good thing for the stability of Pakistan. China will also not want a weakened Pakistan as it does not want an Indian dominated South Asia threatening its interests in the region.

e) For Pakistan, the CPEC project could not have come at a better point in time. The country is floundering economically and is facing massive unrest because of lack of employment opportunities in the country and low standard of living. Thus, Pakistan surely breathed a great sigh of relief when the Chinese Premier Li Jinping agreed to the creation of the CPEC with the Chinese Government funding the project. It is clearly manifested that Pakistan has the most to gain from the CPEC to the point that the project shall be the largest job creating initiative in Pakistan ever. The degree and scale of the plan is such that it has been compared to the Marshall Plan initiated by the USA government to foster development in post-World War II Europe. Analysts have predicted that the Corridor has the capacity of creating approximately 2.3 million employment opportunities between the years 2015-30.
and add an overall of 2-2.5% to Pakistan’s yearly economic growth. The amount to be invested by China is so colossal that it is equivalent to all the foreign direct investment Pakistan has received since the year 1970 and shall be at par with 17% of the gross domestic product earned by Pakistan in 2015. While, this is impressive, the main change Pakistan is hoping for is secondary and is derived from the CPEC’s economic implications. Pakistani officials hope that the creation of jobs shall enable the people to have a better standard of living and more economic power, which ultimately means more money in the government’s coffers. The Pakistani government hopes on using this increase in the government treasury to sort out its other problems like the presence of extremists groups and jihadists running amok in the country.

Ergo, it can be seen that the CPEC shall have a huge impression on the Pakistani political and economic scenario, and can help in the improvement of its social conditions as well. Pakistan should thus play its cards really well and stay on the current track as the Corridor definitely spells better years for it in the future.

f) India: India, even though not a state which is directly impacted by the CPEC, but, the ramifications of the project are such that it indirectly influences India as well. The alliance of Pakistan and China aside, the project is situated in such a region that India is bound to have a problem with the construction of the corridor.

The problem India faces is that the ever since the Partition, every prime minister and a person of economic sense has concluded that Pakistan shall have to deal with India in the future at one point and shall have to rely on it owing to its commercial viability. However, with the construction of the CPEC, China has altered this view altogether. The investment made by China will enable Pakistan to directly trade with China without having to use long trade routes or through reliance on other countries, especially India. Essentially, this makes the nation self-sufficient and autonomous, at least in the trade sphere, which is something India would not have preferred. However, economic impact aside, the main reason for concern for India regarding the CPEC is because of the military history of the three countries. India and Pakistan have had a violent past ever since the two countries were separated because of the Partition. The countries have engaged in acts of war on no less than four occasions, i.e. 1947, 1965, 1971 and 1999, and there have been various reports of small skirmishes and standoffs in between. In all these wars, India has emerged victorious against its hostile neighbor. One would think this shall reduce the conflicts both countries have since Pakistan would realize it just does not have the capacity to take on a nation of such economic and military might, but, even after such a realization, Pakistan has not stopped its aggressive behavior and both the countries remain wary of each other. This is where China comes into the play. China and India have also engaged in armed conflicts in the past, in the year 1962 and 1967, and while things are peaceful now, there are still
reports of standoffs on the Sino-Indian border owing to the fact that China has illegally occupied many Indian territories because it feels that it has a claim over these lands.

China realized long ago, that it needs to partner up with Pakistan in order to ensure that it shall have a staunch ally in the reason and someone to call on for help in times of military conflict. Pakistan has also held the same belief and since the late 20th century, both the countries have been in bed with each other and remain the strongest allies in the South Asian subcontinent. Thus, a major implication of the CPEC project is the fear of rapid troop deployment by China in Pakistan should India and Pakistan enter into a war. In order to protect its investment and its allies, China shall have to provide troops to Pakistan in the event of conflict and this provision of forces is something which can directly impact India as well.

Apart from the above, the very act of construction of the Corridor is in direct violation of international laws as the CPEC shall be built in PoK, i.e. Pakistan Occupied Kashmir. PoK is legally a part of India, but, was taken by Pakistan through the use of military force and now they recognize the territory as their own, while India still claims the occupied area as a part of their country. If the Corridor is constructed and becomes fully operational, it shall strengthen Pakistan’s claim to the area along with China backing it up owing to the investment made by it in the project. Thus, the location of the Corridor is a cause for concern for India as it is literally eating into its territory and can have a huge impact on its current prevalent situation in the war torn state of Jammu and Kashmir.

Ergo, although the project does not directly influence or concern India in any manner, the implications of its construction are huge in terms of future border and national security and for the sovereignty and territory of the country.

**Legal Implications of the CPEC Initiative:**
Since the project is something which involves two nations, the only body of law applicable to this situation is international law as laid down by the United Nations and multilateral and bilateral treaties. And keeping these bodies of law in mind, there are two major legal violations being incurred through the construction of the CPEC.

The first one is a technical one and has huge ramifications. Pakistan and China are not new friends and have had many trade deals in the past like the China Pakistan Free Trade Agreement, 2006. However, Pakistan, as per its classification is a dualist nation, i.e. any international agreement or treaty it enters into needs to be domestically approved as well through federal legislature in order to make the treaty applicable on Pakistan. And till this date, with approximately 50 agreements signed between China and Pakistan, none of them have been ratified internally by the Pakistani federal legislature. This implies that none of the treaties Pakistan has entered into with China, including the CPEC agreement, are legally binding on Pakistan and Pakistan cannot make use of contents of such agreements. However, there is a loophole to this which Pakistan can potentially exploit.
As per the Vienna Convention on Treaty Law, if the countries entering into an agreement express their desire in writing to commit to an agreement, then such an agreement shall be a treaty and the desire/intent for the same does not necessarily have to express and can be implied as well. Using this principle, the International Court of Justice held in the case of Qatar v Bahrain, that any consent shown in a meeting or through a pact counts as well and shall enable the agreement to be a viable treaty, even if it is not ratified internally. Thus, while the treaty is still applicable, Pakistan is not fulfilling its duty under international law to ratify its treaties in order to make them legally enforceable, highlighting its first violation of international law.

The second problem with the CPEC is the issue of Balochistan. Balochistan acceded into Pakistan back in 1948, with Gwadar joining the province in 1977. It is one of the largest provinces in Pakistan and is the most resource laden region of the country. Conversely, however, its populace is the most impoverished and faces a life of human rights violations and hardships. There is an ongoing conflict in the region between the Baloch nationalists and the Pakistani military with separatist sentiment as the main agenda. However, the area is rife with flagrant violations of human rights like, torture, extrajudicial killings, disappearances of people based on hunches of the government et al. The condition there is extremely inhumane and the government is not doing enough to bring a stop to it, and is promoting violence in some areas. And added to this, the CPEC shall pass through Balochistan, prompting more revolts and uprisings in the region. The Corridor shall definitely turn the world’s eyes to Balochistan and the condition of the inhabitants there and Pakistan should definitely sort this issue violation of human rights and international law first before going ahead with the construction of the various projects under the CPEC.

Conclusion:
Since the partition between India and Pakistan, both countries have primarily fought four wars in 1947, 1965, 1971 and 1999 respectively. Sino-Indian relations also saw strains during this era which resulted due to the 1962 and the 1967 wars. Over the period, these countries have tried to create their own hegemony, both physical and economical, in the South Asian continent. India’s enmity with Pakistan has strengthened both economic and military relation with china, thus emphasizing the notion of “enemy of my enemy is my friend”.

CPEC is a game changer for the region not only Pakistan and China will get benefits but also many other countries will also be benefited as well. Definitely, the companies of other countries which export goods and services to China and Pakistan would like to use the proposed route because of less shipping cost and transit time. Landlocked central Asian countries like Afghanistan, Kyrgyzstan, Kazakhstan, Tajikistan, Turkmenistan, and Uzbekistan would also get benefits of shortest way to seaport of Gwadar which is only at a distance of 2500 km as compared to Iran (4500 km) and Turkey (5000 km) This route not only serves China but also European countries, Middle
Eastern countries, and landlocked central Asian countries.

The CPEC initiative is one of the largest projects ever undertaken in the South Asian subcontinent. It involves heavy investments being made by China in Pakistan to construct various infrastructural projects in order to link the Chinese region of Xinjiang to the Pakistani port of Gwadar. Apart from this, the plan also includes the establishment of other facilities like a gas supply pipeline, energy projects etc. The Corridor shall create many employment opportunities in the nation and shall improve Pakistan’s economic standing. It shall also be useful to China as it shall gain access to the African and European markets at lower costs.

The China Pakistan Economic Corridor will surely allow Pakistan to build a robust and a stable economy, as well as, create a momentous opportunity for Pakistan to revive its stalled industry and advance its economic interest. CPEC is a game changer project which will lift millions of Pakistanis out of poverty and misery. The project includes the construction of a textile garment, industrial projects, construction of dams, the installation of nuclear reactors and creating networks of road, a railway line which will generate employment and people will also take ownership of these projects. Fully equipped hospitals, technical training institutes, water supply and distribution in undeveloped areas will also improve the quality of life of people.

However, India as a country stands to lose out on the PoK territory because of CPEC as it shall strengthen Pakistan’s claim on the region and it also poses a threat to India’s security because of the ease of troop movement China shall acquire because of the Corridor. The Corridor is also being constructed in Balochistan, which is problematic as the area is chock full of human rights violations being carried out by the Pakistani military and the CPEC is bound to create more issues in the future. Thus, while the Corridor is a godsend for Pakistan and a project of strategic importance to China, the operation of the Corridor could spell trouble for India and Balochistan, something which can only be speculated about at this point of time.
MEANING OF A COMPANY

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ABSTRACT
There is regularly discussing how an organization is a 'man' in eyes of law. An organization is dealt with as though it's its very own human kind. It is offered order to give different sorts of data, for example, minutes of gatherings, number of chiefs, rundown of items for what the organization is shaped and others. Be that as it may, it is a man in eyes of law as it were. A isn't a genuine individual however a juristic individual, and is under commitment to experience an alternate sort of examination. This phony of the organization is in truth an expansion to the identity of the organization. The organization's identity is said to be diverse to that of their chiefs, promoters and different individuals. Connection between identity of organization and identity of individuals is the additional assurance which the previous provides for the last mentioned. The organization's identity goes about as a window ornament to conceal the characteristics of its individuals, which is typically exploited to submit unlawful acts. Subsequently, this paper hopes to characterize, investigate and build up the different parts of the tenet of lifting the corporate shroud. The teaching is a device in hands of the Judiciary, that where this corporate identity perhaps overlooked with a specific end goal to locate the genuine guilty party and hold him at risk as opposed to holding the organization obligated.

1. INTRODUCTION
Industrial has revolution led to the emergence of large scale business organizations. These organizations require big investments and the risk involved is very high. Limited resources and unlimited liability of partners are two important limitations of partnerships of partnerships in undertaking big business. Joint Stock Company form of business organization has become extremely popular as it provides a solution to overcome the limitations of partnership business. The Multinational Companies like Coca-Cola and, General Motors have their investors and customers spread throughout the world. The giant Indian Companies may include the names like Reliance, Taloji Bajaj Auto, Infosys Technologies, Hindustan Lever Ltd., Ranbaxy Laboratories Ltd., and Larsen and Tubro etc.

Before learning about the principle of lifting the corporate veil, it is expedient for us to understand what a company is, as the principle applies only to the corporate world. The term ‘company’ is actually a derivative of Latin term ‘companias’. If we break this term, we get ‘com’ which means to ‘together’ and ‘panis’ which means ‘bread’. Hence, the term company is means a number of persons who eat together. But this was the ancient approach, where people used to form groups, only for purpose of filling their bellies. Modern day recognizes ‘company’ as group of persons, working together for purpose of carrying out a commercial or industrial activity.
'Company’ in India, is defined under Section 2 (20) of The Companies Act, 2013 (hereinafter referred as “The Act”), which defines it as, a “company incorporated under this Act or under any previous company law.” But this definition is not exhaustive. Lord Justice Lindley defines company as “an association of many persons who contribute money or money’s worth to a common stock and employ it in some trade or business, and who share the profit and loss (as the case may be) arising there from.”

2. MEANING OF A COMPANY
The word company has its birthplace shape the old French military term compaigne which signifies "an assemblage of warriors". As it were company, is a lawful element made up of a relationship of individuals, be they regular, lawful, or a blend of both, for carrying on a business or mechanical venture. Organization individuals share a typical reason, and join so as to center their different abilities and sort out there on the whole accessible aptitudes or assets to accomplish particular, announced objectives. Organizations take different structures, for example,

- voluntary affiliations, which may incorporate non-benefit associations
- business elements with a point of picking up a benefit
- financial elements and banks

An organization or relationship of people can be made at law as a lawful individual so the organization in itself can acknowledge constrained risk for common obligation and tax collection brought about as individuals perform (or neglect to release) their obligation inside the freely proclaimed "birth endorsement" or distributed approach. Company as lawful people may partner and enroll themselves on the whole as different organizations – frequently known as a corporate gathering. At the point when an organization closes, it might require a "passing testament" to maintain a strategic distance from advance legitimate commitments.

According to Section 3 (1) (i) of the Companies Act, 1956 defines a company as “a company formed and registered under this Act or an existing company”. Section 3(iii) of the act states that “an existing company means a company formed and registered under any of the previous companies laws”. This definition does not reveal the distinctive characteristics of a company. According to Chief Justice Marshall of USA

"A company is a person, artificial, invisible, intangible, and existing only in the contemplation of the law. Being a mere creature of law, it possesses only those properties which the character of its creation confers upon it either expressly or as incidental to its very existence”.

Lord Justice Lindley has also given the definition of a company which clearly define company as
“A company is an association of many persons who contribute money or money’s worth to a common stock and employ it in some trade or business, and who share the profit and loss (as the case may be) arising there from. The common stock contributed is denoted in money and is the capital of the company. The persons who contribute it, or to whom it belongs, are members. The proportion of capital to which each member is entitled is his share. Shares are always transferable although the right to transfer them is often more or less restricted”.

3. HISTORY OF A COMPANY IN INDIA
The Company Legislation in India has nearly taken after the Company Legislation in England. The primary authoritative establishment for enrolment of Joint Stock Companies was passed in the year 1850 which depended on the English Companies Act, 1844. This Act perceived organizations as particular lawful elements however did not present the idea of restricted obligation. The idea of restricted risk, in India, was perceived out of the blue by the Companies Act, 1857 firmly following the English Companies Act, 1856 in such manner. The Act of 1857, nonetheless, kept the obligation of the individuals from keeping money organizations boundless. It was just in 1858 that the restricted obligation idea was reached out to managing an account organization too. From that point in 1866, the Companies Act, 1866 was passed for solidifying and altering the law identifying with consolidation, direction and ending up of exchanging organizations and different affiliations. This Act depended on the English Companies Act, 1862. The Act of 1866 was recast in 1882 to get the Indian Company Law similarity with the different alterations made to the English Companies Act of 1862. This Act proceeded till 1913 when it was supplanted by the Companies Act, 1913. The Act of 1913 had been passed following the English Companies Consolidation Act, 1908. It might be noticed that since the Indian Companies Acts intently took after the English Acts, the choices of the English Courts under the English Company Law were likewise intently taken after by the Indian Courts. Till 1956, the business organizations in India were controlled by this Act of 1913. Certain corrections were, be that as it may, made in the years 1914, 1915, 1920, 1926, 1930 and 1932. The Act was widely corrected in 1936 on the lines of the English Companies Act, 1929. Minor changes were made various circumstances from that point.

Toward the finish of 1950, the Government of autonomous India selected a Committee under the Chairmanship of H.C. Bhaba to go into the whole inquiry of the update of the Indian Companies Act, with specific reference to its bearing on the improvement of Indian exchange and industry. This Committee inspected an expansive number of observers in various piece of the nation and presented its report in March 1952. Construct to a great extent with respect to the proposals of the Company Law Committee, a Bill to establish the present enactment, specifically, the Companies Act, 1956 was presented in Parliament. This Act, by and by to a great extent took after the
English Companies Act, 1948. The real changes that the Indian Companies Act, 1956 presented well beyond the Act of 1913 identified with:
(a) The advancement and arrangement of organizations;
(b) Capital structure of organizations;
(c) Company gatherings and methodology;
(d) The introduction of organization accounts, their review, and the forces and obligations of examiners; (e) the examination and examination of the issues of the organization;
(f) The constitution of Board of Directors and the forces and obligations of Directors, Managing Directors and Managers;
(g) The organization of Company Law.


Indian Law gives two major sorts of relationship for such affiliations: association and companions'. Notwithstanding the way that the word association is casually associated with both, the Statute perspectives associations and companions law as specific from affiliations and affiliation law. Association law in India is orchestrated in the Partnership Act, 1932 and relies upon the law of office, every accessory transforming into an administrator of the others and it, thusly, bears a proper structure for a relationship of a little collection of individuals having trust and trust in each other. A more jumbled kind of relationship, with an extensive and fluctuating cooperation, requires a more itemized affiliation which ideally should exhibit corporate character on the association, that is, should see that it constitutes an unmistakable genuine individual; subject to legitimate commitments and fit the bill for legal rights disengage from those of its people. This can be gotten easily and monetarily by enrolling a relationship as an association under the Companies Act, 1956.ii

4. CHARACTERISTIC FEATURE OF A COMPANY

The most important characteristic feature of a company is “separate legal entity” of a company and in most cases it is “limited liability” of members of the company. The other features of a company are discusses below:

1. INCORPORATED ASSOCIATION:

A company is created when it is registered under the Companies Act. It comes into being from the date mentioned in the certificate of incorporation. It may be noted in this connection that Section 11 provides that an association of more than ten persons carrying on business in banking or an association or more than twenty persons carrying on any other type of business must be registered under the Companies Act and is deemed to be an illegal association, if it is not so registered.

For forming a public company at least seven persons and for a private company at least two persons are persons are required. These persons will subscribe their names to the Memorandum of association and also comply with other legal requirements of the
Act in respect of registration to form and incorporate a company, with or without limited liability [Sec 12 (1)]

2. ARTIFICIAL PERSON:
The company, though a juristic person, does not possess the body of natural being. It exists only in contemplation of law. Being an artificial person, it has to depend upon natural persons, namely, the directors, officers, shareholders, etc., forgetting its various works done. However, these individuals only represent the company and accordingly whatever they do within the scope of the authority conferred upon them and in the name and on behalf of the company, they bind the company and not themselves.

3. SEPARATE LEGAL ENTITY:
A company has a legal distinct entity and is independent of its members. The creditors of the company can recover their money only from the company and the property of the company. They cannot sue individual members. Similarly, the company is not in any way liable for the individual debts of its members. The property of the company is to be used for the benefit of the company and not for the personal benefit of the shareholders. On the same grounds, a member cannot claim any ownership rights in the assets of the company either individually or jointly during the existence of the company or in its winding up. At the same time the members of the company can enter into contracts with the company in the same manner as any other individual can. Separate legal entity of the company is also recognized by the Income Tax Act. Where a company is required to pay Income-tax on its profits and when these profits are distributed to shareholders in the form of dividend, the shareholders have to pay income-tax on their dividend of income. This proves that a company that a company and its shareholders are two separate entities.

This principal was explained in the famous case SALOMON v. SALOMON & CO.LTD.
The facts of the case were:

Mr. Saloman, the owner of a very prosperous shoe business, sold his business for the sum of $ 39,000 to Saloman and Co. Ltd which consisted of Saloman himself, his wife, his daughter and his four sons. The purchase consideration was paid by the company by allotment of & 20,000 shares and $ 10,000 debentures and the balance in cash to Mr. Saloman. The debentures carried a floating charge on the assets of the company. One share of $ 1 each was subscribed by the remaining six members of his family. Saloman and his two sons became the directors of this company. Saloman was the managing Director.

After a short duration, the company went into liquidation. At that time the statement of affairs’ was like this: Assets: $ 6000, liabilities; Saloman as debenture holder $ 10,000 and unsecured creditors $ 7,000. Thus its assets were running short of its liabilities b $11,000.

The unsecured creditors claimed a priority over the debenture holder on the ground that company and Saloman was one and the same person. But the House of Lords held that the existence of a company is quite
independent and distinct from its members and that the assets of the company must be utilized in payment of the debentures first in priority to unsecured creditors.

Saloman’s case established beyond doubt that in law a registered company is an entity distinct from its members, even if the person hold all the shares in the company. There is no difference in principle between a company consisting of only two shareholders and a company consisting of two hundred members. In each case the company is a separate legal entity.

4. **PERPETUAL EXISTENCE:** A company is a stable form of business organization. Its life does not depend upon the death, insolvency or retirement of any or all shareholder or director. Law creates it and law alone can dissolve it. Members may come and go but the company can go on for ever. “During the war all the member of one private company, while in general meeting, were killed by a bomb. But the company survived; not even a hydrogen bomb could have destroyed”. The company may be compared with a flowing river where the water keeps on changing continuously; still the identity of the river remains the same. Thus, a company has a perpetual existence, irrespective of changes in its membership.

5. **COMMON SEAL:** A Company being an artificial person is not bestowed with a body of a natural being. Therefore, it does not have a mind or limbs of human being. It has to work through the agency of human beings, namely, the directors and other officers and employees of a company. But, it can be held bound by only those documents which bear its signature. Common seal is the official signature of a company.

6. **LIMITED LIABILITY:** A company may be company limited by shares or a company limited by guarantee. In company limited by shares, the liability of members is limited to the unpaid value of the shares. For example, if the face value of a share in a company is Rs. 10 and a member has already paid Rs. 7 per share, he can be called upon to pay not more than Rs. 3 per share during the lifetime of the company. In a company limited by guarantee, the liability of members is limited to such amount as the member may undertake to contribute to the assets of the company in the event of its being wound up.

7. **TRANSFERABLE SHARES:** In a public company the shares are freely transferable. The right to transfer shares is a statutory right and it cannot be taken away by a provision in the article. However, the articles shall prescribe the manner in which such transfer of shares will be made and it may also contain bona fide and reasonable restriction on the right of members to transfer the shares. But absolute restrictions on the rights of members to transfer their shares shall be ultra vires. However, in the case of a private company, the articles shall restrict the right of member to transfer their shares in companies with its statutory definition.

In order to make the right to transfer shares more effective, the shareholder can apply to the Central Government in case of refusal by the company to register a transfer of shares.
5. LIFTING THE CORPORATE VEIL
Puncturing the veil is corporate law’s most generally utilized principle to choose when an investor or investors will be held at risk for commitments of the organization. It keeps on being a standout amongst the most prosecuted and most talked about tenets in all of corporate law. In spite of the fact that there is close unanimity among the pundits that the present standards neither guide great basic leadership nor deliver reliable or solid outcomes, and there are numerous recommendations for change or cancelation of the present law, one sees minimal discernable development for the situation law toward a superior approach.

Puncturing the shroud law exists as a beware of the rule that, by and large, financial specialist investors ought not be held at risk for the obligations of their company past the estimation of their venture. The cutting edge basis for giving individual financial specialists restricted obligation underlines taking out three kinds of exchange costs. In the first place are the expenses of individual investors or lenders checking the riches position of different investors, second, the expenses and different complexities of every investor or loan boss observing the dangers of administration activities? Third, restricted investor obligation makes it less expensive and less demanding for investors to broaden their ventures. The consequence of restricting these exchanges costs is that constrained risk both empowers speculation and encourages the operation of values markets. Moreover, Hansman and Kraakman have powerfully contended that restricted risk is a piece of a more extensive wonder of benefit apportioning which serves critical social premiums by ensuring lenders that business resources will likewise be shielded from financial specialists' loan bosses. Notwithstanding, another accord is developing in the analysis that constrained risk may well not be legitimized in tort cases and, in spite of the fact that with less unanimity, additionally when the case depends on statutory obligations as opposed to precedent-based law commitments.

While conventional corporate law has not explained diverse guidelines for a parent organization in its part as an investor than for singular speculator investors, parent organizations in reality exhibit distinctive strategy issues and their constrained risk ought to be dictated by an alternate examination. The center thought is that a parent organization as an investor in its auxiliary organizations is in a significant distinctive financial part and performs a significant diverse administration work than singular speculator investors, incorporating open investors in the parent organization itself. A parent organization makes, works and breaks up auxiliaries essentially as a major aspect of a business procedure in quest for the business objectives of the bigger undertaking, which the parent and every one of the backups are seeking after together. The parent isn't a free speculator. Whatever the corporate customs picked, the parent regularly has genuine control over the operations and choices of the auxiliary and the degree to which the parent practices that control depends on business system for the endeavour as opposed to significant division of the lawfully autonomous corporate substances. The different organizations in
the corporate gathering are truly sections that all in all direct the incorporated venture under the coordination of the parent. Inside corporate gatherings, a large number of the contemporary monetary productivity avocations for constrained obligation don't have any significant bearing, and neither should the principles for applying that risk or deciding its external limit.

A choice by corporate law to permit investors constrained obligation is a choice to permit them, as financial specialists, to apportion a portion of the dangers of working together to outsiders. Puncturing the cloak rules are one of the customary ways that courts have directed that hazard distribution choice.

6. **GROUNDS UNDER WHICH THE VEIL IS LIFTED**

The corporate evil is said to be lifted when the court ignores the company and concerns itself directly with the members or the managers. “It is impossible to ascertain the factors which operate to break down the corporate insulation.” The matter is largely in the discretion of the courts and will depend upon “the underlying social, economic and moral factors as they operate in and through the corporation.” It can be said “that adherence to the Solomon principle will not be doggedly followed where this would cause an unjust result”. But the following grounds have become well-established for lifting of the veil of a corporate entity.

- **FRAUD:**

The courts have been more that prepared to pierce the corporate veil when it feels that fraud is or could be perpetrated behind the veil. The courts will not allow the Solomon principal to be used as an engine of fraud. The two classic cases of the fraud exception are Gilford Motor Company Ltd v. Horne and Jones v. Lipman.

In the first case, Mr. Horne was an ex-employee of The Gilford motor company and his employment contract provided that he could not solicit the customers of the company. In order to defeat this he incorporated a limited company in his wife's name and solicited the customers of the company. The company brought an action against him. The Court of appeal was of the view that "the company was formed as a device, a stratagem, in order to mask the effective carrying on of business of Mr. Horne. "In this case it was clear that the main purpose of incorporating the new company was to perpetrate fraud.” Thus the court of appeal regarded it as a mere sham to cloak his wrongdoings.

In the second case of Jones v. Lipman a man contracted to sell his land and thereafter changed his mind in order to avoid an order of specific performance he transferred his property to a company. Russel J specifically referred to the judgments in Gilford v. Horne and held that the company here was "a mask which (Mr. Lipman) holds before his face in an attempt to avoid recognition by the eye of equity" he awarded specific performance both against Mr. Lipman and the company. Under no circumstances will the court allow the anyform of abuse of the corporate form and when such abuse occurs the courts will step in. The three aspects of
fraud, which needs to be looked at before the corporate veil can be lifted which are:

A) What are the motives of the fraudulent person relevant?

Regardless of whether some level of misdirection is essential should be resolved. On account of Hilton v. Plustile Ltd. the offended party and the litigant consented to utilize a medium of an organization in a tenure game plan keeping in mind the end goal to sidestep the use of the Rent Act, 1977. The court of Appeal held that the offended party was not qualified for lift the cloak since he had full information of the issue consistently. However another intriguing inquiry that emerges is the thing that the impact of duplicity on the other party is. The issue came up for exchange on account of Adams v. Cape Industries Plc. In considering whether the corporate shape has been utilized as a part of such a path as to legitimize the lifting of the corporate shroud, the court expressed that the right test in connection to gatherings of organizations was whether the organization had been utilized as a "minor exterior hiding the verifiable certainties" applying this test Slade J. said that the "thought processes of the culprit might be exceptionally material" in both the great cases goal to delude the offended party was especially present anyway it was not so in Adams v. Cape Industries. So the indicate that requirements be resolved is whether thought process is fundamental for the extortion exclusion to exist. However to find any solution it is likewise critical to discover the idea of lawful right that is being denied to the offended party.

B) Is the character of the legal obligation being evaded relevant?

What the court needs is to keep restricted organizations from utilizing the corporate frame to dodge an authoritative or legitimate commitment. Be that as it may one needs to address whether the idea of this commitment will influence the capacity of the court to lift the corporate cover. In the great cases the litigants tried to keep away from the lawful commitments that existed before their fuse, the fundamental rationale of joining was to maintain a strategic distance from the execution of the lawful commitment. In Adams v. Cape there was some discourse about the need to enable the cover to be lifted keeping in mind the end goal to anticipate Cape maintaining a strategic distance from attention as to its contribution in the offer of asbestos to America and to keep cape from having any common-sense advantage of the gathering's asbestos exchange the states without the chaperon dangers of convoluted risk. However the convoluted risk was absolutely theoretical. For the misrepresentation exemption to exist the litigant must deny the offended party some previous legitimate right. On the off chance that no lawful right is existent the aim on part of the litigant to delude the offended party must be theoretical and consequently less significant in nature.

On the off chance that the legitimate right solidifies before the consolidation of the organization then the psychological component is fulfilled if however the turn around then inquiry emerges if whether in such conditions the psychological component can be fulfilled. An appropriate response to this is if the legitimate right
solidifies after the joining however before the utilization of the corporate shape to avoid the lawful right, the misrepresentation special case ought to be fulfilled.

C) Is the timing of the incorporation of the device company relevant?
In Creasey v. Breachwood Motors Limited, the explanation behind the disappointment of the extortion special case was the planning of fuse of the sham organization. Here Mr. Creasey brought an activity against wrongful rejection against his managers BW. BW served a protection however after four months he was served a notice saying that the organization was indebted. BM assumed control over all the business with the exception of the offended party's claim. The offended party got a request for harms and intrigue however before he got anything. BW was disintegrated without going into liquidation. The offended party looked for a request substituting BM for BW on the grounds of equity. For this situation the reality may seem to be like Adams v. Cape Industries however Richard Southwell sitting as recognized Judge alluded to Gilford v. Horne and Jones v. Lipman on the premise that in those cases the sham organizations are had been framed with the view to do the misrepresentation. In the present case the gadget organization BM was at that point in business and minding individually business. This an exceptionally dubious case and ought to have been settled based on the great cases as it ought not make any difference whether gadget organizations were made to maintain a strategic distance from the lawful commitment or whether they were in presence. Creasey ought to have been generally chosen perhaps on the grounds of equity.

➢ GROUP ENTERPRISES
Some of the time on account of gathering of undertakings the Solomon vital may not be clung to and the court may lift the shroud so as to take a gander at the financial substances of the gathering itself. On account of D.H.N. Nourishment items Ltd. v. Tower Hamlets London Borough Council it has been said that the courts may slight Solomon's case at whatever point it is simply and fair to do as such. In the previously mentioned case the court of claim felt that the present situation where it was one reasonable for lifting the corporate cloak. Here the three auxiliary organizations were dealt with as a piece of the same financial substance or gathering and were qualified for pay.

Ruler Denning has commented that we realize that in numerous regards a gathering of organizations are dealt with together with the end goal of records, monetary record, and benefit and misfortune accounts. Gower too in his book says, "There is proof of a general propensity to overlook the different lawful gathering". However whether the court will puncture the corporate cloak relies upon the certainties of the case. The idea of shareholding and control would be markers whether the court would puncture the corporate shroud. On account of Woolfsan the place of rulers held that there was "no premise consonant with the guideline whereupon on the certainties of this case the corporate cloak can be punctured to the impact of holding Woolfson to be the genuine proprietor of Campbell's business or
the benefits of Solfred, "the two backup organizations that were mutually guaranteeing remuneration for the estimation of the land and unsettling influence of business. The House of Lords in the previously mentioned case had commented "legitimately connected the rule that it is proper to pierce the corporate cloak just where unique conditions exist showing that it is a negligible façade covering the verified actualities" In the metaphorical sense exterior indicates outward appearance particularly one that is false or misleading and imports falsification and disguise. That the corporator has finish control of the organization isn’t sufficient to constitute the organization as a minor veneer rather that term recommends in the setting the thin camouflage of the personality and exercises of the corporator. The different legitimate identity of the organization, despite the fact that a "specialized point" is regardless of frame it involves substance and reality and the corporator should not, on each event, be mitigated of the disadvantageous results of a course of action deliberately went into by the corporator for reasons considered by the corporator to be of favorable position to him. Specifically "the gathering endeavor" idea should clearly be deliberately constrained with the goal that organizations who look for the upsides of independent corporate identity should for the most part acknowledge the relating weights and constraints.

An organization having energy to go about as an operator may do as such as a specialist for its parent organization or in fact for all or any of the individual individuals on the off chance that it or they approve it to do as such. On the off chance that so the parent organization or the individuals will be bound by the demonstrations of its specialist insofar as those demonstrations are inside genuine or clear extent of the expert. Be that as it may, there is no assumption of any such relationship without an express
understanding between the gatherings it will be hard to build up one. In Cape case endeavor to do as such fizzled. In situations where the office understanding holds great and the gatherings concerned have explicitly consented to such an assent then the corporate shroud should be lifted and the vital might be subject for the demonstrations of the operator.

➢ **TRUST**

The courts may penetrate the corporate cover to take a gander at the attributes of the investors. On account of Abbey and Planning the court lifted the corporate cover. For this situation a school was run like an organization yet the offers were held by trustees on instructive altruistic trusts. They penetrated the cloak with a specific end goal to investigate the terms on which the trustee held the offers.

➢ **TORT**

Usually the English courts have not lifted the veil on the ground of tort, this is an phenomenon not witnessed in most common law jurisdictions apart from Canada.

➢ **ENEMY CHARACTER**

In times of war the court is prepared to lift the corporate veil and determine the nature of shareholding as it did in the Daimler caseii where germen shareholders held the shares of an English company during the time of World War I.

➢ **TAX**

On occasion charge enactments warrant the lifting of the corporate cloak. The courts are set up to ignore the different legitimate identity of organizations if there should be an occurrence of tax avoidances or liberal plans of expense shirking with no essential authoritative expert.

7. **COMPANY VERSUS BODY CORPORATE**

Body Corporate means a relationship of people which has been joined under some statute having never-ending progression, a typical seal and having a legitimate substance unique in relation to the individuals constituting it. Sub-area (7) of segment 2 of the Companies Act characterizes the articulation body corporate as follows: 'Body corporate or partnership' incorporates an organization joined outside India however does exclude (a) A company sole; (b) A co-agent society enlisted under any law identifying with co-agent social orders; (c) Any other body corporate not being an organization which the Central Government may, by warning in the Official Gazette, indicate in this benefit.

It will additionally incorporate all open budgetary establishments specified in area 4A and in addition the nationalized banks joined under segment 3, sub segment (4) of the Banking Companies (Acquisition and Transfer of Undertakings) Act.

It might be noticed that under proviso (c) of sub-segment (7) of area 2, the Central Government has maintained whatever authority is needed to proclaim any relationship of people as a body corporate. As needs be, Oil and Natural Gas Commission (ONGC) was announced as a body corporate.
In this way, the word body corporate’ isn't identical to the words joined organization'. A fused organization is a body corporate however numerous bodies corporate are not joined organizations Madras Central Urban Bank Ltd. V. Partnership of Madras iii The articulation organization’ or body corporate' is, along these lines, more extensive than the word organization.

Is a Society enrolled under the Societies Registration Act, a body corporate? A general public enlisted under the Societies Registration Act has been held by the Supreme Court in Board of Trustees Ayurvedic and Unani Tibia College, Delhi V. Territory of Delhi iv not to draw near the term body corporate' under this Act, however such a general public is a lawful individual equipped for holding property and turning into an individual from an organization. Comparative view had been held by the Department of Company Law organization in its correspondence No. 8/26/2(7)/63/PR dated thirteenth June, 1962 routed to Federation of Indian Chambers of Commerce. The Department saw as takes after:

As a rule, this Department would think about that as a body which has been or is joined under some statute and which has an interminable progression and a typical seal and is a lawful element separated from the individuals constituting it, will come surprisingly close to the term body corporate'. The term won't, be that as it may, incorporate a general public enrolled under the Societies Registration Act, 1860, or any of the bodies which have been particularly avoided by conditions (a), (b) or (c) of Section 2, sub-segment (7).

An examination from the above qualities of the organization viz, Legal element particular from its individuals, isolate property, manufactured individual, restricted obligation, isolate property, transferability of offers, never-ending progression and basic seal unmistakably demonstrates that organization has a different legitimate element not the same as its proprietors and the same is overseen by an arrangement of individuals who are not proprietors. It is this partition of proprietorship and control that offer importance to the part of Directors. The way that directors of an organization are not proprietors offered ascend to potential outcomes where such supervisors might be either thoughtless with other individuals' cash or mishandle power and position and data to advance their own closures at cost of organization or investors. To offset such inclinations idea of free executives appeared.

The Board of Directors of any organization is thought to be the foremost expert for an organization's administration, the structure and synthesis of the board would essentially affect the way in which the organization is represented. Among the different auxiliary changes that have happened lately to enhance the manner by which organizations are administered, the presentation of the idea of a free chief possesses a conspicuous position. The ascent of autonomous executives in a model of company where scattered possession overwhelms is ordinarily comprehended to address administration investors office issue. —An dynamic and free directorate working for
investors unmistakably would appear to profit the partnership by diminishing the misfortunes from misled 'office' characteristic in the division of proprietorship from control that is essential to the cutting edge organization.

Two models have been overwhelming the corporate administration on the planet. One, untouchable model where organizations are dispersedly held, ordinarily found in US, the stress is that the administration of the firm might have the capacity to confiscate resources of the investors or carry on in an artful or non-esteem boosting way. Second, 'insider' show where organizations have a controlling investor, the key corporate law concern is that the controlling investor may have harming inclinations to the minority investors. For example, fakes like Enron and WorldCom where the administration and controls like Parmalat and Satyam where the controller endeavored to distort money related execution or conceal confiscation. Laxity of evaluators and autonomous chiefs were observed to be factors in every one of these cases. Therefore, strikingly even where corporate administration models contrast, corporate cheats have shown a type of meeting standards.

8. PROCLAMATION OF PROBLEM
Indeed, even today, a greater part of Indian organizations, including organizations recorded on the stock trades, has a gathered proprietorship in the hands of privately-owned company gatherings. Now and again even where the controlling family may have just unobtrusive possession control, organizations in India remain family-oversaw and promoted. In the occasions of corporate fakes, for example, Satyam, it isn’t just open investors yet in addition partners, for example, representatives, lessers, clients, industry in general that endures. A critical inquiry in Indian setting is with respect to organization issue between minority-larger part investor and that between the organization and partners other than investors. That autonomous executive’s holds answer for these office issues particularly in Indian model of shut possession is a fundamental inquiry.

9. POINTS AND GOAL OF STUDY
In the midst of cases being made that autonomous executives, a transplanted idea, fundamentally intended to take care of first level of office issue i.e. the administration investor clashing intrigued, this investigation means to interpret how far this idea can resolve other related office issues. With regards to controlled or promoter-overwhelmed firms in India, this examination look to investigate what parts free chiefs play at such firms where office issues offer very complex circumstance of minority v. dominant part and friends v. partners. Advance in occasion of corporate fakes, for example, Satyam, how far autonomous chiefs and their usefulness can turn away such failures in future or if nothing else raise alert for speculators what’s more, and controllers.

10. HYPOTHESIS
This investigation depends on the speculation that answers for the minority-larger part office issue too that between the organization and partners lies with free executives. The degree and elements of
autonomous executives in the Board of Directors can be successfully extended in the statutory and administrative system to address the issues of minority investors against controlling investors as well as for alternate partners.

11. EXTENSION AND LIMITATION OF STUDY
The extent of this examination is to completely look at and comprehend the hypothetical and recorded foundation of the idea of autonomous chiefs and contextualize the same in the Indian situation where insider model of administration commands the corporate scene. The extent of research in this way reaches out to the nation of source United States and to some degree United Kingdom. In the process a few critical arrangements in pertinent statues, for example, Sarbanes Oxley and board reports have been considered. Likewise say that the legal reaction to autonomous executives particularly the one of Delaware Court has been investigated in more noteworthy points of interest. This is essentially because of the reason that Delaware Corporate law and the state itself is thought to be among the most dynamic and very powerful locales so far as organization law in US is concerned. The reception of this idea in India is to a great extent directed through a few board of trustees reports and suggestions and along these lines an investigation of the same is made. Examinations have been drawn between the recent Company Act 1956 which has been supplanted with the Company Act 2013 while this investigation was all the while going on. Imperatively, Clause 49 of Listing Agreement of the Securities Exchange Board of India i.e., SEBI finds visit reference.

While there has been enormous measure of writing and exact research for the estimation of free chiefs, a similar inquiry is thought to be out of degree for this examination. So also the distinction between ideas of nonexecutive executives, outside chiefs has not been managed at more prominent length.

12. RESEARCH METHODOLOGY
This research embraces a doctrinal strategy and alluded to a few books, diaries, panel reports, ministry sites, legal choices and so on. Promote a similar, chronicled, and basic and scientific method of investigation has been received.
ANTI-DEFECtion LAW; GUARD OR EVIL FOR DEMOCRACY

By Mordhwaj
From Vivekananda Institute of Professional Studies

Abstract

Out of 192 countries in the world, 123 countries follow democracy and among which Indian democracy once was considered as the most vibrant democracies based on modern principles. But now a day’s Indian democracy has gradually slipped to a chaotic governance system and for this, not only one, all the Indian political parties are responsible. This may be due to the past legacy of British laws resulting in sharp differences between caste, region and religion as the divisive principles. However, the Indian constitution was built on modern principles to unite the diverse peoples for solving problems of the poverty stricken population. Thus to remove the illness from the Indian democracy anti-defection law was introduced to the Indian constitution in the year 1985 i.e. 52nd amendment act. One of the most important reasons presented, to bring the anti-defection law, was to curb the power of money after election within the house. The horse trading and unstable government caused by money power and bribery was said to be rampant in the cross voting. Now the question is, in the 32 years of this law, whether this law has achieved its goal or Politicians has found loopholes in this law and used it for their own benefit and made this law an evil for Indian democracy? Does it restrict representatives from voicing the concerns of their voters in opposition to the official party position? Should the decision on defections be judged by the Speaker who is usually a member of the ruling party or coalition, or should it be decided by an external neutral body such as the Election Commission? Thus, this paper provides detailed evaluation of the anti-defection law and how it is against or in favour of the fundamental principles of modern democracy.

Defection is defined as “desertion by one member of the party of his loyalty towards his political party, his duty towards his party or to his leader”. The original Constitution of India had no mention of political parties. But, ever since the multiparty system evolved, the Indian parliamentary system has witnessed defections in large numbers from one political party to another, resulting almost in the breakdown of public confidence in a democratic form of government. The Rajiv Gandhi Government in 1985 introduced anti-defection laws in the Indian Constitution. These were introduced by way of the 52nd Constitutional Amendment, which inserted Tenth Schedule in the Constitution, popularly known as the Anti-Defection law. The amendment put a bar on the elected members of a political party to leave that party or to switch to another party in the Parliament. The Fifty-second Constitutional Amendment Act of 1985 amended Articles 101, 102, 190 and 191 of the Indian Constitution and inserted the Tenth Schedule in it. The Statement of Objects and Reasons of the amendment Stated: “The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundation of our democracy and the
The schedule mentions the grounds on which a defecting member stands disqualified from his original political party. The law also contains some exceptions from disqualification, like in the case of a party merger.

**Evolution of the law:**

The 70s era marked floor crossing as a common problem facing all parties, wherein any member changes his/her stance abruptly just before the voting inside the parliament, probably many times due to monetary allurement. After many cases of floor crossing on crucial voting, the term “Aaya Ram Gaya Ram” was coined to describe this phenomenon in the mass media. Mrs. Indira Gandhi introduced the constitution amendment bill against defection in May 1973; but the proposal could not be passed in the next two years. Finally, the bill was overtaken by imposition of Emergency. But later on this practice of switching political sides to grab office was popularly known as Horse-Trading. There was rampant horse-trading and corruption prevalent amongst the political leaders and political parties. One such incident that left a mark on India’s political history occurred after the 1967 elections when about 142 MPs and 1900 MLAs switched their political parties. In order to curb such a practice and the resulting consequences, the Rajiv Gandhi Government in 1985 introduced anti-defection law bill also known as “daal badal kannon” in the parliament and the bill enjoyed three-fourths majority in parliament. The law was amended once by the 91st Amendment in 2003 under Atal Bihari Vajpayee's NDA Govt.

**Functioning of law:**

The 52nd amendment, containing the anti-defection law, of the Constitution added the Tenth Schedule which laid down the process by which legislators may be disqualified on grounds of defection. An elected Member of Parliament (MP) or state legislature (MLA) is considered to have defected, in case he either voluntarily resigned from his party or disobeyed the directives, in the form of whip issued by the party, on a vote. Hence, the elected members must not vote or abstain on any issue in the parliament against the party's whip. This whip issuance needs profound probing in terms of freedom of expression and liberty. Independent members, elected without any party ticket, are also disqualified if they joined a political party after election. A nominated member can be disqualified if the person joins any political party after the expiry of six months from the date of nomination. Disqualification on ground of defection—

(1) Subject to the provisions of [Paragraphs 4 and 5], a member of a House belonging to any political party shall be disqualified from being a member of the House—

(a) if he has voluntarily given up his membership of such political party; or

(b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or
abstention.

The law also made a few exceptions. The law initially permitted splitting of parties with a faction claiming minimum one third members as a separate group, but that has now been outlawed with the constitutional amendment in 2003. Also, a party could be merged with minimum two third members into another political party. The members may decide to join the newly formed party or function as a separate group. Further, any member elected as speaker or chairman can resign from his party, and rejoin the party after demitting that post.

The law states that only the presiding officer i.e., Chairman or the Speaker of a House, can make decisions on disqualification of a member under this Schedule, and his/her decision is final. If a question arises on the presiding officer on the subject of disqualification, then the decision shall be made by a newly elected presiding officer. The law states that the Presiding Officer’s decision is final and not subject to judicial review. “The Supreme Court struck down this condition partly and held that no judicial intervention shall be made until the presiding officer gives his order. However, the final decision can be appealed in the High Courts and Supreme Court.”

Disqualifications from 1985 to 2009:

<table>
<thead>
<tr>
<th>PARLIAMENT</th>
<th>STATE LEGISLATURE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Person</td>
<td>complained</td>
</tr>
<tr>
<td>88</td>
<td>268</td>
</tr>
</tbody>
</table>

Against disqualification

<table>
<thead>
<tr>
<th>No. Of disqualification</th>
<th>violating party whip</th>
<th>23</th>
<th>133</th>
</tr>
</thead>
<tbody>
<tr>
<td>On the grounds of voluntarily resigning</td>
<td>19</td>
<td>26</td>
<td></td>
</tr>
<tr>
<td>Merger</td>
<td>26</td>
<td>81</td>
<td></td>
</tr>
</tbody>
</table>

**Merits:**
- Provides stability to the government by preventing shifts of party allegiance.
- Ensures that candidates elected with party support and on the basis of party manifestoes remain loyal to the party policies. Also promotes party discipline.

**Demerits:**
- By preventing parliamentarians from changing parties, it reduces the accountability of the government to the Parliament and the people.
- Interferes with the member’s freedom of speech and expression by curbing dissent against party policies.

**Challenges to anti-defection law:**

- By preventing parliamentarians from changing parties, it reduces the accountability of the government to the Parliament and the people.

- Interferes with the member’s freedom of speech and expression by curbing dissent against party policies.
• The very first challenge to the anti-defection law was made in the Punjab and Haryana high court. One of the grounds on which law was challenged was that whether the right to freedom of speech and expression is curtailed by the paragraph 2(b) of the Tenth Schedule. Wherein the court held: “So far as the right of a member under Article 105 is concerned, it is not an absolute one and has been made subject to the provisions of the Constitution and the rules and standing orders regulating the procedure of Parliament. The framers of the Constitution, therefore, never intended to confer any absolute right of freedom of speech on a member of the Parliament and the same can be regulated or curtailed by making any constitutional provision, such as the 52nd Amendment. Therefore the provisions of Para 2(b) cannot be termed as violative of the provisions of Article 105 of the Constitution”.

• The another ground on which anti-defection law was challenged was that whether paragraph 7 of the Schedule barring the jurisdiction of courts in cases of disqualification is constitutional. The court held that “the paragraph seeks to change the operation and effect of Articles 136(special leave to apply by the Supreme Court), 226(writ jurisdiction of High Court) and 227(power of superintendence over all courts by the high court) of the Constitution which give the High Courts and Supreme Court jurisdiction in such cases. Any such provision is required to be ratified by state legislatures as per Article 368(2). The paragraph was therefore held invalid as it had not been ratified.”

• The another important ground was that whether paragraph 6 of the Tenth Schedule granting finality to the decision of the Speaker/Chairman is constitutionally valid. The court held that “The extent that the provisions grant finality to the orders of the Speaker, the provision is valid. However, the High Courts and the Supreme Court can exercise judicial review under the Constitution. Judicial review should not cover any stage prior to the making of a decision by the Speakers/Chairmen. Any law cannot take away the power of the courts to be the final adjudicator of any matter. Therefore paragraph 6 was held to be unconstitutional on the grounds that it violates the basic structure of the Constitution.”

• Following the Kihota Hollohon case some other grounds were also challenged in the court of law. Whether only resignation constitutes voluntarily giving up membership of a political party, Whether the Speaker of a legislature is bound by the directions of a Court and whether judicial review by courts extends to rules framed under the Tenth Schedule. The Supreme Court held that “The words “voluntarily giving up membership” have a wider meaning. An inference can also be drawn from the conduct of the member that he has voluntarily given up the membership of his party. Also The Court cited the case of Kihota Hollohon where it had been said that the Speaker while passing an order under the Tenth Schedule functions as a Tribunal. The order passed by him would therefore be subject to judicial review and Rules under the Tenth Schedule are procedural in nature. Any violation of those would be a procedural irregularity. Procedural
irregularity is immune from judicial scrutiny.”

- When can a court review the Speaker’s decision making process under the Tenth Schedule? The Supreme Court held the “If the Speaker fails to act on a complaint, or accepts claims of splits or mergers without making a finding, he fails to act as per the Tenth Schedule. The Court said that ignoring a petition for disqualification is not merely an irregularity but a violation of constitutional duties.”

- The Constitution (32nd Amendment) Bill 1973 and the Constitution (48th Amendment) Bill 1978 had provisions for decision-making by the president and governors of states in relation to questions on disqualification on ground of defection.

- “The 91st Amendment to the Constitution was enacted in 2003 to tighten the anti-defection provisions of the Tenth Schedule, enacted earlier in 1985. This amendment makes it mandatory for all those switching political sides — whether singly or in groups — to resign their legislative membership. They now have to seek re-election if they defect and cannot continue in office by engineering a “split” of one-third of members, or in the guise of a “continuing split of a party”. The amendment also bars legislators from holding, post-defection, any office of profit.”

**International experience with anti-defection law:**

Most of the developed nation including USA, UK, Canada, France and Germany does not have anti-defection law under the rule of parliament and floor-crossing along with dissent is integral part of democratic system. The consequences of defections are left to the parties, to take care of their intra party discipline, and the individual elected representatives are expected to defend their decision to the party and in the respective constituency. The constituency will take necessary action, elect, reject or re-election. According to USA courts “dispute between the political party and its member would fall under the private affair and the political party has the privilege to expel the member with conflicting philosophy. It was argued that the parties have not elected the legislator member and hence, the party has no control over legislature membership”. However, the political party has the right to expel the member from party membership to maintain discipline. “Further, the US District Court of Pennsylvania judgement upheld the legislator's right to change its political Party membership; different from the party ticket he contested elections, after the election process.”

“Two democracies i.e., New Zealand and South Africa, have abandoned their anti-defection law. In South Africa, the anti-defection law was passed in 1996 and it was abandoned in 2002 after dispassionate evaluation, despite public emotional opposition to floor crossing. Further, Booyzen supporting the end of anti-defection law in South Africa states that, international literature indicates that there are numerous struggles to limit defection on the basis of likely contravention of the mandate of original election and equally comparative studies shows that restricting defection frequently end in travesty. In New Zealand, the bill was passed in 2001 with
sunrise clause resulting in expiry after two elections in 2005. The Solicitor General of New Zealand commented that the bill provided wide discretion to party and party leader and it does not protect the legitimate dissent by an individual member against the party the direction.iii

Many underdeveloped countries, which have adopted democracy during second half of last century, including Bangladesh, Kenya etc., have made anti-defection laws. These early stage democracies have less developed political systems and their political party systems are unstable, due to corruption and personalistic political systems. This is specifically relevant in Indian political system where caste, family, gender and religion are used at the election time to get electorate support.

**Diminishing accountability to constituency destroying the citizens' right to have representative:**

Indian democracy is based on the quote - "by the people, for the people, of the people". This means that every eligible voter has the right to participate in decision making through his/her representative. But the right of individual citizens to have their representatives participating in the decision making process through discussion and voting in parliamentary process is infringed upon by the anti-defection law. The individual citizen's right to have a representative, in the form of member of the house elected from the respective constituency, to work in the interest of constituency is infringed upon by the forceful anti-defection law, as they become legally accountable to the political party.

"Legislators face the following options when voting on policy decisions. First, they can choose to support their voters and stand a good chance of re-election. Second, they can consistently support their party and vote with their party on policy issues, thereby ensuring their ability to rise in power in the party, attain nomination for the next election and seek other benefits as a virtue of their loyalty and status in the party".ii Also a Rajya Sabha member had once stated that due to anti defection law "A member may be unable to express his actual belief or the interests of his constituents"iii

Social scientist Mr. Yogendra Yadav has opined that the anti-defection law has "left little discretion with an MP or an MLA who does not wish to risk losing her or his seat. Hence, much of the derivative expectation on the mandate and role of an individual legislator is now redundant in our context." This is due to the fact that the legal accountability of an elected member towards the party is powerful, due to anti-defection law, leading to loss of membership in the house. In comparison, the accountability of elected member is weak towards the people of respective constituency, because answerability of the actions in parliament will be evaluated only at the re-election time after every 5 years.

**Recommendations of various bodies on reforming the Anti-defection law:**

- Dinesh Goswami Committee on electoral reforms (1990):

  1. Disqualification should be limited to cases where (a) a member voluntarily gives up the membership of his political party, (b) a member...
abstains from voting, or votes contrary to the party whip in a motion of vote of confidence or motion of no-confidence.

2. The issue of disqualification should be decided by the President/Governor on the advice of the Election Commission.

• Halim Committee on anti-defection law (1998):

1. The word ‘voluntarily giving up membership of a political party’ should be comprehensively defined.
2. Restrictions like prohibition on joining another party or holding offices in the government should be imposed on expelled members.
3. The term political party should be defined clearly.

• Law Commission (170th Report, 1999):

1. Provisions which exempt splits and mergers from disqualification to be deleted.
2. Pre-poll electoral fronts should be treated as political parties under anti-defection law
3. Political parties should limit issuance of whips to instances only when the government is in danger.

• Election Commission:

1. Decisions under the Tenth Schedule should be made by the President/Governor on the binding advice of the Election Commission.


1. Defectors should be barred from holding public office or any remunerative political post for the duration of the remaining term.
2. The vote cast by a defector to topple a government should be treated as invalid.

Conclusion:

Anti-defection law was introduced in the Indian constitution with a view to bring government stability and reduce money power in parliamentary politics. Though the law has succeeded in a reasonable way but on the other hand it somehow violates the basic principle of the Indian democracy. The law diminished the freedom of speech and vote, thereby curtailing the constitutional right granted to the elected members. The anti-defection law has minimised the accountability of elected member towards respective constituencies, thereby taking away the democratic right of the citizen to have representatives in the decision making process. Thus for the better working of the government this law should be amended. Different committees have given different suggestions for reforming anti-defection law and this is the high time that a look should be given to those recommendations. Anti-defection law is not an evil till date, but necessary steps should be taken towards it, otherwise it will become one.
ANALYSING THE WORKING OF THE CRIMINAL LAW AMENDMENT ACT, 2013

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INTRODUCTION:

The fundamental rights guaranteed under the Part III of the Indian constitution includes right to life with dignity, right to equality of women and freedom to choose their profession. All these rights impliedly include the right against sexual exploitation for women. Additionally it is a fundamental duty to renounce from practices that are derogatory to the dignity of women. In spite of all these rights and duties the women of our country are continuously exposed to various offences like sexual harassment, dowry, domestic violence which is evident from the recent statistics i.e the total number of rapes during the year 2013 is 33,707 and kidnapping of women and children extend to 51,881 and more pathetically the offences relating to cruelty by husband and his relatives was 1,18,866. The widespread outrage due to the barbarous gang rape incident of a physiotherapy intern, Nirbhaya which took place on 16th December, 2012 near Munirka, a neighbourhood located in the southern part of New Delhi when a 23 year old female physiotherapy intern was brutally gang raped while she was returning home in a private bus with her male friend by 6 other men who was travelling in the same bus including the driver. Both the victims were brutally beaten up when they raised suspicions regarding the change of route... Later the main victim i.e.Nirbhaya was brutally raped by the 6 men repeatedly and the medical report suggested that she was penetrated by a blunt object like a rod that caused extensive damages to her internal organs like intestine, uterus, vagina and abdomen. Later both of them were thrown out in a partly naked state. Then the female...
victim died 6 days later on 22\textsuperscript{nd} December in spite of being treated on both India and Singapore. Including the juvenile all the 6 accused were arrested by the Delhi Administration within one day of the commission of the crime. One of the accused Ram Singh was found dead in the prison and the other four victims were sentenced to capital punishment by the Special Fast track Court and the juvenile was awarded three years imprisonment on a reform home by the Juvenile Justice Board.\textsuperscript{ii}

JUSTICE VERMA COMMITTEE (JVC):\textsuperscript{ii}

This committee was setup by the central government to make recommendations for the amendment of the existing laws relating to offences against women. The committee was constituted under Hon’ble Justice (Rtd) J.S. Verma, former Chief Justice of India as Chairman; Hon’ble Justice (Rtd) Leila Seth, former Chief Justice of HP and Shri Gopal Subramaniam, Former Solicitor General of India as members.

OBJECTIVES OF THE COMMITTEE:

The committee was constituted to recommend amendments to the present criminal law so as to provide speedy trial and enhanced punishment for accused of committing sexual assault against women. The methodologies adopted by the committee were inviting suggestions from all stakeholders through public notice, interactions with number of experts, social activists through their representatives. In this lieu, a public notice dated 24\textsuperscript{th} December, 2012 was issued by the Ministry of Home Affairs and in response to this around 70,000 suggestions were received through e-mails, letters and interviews. Based on these responses the committee made the following recommendations.

RECOMMENDATIONS OF THE COMMITTEE:

1. Registration of marriages should be made mandatory:

The committee recommended for the registration of all the marriages irrespective of personal laws in presence of a magistrate to make sure that it is out of free consent of the couple and without demand of dowry.\textsuperscript{ii}

4. Punishment for Rape:

The committee recommended 7 years rigorous imprisonment punishment for rape and 20 years rigorous imprisonment for causing death or persistent vegetative state. For gang rape it recommends a punishment of imprisonment for 20 years which may extend to life imprisonment in case of causing death and persistent vegetative state. The committee did not recommend for death penalty in case of rape.\textsuperscript{ii}

3. Punishment for other offences:

The committee recommended for increased period of imprisonment for offences like human trafficking, stalking, voyeurism, acid attacks.

4. Registering complaints and Medical Examination:

Every complaint of rape should be registered by the police and the civil society should perform its duties to report any case coming to its knowledge. And the refusal to register or failure to investigate should be made punishable.
5. A Bill of Rights for Women that entitles her a life with dignity and security.

6. The committee recommended for special protection of persons with disability from rape and other sexual offences and makes sure they have access to fair and speedy trial.

7. The protocols for medical examination of victims of sexual assault have been provided in the report.

8. Political reforms:

The committee recommended for reforms in the Representation of People’s Act, 1951 so as to make true representation of people by elimination of those criminal antecedents. A certificate from the Registrar of the High Court should be made necessary to validate the nomination. Candidates who fail to disclose any charge or commission of any offence should be disqualified from contesting the election. Scrutiny and verifications of the assets of the candidates should be made by the CAG and any discrepancies should be made a ground for disqualification of the candidate. In the Parliament and the State Legislature those who have pending criminal proceedings should vacate as a token of respect to the Parliament and the Constitution.

PASSING OF THE CRIMINAL LAW (AMENDMENT) ORDINANCE, 2013 AS AN ADMINISTRATIVE ACTION BY THE PRESIDENT:

The Criminal Law (Amendment) Ordinance, 2013 (hereinafter referred as the ordinance) was promulgated by the president of the 64th year of Republic of India. Further a bill in this regard was introduced in the House of People and also referred to the department related Parliamentary Standing Committee on Home Affairs which is pending. Whereas the Parliament is not in session and the President is satisfied that circumstances exist which render it necessary to take immediate action to give effect to the provisions of the said bill with certain modifications. Therefore the President in the exercise of his powers conferred under article 123 clause (1) of the constitution of India passed this ordinance on 3rd February, 2013.

This ordinance brought about amendments to the Indian Penal Code, 1870; the Code of Criminal Procedure, 1970; and the Indian Evidence act, 1872. This ordinance was a sort of administrative action by the center in order to restore peace and to reduce the unrest caused forth by the Delhi incident. This ordinance was later repealed by the Criminal Law Amendment act, 2013.

THE PASSING OF THE CRIMINAL LAW AMENDMENT ACT, 2013:

The act was passed by the Parliament and received the presidential assent and was deemed to have come into force on 3rd day of February, 2013. The main objective of this act was to amend the Indian Penal Code, the Code of Criminal Procedure, the Indian Evidence Act and the Protection of Children from the Sexual Offences act. The key changes brought by the act are discussed below.

CHANGES TO THE INDIAN PENAL CODE, 1870:
SECTION 100: The offence of acid attack was added to section 100 of the code so as to use the right of private defense of the body so as to cause death.

SECTION 166 A: Section 166 A was inserted by this act so as to punish the public servants who disobey the direction given by law. They shall be punished with rigorous imprisonment for a term of 6 months which may extend to one year and may include fine.

SECTION 166 B: Section 166 B was inserted to provide punishment for non-treatment of victims by hospitals under any authority with an imprisonment which may extend to one year and may include fine.

SECTION 228 A: Section 228 A was amended to include the newly inserted section 376 E relating to the disclosure of identity of victims of certain offences.

SECTION 326 A AND 326 B: Sections 326 A & B was inserted to include the offences of ACID ATTACK and attempt to make an acid attack to the code with their relevant punishments i.e.imprisonment of a term of 10 years which may extend to life imprisonment and also with fine. For attempt to administer acid the punishment is imprisonment for a term of 5 years which may extend to 7 years and also fine. The key feature of this section was that the fine levied as per this section should be used for meeting the medical expenses of the victim.

SECTION 354: Section 354 was amended in order to increase the punishment for the offence of assault or use of criminal force to women with intent to outrage her modesty from 2 years to 5 years of imprisonment.

SECTION 354 A: Section 354 A was inserted to introduce the offence of sexual harassment and its relevant punishment of rigorous imprisonment for a term one year which may extend to three years along with fine.

SECTION 354 B: Section 354 B was inserted to include the crime of assaulting or compelling a women to disrobe or compelling her to be naked for which he could be punished with imprisonment for a term of three years which may extend to seven years along with fine.

SECTION 354 C: Section 354 C was inserted to introduce the offence of VOYEURISM i.e. watching or capturing image of women engaged in private act which will be punishable with imprisonment for a term of one year which may extend to three years and in case of second conviction it may extend to seven years and may include fine.

SECTION 354 D: Section 354 D deals about the offence of STALKING which means following her, monitoring the use by a women her emails or internet or any other electronic means of communication or tries to communicate with her despite of clear indication of dis interest. The offence of staling is punishable with imprisonment of a term of 5 years which may extend to seven years in case of second conviction and also liable to fine.

SECTION 370 & SECTION 370 A: Section 370 & 370 A were substituted in order to widen the definition of trafficking of person and to provide for punishments for specific offence of trafficking like trafficking of
minor, more than one person and repeated trafficking.

Section 370 A provides for punishment of exploitation of trafficked person.

SECTION 375: Section 375 was substituted to widen the ambit of the definition of RAPE. A man is said to commit the offence of rape if he penetrates or inserts or manipulates any part of the body of the women so as to cause penetration into the urethra, vagina or any part of the body of the women or applies his mouth to vagina, urethra, anus of a women or compels her to do so with him or any other person under the following circumstances.

- Against her will
- Without her consent
- With her consent which was got by fear or death or hurt
- With her consent when she believes the man to be her husband and he is not so
- With her consent, got while she was intoxicated or due to unsoundness of mind she is unable to understand the nature of act
- With or without her consent when under 18 years of age.
- When she is unable to communicate consent.

The exceptions provided in the section were medical examination and sexual intercourse by husband with his wife who is not under 16 years of age.

SECTION 376: Section 376(1) provides for punishment of offence under section 375 to be rigorous imprisonment for a term of seven years which may extend to life imprisonment and shall also be liable to fine.

Section 376(2) provides for more heinous forms of rape like rape by a police officer, public servant, member of armed forces, staff of jail or any custody place by any relative or guardian of the women and commits rape during communal or sectarian violence, raping a pregnant women, raping a women under sixteen years of age, women incapable of giving consent, women suffering from mental or physical disability, commits rape repeatedly on the same women then the punishment will be rigorous imprisonment for a term not less than 10 years which may extend to life imprisonment and shall also be liable to fine.

SECTION 376 A: Section 376 A provides for punishment of causing the death or persistent vegetative state of the victim to be rigorous imprisonment for a term of 20 years which may extend to life imprisonment and shall also be liable to fine.

SECTION 376 B: Section 376 B gives punishment for sexual intercourse by husband with his wife during separation or against her will or when she is under sixteen years of age to be punishable with a imprisonment of a term of 2 years which may extend to 7 years and shall also be liable to fine.

SECTION 376 C: Section 376 C states the punishment for the under section 375 when it is committed by persons in authority like ones in fiduciary relationship or public servant or manager of a jail or hospital to be punished with rigorous imprisonment for a term of 10 years which may extend to
life imprisonment and shall also be liable to fine.

SECTION 376 D: Section 376 D defines gang rape and fixes the punishment to be rigorous imprisonment for a term of 20 years which may extend to life imprisonment and also fine. Provided the fine is used to meet the medical expenses and rehabilitation of the victim.

SECTION 509: Section 509 was amended to increase the punishment from imprisonment of a term of one year to three years and also with fine for the offence of using act, gesture or act intended to insult the modesty of women.

CHANGES TO THE CODE OF CRIMINAL PROCEDURE, 1970:
With respect to the amendments made to the INDIAN PENAL CODE, the Cr.P.C was amended so as to include the amended provisions of IPC.

CHANGES TO THE INDIAN EVIDENCE ACT, 1872:
Similarly the Evidence act was amended to include the amendments made to the Indian Penal Code.

CHANGES TO THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012:
Sections 42 and 42A of this act was amended so as to include the amended sections of IPC and to give an overriding effect to this act in case of consistencies with other acts.

WORKING OF THE ACT:
This act made drastical changes to the Indian Criminal Legal system by including various acts as criminal offences in the Code and increasing the punishment for some of the heinous crimes. The new offences included by the 2013 act were Acid Attack, penalizing the misconduct by public servants, penalizing the non-treatment of victims by private or government hospital, penalizing sexual harassment at work place, disrobing, stalking, voyeurism. The important change brought by the act was widening the definition of rape under section 375 of the Code. Before the amendment the definition of rape was very narrow and included only penetration of male genital organ into the female genital organ as rape. The court in the case of Madan Gopal Kakkad vs. Naval Dubey held that mere or slightest penetration of male organ with that of the female genitals was sufficient to constitute sexual intercourse. It was held that the extent of penetration is also immaterial. To constitute rape there is no of any injuries to be present on the private parts of ten women. The act included penetration of other objects also to be included under the purview of rape. Many offences like acid attack, stalking, voyeurism etc., which were increasing due to lack to proper provisions, were curbed by this act which introduced stringent provisions and strict penalties. Provisions were made in Cr.P.C to facilitate the recording evidence in certain offences relating to women. This act was an evident move by the government to uphold its duties under the Indian Constitution and also the International obligations i.e. Universal Declaration of Human Rights, 1948; the International Covenant on Civil and Political Rights, 1966; the International Covenant on Economic, Social and Cultural Rights,

LACUNAS OF THE ACT:
The act respite of so many advantages had some some disadvantages too. One of the important lacunas is that Death Penalty was not included as a punishment for rape under section 376 of the Code neither in The JVC report nor the act or ordinance. Instead the court held that Death Penalty should be awarded only in “Rarest of Rarest case” ii.

Another major criticism received by this act was that the act did not include the Political Reforms Recommended by the Justice Verma Committee i.e. disqualification of persons with pending criminal proceedings to contest from election and resignation of elected members in case of criminal charge. The offence of marital rape was not included in the act which is now emerging as a serious threat in the society.

CONCLUSION:
Thus the Criminal Law Amendment Act, 2013 was a corner stone in the history of Criminal Legal system, as it fixed the emerging threats in the society by way of introducing new offences and increasing the punishments to reduce the crime rate. But the society wants the punishments to be more heinous to completely eradicate this violence against women from this society.

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SENIOR CITIZENS: OUR RIGHTS OR DUTIES?

By Niharika Thakur
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“Iam retired and not given any pension. My son abuses me as he thinks I have hidden my money” says a 62 year old man. “At my son’s place Iam given only two chapattis a day” says another 60 year old man. Beaten in body, mind and spirit paints a dark picture of senior citizens in India. The survey revealed that daughter-in-laws emerged as the biggest perpetrator of abuse with nearly 61% of senior citizens blaming for their miseries. Helpage India highlights an awful situation in the lives of ‘old in age- young at heart’. As it is natural that if we are born we will die, similarly when a person is aging his physical and mental change, he also changes from an independent to dependant person. Therefore after he has crossed the age of 60, he should be given proper care and medication by his children and family rather than considering it a burden.

It shall be questioned that whether there should be rights enforced for senior citizens or should it be our duty to look after them? Forget about the rights that elderly enjoy in India, just forget about the legal actions they can take and think on moral grounds. Why do we tend to forget that the reason we are in this world, the reason we are able to read and write, the reason we are able to walk and talk is none other than our own parents. When we were kids our parents always stood as a support of pillar and we confidently knew no matter what our parents will be our savior but when it’s our turn to give respect, to reciprocate the love and show our gratitude we back out. But the truth is that even when they are counting their last breath they think of us only. Hence it should be undoubtedly stated that the so-called rights should rather be our duty.

As we all know that Maintenance and Welfare of Parents and Senior Citizens Act, 2007 defines senior citizen as any person who is a citizen of India and has attained the age of 60 years or above. This Act was enacted to ensure maintenance for parents, senior citizens and their welfare. It is applicable to senior citizens and parents which include mother/step mother, father/step father of any age. Sum of money which a senior citizen gets to ensure his welfare is known as maintenance. The maximum amount which can be claimed for maintenance of senior citizen shall not exceed ₹10,000 per month and shall be prescribed by the State government. A senior citizen can only claim maintenance if he/she is unable to maintain his/herself from property owned or from own earning. Such claims can be made upon his own children or grandchildren who are not minors and if they do not have children then it can be claimed from the relative who will be the legal heir of their property. This application for maintenance may be filed in the District Court where the senior citizen resides or where the child or relative stays. When the application for maintenance is filed under Section 4 of Maintenance and Welfare of Parents and Senior Citizens Act, 2007 the Tribunal will issue a notice to the children and they will get the opportunity of being heard. Thereafter the Tribunal shall fix the
amount of maintenance which shall be paid from the date of order. If one of the children die the other children shall continue to be liable and failure to comply with the order shall be punished with levy of fines and imprisonment up to a month. The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 offered that the senior citizens can now reclaim their property they ‘gifted’ in the name of their children, if their welfare and basic needs are not being fulfilled. An aggrieved senior citizen can now approach the Deputy Commissioner and reclaim their property rather than paying futile visits to Court and awaiting outcome for several years. Section 23 of the Act reads “Where any senior citizen who, after the commencement of this Act, has transferred by way of gift or otherwise, his property subject to condition that the transferee shall provide the basic amenities and basic physical needs to the transferor and such transferee refuses or fails to provide such needs, the said transfer of property shall be deemed to have been made by fraud or coercion or under undue influence and shall at the option of transferor be declared void by the Tribunal”. This means that if the senior citizen decides not to reclaim the property, he can make his children direct through the Deputy Commissioner to pay them monthly maintenance of the property. This application for maintenance may be filed in the District Court where the senior citizen resides or where the child or relative stays. When the application for maintenance is filed under Section 4 of Maintenance and Welfare of Parents and Senior Citizens Act, 2007 the Tribunal will issue a notice to the children and they will get the opportunity of being heard. Thereafter the Tribunal shall fix the amount of maintenance which shall be paid from the date of order. If one of the children die the other children shall continue to be liable and failure to comply with the order shall be punished with levy of fines and imprisonment up to a month. The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 offered that the senior citizens can now reclaim their property they ‘gifted’ in the name of their children, if their welfare and basic needs are not being fulfilled. An aggrieved senior citizen can now approach the Deputy Commissioner and reclaim their property rather than paying futile visits to Court and awaiting outcome for several years. Section 23 of the Act reads “Where any senior citizen who, after the commencement of this Act, has transferred by way of gift or otherwise, his property subject to condition that the transferee shall provide the basic amenities and basic physical needs to the transferor and such transferee refuses or fails to provide such needs, the said transfer of property shall be deemed to have been made by fraud or coercion or under undue influence and shall at the option of transferor be declared void by the Tribunal”. This means that if the senior citizen decides not to reclaim the property, he can make his children direct through the Deputy Commissioner to pay them monthly maintenance of the property. Section 20 (3) of Hindu Adoption and Maintenance Act provides for the obligation of a person to maintain their parents according to financial capability when they are unable to look after themselves. A study by NGO Agewell stated that old persons are not much aware of their rights which are one of the major reasons
behind violation of their rights and even if some are aware, they do not want to file a suit against their own children. An advocate Shiv Kumar asked many senior citizens that how many of them wanted their children to go to jail for ₹10,000 and majority replied as “We will beg, we will borrow, we will starve, but we will not have a situation where our children will go to jail”.

There is however some benefits for the senior citizens who have been left in the lurch by their children and at the dusk of their lives. The government provides extra financial assistance to them by reserving two seats in front row of the buses. Indian Railway provides 40% concession for males and 50% for females over 60 years in all classes in the train. Indian Airlines provides 50% Senior Citizen discount on Normal Economy Class fare for all domestic flights. Complaints of senior citizen in telecommunication are given priority by registering them in VIP flag. Free medical and health services are also provided at various hospitals. A separate queue for senior citizens is also made in hospitals for registration and clinical examination. Special clinics are also available for senior citizens at various hospitals in New Delhi every Sunday between 10 a.m to 12 noon. Senior citizens also enjoy the benefit of not paying income tax at all up to ₹2,50,000. The Ministry of Rural Development under the National Old Age Pension Scheme provides ₹75 per month and under the Annapurna Scheme free food grains up to 10kg per month is provided to the senior citizens who do not have even the basic necessities to survive. These are the proper legal mechanism which ensures that senior citizens are not harassed anymore. 1st October is observed as the International Day of older persons every year. The Ministry for welfare of senior citizen celebrates this occasion every year by organizing a series of programmes and felicitating the distinguished senior citizen with ‘Vayoshrestha Samman’. Free medical and health services are also provided at various hospitals. A separate queue for senior citizens is also made in hospitals for registration and clinical examination. Special clinics are also available for senior citizens at various hospitals in New Delhi every Sunday between 10 a.m to 12 noon. Senior citizens also enjoy the benefit of not paying income tax at all up to ₹2,50,000.

The Constitution of India is regarded as the heart and soul which protects the rights of citizens of India including senior citizens as well. Article 41 under Part 4 of The
Constitution of India 1950 directs the State to make effective provisions for securing Right to Work and public assistance which includes the old age and Article 46 aims to protect the economic interests of the weaker sections. The DPSP being fundamental in governance of the country but are not enforceable in Court of Law. The legal right to claim maintenance is given under various personal laws, Code of Criminal Procedure and also under Maintenance and Welfare of Parents and Senior Citizens Act, 2007. In Hindu Adoption and Maintenance Act, 1956 parents can claim maintenance from their son as well as daughter under Section 20 if they are unable to maintain themselves. Under the Muslim Personal Law both son and daughter are liable to maintain their parents who are poor. The concept of adoption does not exist in Muslim community and hence the personal law is silent on the right to maintenance of adoptive parents. There are no provisions for maintenance of parents under Christian and Parsi Law and thus the parents who wish to claim maintenance from their children can do so under Code of Criminal Procedure (CrPC). Under Section 125 of CrPC parents of any community can claim maintenance from their children (son, daughter, and married daughter) provided their children must have sufficient means to maintain their parents and the parents lack the means to maintain themselves. Lastly, the Maintenance of Parents and Senior Citizens Act, 2007 aims to protect the life and property of senior citizens by setting up Old Age Homes in every district. As per the information available with HelpAge India, there are 1279 Old Age Homes in India. Detailed information of 836 homes is available and for 443 homes only contact details are available. 543 homes provide free of cost services while 237 old age homes are on pay & stay basis. 161 homes have both free as well as pay & stay facilities. 214 old age homes accept medical/ constant care cases. 133 homes are exclusively for older women. Besides all these schemes and facilities there are certain steps taken by the government under National Policy on Older Persons, 1999 where a separate bureau of Social Justice and Empowerment for senior citizens was set up. It also aimed at setting a National Council for older persons to solve the problems of elderly and work towards their solution.

The Hon’ble Chief Justice of India has ordered the Chief Justice of all High Courts in the country to prioritize the cases related to senior citizens and ensure their rapid disposal. Mumbai High Court held that it would give out-of-turn chance to hear and settle the cases where it is related to the people who have crossed the age of 65 years. This High Court decision would also be applicable to its benches at Goa, Aurangabad and Nagpur and would include all matters irrespective of civil or criminal pending in the court of law. Union Minister for Law and Justice referred to the Chief Minister of all the States to set up Fast Track Courts (FTCs) for speedy disposal of cases. Separate lane of courts for senior citizens would be of great help to solve all the civil, criminal cases or the cases pending in the courts. If additional courts can’t be created for this purpose, then administrative arrangements such as two FTCs may be there with one exclusively dealing with senior citizens cases on priority.
Our culture accepts the status of parents as that of God through sayings like “Matrudeo Bhava”, “Pitrudeo Bhava” etc. Traditional norms and values of the Indian society laid stress on providing care for the elderly. It is the moral duty and an obligation for children to maintain their parents. However, due to withering away of joint system, a large number of elderly people are not being looked after by their family. Consequently, many older persons, particularly widowed women are now forced to spend all their twilight years alone. They are being sent to Old Age Homes to spend their rest of life and are exposed to emotional neglect due to lack of care and support. It is really disheartening to know that the senior citizens are mostly neglected, become desolate and find it very difficult to eke out their livelihood. Some of them manage to find a place in the ‘Homes for the Aged’, some of them choose to beg and most of them die of starvation. One sphere in which India is believed to be ahead of other developed western nation is the way we respect and look after our parents and elderly. It’s something for which we Indians feel proud. With the fast-paced lifestyle and careers of young Indian, this characteristic is said to be fading. Is this true? Does India care and respect its elders less than before? Is the youth becoming too insensitive towards elders like the west with nuclear families? Passing comments to an old man walking slowly on the road and disturbing the flow of traffic are our ethics? Come on youth, stand up against such injustice. Do not treat your parents like burden, especially when they need you.

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A HEALTHY-PRISON WITH HEALTHY PRISONERS

By Nikhil Mittal
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Health is a complete state of physical, mental and social stability and it is not only confined to absence of disease but also peace in mind. It is a dynamic condition which is a result of adaptation and adjustment according to the environment. Every individual has a right to stay healthy irrespective of his caste, gender, race etc. A good health is important to maintain for every individual for fulfilling their duties in minimal cost and earn maximum. A good health helps the student to study hard and perform well in the examination likewise the good health of the farmer is also important for getting the better cultivation. A wise man said that a sound mind only exist in a sound body.

An average person needs around 2400 calories in a day to maintain them but it is difficult for a poor person to attain that much of calories like that of a prisoner. Prisoners are the sufferers of ill health. Prisoners tend to have worst social, physical, mental health conditions in prison due to their lifestyles. Most of the prisoners don’t have any medical contact before entering in to the prison and due to lack of this they start in taking of drugs etc.

Prisoners are also human beings like others and they have also the same rights regarding their health even behind the bars. They do not lose their basic constitutional rights and these rights are provided to them by the Constitution Of India and The Prisoners Act 1894. In the case of State of A.P. v. Challa Ramkrishna Reddyii, the Supreme Court held that being a prisoner does not ceases him to be a human being. He must not be deprived of his liberty and he shall enjoy the fundamental rights provided to every individual by the Constitution of India.

Are Articles 14, 19, 21 of Constitution Of India available to prisoners?

Article 14, 19, 21 of The Constitution of India are available to every individual whether in prison or not. Bar of the prison does not bind the constitutional as well as the fundamental rights of prisoners.

Article 14 of The Indian Constitution provides that every individual is equal in eyes of law and there shall be equal protection of law. Equal protection of law is a more positive concept implying equality of treatment in equal circumstancesii. The rule is that the like should be treated alike. This article is very useful guide and helps in determining the various categories of prisoners and their classifications with the object of reformationii and the classification must not be arbitrary, artificial or evasive.

Article 19 of The Indian Constitution guarantees to the citizens of India six fundamental freedoms like freedom of speech and expression, assembly, form associations, movement, reside and settle, profession trade etc. Amongst all these fundamental freedoms certain freedoms are provided to prisoners because of their nature. Article 19(1)(a) Freedom of speech
and expression and Article 19(1)(b) Freedom of assembly are available to the prisoners. Freedom of speech and expression means that every individual whether a freeman or a prisoner has a right to express his/her opinions by writing, printing, mouth or by any other source. In *M. Hasan v. Government of A.P.*, the jail authorities refused the journalists to interview the prisoners and the court held that this denial leads to the violation of Freedom of speech and expression under Article (19)(a). It further added that every prisoner has a right to communicate or express their ideas and views but some reasonable restrictions should be applied upon them. If the prisoners are finding any health issue then they have a right to speak up in this regard, to raise their voice against their malnutrition. Freedom of Assembly guarantees to all citizens of India right to assemble peaceably and without arms and some reasonable restrictions can be imposed under Clause 3 of Article 19.

Article 21 of the Constitution describes that the personal liberty of every individual cannot be curtailed except in some cases which are established by law. It includes Right to Livelihood which means every person has a right to live his life in a way he wants. Right to health and medical assistance is included under Article 21 of the Constitution. Right to health i.e., right to live in a clean, hygienic and safe environment. Clean surroundings leads to a healthy body and a healthy mind. Prisoners are entitled to get the clean and prosperous environment in prison and a proper time to sleep. Right to die is not enshrined in Article 21. By Article 21 of the Indian Constitution it is clear that it is available not only for free people but also to those people who are behind the prison. Following are the rights of prisoners which are provided under the Article 21 of the Constitution of India:-

1. Right of inmates of protective homes,
2. Right to free legal aid,
3. Right to speedy and fair trial,
4. Right against cruel and unusual punishment,
5. Right against custodial violence and death in police lock-ups or encounters,
6. Right to live with human dignity,

**Prisoner’s Rights under The Prisons Act 1894**

1. Sanitary administration of prison – Prisoners has the right to get good sanitary conditions in the prison with a proper accommodation. Under Section 13 of the Prisons Act 1894, the medical officer must take the charge of the welfare of the prisoners and to report to superintendents in case of any problem.
2. Separation of Prisoners – Prisoners should be kept separately. Male prisoners should be separated from female prisoners, civil and criminal prisoners should be kept separately like that of convicted and under trial prisoners under Section 27 of the Prisons Act 1894. Separation of different types of prisoners is necessary to provide them with safe custody and with security.
3. Safe custody and shelter to prisoners – A proper and a suitable place is to be provided to the prisoners for their safe
custody. A reasonable care should be taken off for the prisoners.

(4) Time to time medical check-up – Prisoners are entitled to get a regular medical health check up so that they can be protected from the curable or incurable diseases. In every prison a medical officer is appointed to take care of the health of the prisoners and has the duty to submit the medical report of every prisoner to the superintendent.

(5) Remuneration – If a prisoner is providing any services behind the prison then he is entitled to get the reasonable wages and these reasonable wages should not be less than the minimum wages described by the state. There should not be any inequality of wages between the prisoners and the freeman in the society.

(6) Protection from torture – Prisoners has a right to be protected from torture by the police officer whether a male or a female, sound mind or unsound mind, convicted or under trial prisoners. Section 25 and 26 of The Indian Evidence Act protects the arrested persons from any cruelty, torture etc. by the police officer.

(7) Right to get health-related education – If the prisoners are provided with a good health related education then it will be helpful to maintain a good environment in the prison. Improvement in prison health is required for the success of public health policies.

(8) Right of arrested persons to consult an advocate – Every prisoner irrespective of his caste, colour, gender has certain rights and these rights are expanding day by day. The rights are not only confined to save prisoners from physical torture and maintaining good health but it also includes the right to consult an advocate to prevent them from mental torture.

Section 54 of Criminal Procedure Code 1973 states that the arrested person has a right to be examined by a medical officer and in absence of medical officer by a registered medical practitioner. It was held in D.J Vaghela v. Kantibhai Jethabhai, that the arrested person must be informed that on getting tortured under police custody he has a right to be examined by the medical officer.

Duties of a Medical Officer regarding prisoners in The Prisons Act 1894

(a) Medical officer has a duty to maintain a good sanitary system in the prison and to check the health of the prisoners on the regular basis. (Section 13)

(b) If the mental health of the prisoners is affected by the treatment provided to them, then the medical officer should inform the same to the superintendent with observations. (Section 14)

(c) On the death of the prisoners, the medical officer has to maintain a report with certain particulars like the day and date of the death, the nature of disease, the labour engaged on that day etc. (Section 15)

(d) The names of the prisoners who are out of health or who desire to meet the medical subordinate are to be submitted to the jailor by the medical officer. (Section 37)
(e) The record of directions of medical officer should be maintained. (Section 38)

(f) If the prisoner is unfit to undergo any punishment, then the medical officer can record this in writing and he should state whether the prisoner is unfit or not and the prisoner will not be liable for any punishment under that state. (Section 50)

A vision to promote health care in the prisons

It is the duty of the medical officer or other authorities to take care the prisoners as they are also human beings and it should be kept in mind that the prisoners are not behind the bars, as punishment but, for punishment. Prisoners are in a poor condition and are not physically, mentally, socially fit. So there must be the promotion of the healthcare issues in the prison so that the prisoners can prevent themselves from the curable or incurable diseases. There shall be an increase in the quality and the quantity of services offered to prisoners. They should not be treated as a burden because they are there to reform themselves. A specified policy framework should be maintained to be adhered to. The needs of the prisoners should be kept in mind and not all needs but certain basic needs must be fulfilled.

Education is the most important and essential element in transforming a person so that’s why education should be provided to prisoners so that they can distinguish between right and wrong and it would be helpful to them. Awareness programs can be made to teach them about their health etc. The staff members i.e., jailor, superintendent, medical officer and others must take a step in promoting the health care issues. Prisoners who are unfit should be given support for more physical activity and a proper diet to make them fit. Counselling of the prisoners can be done for the betterment of them because no one is bad, the bad is only their work in which they indulged themselves. State government shall provide training like carpentry, cooking, gardening, tailoring etc. and workshops and seminars shall be conducted for reformation of the prisoners and for educating them.

Article 3 of the Human Rights Act 1998 protects the prisoners from torture, degrading treatment of the prisoners and inhuman behaviour and it is of very much importance. A treatment is considered as degraded when it causes physical, mental trauma. Degrading treatment, inhuman behaviour not only means an act of cruelty or misbehave but it also includes the omission of work like bad condition of premises of prison, poor medical facility etc. In Kudla v. Poland (2000), the person was charged with fraud or forgery charges and a psychiatric assessment was given to him due to which he undergone on a hunger strike and experience depression, the court held that the psychiatric assessment was reasonable and there is no violation of Article 3 of The Human Rights Act 1998.

The Prisons (Amendment) Bill, 2016

The provisions of The Prisons Act 1894 are very old and they are in need to be amended for the management of prisons in the present context. It is necessary to ensure humanitarianism, to ensure good health and a hygienic environment in the prison, to
educate prisoners etc. So there are certain sections which are amended and some of these are related to hygiene and health care of prisoners. In Section 29, it is inserted that the separate cell which is used for the isolation of a prisoner as a punishment must be maintained with proper care, hygiene, air and light.

Section 39A is added which puts a duty on the authorities of the prison to maintain hygiene in the prison and the authorities should employ the prisoners for maintaining the hygiene in the prison and in the absence of the prisoners temporary workers should be appointed for the same.

Section 58A is added which imposes a duty on the superintendent of prison or other authorities to inspect the premises of the prison and to submit a report on the same to the State government. Section 58B is added so that the authorities can make a check that no prisoners in the prison indulge in a fight with each other.

Supreme Court issues landmark guidelines on Prison Reforms

The bench said that the prisoners are also human beings and they have a right to be treated with dignity. In each district a Under Trial Review Committee is formed. The bench issued the following guidelines:

(a) Appropriate steps will be taken by the committee to release the prisoners who had completed their punishment or who are entitled to get release by the remission granted to them.

(b) There will be the implementation of Probation Offenders Act 1958 for giving chance to first time prisoners for reformation and to release the under trial prisoners at its earliest.

(c) Every person has a right to consult an advocate (Right to legal Aid) and an adequate number of lawyers are to be enrolled for under trial prisoners, poor etc.

(d) The Director General of Police or police in-charge of prisons should ensure the fully utilisation of funds for providing better living conditions to the prisoners.

(e) There will be a Management Information System in every prison for the effective management of prisons.

(f) The Ministry of Home Affairs will conduct an annual review of the implementation of the Model Prison Manual 2016 for which considerable efforts have been made not only by senior officers of the Ministry of Home Affairs but also persons from civil society. The Model Prison Manual 2016 should not be reduced to yet another document that might be reviewed only decades later, if at all. The annual review will also take into consideration the need, if any, of making changes therein. ii

(g) The Under trial Review Committee will make a regular visits in the jail to look after the living conditions of prisoners.

(h) The bench also suggested Ministry of Women and Child Development to look after the living conditions of children and women.

Conclusion

It can be noted that the prisoners are also entitled to enjoy the fundamental rights
Being a prisoner does not cease their fundamental rights and these rights are available to them by the Constitution of India under article 14, 19, 21. There are certain more provisions available to prisoners under The Prisons Act, 1894 which helps them in providing a good and a hygienic environment to live with a proper diet. Prisoners are also a legal person, a natural person and being a prisoner does not make them a non-person. Prisoners should receive healthcare equally like that of a general public. Prisoners should be provided with education or some kind of skillful training so that after release he can get opportunity to be employed, and in perfect sense this will be called the rehabilitation of inmates. The system of open prison is more effective for reformation a prisoner and a closed prison is suitable for the hardcore criminal. Certain healthcare standards should be maintained inside the prison to improve the public health. If a person commits a crime it does not mean he ceases to be human being. Prisons are only for reformation of a person and this reformation purpose fails when the fundamental rights are not provided to the prisoners. So we as a citizen of India must take steps to curb this problem and to ensure that there is no violation of fundamental rights and a good environment so that they can live with dignity, because, they are humans too.

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CASE COMMENT ON M.C. MEHTA V. UNION OF INDIA

By Nimish Bassi
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Abstract

The concept of law and justice is prevailing since times immemorial and a lot of cases have occurred over the past years. Some of them became a way of reformation in the legal area and have altered the concept of law in one way or the other. One such case is the famous case of M.C. Mehta v. UOI, 1987 which has laid down some new principles and has become a landmark case which acts as a precedent for many cases to come in the future. This paper is about the case and the outcomes that occurred after this case. In this paper the author has selected this landmark case and has also given his own opinions regarding the case and as to how this case altered the civil law and the concept of deep pockets also evolved from this case only. The author has tried to highlight the different aspects in relation to this case.

INTRODUCTION

This case of M.C. Mehta v. UOI is one of the landmark cases ever in the Indian history which has introduced the topic of absolute liability as a part of civil action. The most important issue that was raised under this case was whether article 21 was available against Shriram whether Shriram owned by Delhi cloth Mills Ltd. Public co. comes within the meaning of state under the article 12. Another issue that was raised Whether Article 21 is available against Shriram which is owned by Delhi Cloth Mills Limited, a public company limited by shares and which is engaged in industry vital to public interest and with potential to affect the life and health of the people. It was also issued that what was the measure of liability of an enterprise engaged in a hazardous activity which might have a bad effect on the health of people and also affect the environment.

BACKGROUND:

Shriram Food and Fertilizers Industry a subsidiary of Delhi Cloth Mills Limited was producing caustic and chlorine. On December 4th and 6th 1985, a major leakage of petroleum gas took place from one of the units of Shriram Food and Fertilizers Limited in the heart of the capital city of Delhi which resulted in the death of several persons. The leakage was caused by a series of mechanical and human errors. This leakage resulted from the bursting of the tank containing oleum gas as a result of the collapse of the structure on which it was mounted and it created a scare amongst the people residing in that area. Hardly had the people got out of the shock of this disaster when, within two days, another leakage, though this time a minor one took place as a result of escape of oleum gas from the joints of a pipe. Shriram Foods and Fertilizer Industries had several units engaged in the manufacture of caustic soda, chlorine, hydrochloric acid, stable bleaching powder, super phosphate, Vanaspati, soap, sulphuric...
acid, alum anhydrous sodium sulphate, high test hypochlorite and active earth. All units were set up in a single complex situated in approximately 76 acres and they are surrounded by thickly populated colonies such as Punjabi Bagh, West Patel Nagar, Karampura, Ashok Vihar, Tri Nagar and Shastri Nagar and within a radius of 3 kilometres from this complex there is population of approximately 2,00,000. On 6th December, 1985 by the District Magistrate, Delhi under Section 133(1) of CrPC, directed Shriram that within two days Shriram should cease carrying on the occupation of manufacturing and processing hazardous and lethal chemicals and gases including chlorine, oleum, super-chlorine phosphate, etc. at their establishment in Delhi and within 7 days to remove such chemicals and gases from Delhi. At this juncture M.C. Mehta moved to the Supreme Court to claim compensation by filing a PIL for the losses caused and pleaded that the closed establishment should not be allowed to restart.

COURT'S VERDICT/DECISION:
After hearing all the arguments, Bhagwati J. stated that,” We in hold our hands back and I venture to evolve a new principle of liability which English Courts have not done. We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because it has not been so done in England. 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 to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken”. He further stated that in the case where an enterprise is engaged in a hazardous activity and the consequences of which are bad on the health as well as environment in such a case the enterprise is strictly and absolutely liable to compensate those who have suffered or have been 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.

The Court also pointed out that the measure of compensation in the kind of cases referred to must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.

ANALYSIS:
After going through all the facts and judgements, one can observe the most
important element i.e. the rule of absolute liability where it means strict liability without any exception. Hence, the concept of absolute liability was first laid down in India in this case only. One can also observe that the measure of compensation in the kind of cases referred to must be correlated to the magnitude and capacity of the enterprise and the concept of ‘deep pockets’ also evolved through here only which means that the larger the enterprise, greater will be the amount of compensation awarded. The hazardous enterprises although play a great role in the development of the economy but on the other hand they also pose a grave threat to the environment which on the leak of some chemicals might have adverse effect on the environment and its natural components.

CONCLUSION:
The conclusion hence worth can be drawn from the above situations is that the principle of absolute liability cannot be ignored especially in the cases where the matters of environmental concerns are related and moreover an enterprise owes a duty of care towards not only people but also towards the environment which forms as an essential component of society. Hence, the principle of absolute liability and the concept of deep pockets has emerged greatly and has given law of torts a whole new direction. The court however has given a good decision in awarding the victims and I think that it has rightfully stood up on the principle of natural justice as the case on the prima facie was a kind of its own and has revolutionised the whole concept of absolute and strict liability especially in the Indian context. Also the judgment of this case shows the importance of environment and the necessity to safeguard it as much as possible. Thus, the principles of natural justice and absolute liability come into play when their relevance are tested in the real life and that how important it is ensure the environment as leaking of such chemicals not only damages environment but also people at large directly or indirectly.

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UNENDING STRUGGLE FOR EQUALITY

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ABSTRACT

This essay explores the struggles that women face globally for the recognition of their rights and the crimes that have been committed against women since the beginning of time. References have been made to international conventions and surveys conducted by the United Nations over the past few years to shed more light on the crimes committed against women all over the world. It also explores the struggles of an Indian Woman and the various legislations implemented by the Indian Legislators to put an end to them. Moreover, it also suggests ways to empower women and emphasizes their importance in society.

“There are two powers in the world; one is the sword and the other is the pen. There is a great competition and rivalry between the two. There is a third power stronger than both, that of the women.”

The struggle for recognition of Women’s Rights has been a long one. Women have always played a very important role in society but they have always been discriminated against because of their gender. Often in historical times, the rights and liberties that were given to men were denied to the women due to this women have not been able to lead a life on par with men in spite of their urge for equality.

Earlier women were not allowed to work and were not given any property rights as they were only perceived as caretakers of the household and the men were considered the bread getter. They had no means to fend for themselves and were completely dependent upon the males in their lives leaving them in a vulnerable position. As women were only considered important in family organizations, their opinions and voices were often suppressed. However, with the rise of Women Rights Movement and the principle of equality, changes have been made to this societal structure. The modern society now has seen that a woman can not only successfully manage her house but can also work and have a career. This change has been possible due to the adaption of various laws which aim at ending differential treatment of women in society.

The Universal Declaration of Human Rights which is considered to be the “Magna Carta” of human rights has contributed greatly to secure the rights of women by propagating the principles of equality in all its articles. Article 2 of the Declaration which deals with right against
discrimination propagates the ideal that all the rights mentioned in the Declaration are available to everyone without any kind of discrimination.

However, the most significant contribution to this cause has been made by the United Nations in 1979 when the Convention on the Elimination of All Forms of Discrimination Against Women was adopted by the General Assembly. Currently there are ninety-nine signatories to the Convention. The thirty Articles long convention attempts to end discrimination against women in all spheres. Many signatories to the convention have ratified the convention but none have done so without reservations. Some powerful countries like USA, have still not ratified this convention.

So you see, we have a lot of laws to end the struggle of women to be treated as equals but all of this is in theory. Yes, the modern society has changed and yes there are better laws but women are still very often stigmatized and forced to conform to societal pressures. In workplace, they still face difficulties and there is always the existence of glass ceiling which is preventing women all over the country and all over the world to achieve their full potential.

I recently came across a story where the husband and the wife both used to work. When the husband used to come back from work, his mother would pamper him and smother him with love but when the daughter-in-law used to return from her job, two hours after her husband, she was given orders to do household chores. Sadly, these stories are very common. If women are not forced to sacrifice their career or forced into unwanted marriages, extra pressure to juggle both the worlds is being put on them.

Societal Pressure and family pressure is not the only struggle in a women’s life, the biggest threat is violence against women. History bears witness to centuries of atrocities faced by women, it bears witness to the constant violations of a woman’s right and the numerous crimes that have time and again been committed against the women around the world.

Today’s world is no different in this perspective. Instances of Rape, Honor Killing, Dowry Death, Acid Attacks, Stalking, Voyeurism, Eve-teasing and Sex-Trafficking are a daily part of our news feed. Daily, we hear news that some girl got raped, another got murdered because she wanted to marry a person of her choice, some got burned by the in-laws because of less dowry. This scenario is not just limited to India but all around the world there are numerous crimes being committed against women. Women’s safety in today’s time is a big issue. Various surveys conducted by the United Nations Organizations paint a very horrific picture of crime against women. Some of the results of the surveys are:

- It is estimated that 35 per cent of women worldwide have experienced either physical and/or sexual intimate partner violence or sexual violence by a non-partner at some point in their lives.
- Forty-three per cent of women in the 28 European Union Member States have experienced some form of psychological violence by an intimate partner in their lifetime.
• Worldwide, almost 750 million women and girls alive today were married before their 18th birthday. Child marriage often results in early pregnancy and social isolation, interrupts schooling, limits the girl’s opportunities and increases her risk of experiencing domestic violence.ii

• Around 120 million girls worldwide (slightly more than 1 in 10) have experienced forced intercourse or other forced sexual acts at some point in their lives.ii

• At least 200 million women and girls alive today have undergone female genital mutilation in the 30 countries with representative data on prevalence. In most of these countries, the majority of girls were cut before age 5.ii

• Adult women account for 51 per cent of all human trafficking victims detected globally. Women and girls together account for 71 per cent, with girls representing nearly three out of every four child trafficking victims. Nearly three out of every four trafficked women and girls are trafficked for the purpose of sexual exploitation.iii

So, in the global scenario we see that the rates of violence against women are alarmingly high. If we look at the Indian scenario then a leading newspaper, recently reported an economic survey which stated that “the growing number of crimes, including kidnapping, sexual assaults on girls and women, has reached appalling levels and the insecurity women have to face in public spaces has increased. “iii


Under the Indian Penal Code, Section 354 of the IPC deals with outraging the modesty of the women, Section 304B of IPC deals with cases of dowry death, Section 498A deals with cruelty by husband and relatives and prescribes punishment for the same. There are various other provisions as well which deal with different crimes committed against females. These provisions have equipped the judiciary with punishing those who attempt to attack the females and this ensure that the women of the country can be in a position to ask for justice and raise a voice against these activities and crimes.

We have ample laws to punish the culprits but what the time now requires is more preventive and deterrent laws instead of just reformative laws. The objective of the law should be to prevent these crimes from happening and not just punishing the instances of grave violations. Also, more steps should be implemented by the government to assure the restitution of the life of the victim and providing adequate compensation to victims of horrific crimes like acid attack.
One of the most common crime that is committed against women is rape. Rape is a violation with violence of the private parts of a woman, an outrage by all means. Rape not only harms a person physically but also psychologically. The infamous Delhi Gang Rape case brought a roar throughout the nation about the lack of effectiveness of rape laws in India. In reaction to this the Criminal Law Amendment Act of 2013 was passed which brought major changes under Section 375 and 376 of the Indian Penal Code, 1860. However, there is still a problem with the rape laws.

Exception 2 of Section 375 states, "sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape." Even though the 172 Law Commission in its report submitted that this exception should be removed, the same has not been done till date.

One huge problem with this exception was that if the wife was above the age of fifteen years that was also not considered rape. One week after the Hon’ble Supreme Court passed the landmark ‘Right to Privacy Judgment’, a petition was filed before the Court to criminalize marital rape on minor and remove this exception.

The Hon’ble Court which has previously protected the rights of women and brought reforms in unfair legislations and given memorable judgments in Shah Bano Case, ShyaraBano Case, once again passed a landmark judgment on 11 October, 2017 and updated the section. Hon’ble Justice Lokur has said in the judgment that “we are left with absolutely no other option but to harmonize the system of laws relating to children and require Exception 2 to Section 375 of the IPC to now be meaningfully read as: “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.” It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the framers of our Constitution can be preserved and protected.”

Even though this judgment has brought a sigh of relief but the adult wives are still in danger. This provision legitimizes marital rape, in a country where most of the population is forced into marriage, the existence of this provision sends a shiver down spine because of the consequences it can have. Rape is rape whether the parties are married or not. It also raises an alarming issue that if marital rape continues to be legalized then instances of where the girl is forced to marry her rapist might also increase and this might lead to a very hard and disrupted life of the female. This exception is forcing many women to stay in abusive marriages and preventing them to take necessary actions to get justice.

It is not just the laws which are sometimes failing the victims of these heinous crimes but also the society. The victims of these crimes, especially of sexual assaults and other forms of sex crimes are often blamed for the ordeal. It creates more psychological fear in the mind of a person who is already trying to recover from the trauma. Majority of the cases are still unreported as a result. This prevents many victims from getting justice.
The importance of women in society cannot be emphasized enough. Women play a very vital role in all spheres of life but still time and again they have to struggle to prove their worth. It is the need of the hour to remove the concept of sexism, sex differences and bring an end to sexual discrimination in society. Women need to be empowered. This empowerment of women can be done by obtaining greater political participation of women, increasing female literacy level and by generating better income schemes for women.

The government takes various measures like conducting legal aid camps to end violent crimes against women but the society also needs to cooperate and let the females rise. Victimization of women, stigmatization, objectification, victim blaming and shaming all needs to be done away with. Women need to be seen as equals of men because they are.

It is high time that we as individuals take actions to protect our female friends, co-workers, family members and give them the courage to pursue their dreams and fight for their rights. It is time to overcome the societal barriers and break age old norms. It is time now that women also walk at par with men in the society.

“Because you are women, people will force their thinking on you, their boundaries on you. They will tell you how to dress, how to behave, who you can meet and where you can go. Don't live in the shadows of people's judgment. Make your own choices in the light of your own wisdom.”

--- Amitabh Bachchan

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REFUGEES AND HUMAN RIGHTS: A JURISPRUDENTIAL CONUNDRUM OF ROHINGYA CRISIS

By Pareesh Virmani
From Delhi Metropolitan Education

To deny people their human rights is to challenge their very humanity.”

– Nelson Mandela

ABSTRACT:

Rohingyas are known as the world’s most persecuted ethnic minority. There has been a mass exodus of the Rohingyas from Rakhine province in Myanmar ever since the ethnic conflict escalated. Most of them have fled from what has been described as a genocide, leaving behind burning homes and all their belongings. By nature, such a helpless community cannot be termed as illegal immigrants but they would fall well within the definition of refugee under the 1951 Convention on the Status of Refugees.

Our Constitution confers contains rights on every human being and certain other rights on citizens and non-citizens. Every person is entitled to equality before the Law and equal protection of the laws. Hence, no person can be deprived of his life or personal liberty except according to procedure established by Law.

Order of deportation of Rohingya refugees to be tested against Article 19 of the Constitution, but the challenge is limited to the non-compliance of the mandate under Article 14 & 21 as well as the requirements of international law and treaties which India has signed and which according to various judgements of Apex Court, must be read into domestic law and is against the preamble of Convention relating to status of Refugees, 1951 and Protocol Relating to the Status of Refugees, 1967. The general principle of right to asylum and right not to be deported is contained in the International Convention of Civil and Political Rights (ICCPR) (Articles 6 and 7) & under the Universal Declaration of Human Rights (Article 14). These are binding since India has both signed and ratified these conventions and India is bound by its obligations under these two conventions. Thus claim a right against deportation, in keeping with the Constitutional guarantees under Articles 14 and 21 read with Article 51 (c) of the Constitution of India and on the facet of Humanitarian law which protect against arbitrary deportation of Rohingyas refugees who have sought asylum in India after escaping a situation akin to genocide in their home country.


INTRODUCTION

‘Human right is the right which born’s with birth of
the person and dies with the death of the person”

-Justice Krishna Iyer

Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination.

International human rights law lays down the obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

One of the great achievements of the United Nations is the creation of a comprehensive body of human rights law—a universal and internationally protected code to which all nations can subscribe and all people aspire. The United Nations has defined a broad range of internationally accepted rights, including civil, cultural, economic, political and social rights. It has also established mechanisms to promote and protect these rights and to assist states in carrying out their responsibilities.

The foundations of this body of law are the Charter of the United Nations and the Universal Declaration of Human Rights, adopted by the General Assembly in 1945 and 1948, respectively. Since then, the United Nations has gradually expanded human rights law to encompass specific standards for women, children, persons with disabilities, minorities and other vulnerable groups, who now possess rights that protect them from discrimination that had long been common in many societies.

INTERNATIONAL LAW AND HUMAN RIGHTS

Universal Declaration of Human Rights
The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 by General Assembly resolution 217 A (III) as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected. Since its adoption in 1948, the UDHR has been translated into more than 501 languages. The UDHR, together with the International Covenant on Civil and Political Rights and its two Optional Protocols (on the complaints procedure and on the death penalty) and the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol, form the so-called International Bill of Human Rights.

Economic, social and cultural rights
The International Covenant on Economic, Social and Cultural Rights entered into force in 1976, and had 164 states parties by the end of October 2016. The human rights that

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the Covenant seeks to promote and protect include:

- the right to work in just and favourable conditions;
- the right to social protection, to an adequate standard of living and to the highest attainable standards of physical and mental well-being;
- the right to education and the enjoyment of benefits of cultural freedom and scientific progress.ii

Civil and political rights


The Covenant deals with such rights as freedom of movement; equality before the law; the right to a fair trial and presumption of innocence; freedom of thought, conscience and religion; freedom of opinion and expression; peaceful assembly; freedom of association; participation in public affairs and elections; and protection of minority rights. It prohibits arbitrary deprivation of life; torture, cruel or degrading treatment or punishment; slavery and forced labour; arbitrary arrest or detention; arbitrary interference with privacy; war propaganda; discrimination; and advocacy of racial or religious hatred.

Human Rights Conventions

A series of international human rights treaties and other instruments adopted since 1945 have expanded the body of international human rights law. They include:

International Law Obligations of India

India ratified the Universal Declaration of Human Rights on 10th December 1948. UDHR, while laying down the basic foundation for Human Rights, protects the Refugees by explicitly recognising the Principle of Non-Refoulement. ii

Article 14 states the following:

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

International Covenant on Civil and Political Rights

The United Nations High Commission on Refugees in their Advisory Opinion on Non-Refoulement stated that the ICCPR also “encompass the obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 [Right to life] and 7 [Right to be free from torture or other cruel, inhuman or degrading treatment or punishment] of the Covenant, either in the country to which removal is to be effected or
in any country to which the person may subsequently be removed.” India ratified the ICCPR in 1979.

- **Article 3 of the Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment or Punishment** 1984 to which India is a signatory as far back as 1997, states that:

  “1. No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial ground for believing that he would be in danger of being subjected to torture;

2. For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

India became a signatory to the **Convention of the rights of Child in 1992** and accepted the most of the provisions except that of child labour. Article 22 of the Convention explicitly provides for non-refoulement of children and states:

i. “States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

ii. For this purpose, States Parties shall provide, as they consider appropriate, cooperation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.”

**LEGAL FRAMEWORK AND POLICY**

India has very liberal policy towards refugees. India is neither a party to the 1951 International Convention on Status of Refugees nor to the 1967 protocol but the refugees are protected under the Constitution of India. There has not been any domestic legislation passed with respect to the entry and status of refugees in India. There is no any word like “refugee” mentioned in Indian Laws. The refugees are considered as “aliens” under Indian laws. The word “alien” has been referred Article 22 of the Constitution of India, Section 83 of the Indian Civil Procedure Code, Section 3(2) of the Citizenship Act, 1955 and in some other statutes.
The Constitutional validity of the IMDT Act was continuously challenged since its inception in 1983 before the Court on the ground of unreasonable classification under Article 14. Finally, in the case of SarbanandSonowal v. Union of India, the Supreme Court struck down the Illegal Migration Detection by Tribunal (IMDT) Act, 1983 on the ground that it is biggest hurdle and main barrier in the identification and deportation of illegal migrants.

The Hon’ble Supreme Court has stated that the Government’s right to deport or expel foreigners is absolute and unlimited. The Constitution does not consist of any such provision which can challenge the discretion of the Government. The refugees living in India has only UNHCR card as an identity due to absence any domestic law concerned with it.

ABUSES AGAINST ROHINGYAS – HUMAN RIGHTS PERSPECTIVE

Rohingya are an ethnic group, largely comprising Muslims, who predominantly live in the Western Myanmar province of Rakhine. They speak a dialect of Bengali, as opposed to the commonly spoken Burmese language.

Though they have been living in the South East Asian country for generations, Myanmar considers them as persons who migrated to their land during the Colonial rule. So, it has not granted Rohingyas full citizenship. According the 1982 Burmese citizenship law, a Rohingya (or any ethnic minority) is eligible for citizenship only if he/she provides proof that his/her ancestors...
have lived in the country prior to 1823. Else, they are classified as “resident foreigners” or as “associate citizens” (even if one of the parent is a Myanmar citizen). Since they are not citizens, they are not entitled to be part of civil service. Their movements are also restricted within the Rakhine state.

**Rohingyas as victims of genocide under Genocide Convention of 1948**

The most appropriate Law in the context of the human rights violation meted out on the Rohingyas is the 1948 Genocide Convention. The peculiarity of the convention is that, Article 1 of the convention enumerates that Genocide could be committed even during peace time.

Secondly, it is a Human Rights Instrument, since the preamble of the convention employs the term humanity. Article 2 of the Genocide Convention lists down the categories of persons on whom the convention would be binding and one such category is religion. Also, one of the paramount fact is that dolus specialise or specific intent as fulfilled which is an essential component of a crime of Genocide

**SUPREME COURT AND HUMAN RIGHTS VIS-À-VIS CONSTITUTION OF INDIA**

Considering that global migration primarily for reasons of persecution, violence, exploitation and denial of human dignity are on the rise, there is an urgent need for global governance on the subject based on customary and international humanitarian law. Further, in relation to nations, the progress of civilization has been from force to law. India has a track record of consistently honouring international humanitarian obligations and has remained steadfast in its commitment to the promotion of human dignity. This commitment is entrenched in Part III of the Indian Constitution and has been reinforced through a series of decisions of this Hon’ble Court. The evolving constitution and human rights jurisprudence impels an urgent intervention by this Hon’ble Court to protect, preserve and uphold the basic human rights of the Rohingya Muslims by ensuring that they are not deported back to their country of origin to face persecution.

Extracts from some of the relevant judgments are:

(i) In *DonghLian Kham v. Union of India*,[ii] the Hon’ble Delhi High Court observed as under,

> 30. The principle of “non-refoulement”, which prohibits expulsion of a refugee, who apprehends threat in his native country on account of his race, religion and political opinion, is required to be taken as part of the guarantee under Article 21 of the Constitution of India, as “non-refoulement” affects/protects the life and liberty of a human being, irrespective of his nationality. This protection is available to a refugee but it must not be at the expense of national security...

Since the petitioners apprehend danger to their lives on return to their country, which fact finds support from the mere grant of refugee status to the petitioners by the UNHCR, it would only be in...
keeping with the golden traditions of this country in respecting international comity and according good treatment to refugees that the respondent FRRO hears the petitioners and consults UNHCR regarding the option of deportation to a third country, and then decide regarding the deportation of the petitioners and seek approval thereafter, of the MHA (Foreigners Division).”

The Gujarat High Court in Ktaer Abbas Habib Al Qutaifi v. Union Of India, held as under:

“This principle prevents expulsion of a refugee where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Its application protects life and liberty of a human being irrespective of his nationality. It is encompassed in Article 21 of the Constitution, so long as the presence of refugee is not prejudicial to the law and order and security of India. All member nations of United Nation including our country are expected to respect for international treaties and conventions concerning Humanitarian law. In fact, Article 51(c) of the Constitution also cast a duty on the State to endeavour to respect for international law and treaty obligations in the dealing of organized people with one...”

By the virtue of customary international law, ratification of the Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1976) by India, the obligations of due process and the universal principle of non-refoulement, India is obliged to facilitate the persecuted Rohingya community for preserving their basic human rights, including their right to live with dignity as expressed by this Hon’ble Court and as understood internationally.

Article 51 (c), a Directive Principle of State Policy, requires India to foster respect for international law and treaty obligations in the dealings of organised peoples with one another. Thus India needs to secure and protect the interest of refugees and save them from being deported back to Myanmar, and to fulfill its international obligation.

The evolving constitutional and human rights jurisprudence impels an urgent intervention by this Hon’ble Court to protect, preserve and uphold the basic human rights of the Rohingya refugees by ensuring that they are not deported back to their country of origin to face persecution. This Hon’ble court has in a series of judgments, held that torture or violence offends human dignity which is a core right that inheres in every individual by virtue of his humanity and this right cannot be taken away by the State.

That India is not bound by the Convention relating to status of Refugees, 1951 and Protocol Relating to the Status of Refugees, 1967, since India is not a signatory to either of them. It is humbly submitted that even though India is not a signatory to 1951 Conventions and its protocols, it has been a member of several international instruments / declarations which provide for right to asylum and against forcible repatriation. As a party to these treaties India is under a legal
obligation to protect the human rights of
refugees by taking appropriate measures
under Article 51(c) which mandates India to
foster respect for International treaties and
obligations. In keeping with this, India is
bound to recognise under the same
international laws that it is under the
obligation to uphold the principle of non-
refoulement which is now an established
principle of customary international law
based on a consistent practice combined
with a recognition on the part of States that
the principle has a normative character. This
conclusion is supported by the fact that the
principle has been incorporated in
international treaties adopted at the universal
and regional levels to which a very large
number of States have now become parties.
India is a member of the Executive
Committee of the office of United Nations
High Commissioner for Refugees since
1995 which puts a moral, if not legal
obligation, on it to build a constructive
partnership with UNHCR by following the
provisions of the 1951 Refugee Convention.
The Hon’ble Supreme Court has in many
cases directed that action of the States must
be in conformity with international law and
conventions.

In Gramophone Company Of India Ltd vs
Birendra Bahadur Pandey &Ors, the Apex
Court had held that the comity of Nations
requires that Rules of International law may
be accommodated in the Municipal Law
even without express legislative sanction
provided they do not run into conflict with
Acts of Parliament. It is respectfully
submitted that as per the doctrine of
incorporation laid down in the mentioned
case, the principle of non-refoulement, a
recognized principle of international law,
must be incorporated in the law of land since
there is no municipal law in India which is
in conflict with such principle. Inasmuch
even without any express legislative
sanction, such principle of non-refoulement
shall be applicable to India with reference to
the Rohingya refugees. The relevant
paragraph of the judgement is produced
below for perusal.

‘5. There can be no question that nations
must march with the international
community and the Municipal law must
respect rules of International law even as
nations respect international opinion. The
comity of Nations requires that Rules of
International law may be accommodated
in the Municipal Law even without
express legislative sanction provided they
do not run into conflict with Acts of
Parliament. The doctrine of
incorporation also recognises the position
that the rules of international law are
incorporated into national law and
considered to be part of the national law,
unless they are in conflict with Act of
Parliament.’

In Vishaka&Ors vs State Of Rajasthan, the
Apex Court has held that international
conventions and norms can be used for
construing the fundamental rights expressly
guaranteed in the Constitution of India. The
relevant paragraphs of the judgement are
produced below for perusal.

‘6. Before we refer to the international
conventions and norms having relevance
in this field and the manner in which they
assume significance in application and
judicial interpretation, we may advert to some other provisions in the Constitution which permit such use. These provisions are:

Article 51:
"51. Promotion of international peace and security – The State shall endeavour to -
(c) foster respect for international law and treaty obligations in the dealings of organised people with one another;

Article 253:
"253. Legislation for giving effect to international agreements -
Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

Seventh Schedule:
"List I - Union List:
14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

In Nilabati Behera vs. State of Orissa ii a provision in the ICCPR was referred to support the view taken that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right, as a public law remedy under Article 32, distinct from the private law remedy in torts. There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity."

RIGHT TO PRIVACY: JUDGEMENT AND HUMAN RIGHTS

The Supreme Court in its landmark judgement on the right to privacy dated 24th August 2017, in Justice K.S. Puttaswamy (Retd) and Anr. v. UOI and Ors ii, has categorically stated,

"...India is a responsible member of the international community and the Court must adopt an interpretation which abides by the international commitments made by the country particularly where its constitutional and statutory mandates indicate no deviation. In fact, the enactment of the Human Rights Act by Parliament would indicate a legislative desire to implement the human rights regime founded on constitutional values and international conventions acceded to by India.

Constitutional provisions must be read and interpreted in a manner which would enhance their conformity with the global human rights regime. India is a responsible member of the international community and the Court must adopt an interpretation which abides by the international commitments made by the country particularly where its constitutional and statutory mandates indicate no deviation.

Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields: they do not attempt to enunciate distinct rights."
Thus, the action of centre in seeking to deport the Rohingya refugees is in violation of their rights guaranteed under the Articles 14 and 21 of the Constitution of India and also international treaty obligations.

CONCLUSION
Illegal refuge infiltration is a global problem now. As on January 01, 2014 there are 6.7 million global refugees, 1.2 million asylum seekers, 33.3 million internally displaced people in the world. The developed, as well as the developing nations, are facing with the problem of illegal immigrants. Illegal immigration has been a perennial problem for India since independence. India lacks resources as well as concrete legal framework for their sustenance. The global figure for refugees have crossed the 52 million mark since World War II in 2013. It is a human catastrophe and should be dealt effectively by the global community.

REFERENCES

Websites
- Manupatra
- SCC Online

Petition
Mohammad Sallaumin&Anr. V. Union of India; Writ Petition [Civil] No. 739 of 2017

Books
- Constitution of India, M.P. Jain
- Implementation of Human Rights, Manoj Kumar Sinha
- The International Human Rights Movement: A History, AryehNeier
- The Moral Dimension of Human Rights, Carl Wellman
EVOLUTION OF CONSTITUTIONAL CONVENTION IN INDIA

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ABSTRACT
This Article begins with the concept, nature, development Constitutional conventions. Conventions are not laws but they are sometimes considered to be unwritten laws of the Constitution of a nation. Constitutional conventions are regarded as rules of political practice in a State and these rules will be binding on those to whom they apply. The Article then focuses on the purpose and importance of conventions as the Conventions are the elaborated rules for the developing the spirit of cooperation of the Constitution. For maintaining the flexibility of the Constitution and for the proper working of the parts of the Constitution without inconsistency and for the better relations to one another, the Conventions are important for every Constitution. The focus then shifts to the British Conventions which are made provisions in Indian Constitution. During the Constituent Assembly debates, Dr. Ambedkar (the Chairman of the Constituent Assembly) has clearly emphasized that Our Constitution has chosen the British model of Parliamentary government. Many provisions related to the Government and the Executive are taken from the British Conventions and made provisions with slight changes. This article elaborates on the British Conventions and Indian Constitutional provisions in detail and the instances which have taken place in India related with those Constitutional Conventions. Thus the convention helps the Constitution to make amends as per the needs and desires of the society.

Conventions are not laws but they are sometimes considered to be unwritten laws of the Constitution of a nation. If there is a conflict between a law and convention, there is no doubt that law will prevail over it. The Conventions cannot enforceable in the Court of law. It is just an informal agreement and un-codified procedural agreement between institutions of a State. Every Constitution comprises of two rules. One which is written and is enforcable by courts and other is unwritten and there is no chance of enforceability of such rule. Generally Constitutional conventions are regarded as rules of political practice in a State and these rules will be binding on those to whom they apply.

THE PURPOSE AND IMPORTANCE OF CONVENTIONS
For the development and changing of laws as per the needs and welfare of the society, it is required to amend the rules by following amendment procedures mentioned in the Constitution. Here the conventions indirectly serve as means for the development of the Constitution without the formal amendments to the law. The conventions are important as they are elaborated rules for the developing the spirit of cooperation of the Constitution. For maintaining the flexibility of the Constitution and for the proper working of the parts of the Constitution without inconsistency and for the better relations to one another, the Conventions are important.
for every Constitution. This will make the clear understanding of the statute and without them the law will be distorted.

In United States, the convention regarding the election of the President is mostly developed. In Canada and Australia, though they have written Constitutions, they follow a number of British Conventions. According to the Thoughts of Dicey, the Constitutional law of a nation mainly consists of two elements. The first one is the law of the Constitution and the other one is the Conventions of the Constitution which are not strict binding laws. The Conventions of the Constitution consists of various customs, political rules and ethics & practices.

Thus through the basic meaning and definitions of Conventions, there are some of the essential characteristics which are relevant and required to constitute convention. This includes the certainty and uncertainty of application as per the circumstances and there will be some modification in the application and enforcement of rules of law because of this convention in a Constitution.

CONVENTIONS AND INDIAN CONSTITUTION
The Constitution of India is very comprehensive and bulky Constitution in which all laws are written in one document. Indian Constitution is one of the bulkiest Constitutions as it compromises of 443 Articles and 12 Schedules. It can be clearly noticed that many of the British Conventions are made provisions and these provisions fills the grey area of the Constitution. Constituent Assembly members agree the fact that the India chose the West-minister type of Parliamentary democracy. During the Constituent Assembly debates, Dr.Ambedkar (the Chairman of the Constituent Assembly) has clearly emphasized that Our Constitution has chosen the British model of Parliamentary government. Thus the Parliamentary system of government in India is adopted from the unwritten Constitution of United Kingdom. The Union Committee recommended Parliamentary System of government with elected President of India as the Head of the State.

Following are the British Conventions which are followed and made provisions in the Constitution of India:

I. FIRST CONVENTION
In England, it is the monarchy who takes the decision and this choice depends upon the advice of members of the House of Commons. The monarch exercises the prerogative powers in accordance with the ministerial advice in special situations.

In Indian Constitution, Article 74 clearly states that there will be a Council of Ministers with the Prime Minister at the head, to aid and advise the president of the State in the exercise of his functions and powers.

There is a difference between the powers of the President in United States and the powers of the President in Indian Constitution and also with the powers of President under English Constitution. Under the Presidential system of United States, the President is considered as the Chief Head of
the Executive and the administrative powers are vested in him. There are secretaries in charge of different departments under the President. The President is not bound to accept any advice from any of his secretaries. He also has the power to dismiss any secretary at any time.

Under Indian Constitution, the President is the Head of the Executive. The president will have ministers in charge of different departments under him. The President is bound by the advice of his ministers and bound not to do anything contrary to their advice or without their advice. The President has no power to dismiss any of the ministers. Under English Constitution the President is considered as the Head of the State and not the Head of the Executive. The President in United Kingdom only represents the nation and has no power to rule the nation. Generally the President is considered to be the symbol of nation.

The ministerial advice does not mean that the President is always bound to follow their advice. The President has the right to ask for reconsideration. Article 74 impliedly provides that it is the function of the Council of Ministers to advice the President. Under Indian Constitution, as the President is the Constitutional head of the Executive, in the same way the governors are head of the State and the Governors are appointed by the President. His functions in the sphere of the State Government are similar to those of the President in the Union Government. Under Article 163 of the Indian Constitution, it clearly states that there will be Council of Ministers along with the Chief Minister of the State to aid and advice the Governor in the exercise of his functions.

The 42nd Amendment which was inserted in the year 1976, provides that the President shall act in accordance with the advice of the Council of Ministers was not only redundant but has the potential of being harmful. Before this Amendment the Supreme Court has ruled in Shamsher Singh v. State of Punjab, that the President has the power to refuse the advice of the Council of Ministers in extra ordinary circumstances and is subject to the interest of Good Governance. Justice Krishna Iyer in this case captured the correct picture in this regard:

“The President and the Governor, custodians of all executive, exercise their power upon and in accordance with the advice of their ministers save in few well-known situations. Here the exceptional situations relate to (a) the choice of the Prime Minister (CM), restricted though this choice is by the paramount consideration that he should command a majority in the house; (b) the dismissal of a government which has lost its majority in the house but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous. This is not headed by the head of the State but has to be performed as per advice by his Prime Minister, even though it can be happen and done by the President. We do not examine the detail the Constitutional proprieties in this predicaments except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory.”
In 1987, the President Zail Singh has exercised his power under the proviso added to Article 74 (1) by the 44th Amendment. He has sent the ‘Indian Postal Amendment Bill Act, 1986 to the government for reconsideration.

In years 1977 and 1978, the President K.R. Narayan has exercised his power under the proviso of the Article 74 (1) for reconsideration in regard to the imposition of President’s rule under Article 356 Emergency in the State of Uttar Pradesh and the State of Bihar respectively.

In the year 2006, the President Abdul Kalam also exercised this power and has sent the profit bill for reconsideration but the bill was passed without any changes.

In S.R. Bommai v. Union of India, the Supreme Court held that the Article 74(2) is no bar to the production of all the material on which the ministerial advice is based.

II. SECOND CONVENTION

Though the power of the Sovereign is deprived of most of the prerogatives, the Sovereign has three rights, namely the right to be consulted, the right to encourage and the right to warn.

In Indian Constitution, Article 78, Duties of the Prime Minister as respects the furnishing of the information to the President, etc., states that the Prime Minister is duty bound to communicate and to furnish all information and decisions of the ministers relating to the administrative affairs of the Union and proposals for legislation as the President may call for.

The last clause generally speaks about the successful working of the rules of collective responsibility i.e. the minister should not make a statement of policy or take any important action on his own responsibility without the previous approval of the Council.

The clause empowers the President to require a matter on which a decision taken place by minister without the consideration by the Council of Ministers, to be submitted to the Council of Ministers for its consideration. This does not mean that it authorize the President to reopen any decision already taken by the Council of Ministers.

Jennings has pointed out the essentials elements of the doctrine of collective responsibility and this doctrine implies three things. Firstly that the prime Minister is frequently in a position to pledge his colleagues support because the only alternative is his resignation. Secondly, a minister should not announce a new policy without Cabinet consent, but if he does, the Cabinet must either support him or accept his resignation. Thirdly, the minister ought to be chary about expressing personal opinions about future policy except after consultation and if the circumstances are such to pledge the government, the Prime Minister has real cause of complaint.

In Article 167, the Chief Minister of each State – duties of the Chief Minister as respects the furnishing of information to Governor, etc. In this Article, there is same
obligation on the Chief Minister as the Prime Minister has in Article 78.

Shri K.M. Munshi, Member of Drafting Committee has explained about the scope of clause© saying that “under this clause, the Governor has right to consult about information regarding to the policy making of a State and the power to sending the policy back to Cabinet for reconsideration. Therefore, this clause is a safeguard which preserves the Collective Responsibility and the powers of the Prime Minister. There is great advantage if the Governor of the State exercise such influence over his Cabinet because then they will be able to get confidential information and advice from a person who has completely identified himself with them and yet is accessible to the other parties.”

III. THIRD CONVENTION

In British Parliamentary System, the Sovereign has some importance in choosing the Prime Minister of his choice. But in reality, there is no choice at all. Further, The Queen appoints the other ministers on the advice of the Prime Minister. Here the Prime Minister is given full liberty to choose the Council of Ministers. There can be implied power given to the powers of the Prime Minister to recommend dismissal. Thus on his advice, the president has power to dismiss the ministers. Here, the Prime Minister must have the support of a stable majority in the lower house. This is generally called as the Principle of Parliamentary System of Government.

In Indian Constitution, Article 75, other provisions as to ministers, states that the Prime Minister will be appointed by the President and the other minister will be appointed by the President on the advice of the Prime Minister. In case of S.P. Anand v. H.D. Deve Gowda, the Supreme Court held that it is not the Prime Minister as a person must be member of either of the Lower or any of the two houses of the Parliament at the time of appointment. The President first invite and appoint him the Prime Minister and then the person has to prove his majority or seek vote of confidence in Lok Sabha within a reasonable time.

While appointing the Prime Minister, there can be discretion in the choice of Prime Minister if there is less than majority support or it may be because of sudden death of the Prime Minister.

In 1979, after the fall of Morarji Desai Government, there was discretion where the President Reddy has exercised by inviting Charan Singh to form the ministry and not inviting the Jagjivan Ram.

Appointment of other ministers: Other ministers are appointed by the President only on the advice of the Prime Minister. The Prime Minister gives advice of such people who can work together and by doing this, the Prime Minister will secure the support of the House of the people. If it fails, he must find another party for securing the support of the lower house and it must be a strange house that is willing to support alternative governments.

Removal of Ministers: Clause (2) of Article 75 only applies to the dismissal of minister and of the dismissal of the Council of
Minister. Generally, if there is lost in the confidence of Lower House, PM must either resign and sought dissolution of Lok Sabha. In 1970, Indira Gandhi and in 1999, Atal Bihari Vajpayee had lost to the vote of confidence, but still the President has allowed to continue till the completion of election and no one else were able to form the government at that time.

In Constituent Assembly, debate, the speech of Dr. Ambedkar, Chairman of the Drafting Committee, has said:

“In case of no Prime Minister, every minister will be subject to the control of the President. Here, there would be a possibility where, President who is not ad idem, while controlling the ministers can cause disruption in the cabinet. Thus, there must be collective responsibility and this will be only achieved through the instrumentality of the Prime Minister. Therefore, the Prime Minister is really the keystone of the arch of the cabinet and unless and until we create that office and endow that office with statutory authority to nominate and dismiss ministers there can be no collective responsibility.”

As discussed in Article 75 about the appointment of PM and appointment of other ministers in the same manner, under Article 164 the appointment of Chief Minister takes place by the Governor and the other minister will be appointed by the Governor on the advice of Chief Minister.

IV. FOURTH CONVENTION
The Ministers are collectively responsible to Parliament and this led to establishment of the basic principle of parliamentary government. In England, by middle of the 19th century, this doctrine got established. Generally the doctrine generally operates in all the important parliamentary government like Australia, Canada, Ireland and New Zealand. The principle of collective responsibility is both the cause and effect of the cabinet solidarity.

In Indian Constitution, Article 75(3) states that the Council of Ministers will be collectively responsible to the House of People. Thus, this Article clearly and expressly embodies the principle of collective responsibility in the Indian Constitution.

The Supreme Court has explained the concept of collective responsibility as follows:

'Collective Responsibility" has two meanings; the first meaning which can legitimately be ascribed to it that all members of a government are unanimous in support of its politics and would exhibit that unanimity on public occasions although while formulating the policies they might have expressed a different view in the meeting of the Cabinet. The other meaning is that Ministers, who had an opportunity to speak for or against the policies in the Cabinet, are thereby personally and morally responsible for its success and failure. Here, in spite of the fact that the Cabinet of Ministers id collectively responsible to the House of the People, there may be an occasion when the conduct of a Minister maybe censored if he or his subordinates
have blundered and have acted contrary to law. Thus the whole issue of collective responsibility relates to the continuance of a minister or a government in office and the only sanction for its enforcement is the pressure of public opinion by the support of members of the legislation.

As discussed above the collective responsibility of the Council of Minister in Article 75(3), there will be the collective responsibility of the Council of Minister to the Legislative Assembly of the State as mentioned in Article 164(3) of the Constitution. Any decision given as per this provision is a collective decision from which no ministers can dissociate. Here the minister who does not resign is absolutely and in irretrievably responsible.

V. FIFTH CONVENTION
The Prime Minister must be a member of the Parliament immediately after his appointment by the President, i.e., the member of the House of Commons. This also means that the ministers who are being appointed by the President with the advice of Prime Minister must also be member of one of the House of Parliament. This generally means that there must be secure membership in either of the house and this is because, it will be impose direct responsibility on the member on the members of the house of the Parliament and the Prime Minister.

In Indian Constitution, Article 75(5) and 164(4) provides that the minister who has been appointed by the President or Governor must be a member of the Parliament and State Legislature respectively within a time period of six months, and the expiration of such time period ceases to be a minister. In India, six months is the concession time period given to all the ministers including the Prime Minister to secure the membership of either house of the Parliament.

These clauses were taken by the Constitutional makers from the Government of India Act, 1935. In Indian Constitution, there is no special provision with regard to the compulsion on the Prime Minister or Chief Minister to become member of the Lower House.

A person who is not a member or either house and he is appointed as a minister or the Prime Minister, if he does not become the member of any house of the parliament, he may continue to be so up to a period of six months.

VI. SIXTH CONVENTION
One of the distinguishing essential or characteristic or parliamentary system of government or British parliamentary system is the dissolution of the parliament on the advice of ministers.

Generally, in non-Parliamentary system, the legislatures are elected for the fixed time period. In this parliamentary system, the power of dissolution is in the hands of the head of the State. This dissolution is considered as a means of retain the support of the majority in the house of common.

In Indian constitution Article 83, duration of Houses of Parliament, it is clearly stated under clause (2) that the House or the people
shall continue for five years from the date approved. Unless dissolved and after the expiration of time period of five years, it will operate as a dissolution of the house. Here the parliament cannot extend nor has the right to extend the life of the House of people except during proclaimed emergency, where it may prolong its life by a year at a time (Article 352). This will not extend the continuance beyond a period of six months after the proclamation of emergency has ceased to operate.

In Article 85, Sessions of parliament, prorogation and dissolution, the clause (2) of the Article states that the president may from the time to time-

- Prorogue the house or either house
- Dissolve the house or the people

As per A.N ray (Chief Justice), the main purpose of this article is to give effect to the collective right of house and this article is not a provision regarding the contribution of parliament but of holding of session.

As mentioned and discussed in the above article 83 and 85 in the same way, there are articles 172, duration of state legislature and 174 Sessions of the State legislature, prorogation and dissolved the concept of dissolution is same as of the dissolution of the house of parliament. Hence the dissolution by the parliament after proclamation would be as good as dissolution by the Governor of a State whose powers are taken over.

VII. SEVENTH CONVENTION
The Queen is considered to be an essential part of parliament as a law-making organ of a State. In UK parliamentary system, the parliament is the supreme legislative authority and the Parliament consists of three elements, mainly the Queen and the two Houses of parliament.

In Indian Constitution, Article 79, Constitution of Parliament, it is stated that there will be Parliament for the Union which consists of the President and two houses to be known respectively as the House of the people and Council of states.

Articles 168, Constitution of legislatures in States, it is stated that there all be legislature for the states which consists of the governor and one house in some states and the governor and two houses in some of the States.

One house is the legislative council and the other is the legislative assembly, where there is only one house along with Governor, it means the house is the legislative assembly. In six states of the Union, namely Andhra Pradesh, Bihar, Maharashtra, Karnataka, Tamil Nadu and Uttar Pradesh, the legislature is bicameral and in other states, it is unicameral.

VIII. EIGHTH CONVENTION
The Queen shall not withhold the Royal assent from a Bill duty passed by the Parliament; here the queen shall declare her assents to the bill which are passed by Parliament. The Queen in England has the right to veto a bill, but this right has not been exercised since the reign of Queen Anne.

In the Indian constitution, under Article 111, assent to bill, it is clearly stated that when there is a bill passed by the house of
Parliament, it will be presented to the President, and the President thereafter will declare either that he accents to the bill or he withholds assent. Here the president sends a message for reconsideration and then the houses shall reconsider the bill and will presented again for the President assent.

There are some instances where, the President has sent back the bill for reconsideration. In 2000, President Abdul Kalam sent the amended Parliament (Prevention of Disqualification) Act, 1959 for such reconsideration. Then after reconsideration, it was present to him without any amendments the president asserted to it.

As discussed in Article 111, in the same way there will be assent to the Bills by the Governor in the case of State, can withholds assent or assents to the Bill same as the President. This provision is mentioned under Article 200. Here regarding assent of the bill, it will be politically impossible for a Governor or Prime Minister to refuse their assent to a bill and exercise Veto power. In Madhya Pradesh, the Governor for the consideration of the President has returned the bill on the ground that some of the provisions of the Madhya Pradesh Panchayat Bill, 1961, were undemocratic and opposed to the Directive Principles of State Policy.

Once a bill is reserved for the consideration of the President and thereafter, the President assents to it, then the bill becomes an Act and after passing of the Act, nobody has the right to question about its validity on the ground that it was not necessary to reserve the bill for the consideration of the President.

**IX. NINTH CONVENTION**

If there is election of the new Speaker, the Speaker should be elected normally unopposed and the Speaker is expected to be above the parties and politics. In Parliamentary System, the office of Speaker is considered to be held in a very high esteem and respect. The position and the role of the Speaker are governed by the Convention.

Articles 93-97, and Articles 178-181 of the Constitution are related to the office of the Speaker and provide the duties and powers of the Speakers and more. This office of the Speaker for the first time was created by the Government of India Act, 1919. Here the position of the Speaker is made impartial and independent in Indian Constitution.

**Conclusion**

From the above conventions it can be observed that the main purpose of convention is to retain the flexibility of the Constitution and to ensure the legal framework. The convention helps the Constitution to make amends as per the needs and desires of the society. Some conventions are well-established but some are vague and because of that, it may lead to manipulation for political purposes. Thus the convention will guide the use of Constitutional discretion. The framers of our Constitution have left certain matters of the Constitution to be governed by the Conventions.
A TO Z OF TRIPS: AN AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

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ABSTRACT

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) in 1994 was the most crucial turning point in the history of Intellectual Property Rights. It was negotiated in order to reduce distortions and impediments to international trade law and to provide adequate protective measures. Part I of the Agreement sets out the basic principles to protect intellectual property. As a part of WTO Agreement, the implementation of the TRIPS patent regime was the primary requirement in order to enable participation in multilateral trading system. The researcher has given an in depth view of the factors responsible for and outcomes of the TRIPS Agreement.

Introduction

Emergence of the TRIPS Agreement

The Agreement on Trade related Aspects of Intellectual Property Rights (hereafter referred to as TRIPS), together with the 1967 Stockholm Conference that adopted the revised Berne and the Paris Convention which created the World Intellectual Property Organization (WIPO) can be termed as the most significant milestone in the development of intellectual property rights in this century. It not only widened the scope of industrial property but also made provision to cover up for failed treaties. Thus, its scope was much vast than any of the erstwhile international agreement. The real worth of the TRIPS agreement was due to its success in enshrining very detailed rules on the issue of enforcement.

For an understanding of the progression of the TRIPS, it is necessary that we should trace the history of intellectual property rights and the vital role played by GATT in enhancing its protection. As already discussed the initiative for establishing ITO was launched in 1946 by a decision of the UN Council for Economic and Social Affairs (ECOSOC).

A committee comprised of representatives from 18 countries were asked to draft the ITO charter for the purpose of promoting the expansion of trade and protection exchange and consumption of goods. Ultimately a couple of conferences lead to the signing of a treaty on October 30, 1947 adopting GATT at Geneva. Failure to adopt ITO charter led to the restructuring of the GATT and its Secretariat from 1948 till the establishing of the World Trade Organization (WTO) on January 1, 1995. The GATT was applied on a provisional basis as a covenant amongst a number of governments. Thus, it was applied to government not citizens and was not self-executing. The interim committee of ITO was the employer of the GATT secretariat staff.
GATT allows contracting parties to adopt or enforce measures which are necessary to secure compliance with laws or regulations which are not consistent with the provision of this agreement including those relating to the protection of patents, trademarks, copyright etc. The Provisions were invoked in two disputes brought before GATT panels. Apart from this, WIPO also administered two principle international intellectual property covenants - The Paris Convention for the Protection of Industrial Property and the Berne Convention for protection of Literary and Artistic Works. WIPO also administers a number of agreements designed to facilitate acquisition of multi country production for industrial property. But the absence of detailed rules on enforcement of rights in front of national judicial administrative authorities and the absence of binding and effective dispute settlement mechanism were main flaws in the Paris and Berne Conventions. In addition to this the evolution of the world trading system, sky rocketing importance of intellectual property and technology changes, especially generally computerization and digital technology, required a serious updating of intellectual property rules.

The Uruguay Round

To remove the above said shortcomings and bring in new standards, the ministerial conference launched the Uruguay round of multilateral trade negotiations at Punta del est in September, 1986. The United States and Japan submitted proposal to the round’s preparatory Committee to cover all intellectual property rights and their enforcement. However Brazil and Argentina opposed the inclusion of it. The ministers included the item "Trade Related Aspect of Intellectual Property Rights" including trade in counterfeit goods. This round was the broadest and most extensive multilateral agreement in the field of intellectual property. It covered the entire area and added enforcement, acquisition and most favored nation obligation to the existing rules. The negotiations had to essentially address the question of trade in counterfeit goods taking into account the work already done in the GATT.

The pressure on the developing countries to ratify GATT was immense. A powerful group of US chemical, pharmaceutical, computer, entertainment, publishing and electronic corporation lobbied with the US government to introduce intellectual property issues into the multilateral trade negotiation under the GATT. The chairman of Pfizer, a US based pharmaceutical company, was considered the driving force behind this move. He was made the chairman of the Advisory committee for trade negotiations in 1981 to shape the US trade policy. 13 major US corporations formed the Intellectual Property Rights Committee (IPRC) to set out an agenda for what he wanted to achieve through the international trade negotiation. To enhance the pressure US enacted the Trade and Competitiveness Act, 1988 with an aim to promote US exports and reduce US trade deficit. It invoked section 301 of the Trade Act of 1974 that authorized the United State Trade Representative (USTR) to identify countries that deny adequate and effective protection of IPRS, identify priority countries that are IPR transgressors and do not make progress in negotiations
with USTR and initiate accelerated section 301 investigations on practices of identified priority countries. 

On May 25th, 1989, office of the USTR, identified 17 countries on intellectual property watch list and 8 countries on Priority Watch List." ii India was among the later and asked for improved and adequate patent protection for all classes of inventions under USTR's accelerated action plan." ii Similar the US Pharmaceuticals Manufacturers Association (PMP) filed a complaint on Brazil patent regime for pharmaceuticals and was declared unreasonable. Chile, Argentina and Venezuela were also targeted in similar way. All these countries ultimately adopted law or prepared bill that met US demands. These legislative changes were introduced merely to avoid trade sanctions imposed by US.

The importance of technology in the development of international trade was considered as primary reason that led to the incorporation of Intellectual Property Rights in the GATT. Apart from this increasing interface between trade, technology and Intellectual Property Rights, the developing countries were continuously arguing against the inclusion of Intellectual Property Rights in GATT. Technology was considered as a strategic factor for national development during 1960s and 1970s and by the year 1980 it evolved as a strategic element to control international markets. 

The internationalization of high technology and its rapid diffusion created diverse conditions, and the developed countries argued for its effective regulation. The United States sought the inclusion on the ground that failure to respect and enforce Intellectual Property Rights was harmful to trade relations and that such infringements amounted to permitting the existence of NTBS (Non-tariff Barrier) in this area. 

Most of the developed countries were in consonance with the views expressed by US however Japan, EC and Nordic countries showed some differences. Developing countries argued that setting of norms and standards was beyond the competence of GATT. It is to be noted that at a time when some developing countries had turned from import substitution to more aggressive export oriented policies, the importance of creating a comparative advantage and acquiring technological competitiveness was paramount. ii This realization saw these states approach GATT and IPRS. The reduction of dependency and a more active participation in technological change along with realization of potentialities of strong science base marked their response to protect Intellectual Property Rights.

TRIPS Negotiations: Main Approaches

Developing Countries

The TRIPS Negotiating Group met twice in July 1989 to discuss, first the applicability of basic GATT principles to intellectual property and secondly the provision of adequate standards regarding the availability, scope and use of intellectual property rights. 

There were two broad approaches in the TRIPS negotiations. A number of developed countries had made written submissions to the Negotiating Group on TRIPS notably the United States, Japan, Switzerland and EC. These countries stressed that inadequate and discriminatory protection of intellectual property rights constituted a major distortion to trade and should be dealt within the framework of GATT. The developing countries on the
other hand maintained that it was not within the mandate of GATT or Negotiating group to consider the protection of Intellectual Property Rights by elaborating upon substantive norms and standards compulsory for all the states.

India and Brazil were the front runners to oppose the GATT negotiations on TRIPS. The fundamental issues that Brazil raised in the discussions with the negotiating group were:

- The extent to which rigid and excessive protection of intellectual property rights impeded the access to latest technological developments, restricting the participation of developing countries in international trade.
- The extent to which the abusive use of intellectual property rights gave rise to restrictions and distortions in international trade.
- The implications that a rigid system of intellectual property rights protection held with respect to international trade.

In nutshell, the Brazilian submission restricted its view to the consideration of the trade related and developmental aspects of intellectual property rights. They argued that such a rigid monopoly situation created by excessive protection of Intellectual Property Rights would be a serious restriction on trade.

The Indian submission also set out its views on the provision of adequate standards and principles concerning the availability, scope and use of trade related aspects. India identified some particular areas like working of patents, compulsory licenses; product verses process patents, term of patent and exclusions from patentability as crucial in achieving the development objectives. India maintained that member states should be given freedom to tune their intellectual property protection system with their own needs and conditions. India's basic approach may be broadly described as follows:

- The evolution of patent system both in industrialized and developing countries would clearly establish the correlation between the economic, industrial and nature and technological development of a country with the nature extent of patent protection granted.
- Patent system is an instrument of national economic policy for the industrialization and technological advancement of a country.

There should be no attempt at the harmonization of patent laws of the industrialized and developing countries nor theredid any imposition on the developing countries as to the standards and principles relevant to develop countries.

- Patent law must focus equally on the duties and obligations of the patent owner.
- Giving due consideration to sectors of critical importance to developing countries like food production, nutrition health care, poverty alleviation and disease prevention.

The essentials of the position taken by India in general, reflected a view of
patent protection that could be identified in its own patent legislation. These flexible features of the Indian patent law were put forth before the Negotiating Group for a more favourable patent regime for developing countries.  

**Developed Countries**

**United States**

The developed countries, notably the United States, Japan, EC and Switzerland made written submissions to the Negotiating Group on TRIPS. The position of the United States represented the interests of the MNC's and sought to create a favorable domestic and international environment for their smooth working. Thus, its proposals reflected the ideas put forward by the MNCs from time to time. According to them, the protection of intellectual property rights fostered creative activity and innovation and encouraged investment in the commercialization of new ideas and technology. Its main focus was to change the relationship between trade and deficiencies in the protection of intellectual property rights, the identification of deficiencies in intellectual property rights protection and the review of existing disciplines in the GATT and other international convention. In its views, the deficiencies in the protection of Intellectual Property Rights distorted the trade in goods and reduced the value of concessions negotiated in the previous rounds of trade negotiations. The inadequacies identified by the US in the national laws included:

(a) Total lack of patent or copyright laws.

(b) A narrow scope of protection under intellectual property laws.

(c) The term of protection was too short to permit the inventor time to test the product, market it and achieve adequate return on investment.

(d) Misuse of compulsory licensing programs. The United States also regarded the lack of effective enforcement of national laws relating to intellectual property rights as a form of trade distortion.

They stressed that the standards laid down in some international conventions were unacceptable as they failed to provide adequate protection to intellectual property rights. In the ultimate analysis, the US sought to create new standards and principles to provide adequate protection. As an immediate step, the US proposal even suggested that interested contacting parties should sign a draft Agreement on measures to discourage the importation of counterfeit goods without modification to the existing text.  

**European Communities**

The European Community (EC) proposals identified trade related issues of intellectual property rights in three areas:

(a) Inadequacies in the availability and scope of rights.

(b) Inadequate procedures and remedies for the enforcement of such rights and

(c) National laws which discriminated against imports in favour of domestic economic activity.
The proposal specified the legislative provisions in the patent laws of countries which resulted in inadequacies in protection particularly relating to food, chemical and pharmaceutical products. Granting of process patent as opposed to product patent in chemical sector gives rise to 'counterfeiting.' The compulsory licensing of pharmaceutical patents of the product patented was also seen as a factor leading to trade distortion which could lead to a negative impact on the recovery of considerable investment needed to sustain innovation in the pharmaceutical sector. Another crucial aspect of discrimination was the 'preferential' treatment of activity on national territory i.e. rules which discriminate against activity abroad. This deprived the European inventors of the possibility of obtaining a patent to which they would otherwise be entitled.

Japan

The Japanese proposal listed problems or cases caused by insufficient protection of intellectual property rights which could create impediments for legitimate trade. The proposal viewed the problem in two ways namely:

(a) The problems resulting from discrepancies in the national intellectual property rights laws and

(b) The problems concerning the enforcement of intellectual property rights.

More specifically, the Japanese proposal focused on the difficulties faced by Japanese entrepreneurs in getting adequate patent protection. The intellectual property law of Japan was revised in 1987 to incorporate all the major features of the international patent law. Thus diversities in various national laws of member countries were the chief component of Japanese proposal.

Nordic Countries (Finland, Iceland, Norway and Sweden)

The submission of the Nordic countries were focused on two issues concerning the trade related aspects of intellectual property rights namely:

(a) Inadequate level of protection and

(b) Adverse trade effects arising from national procedures.

Referring to the problems of inadequate protection, the submission referred to the inadequacies in the international conventions, such as lack of specific obligations on the extent to which intellectual property rights could be protected. Problems are also created by long periods while application for patent is pending and complexities of procedure. Therefore, the Nordic countries supported the need to address trade related aspect of intellectual property rights by developing rules and disciplines multilaterally.

Similar was the Swiss submission favouring negotiations for additional provisions in order to remedy distortions arising from insufficient level of protection of intellectual property. The Swiss submission attempted to equate the protection of physical aspects of goods and the intangible component of products. However, it could not explain in clear terms the exact nature of legal framework which could sub serve the concept of adequate protection of intellectual property. Thus, the
major thrust of all the developed nations was a strong patent protection regime. Both the contentions of developed as well as developing nations were put in form of two basic approaches A and B figuring in the 'chairman's report on the group of 'Negotiation on Goods' drafted by Chairman Lars Anell.  

Conflict and Compromises

The submission made by both the developing and the developed countries clearly outlined the differences in approaches towards the redefining of regulatory mechanisms concerning intellectual property rights. Among developing countries only India and Brazil gave detailed proposals, however among developed the list was long. The fundamental differences between both the groups pertained to patentable subject matter, limitations on patentee’s right, inadequate duration of protection and inadequate enforcement. As regards the main issue i.e. patentable subject matter the US model was accepted that used the phrase “all products and processes,” and novelty, inventive step and industrial applicability as criteria of patentability. A brief survey of proposal submitted by different group of countries clearly established the fact that the developed countries in order to protect their technological superiority wanted strict patent regime. These proposals went beyond the limits placed by the Paris Convention which did not make any attempt to define ‘patentability’ and ‘patentable subject matter.’

The final agreement, sought to liberalize major sectors of the economic process except those concerning intellectual property rights. It was evident that the proposals submitted by the developed countries primarily considered the interests of a few influential commercial groups particularly MNCs. The text of final act incorporated the proposals of developed countries. The removal of distinction between product and process patent was set to leave a far reaching impact on the pharmaceutical and Chemical sectors of many of the developed countries. Till very recently many of the developed countries were granting only process patents in the pharmaceutical sectors to achieve faster economic growth and to provide health care to all by maintaining low prices of drugs. But the draft reflected the negotiating objectives of the developed countries.

During the negotiations in December, 1991, Author Dunkel, Director General of GATT presented a set of proposals, popularly known as ‘Dunkel’ Proposal. The 108 participating states were given time till January 13, 1992 to respond to the proposals. The final act was adopted in Marrakesh on April 15, 1994.

TRIPS – AN ANALYSIS

The Agreement on Trade Related Intellectual Property Rights (TRIPS), signed at Marrakesh was an annex to the agreement establishing the World Trade Organization (WTO). The agreement established a link between international trade and international intellectual property regime. TRIPS is said to be comprehensive agreement on intellectual property dealing with all types of intellectual property rights. The
establishment of the new regime had put an end to the sole role of WIPO in the management of international intellectual property regime. ii The agreement was an instrument to maintain the technological supremacy of the developed countries. The agreement prescribes minimum standard of protection to the following forms of intellectual property rights:

- Copyright and Related rights
- Trade marks
- Geographical Indications
- Industrial designs
- Patents
- Integrated Circuits
- Undisclosed Information

Apart from prescribing the minimum standards of protection the agreement sought to follow the standards set by other Intellectual Property treaties. ii This made a party to the agreement to be ipso facto member of the other treaties viz Bern Convention, Rome Convention, Paris Convention and Washington Treaty on integrated circuits. The agreement consists of VII parts viz. General provisions and basic principles, standard concerning the availability, the scope and use of intellectual property rights, enforcement of intellectual property rights, acquisition and maintenance of intellectual property rights and related interparty procedures, the dispute prevention and settlement, mechanisms transitional arrangements, institutional arrangements and final provisions. Some main features are:

- Scope of Patentability (Article 27)
- Conditions on Patent Applications (Article 29)
- Rights and exceptions to Rights conferred (Article 28 and 30)
- Compulsory Licensing (Article 31)
- Burden of Proof (Article 34)
- Enforcement (Article 41-64)
- Dispute Settlement (Article 64)
- Transitional Arrangements (Article 64)

The states which are a party to these arrangements are obliged to legislate their Intellectual Property laws in a manner which makes it compatible with the agreement per se. Thus the implementation of the TRIPS should be done in a manner conducive to the specific context of each country. The scope and length of protection should be limited in order to strike an appropriate balance between creations and dissemination.

Objective and Scope of the TRIPS Agreement

According to the preamble of the Agreement on Trade Related Aspects of Intellectual Property Rights the main objective of the agreement is “to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights such that they do not themselves become barriers to trade.” Further it states, “The underlying public policy objectives of national system for the protection of intellectual property including developmental and
technological objectives.” Article 7 and 8 of the agreement elaborates them. According to Article 7 objectives of, protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technical knowledge in a manner conducive to social and economic welfare and to balance of rights and obligation.

Further, the agreement gives freedom to the states in formulating or amending their national laws and regulations, adopt measures necessary to protect public health and nutrition and to promote public interest in the sectors of vital importance. It also authorized the states to formulate rules against abuse of patent rights. State could implement the TRIPS agreement according to its socio economic conditions provided it is not inconsistent with the agreement. Thus, the TRIPS provisions could be implemented by the states within the frame work provided by Article 7 and 8.

Scope of Patentability (Article 27)

The scope of patentability is the scope of an invention to get patent protection. Article 27 provides minimum protection to inventions irrespective of the field of invention. Patents are now available for any inventions, whether product or process in all fields of technology provided they are new, involve an inventive step and are capable of industrial application. It also ensures that patent rights shall be available and enjoyable without discrimination as to the place of invention, field of technology and whether products are imported or locally produced. The Article further allows the member states to exclude certain inventions from patentability on grounds of morality, decency and plant, animal or human life to avoid serious prejudice to the environment. However, the Agreement protects inventions of micro-organism, non-biological and microbiological products of plants and animals.

A clear cut distinction needs to be drawn between discovery and invention. The concept of invention has under gone change in the industrialized nations. Thus, every state which is a party to the Agreement has freedom to define what an invention is. The term discovery is used to mean the mere recognition of what already exists. It is the finding of causal relationship, properties or phenomena that exist in the nature. However, an invention entails developing a solution to a problem by applying technical means. This distinction prevents certain items from being patented. According to the dominated practice; an invention should be new in absolute terms in order to qualify for patent protection. The absolute novelty demands that the invention should not be part of the prior art in any part of the world. However, the US practice varies. In US, novelty will not be lost when invention is divulged in non-written means such as public use and sale. It was this concept of US that resulted in the patenting of traditional Knowledge for e.g., patent on neem and turmeric etc.

Regarding the requirement of inventive step there are divergent practices. According to the US practice, the critical date of examining inventive step is the date of the invention. In other countries it is the date of the patent application. Further in the
US obviousness is judged on the basis of a claimed invention using the prior art and the level of ordinary skill. In Europe, the emphasis is on the extent to which the invention solves a technical problem.

Lastly, the industrial application requirement is synonymous with the term 'useful' given under the Agreement. Hence in the US one invention needs to be capable of satisfying some function of benefit to humanity. However in Europe it is the industrial application that matters. This means that the EC would not allow the patentability of purely experimental inventions. This is specifically enacted in Argentinean Patent Law which requires that invention causes an industrial result or product to be obtained. As a result the patentability of methods of surgical, therapeutically and diagnostic methods, methods of treatment of humans and animals are not considered as inventions.

Disclosure (Article 29)

The full disclosure is considered as one of the basic principles of patent law. It is in exchange for the cost of monopoly granted to the inventor or patentee. An applicant for a patent shall disclose the inventing in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the state of art. The State may also require the applicant to indicate the best mode of carrying out the invention known to the inventor at the date of filing or where priority is claimed, at the priority date of the application. The purpose of this best mode is to prevent the right holder from hiding the invention from the public. It also prevents excessively broad claims. For instance, the applicant sometimes seeks protection to methods on products that have not been described in the application. The national laws can demand information on the source or place of origin of the biological material deposited. According to the Indian Patent Act, the disclosure of source and geographical origin is mandatory. Further, the biological materials mentioned in the specification are available to the public immediately after the publication of the application.

Rights of a Patentee (Articles 28 and 30)

Under the TRIPS Agreement, a product patentee can exclude third parties from the act of making, using, offering for sale, selling or importing for those purposes. The same is applicable for process patent. The Agreement also grants certain exception to the exclusive rights granted on three conditions, these are:

- They must be limited
- They should not be in conflict with the normal exploitation of the patent.
- Exceptions should not unreasonably prejudice the legitimate interest of the patent owner.

Based upon these conditions a few examples of these exceptions provided by various countries are, use of the invention for research, use of the invention for teaching practices, experimentation on the invention to test or improve on it, preparation of medicine, bonafide use of the invention by third party that had used it before the date of application of patent, parallel import and experiments made for the purpose of seeking regulatory approval.
for marketing of a product after the expiration date (Bolar exception).ii

Compulsory License (Article 31)

It is a part of public policy that tries to balance the monopoly rights of the patentee with the competition and consumer rights. Compulsory License is one of the main mechanisms used for this purpose. A compulsory license can be defined as authorization given by a national authority to a person without or against the consent of the title holder, for exploitation of a subject matter protected by a patent or other intellectual property rights.ii A compulsory license operates only at the request of the person. TRIPS does not use the term, 'Compulsory License' but it uses other use without the authorization of the right holder. A compulsory license is non-exclusive and non-transferable. ii

Grounds for granting compulsory license are.

- Emergency and extreme urgency – Article 31(b)
- Anti-competitive practices – Article 31 (j)
- Public non-compulsory use – Article 31 (b)
- Dependent patents – Article 31 (k)
- Refusal to deal – Article 31 (b)

However, the states are obliged to give powers to the courts to issue injunctions both permanent and interlocutory. Judicial authorities should be given power to issue damages as remedial measures. A Border measure obligates the state on request of the right holder, with competent authorities, administrative or judicial, for suspension by the customs authorities of the release into free circulation of such goods.ii

Enforcement (Article 41 and 64)

Apart from the above mentioned provisions enforcement of intellectual property rights was a major issue for discussion. Pre-existing Intellectual Property laws contained few provisions in this area. A notable feature of the agreement is the detailed provision for the enforcement procedure. Article 41 sets the general obligation on enforcement. Articles 42-50 spell out the civil and administrative procedures and remedies. Article 61 requires the institution of criminal remedies in case of willful trade mark counterfeiting and copyright piracy on a commercial scale. Articles 51-60 provides an important remedy in form of border measures. The Agreement does not provide any special court for Intellectual Property cases.
TRIPS council is to reach a consensus on the course of action with regard to the non-violation complaints.

Conclusion

Intellectual property system provides a boost to the national wealth and contributes considerably to its sustainable development. Hence, there is a great economic value attached with promoting the use of the intellectual property system and ensuring its effective protection. Protection of Intellectual Property is conducive to increased investment in the economies that provide for such protections. It is also a notion to enhance its international trade. In general the economic value of Intellectual Property Rights depends on its competitive capability and scope for its enhancement and protection. Thus an intellectual property system helps in expanding a country's economic and trade programs. The TRIPS Agreement laid down basic minimum criteria for patentability irrespective of technological and economic development of participating countries. The Agreement made drastic changes in the international patent regime. It prescribed a universal minimum protection for patent including the scope of patentability, rights of the patentee, duration of protection, compulsory licensing, burden of proof and set up an enforcement mechanism.
CYBER SPACE THE DOUBLE-EDGED SWORD

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Introduction

Man is a social animal and it has a natural tendency to want to communicate and socialize. Once he realized the significance of using computer network to communicate, he began to demand access. Cyberspace is the biggest breakthrough mankind has ever seen and experienced in the field of science and technology. It is so vast and colossal that it becomes impossible to fathom it as an invention. From being unknown to absolutely ubiquitous, cyberspace has morphed from military communication to global phenomenon. It is a veritable outhouse on clicks from which one can transcend to some other place virtually. The paper takes a broader aim to know how the cyberspace has catered to thrive as a double-edged sword. It has shed light on the emergence of cyberspace and the history behind it, the advantages and the disadvantages has been drawn upon with some contemporary case studies. Following which how cybercrime has emanated and combated with the existing law.

Cyberspace and its history

The word ‘cyber’ has its origin from the Greek verb “Kubernao”, which means “to steer”. William Gibson, a science fiction author first coined the term ‘cyberspace’, when he sought a name to describe his vision of a global computer network, linking people, sources, information and machines altogether, through which one can wander or navigate in a parallel universe. The Merriam Webster dictionary meaning of ‘cyber’ is ‘relating to or involving computers or computer network’. Cyberspace means “The notional environment in which electronic communication occurs or virtual reality.” In simpler explanation it is a world comprising of optical fibers, digital signals, data, bytes and other such elements that maybe thought of, together, constitutes cyberspace/cyber world/internet. It is a world within a world, inhabiting persons from every nation on earth with no defined geography and chorography, spreading across the globe and is of only four decades old. It has the population of 3.2 billion people or almost half of the world’s population, surpassing any nation (China, India etc.). Although it feels like the internet has been around us since time immemorial but it has been only around us for over 40 years. It all began in the United States as a University experiment in military communications during the cold war. It was decided to link computers together in a network instead of perfectly aligned straight line. The Pentagon had this notion that if there is a nuclear strike on the USA, it was unlikely to damage the entire network and therefore there is still a chance that they would be able to send and receive intelligence.
At first, the computers were physically linked to each other but this method had its own limitations. This problem was solved by the development of usage and utilization of telephone network system. They deduced that, even if there is a nuclear strike or not, they can still talk to each other using this computer network. Gradually it was seen that some university student started using this network system to do their homework together. At first the users were primarily from the university and government sectors. Increasingly all sector of people became a daily part of it in one way or other. It was started to herald as the next big thing. More and more people could see the endless possibilities of computer networks in different dimensions and it started to grow rapidly. The internet has been renovated from an esoteric communication system for the military and scientific elite to a massively prevalent medium.

The launch of the Educational Research Network (ERNET) in 1986 established as the first step in the history of the internet in India. The network was strictly made available to educational and research communities. Two years later, in 1988, NICNet was established for communications between government institutions. The network was operated by the National Informatics Centre. On 14th August, 1995, the first publicly available internet service in India was launched by state-owned VSNL for commercial purposes.

Advantages/ Case studies

The world of internet has no limiting scope and expands up until, till the mind can perceive. During the last four decades, this space has grown from one-dimensional approach to multi-dimensional approach. It has grown tremendously and matured into a popular medium, visited by millions of people stretching it each day to new vistas. It has enabled people to interact and communicate with each other, exchange data and information, share ideas, entertain, do trade and commerce, plan, confer and scheme things accordingly. The magnum opus of a digital transformation network and innovation, for its ‘anytime, anywhere’ services, internet gives instant access to an endless supply of knowledge and entertainment. Internet makes the world smaller and closer, keeping people within each others reach.

In the Mahabharata era, Guru Dhronacharya, the revered teacher refused to take tribal prince Eklavya under his tutelage because he was not a high born from the lineage of royal family. To seek inspiration Eklavya made and instituted a statue of Guru Dhronacharya and practiced archery day and night. Now a student as dedicated and passionate as Eklavya could easily have found himself a virtual guru in this 21st century without having being worried about his lineage, caste and all other things. He simply would have excelled and would have saved himself from the embarrassment of playing favorites and biases.

In the age of cyberspace, education is easily availed through online platforms to enrich the minds of the students. They do not need to travel long distance or reside in faraway places for the search of quality education or coaching tutors. Everything is readily available in the internet and is just a few
clicks away. Online education has grown so much at such fast pace as internet allows innovative tools for imparting education. Universities are offering distance courses to make studies more efficient and convenient. Internet has become a favorite gateway for those who seek to learn but can’t afford the price of living in distant foreign lands. Secondly, data and information are the biggest advantage that an internet offers. It is a virtual gem trove of information. On any topic, any kind of information is available and gets picked up under the sun on the internet. Using search engines, websites dedicated to any matter and bulky number of articles, paper services is available instantly on tap for perusal in a quick matter of few seconds. Students are able to finance their own education by working part time in online jobs such as data entry, creative writing, blogging etc. This not only helps them earn few bucks but also hones their skills. In fact, internet has acquired the sources to locate job opportunities and finding right talented individuals for any advertised organization.

Internet lets people to communicate with each other virtually in any part of the world, staying within a four walled room. The further addition of chat rooms and video-conferencing has made it more feasible and available. Different forums plenteously exist where people can voice their opinion, discuss, debate and can comment over any topic. Social Medias like Facebook, twitter, instagram etc. allows people to share their photographs or memories and cherish them together with their friends and relatives alike. With the establishment of these services mankind has forged a new global friendship sharing his thoughts, participating and exploring other worldly events and cultures.

Entertainment is another most popular aspect for people surfing the internet to kill their boredom. Playing online games, listening to songs or downloading the latest movies and watching them are some of the ways to pass time. Due to ingrown demand in the online gaming, enthusiastic gamers competing against each other from various parts of the world, the gaming industry has revolutionized to cater the needs of their consumers. Similarly, lining up in a queue for a latest music album is a thing of the past as they are live streamed over the internet, thus saving the time and effort.

E-commerce sector has boomed due to paradigm shift from traditional method of shopping to virtual medium. They have proliferated their bases in the countries and have gotten a complete makeover to attract and captivate their targeted set of consumers. With numerous options flooding over our computer screen, we have a world full of choices. From medicines to clothes, home furnishing equipment to automobiles, we have a plethora of options lurking around. One can select the desired product and the entire financial transaction is carried out and conducted through the internet. The majority of companies are therefore doing the right thing in defining their own role in this new virtual universe.

Furthermore, transferring money is not a tedious, heckling job anymore. Banks have come up with online transaction services which have made our life expedient. Numerous online services now can perform all the transactions online. One can book
tickets for movies, reserve a hotel, pay utility bills, taxes and transfer funds through the internet. Internet has transfigured our world with easier options.

Our increasing reliance on cyberspace and the internet is evident. We had over 100 million internet users in India over two years ago. Adding to this number, there are 381 million mobile phone subscriptions with internet connectivity and the increasing seamlessness with which all sorts of devices are connected to the internet. There are over 2 billion internet users in the world- a number that doubled in the five years between 2005 and 2010. The figures are growing exponentially every year.

“If you want a free society, just give them internet access.” These were the words of 30-year old Egyptian activist Wael Ghonim in a CNN interview on February 9, 2011, just two days before long-time dictator Hosni Mubarak was forced to step down under pressure from a popular, youthful and peaceful revolution. The netizens of Egypt were successful in mobilizing the people through the ‘Revolution of 25 January’ , a virtual event on the social networking site: Facebook. It took the world by storm when the news hit the world about how the Egyptians were successful to overthrow the dictatorship government who ruled the country ruthlessly for close to three decades. Internet became a powerful tool for the citizens to unearth corruption, mobilize mass for protests and demonstrations and act as a real watchdog over the government. Internet helped to turn individualized, localized and community-specific dissent into structured movements with a collective consciousness about both shared grievances and opportunities for action.

The role of internet in the creation of awareness is immense. It opened up possibilities for journalists, activists and bloggers alike to get involved in the creation of awareness among the public mass. It helped fostering a creation of a shared identity among larger group of women who were nonetheless concerned but never really channeled it into action. Another such example is “One Million Signature” campaign in Iran. The campaign aimed to collect one million signatures among men and women to support the change of discriminatory laws and to raise consciousness and awareness regarding the unjust nature of Iranian laws concerning to women. The Government increased its attacks on the women’s movement as it garnered success in this initiative, both domestically and globally. Later on, the Iranian Government caved to their demands. Similarly in India, Anna Hazare effectively used internet and social media to mobilize the youth and middle classes in his agitation over the issue of Jan Lokpal Bill. The issue not only amassed a lot of attention in the cyberspace world but also got huge support from the anti-corruption campaigns worldwide.

The power and potential of cyberspace/internet is now widely recognized by the governments across the world. Internet provides social media as a platform to engage people and the government, cohesively together by seeking feedback, checking corruption and empowering people. The ruling government is changing the dimension of governance...
with the usage of internet. Political activism has paved a way for social activism.

**Disadvantages and case studies**

The mythical Roman God Janus has two contrast characteristics aspect to it. He is known as the God of beginning as well as the God of ending, often depicted with two faces. Therefore the Roman God Janus would be an apt metaphor to describe cyberspace. Cyberspace is a double-edged sword that we tread upon every day. Like every coin has two sides, similarly even the exponentially growing phenomenon has its own distinct downside.

Cyberspace the new frontier, is the common heritage of mankind but unfortunately some people misuse the common heritage and therefore, cyberspace is also a new frontier of different types of crime which is labeled as cybercrime.ii

With the development of internet, and its related assistance also developed the cyber-crime. Cybercrimes are the new emerging species of crime. It has not been defined in any Act or statute passed by the Indian parliament. In general term cyber-crimes are crimes which are perpetuated against people where cyber space serves as the medium. The computer can be used as a tool or a target or both. Cyber-crimes are different than the conventional crimes, sometimes fathomless and as heinous as it could be. It promotes anonymity, albeit unintentionally. There is nothing similar between a conventional crime and a cybercrime. Cybercrimes often go unnoticed, undetected and unreported due to its anonymity feature. Cyberspace facilitates anonymity encryption which again in most of the cases is devastating to criminal investigations. Within a split second cybercrime can be committed in any part of the world. Cybercrimes are scene less, deducing evidence needs exquisite skills which need specially trained hands to detect, recover, conclude and analyze the digital evidence. Cybercrimes are borderless. It can transcend state and national boundaries, in no time. The concept of jurisdiction becomes irrelevant here as the whole world is a crime field. There are no eyewitneses, no physical violence as there is no crime scene. Most of the time realization hasn’t dawned upon the victim that he was hit with blows swift, silent and with a killer punch.

Also hiding behind a fake name or remaining anonymous gives people a bolder persona that they couldn’t have achieved had been they face to face or in reality. There is always a lookout for gullible and unwary people browsing online so that they can be lured and tangled in a web of deceit. Personal photos and data/ information can be used against those persons for dubious purposes, making them emotionally wrecked and helpless. Also pedophiles lurk around with fake identities befriending with the innocent children and later kidnapping them to satisfy their perverse minds. Often such cases go unreported due to the stigmatized fear.

A few years back, there was lack of awareness about the cyber-crimes and its reach. India is not far too behind to catch up with it. As per the reports of National Crime Records Bureau (NCRB), 11,592 cases of cybercrime were registered in India leading to 8,121 arrests. Among the states Uttar Pradesh is in the lead with highest number
of cyber-crimes at 2,208 while Maharashtra is placed second closely with 2,195. Every ten minutes in India at least one cybercrime is reported in the first six months of 2017 compared to twelve minutes in 2016.

The recent rumors that mongered about communal violence between Hindu and Muslim in Kolkata which created a massive furor, sets an example on how this tool, with its unrivaled reputation as an information assassination can suffer if internet facilities are abused, especially by those who have an axe to grind.

Recently the world was caught up in a whirlwind with the ransomware virus. Global Ransomware attack affected organizations around the world including Britain’s National Health Services. The criminal hackers found a loophole in ‘retired’ Microsoft software which was not routinely scrutinized for update and patched for security, thus infecting computers with the Wannacry Ransomware virus. Ransomware is a type of malicious software designed with the intent to block the access to any computer system, until the ransom money is paid by the owner as demanded in online crypto currency bit coins. The software attack took a toll on the entire world affecting biggest of nations and organizations posing a major threat to them.

Another game that consumed the world into horrors of cybercrime happens to be the blue whale game. The Blue Whale Challenge is a morbid social media game targeting vulnerable youngsters and pushing them to inflict self-harm and ultimately suicide. The challenge involves 50 tasks given by the administrator and has to be completed one by one. The game usually preys on teenagers and young adults, people who are susceptible to influences and attempts to create a thin air of unworthiness and ineptness around them. The game requires players to submit sensitive data before playing the game, which the administrators use it against them to blackmail if else the players try to back out. The game was launched in Russia in 2013 and its inventor is currently behind the bars. Yet the authorities are unable to control its spread.

Nigerian Advance Fee Fraud or Advance-fee fraud schemes are a very common online cybercrime fraud which is committed by spam bots. Spam bots, as the name suggests, are artificial intelligence bots that have been programmed to “spam” or send multiple emails to those users who have lower email security measures and are susceptible to online attacks. Although such scams originate from the world over, it came to prominence while being associated with a sender claiming to be a powerful Nigerian political figure requesting cash is wired to him to help him out of a problematic situation. The spam-bot creates vividly detailed and human-like emails soliciting potential victims to wire in a certain amount of cash which would then allow the sender to reimburse any person who helps him by a deposit of money much larger than the amount originally borrowed. By doing so the perpetrator gains access to multiple points of personal detail of the victim and utilize benefits requiring the victim’s online signature and so on. These perpetrators then gain access to a wide range of personal information and threaten to misuse or physically harm the victims should they try
and retaliate or complain to law enforcement officials. Some victims have even been lured into the country of Nigeria where they were imprisoned, kidnapped or worse. While very easily recognizable in the modern day by most people as a hoax, at the time of its initial launch into the World Wide Web, it was a cybercrime of epidemic proportions that lead to millions of dollars’ worth of loss for countless victims worldwide. The Nigerian government however is unsympathetic towards the victims as the victims themselves, by following instructions, are punishable by law for conspiring to remove funds from Nigeria in an illegal manner. Victims who are somehow able to escape dire consequences suffer debt, damage to credit rating, identity theft or face legal action on an international level. This fraud is a perfect example of a combination of advance fee fraud and identity theft. To avoid advance fee fraud individuals and organizations need to be vigilant and follow some basic steps in verifying emails which include any form of solicitation involving funds. One must never reply to a mail from a third party who is not involved with a person you know personally or a client you are dealing with. Push the perpetrators for information which in turn makes them give you more info to file a suit against them later on. And under no circumstances should any amount of form of money is to be sent across to anyone until such perpetrators have been completely shielded off from your online presence. Recently the rise of artificial intelligence security systems that automatically sense and adapt to incoming threats have reduced such fraud to a great extent. But as can be seen from latest organization wide surveys, human errors still account for a majority of such cybercrimes. So the only fool-proof way to protect individuals and organizations from such fraud is in-depth training and awareness.

Internet has kept the tarred reputations of public figures, infringed laws of privacy, copyright and other human rights through user-generated content. Yet in no way it has deterred the growth of the phenomenon which has threatened to replace traditional method whether in India or any country in the world. Despite facing criticism that internet has adversely affected personal communication whereby people no longer seem to find the time to talk to each other in face to face, old-fashioned way, the virtual space keeps throwing up newer and more engaging means of networking.

Analysis of Indian Cyber Law

Cyber-crime is pernicious in nature and has taken the world under its grip. It is confronting our planet with questions which no nation can seem to answer. A cyber-criminal can easily hack the websites and portals, plant viruses and carry out cyber frauds. He/ She can penetrate into highly classified and confidential files; bring out sensitive matters which can endanger a nation’s security. Cybercrimes are exponentially growing by each day, throwing up new challenges for the law and order machinery. It causes economic loss and risks to countries, undermines development opportunities and threatens international peace and stability.

Cyber-crime includes phishing, bank robbery, child pornography, cyber terrorism, credit card frauds, cyber stalking, industrial...
Espionage, scams, hacking, kidnapping children via chat rooms, creation and/or distribution of viruses, spam and so on. Cyber-crimes have been divided into two categories:

i) The crimes in which computer is the target. Examples - hacking, virus attacks etc.

ii) The crimes in which computer is used as a weapon. Examples – cyber terrorism, pornography etc.

The Convention on Cyber-crime or Budapest Convention is the first and only binding multilateral treaty which is based on combating cybercrime. The Council of Europe drafted it with active participation from the observer states in 2001 providing a framework for international cooperation between the state members of the treaty. The object of this substantive multilateral treaty is to address cybercrime with convergent, harmonized legislation, capacity building and cooperation, enjoying compliances even from the non-signatory states. India has taken a cue from the developed countries and is one of the few countries to take steps to counterattack cybercrimes.

Heading in this sphere, India has taken a roadmap to full-fledged legal system to ensure that the administration of human conduct is regulated in cyberspace and proper policies are formulated.

In 1996, the UNCITRAL, i.e. the United Nations Commission on International Trade Law adopted the Model Law of electronic commerce followed by the United Nations’ General Assembly recommending all the states to give favorable considerations to the State Model Law when they enact or revise their laws by its resolutions bearing NO. 51/162. The Indian government also realized the need for legislation and came out with Information Technology Act, 2000. It was the first Act to define cybercrime and provide for penalties, punishment and compensation in the listed crimes in the Act itself.

- The objective of this Act was to accord a legal sanctity to all the electronic records and activities carried out by electronic means or better commonly known as e-commerce. It facilitated electronic filing of the documents with the government agencies.

- The above implications of the provisions will enable the e-mail to exist as a valid and legal form of communication, which can be duly produced and proved in a court of law.

- Under IT Act, 2000, extra company notes and memos which was used for official purposes, shall also come under it.

- The Corporate sector thrives on e-mails and digital signatures on a regular basis to carry out their tasks online. Under the ambit of IT Act, 2000 secure digital signatures have got legal validity. When in dispute over the digital signatures, such signatures are to be authenticated by the Certifying Authority which is further overseen by a Controller of Certifying Authorities.

- The Corporate sector before the advent of IT Act had no legal redressal for issues concerning cybercrimes such as hacking, damaging the computer core etc. Now, the Act has provided remedy in form of
monetary compensation amount not exceeding up to Rs 1,00,00,000.

• Many cybercrimes has been defined and has been declared penal offences punishable with imprisonment as well as fine.

• Further the amendment of Indian Penal Code (1860), Indian Evidence Act (1872), Banker’s Book Evidence Act (1891) and the Reserve Bank of India Act (1934) to be done so as to bring them in consonance with the information technology regime.

• This Act also provided for the Cyber Appellate Tribunal to be set up to hear appeals against adjudicating authorities.

Although the IT Act, 2000 has proven to be a success but it also has its fair share of criticism. The negative aspects are as follows:

• Exclusion of negotiable instruments from the applicability of IT Act, 2000. The Act promotes electronic commerce where a payment received by means of negotiable instrument for an e-commerce transaction doesn’t get included in the ambit of Act.

• The IT Act, 2000 doesn’t deal with the protection of Intellectual Property Rights in the cyberspace which is one of the biggest blunders.

• There is no uniformity/ balanced approach regarding the degree of the crime to that of the punishment which makes it appear out of sync with other principles of criminal law.

• Under the IT Act, 2000 no difference has been made between ethical and unethical hacking, and has mandated it as punishable offence. RBI in its guidelines, dated June 14, 2001 had encouraged all the banks to utilize the services of ‘ethical hackers’ for accessing the shortcomings in the security system. This shows the irony of the law.

• Many other forms of cybercrimes have been left out or had no mention in the Act at all such as cyber stalking, cyber forgery, spamming etc.

• The IT Act doesn’t define the offences if they are bailable or non-bailable in nature, compoundable or non-compoundable.

• It hasn’t laid down parameters for its implementation.

The IT Act, 2000 was amended in 2008, which introduced remarkable provisions and amendments facilitating the effective enforcement and growth of cyber law in India. Data protection is of utmost importance and finds it rightful place in S-43, 43A, 66, 72 of the Act. Plethora of cybercrimes have been incorporated under Chapter IX as offences under the Amended Act such as cyber terrorism, child pornography etc. The offences have been defined if they are bailable or non-bailable, cognizable or non-cognizable.

Even though some of the pressing matters have been addressed, there is still a long way to cover all the lacunas. With the crime infiltration growing rapidly we need to march fast and ahead so as to control its menaces. After discussing the challenges before Indian cyber law regime, some strategies needs to be employed.

• To educate the netizens and common man about their rights and obligations in the cyberspace. The concerning fact is that most
people are oblivious of the laws of the cyberspace, the crimes that lurks around and the forums for redressal of their grievances.

• It should be obligatory to impart the basic legal and technical training to law enforcement officials.

• There must be a cybercrime cell in vicinity of every local police station as it is often said accessibility is the greatest impediment in delivery of expeditious justice.

• There is only one government recognized forensic laboratory in India at Hyderabad which prepares forensic reports in cybercrime cases. We need more such labs to efficiently handle the increasing volume of cybercrime investigation cases.

• Adoption of foolproof security procedures of computer in organizations.

• International interaction and information exchange between countries to provide, practical, effective and comprehensive solutions.

Conclusion
Cyberspace has always been a double-edged sword. It has enabled exponential growth and unparalleled advancements in various sectors, at the same time it has led to overload of data and risking personal security. Our every move is tracked, for better or for worse. Sometimes they help us enhance our experiences and make the best of what we have but sometimes, with a hint of human malice, the same technology can put us into grave trouble. Take for instance the prevalence of frauds, phishing and identity theft in cyberspace. At the click of a few buttons and a momentary lapse of attention, our entire identity and all associated entities related to it are snuffed out and exploited. With cyberspace came the prevalence of cloud computing and with cloud computing came the problem of transparency. Various entities can poke and prod through our cyberspace history and data and may decide to use it against us. With e-commerce came the era of customer driven, easy to order business but with it also came frauds and cases of theft. In a world where data is free flowing in every form through every space, in an era where the Internet of Things and automation are the go to technologies, security and security enforced with lawful intervention is of paramount importance. With laws at nascent stage prevalent in our judicial system we cannot possibly fathom facing global cyber space threats like electronic warfare, large scale hacking and other such activities because not only is the jargon and vocabulary required to handle these situations not present, but getting such legislations and amendments through quickly enough to react to rising global threats is going to be a herculean task. Both in terms of the administration and the populace. The administration needs to understand and fast track the proceedings dealing with such cyberspace crimes and the populace needs to be made aware of all the benefits and protections they have in place to deal with in case things get out of hand. Lastly, we need to ask ourselves the ever-pertinent question, is the cyberspace inherently malicious? The same dark web that enables our militaries to be technologically operational under the enemy radar is also the dark web that is used to distribute child pornography. The same
crypto currency that is being adopted worldwide can also turn out to be yet another money-making hoax. The fact of the matter is that the cyberspace only turns hostile if the people in charge of it are hostile. Like every invention cyberspace is the manifestation of human ideas and action put together for the benefit of human society. Likewise, human beings are the only ones who have been bestowed upon with the ability to think, to work and to bring changes so the world is benefitted out of it. If the same minds can find a way to hack into top secret government databases, so can they provide countermeasures to not only combat such breaches but also back them up with legal enforcement so those who misuse such technology face the consequences of their wrongful actions.

Reference:
1. An Introduction To Cyber Law book by Dr. J. P. Mishra
2. Cyber And Criminal Law by Dr. Amita Verma
3. Yojana Magazine may 2013 edition

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INSOLVENCY AND BANKRUPTCY CODE VIS A VIS NATURAL JUSTICE

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1.0 INTRODUCTION:

Prior to 2016, Insolvency was a time consuming process in India making it appear at last on the list of countries with ease of doing business. There were thousands of pending cases for the recovery of money due to overlapping jurisdiction of various laws governing insolvency. At that scenario, it took almost 4 years to wind up a company in India. India was thus lacking institutional and legal machinery to deal with debt defaults as per global standards. The then existing Insolvency regime were either a century old or not effective enough to give the desired outcome of the recovery of outstanding debts. So the government under took a plan to replace the existing Insolvency laws with one consolidated and comprehensive law which will facilitate easy and time bound closure of business. So the Insolvency and Bankruptcy Code was passed by the Lok Sabha on 5th May, 2016 and then passed by the Rajya Sabha on 11th May, 2016. Finally it got the President’s assent o 28th May 2016.

The Insolvency and Bankruptcy Code seeks to achieve a certainty in recovery and enforcement proceedings in debt recovery regime and to this extent it served as a useful tool for the creditors and investors. One of the important points is that, in contrast to the then existing Insolvency Regime, The Insolvency and Bankruptcy Code does not makes a distinction between the rights of domestic and international creditors or between the classes of financial institutions. Specific attention has to be drawn to the rights of unsecured and secured creditors in priority of their claims ensuring their level in the playing field for their access to an effective Insolvency Resolution. Moreover, the strict timelines for the IRP and Liquidation proceedings is a requisite impetus for the economic growth. Hence the Insolvency and Bankruptcy Code, in addition to improving the ease of doing business in India, also facilitates a better and faster debt recovery mechanism in the country. Though the Insolvency and Bankruptcy Code is one of the path breaking laws promulgated in the country, it should not do injustice to the Corporate Debtor in name of faster recovery of Debt. Section 7 of the Insolvency and Bankruptcy Code, under which the Financial Creditor can file an application for initiation of Insolvency Resolution Process before the Adjudicating Authority, doesn’t mandate the Service of Notice to the Corporate Debtor. So, whether the non-obstante clause in the Insolvency and Bankruptcy Code has the power to override even the principles of Natural Justice (Opportunity of Being Heard) will be the main point of contention in this article.

2.0 AN OVERVIEW OF INSOLVENCY AND BANKRUPTCY CODE, 2016:

As stated by the preamble of the Insolvency and Bankruptcy Code (hereinafter referred to as The Code), its
objective is to consolidate and amend all laws related to insolvency and reorganization of corporate persons, Limited Liability Partnership (LLP), Partnership Firms and Individuals in a time bound manner with subsequently maximizing the asset value of the Corporate Debtor. Other incidental objectives include promotion of entrepreneurship, favoring the availability of credit balance, balancing the interest among all shareholders by altering the priority of dues etc.

The Code has 5 parts and 255 sections. But its general framework can be divided into three viz.

- Insolvency Resolution and Liquidation for Corporate persons and LLP (Part II of The Code)
- Insolvency Resolution and Bankruptcy for Partnerships and Individuals (Part III of The Code)
- Provisions regulating the Insolvency Professionals, agencies and Information Utilities (Part IV of The Code)

2.1 INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS AND LLPs:

The Insolvency Resolution Process (IRP) can be initiated either by the financial creditor or operational creditor or by the corporate debtor himself for a default of rupees one lakh or more by filing an application before the concerned Adjudicating Authority. Upon the acceptance of such application, a moratorium will be passed by virtue of which the creditors claim will be frozen for a maximum of 180 days. That is to say, no coercive proceedings can be initiated against the Corporate Debtor under any other forum or any other law. The Adjudicating Authority may accept or reject the application based on the existence of default and if accepted, an Interim Resolution Professional will be appointed who shall manage the affairs of the Corporate Debtor. Further, the insolvency professional collect all details regarding the assets, finance and other operation of the Corporate Debtor and constitutes the committee of creditors. Then he has to manage the company as a going concern and has to protect and preserve the value of the assets of Corporate Debtor. The tenure of such Insolvency Professional shall not exceed 30 days. The committee of creditors constituted by the Insolvency Professional shall consist of all the financial creditors (Operational Creditors can be a part of the committee without voting rights if their aggregate due is not less than 10% of total debt) excluding those related to Corporate Debtor (Section 5(24) of The Code). Resolution Professional shall be appointed with a vote of not less than 75% in the committee of creditors by the Adjudicating Authority. The Resolution Professional will conduct the Corporate Resolution Process & prepare the Resolution Plan. The Resolution Plan, which is laid before the committee of creditors, if accepted, can be used for restructuring process i.e. as a repayment plan for the company and if rejected, the debtor’s assets will be liquidated to repay the debt.

By virtue of Section 12 of The Code, the Insolvency Resolution Process is supposed to be completed within 180 days from the date of admission of application. The IRP
can be extended to a further period of 90 days if accepted by a majority vote of not less than 75% by the committee of creditors.

Apart from the failure of Resolution Plan, there are several other grounds under which a company can be liquidated which were enumerated in Section 33 of The Code.

- Rejection of Resolution Plan for non-compliance with the provisions of The Code
- Failure to submit the Resolution Plan within the prescribed time limit
- Contravention of Provisions of The Code by the Corporate Debtor

In Liquidation Process, the Resolution Professional can act as Liquidator unless replaced by the Adjudicating Authority or the committee of creditors. The liquidated asset shall be distributed in order of priority as laid down under section 53 of The Code.

- Insolvency Resolution cost and Liquidation cost
- Workmen’s dues (for 24 months before the commencement of IRP) and the debts owed to secured creditors (who have relinquished their security interest in the manner provided U/S 52 of The Code)
- Wages and unpaid dues to employees (for 12 months before the commencement of IRP)
- Financial debts owed to unsecured creditors and workmen due for earlier period
- Crown debts (amount payable to the Central or State Government in two years preceding the commencement of Liquidation) & debts to secured creditors for any amount unpaid following the enforcement of security interest

- Remaining debts
- Preference Shareholders
- Equity Shareholders or partners
- Remaining surplus can be used to settle the interest accrued since the commencement of IRP

Upon the completion of Liquidation of assets, the Adjudicating Authority shall pass an order dissolving the Corporate Debtor. The whole process of IRP and Liquidation for corporate persons can be summed up into the following flowchart.

2.1.1 FAST TRACK RESOLUTION PROCESS:

Fast Track Resolution process is almost similar to the IRP with the only difference that it shall be completed within 90 days from the date of acceptance of
application by the Adjudicating Authority. Extension can be given for the same for a further period of 45 days. This process can only be initiated by those qualified Corporate Debtors as notified by the Central Government.

2.1.2 VOLUNTARY LIQUIDATION:

Generally, the IRP can be initiated only if there exists a default. But a Corporate Debtor, who has not committed any default, can himself enter into Liquidation which is famously styled as Voluntary Liquidation to pay off his debts from the proceeds of the same. The main condition precedent is that there should be a declaration to that effect by the majority of Directors of the company or by the creditors representing 2/3rd of the company’s debts, stating that the company is not being liquidated to defraud any person.

2.2 INSOLVENCY RESOLUTION AND BANKRUPTCY FOR PARTNERSHIPS FIRMS AND INDIVIDUALS:

Unlike the IRP of corporate persons and LLPs, the Insolvency Resolution and Bankruptcy in case of Partnerships and Individuals have no specified time limits. Because, Individual businesses are varied and vastly different with no standardized information about their activities are available so as to frame a generalized time period for the completion of IRP. A default of 1000 rupees or more will trigger the IRP for Partnership and Individuals. The procedure is almost similar to the IRP and Liquidation (Bankruptcy in case of Partnership and Individuals) for corporate persons and LLPs with some minor differences with respect to the Adjudicating Authority and persons eligible for invoking Insolvency proceedings.

2.2.1 FRESH START PROCESS:

Those debtors who are qualified under section 80ii of The Code can apply for the Fresh Start Process to the concerned Adjudicating Authority for discharging the debts up to a certain threshold (not exceeding rupees 35,000). This method is exclusively available only for the Individuals and Partnership firms. Upon the acceptance of the application filed by the Individual Debtor, interim moratorium (Sections 80 (1)-(2) & 85 of The Code) will be passed after which the Resolution professional shall be appointed. He shall formulate the Resolution Plan, which if accepted by the Adjudicating Authority, shall be executed.

2.3 ADJUDICATING AUTHORITY:

The Adjudicating Authority for the Insolvency Resolution and Liquidation of the Corporate Persons and LLPs (Including the Bankruptcy of the personal guarantor of Corporate Persons) is the National Company Law Tribunal (NCLT) as constituted by the Section 408 of the Companies Act of 2013. The jurisdiction is based on the location of the registered office of the Corporate Debtor. It has to power to entertain an application made by or against a Corporate Debtor (Including his Subsidiaries), to deal cases involving question of priority, question of Law, question of fact in relation to the Insolvency Resolution and Liquidation of Corporate Persons. Appeals from the orders of NCLT can be made to the National Company Law Appellate Tribunal (NCLAT) as constituted by Section 410 of
the Companies Act, 2013 within 30 days from the date of order. NCLAT orders can further be appealed to the Supreme Court of India only on question of Law arising out of that order within 45 days from the date of receipt of such order. (Can be extended to 60 days on sufficient cause).

In case of Partnerships and Individuals, The Debt Recovery Tribunal (DRT) as constituted under Section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 shall be the Adjudicating Authority. Orders of DRT can be appealed to The Debt Recovery Appellate Tribunal (As constituted U/S 8 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993) within 30 days of the said order. It can further be appealed to The Supreme Court within 45 days (can be extended to 60 days) on the ground of question of Law arising out of such order.

2.4 OFFENCES AND PENALTIES:

The Code provides for punishments for various wrongdoings with a view to ensure serious and meaningful Insolvency process. Some of the common Insolvency offences include concealment of property by the debtor, entering into a transaction with intent to defraud creditors, misconduct in course of IRP, falsification of book of accounts, willful and material omission of statements relating to the affairs of the Corporate Debtor, false representation to creditors, contravention of resolution plan or moratorium etc. The maximum punishment given to Corporate persons is imprisonment up to 5 years or fine up to one crore rupees.

2.5 SALIENT FEATURES OF THE CODE:

- It separated the commercial aspect of the Insolvency proceedings from the judicial aspects. That is to say, while the Insolvency Professionals deal with the management of the affairs of the Corporate Debtor (formation of creditors committee, resolution plan etc.), the adjudication will be dealt by the NCLT and DRT respectively.
- The Code facilitates the transfer of control over the affairs of the company to the committee of the creditors upon the default of Corporate Debtor for 180 days during which the repayment plan shall be formulated. It helps in maintaining the company as a going concern through Resolution Professional thereby facilitating the maximum use of productive resources of the economy (Labour & Capital).
- Cross border Insolvency introduced by The Code provides that the Central Government can enter into agreements with foreign nations for enforcing the provisions of the code (Section 234 of The Code). Further, the assets of the Debtor located outside India can also be included for the purpose of Insolvency/Liquidation process. So The Code aims at bringing all the creditors (whether local or foreign) on same footing.
- The Code provides for an Institutional Infrastructure in the
Insolvency regime. It established the Insolvency and Bankruptcy Board of India to oversee the functions of the Insolvency intermediaries like Insolvency Professionals, Insolvency Professional Agencies and Information Utilities and to regulate the Insolvency process.

3.0 APPLICATION UNDER SECTION 7 OF THE CODE:

Section 7 gives power to the financial creditor to file an application before the NCLT for the initiation of IRP against the Corporate Debtor provided that the amount of default is not less than one lakh rupees. The condition precedent for invoking IRP is the existence of default. According to Section 3(12) of The Code, default means the nonpayment of debt when whole or any part or installment of the amount of the debt has become due and payable, but has not been paid by the Corporate Debtor. The basic essence is that when a financial creditor files an application before NCLT, it has to be construed as being filed jointly by all other financial creditors. So it is not necessary that the default must be related only to the financial debt owed by the Corporate Debtor to the applicant. Along with the application, the financial creditor is supposed to furnish such documents as evidence to the default, the name of the Resolution Professional who is proposed to act as an Interim Resolution Professional and any other documents as may be specified by the board.

Then the NCLT has to ascertain the existence of default from the records on Information Utility and the documents submitted by the financial creditors within 14 days from the receipt of application. If the NCLT is satisfied with the existence of default and there is no disciplinary proceeding pending against the proposed Resolution Professional, it may accept the same. In case of incomplete application, the NCLT may reject the application by giving seven days time to the applicant to rectify the application. The Corporate Insolvency Resolution Process starts upon the acceptance of the application and the same shall be communicated to the financial creditor and the Corporate Debtor.

Thus the plain reading of Section 7 of The Code provides that the financial creditor can directly file an application before the NCLT without even providing a demand notice to the Corporate Debtor. He is being notified only after the acceptance of the application by NCLT which serves no purpose. Because, after the acceptance of the application by NCLT, moratorium will be passed by virtue of which the management of the affairs of the Corporate Debtor will be divested to the interim Resolution Professional. So the Corporate Debtor was not given an opportunity to defend himself.

4.0 PRESUMPTION IN FAVOUR OF NATURAL JUSTICE:

Natural Justice is synonymous with jus naturale (Natural Law) which means that some rules need to be so just that they are binding on the entire mankind. What it requires is fairness by the concerned authority and what is fair depends on the situation and context. It acts as a procedural safeguard against abusive, wrong or undue use of power conferred particularly when
such power is prejudicial to particular person(s). Bhagwati J has characterized natural justice as a humanizing principle, infusing law with fairness to secure justice. But this is not a normal norm of administrative procedure. Whether or not a particular administrative action is subject to fair hearing depends on the context of each case. Nevertheless, unless a statute either specifically or by necessary implications excludes the operation of the Principles of Natural Justice, the requirement of giving reasonable opportunity of being heard before a Quasi Judicial order is passed is generally read into the provisions of the statute.

To put it in other words, a Quasi Judicial Body, while acting under the provisions of the act must follow the Principles of Natural Justice. So Right of Hearing can be invoked when there is a lis (contest) between two contending parties and there is an Adjudicating Authority deciding the dispute. For instance, the Central Government, which is deciding a dispute between the Director of a company who has discretionary power of refusing to register a transfer of share and the aggrieved party, is supposed to give reasonable opportunity of being heard to both the parties as its order is of Quasi Judicial nature.

The Insolvency and Bankruptcy Code, by virtue of Section 60 has empowered the NCLT to be Adjudicating Authority in relation to IRP and Liquidation of Corporate Persons and LLPs. The NCLT is deciding a dispute between the Corporate Debtor and Financial Creditor and the order will be prejudicial to either one of them. So, the NCLT is indeed a Quasi Judicial Body and hence it is bound by the Principles of Natural Justice. This has been affirmatively laid down in the landmark case of “Innoventive Industries Ltd. v. ICICI Bank & Anr”.

4.1 ANALYSIS OF INNOVENTIVE INDUSTRIES LTD. V. ICICI BANK CASE:

The main contention in this case was that the impugned order was passed by the NCLT without issuing notice to this Corporate Debtor (Innoventive Industries) which is against the Principles of Natural Justice stipulated by Section 424 of the Companies Act, 2013. Another corollary question which comes along with the contention is that How far the Principles of Natural Justice are essential so as to read into the lines of statute?

4.1.1 WHEN NATURAL JUSTICE CAN BE EXCLUDED?

Basically, Rules of Natural Justice are essential elements of the procedure established by Law. It can be exclude only on some exceptional circumstances. The word exception here is a misnomer because in these exceptional circumstances, the Principles of Natural Justice (Audi Alteram Parteram) are held inapplicable not by way of an exception to the fair play in action but because nothing unfair can be done by not affording an opportunity to present a case. The object of Audi Alteram Parteram is to inject justice into the law and so the same cannot be applied to defeat the ends of justice. Only if the importing of Audi Alteram Parteram has the effect of
paralyzing administrative process or there is a need for prompt action or the urgency of situation so demands, the Audi Alteram Parteram can be wholly excluded. Thus Natural Justice is a flexible rule and is amenable to capsulation under compulsive pressure of circumstances.

Moreover, the rules of Natural Justice cannot be elevated to the status of Fundamental Right. Only if the statutory provisions can be read consistently with the Principles of Natural Justice, the court can apply the same. And if the statute excludes it by necessary implications, the court cannot ignore the statutory mandate. So the Right to be heard cannot be presumed where the delay in action would defeat the very purpose of the act.

The Principles of Natural Justice operates only in areas not covered by law. That is to say, it can only supplement law and not supplant it. Whether or not, the application of Principles of Natural Justice has been excluded, wholly or in part in the exercise of statutory power, depends on the language of the statute, basic scheme of the provisions conferring such power, the nature and purpose for which the power is conferred and the effect of exercise of such power.

Now, it’s clear that the Principles of Natural Justice can be excluded by the express language of the statute. But what if the statute conferring power does not expressly exclude the rule but the same is sought by the necessary implications? General rule is that it is not permissible to interpret a statute so as to exclude the Principles of Natural Justice.

Because, the Principles of Natural Justice is fundamental in the concept of ordered liberty and therefore, implicit in every decision making function, call it judicial or Quasi Judicial or administrative. Statutory silence with respect to the applicability of the Principles of Natural Justice implies the compliance with the same. Such presumption can be removed only if there is a conflict with public or private interest. Hence, unless the law expressly or by necessary implications excludes the application of Principles of Natural Justice, the courts will read the said requirement in those enactments which are silent and insists its application even in case of administrative action having civil consequence.

From the above findings, the grounds on which the Principle of Natural Justice can be excluded are summed up as,
- In case of Emergency
- Express statutory exclusion
- Prejudicial to public interest
- Prompt action
- Impractical to hold hearing
- No persons’ rights have been infringed
- Procedural defect has made no difference to the outcome.

4.1.2 INSOLVENCY AND BANKRUPTCY CODE IN RELATION TO NATURAL JUSTICE:

As stated earlier, the main issue addressed in this article is that whether The Code can claim any of the above mentioned
grounds so as to exclude the Principles of Natural Justice under Section 7?

On paper, there is no express provision in The Code which mandates the Service of Notice to the Corporate Debtor at the stage of filing of application by the financial creditor. But, as per the provisions of The Code, the Adjudicating Authority for the IRP and Liquidation of Corporate Persons is the NCLT as constituted by Section 408 of the Companies Act, 2013. Being a creature of the Companies Act, NCLT is bound by the Section 420 which says that the Tribunal should provide a reasonable opportunity of being heard to the parties concerned and Section 424 which says that the Tribunal is not bound by the Code of Civil Procedure and so, to regulate its own procedure, it should follow the Principles of Natural Justice.

So, NCLT has to apply the Principles of Natural Justice as a part of the procedure while hearing an application under Section 7 of The Code. Moreover, a proceeding for declaration of Insolvency of a company has drastic consequences. It may even end up in Liquidation of the company. So the concerned person cannot be condemned unheard. When the statute is silent on Right of Hearing and it does not, in express terms, oust the principles of Natural Justice, the same can and should be read into the statute. Hence the NCLT is obliged to afford a reasonable opportunity to the Corporate Debtor to present his case before admitting an application filed by the financial creditor.

This view is further substantiated by the Section 7(4) of The Code read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (I&B (AAA), Rules). Section 7(4) of The Code requires that the Adjudicating Authority to ascertain the existence of default by considering the documentary claims of the financial creditor. This mandates the extension of Right of Hearing to the Corporate Debtor so as to negotiate the same. Further Rule 4(3) of the I&B (AAA) Rules, 2016 requires the financial creditor to dispatch a copy of application filed by him before the Adjudicating Authority to the Corporate Debtor at the stage of filing of application.

5.0 CONCLUSION: As the application U/S 7 of The Code has serious civil consequences, not only to Corporate Debtor but also to the Directors and Shareholders, i.e. following the application, Insolvency Resolution Professional will be appointed to manage the affairs of company with instant removal of the Board of Directors, the Adjudicating Authority is bound to issue notice to the Corporate Debtor. It is evident from the perusal reading of the Code that it is definitely an effective move towards establishing a strong regulatory framework to deal with insolvency and liquidation problems. However, the Code is at its nascent stage, it will take time to cross various practical and logistical hurdles before becoming fully comprehensive and consistent. At present, the Code illustrates a picture detrimental to the interest of debtor companies instead of a balance of interest between corporate debtors and their
creditors. However, it can be hoped that such interest will be protected in future.

REFERENCES:

3) Statutory Material:
Insolvency and Bankruptcy Code, 2016

2) Secondary Sources (Books):

3) Online Articles:
RELEVANCE OF RULE OF LAW

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ABSTRACT

The idea of "Rule of Law" is the building hinder on which the advanced law based society is established. For the fruitful working of the polity it is basic that there is requirement of law and of all agreements in light of law. Laws are made for the welfare of the general population to keep up concordance between the clashing powers in the public arena. One of the prime objects of making laws is to keep up lawfulness in the public arena and build up a tranquil domain for the advance of the general population. The idea of Rule of Law assumes a vital part in this procedure. The expression "Rule of Law" is taken from the French expression 'La Principe de Legality' (the guideline of legitimateness) which alludes to a legislature in light of standards of law and not of men. In a more extensive sense Rule of Law implies that Law is incomparable and is over each person. No individual whether on the off chance that he is rich, poor, rulers or ruled and so forth are above law and they ought to obey it. In a smaller sense the Rule of law suggests that administration expert may just be practiced as per the composed laws, which were received through a built up strategy. The standard of Rule of Law is planned to be a shield against discretionary activities of the administration experts.

This article is based on the concept of Rule of Law and how it is relevant in our society.

"Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state".

- Plato

The rule of law is antiquated perfect. It was talked about by the rationalist, for example, Aristotle or Plato in 350 BC. Aristotle composed that law ought to represent and those in powers are hirelings of law. It is gotten from the French guideline 'la principe de legalite' (the standard of lawfulness). It implies that the administration is administered by standards of law and not of men. This control makes law the incomparable. The regulation of Rule of Law is one of the essential standards of English constitution. It is very much acknowledged in U.S and also Indian Constitution. Administer of law is the premise of authoritative law.

The precept of rule of law was started by Sir Edward Coke. Later it was produced by A.V Dicey and included three particular columns:

(I) Supremacy of Law

It implies that individuals ought to oversee as indicated by the law. Their energy or obligations can't surpass the limits of lawful system. Anything they ought to be legitimizes in law. In India our constitution

www.supremoamicus.org
was preeminent and anything which damages its fundamental guideline is void.

(II) Equality under the watchful eye of Law

It's vital that law ought to be preeminent as well as that it ought to be simply and reasonable. The law ought not to oppress race, sex, age or home. It is imperative that law ought to be connected in just way. In our constitution this idea is systematized in Article 14.

(III) Predominance of Legal Spirit

In including this as a necessity for the rule of law, Dicey's conviction was that it was inadequate to just incorporate the over two standards in the constitution of the nation or in its different laws for the state to be one in which the standards of control of law are being taken after. There must be an upholding expert and Dicey trusted that this specialist could be found in the courts. The courts are the authorities of the run of law and they should be both fair and free from every outer impact. In this manner the flexibility of the legal turns into an essential column to the rule of law.

In present day speech Rule of Law has come to be comprehended as a framework which has safe watchmen against official discretion, averts political agitation and enables individuals to design the legitimate results of their activities.

Theoretical Aspect of Rule of Law

India embraced custom-based law framework with some change. In England, there is no composed constitution or any type of composed managerial law. Uncertain trusted that regular law and rule of law is sufficient to evacuate official assertion. Be that as it may, we embraced this framework and have formal composed constitutions in which the rule of law is arranged to guarantee consistence.

In India constitution is preeminent. The officials and legislatives get their power from the constitution. Any law which isn't in similarity with the constitution is void. This is expressed in Article 13. Article 14 guarantees fairness under the watchful eye of law. No one ought to be separated based on status, sex, religion and so forth. Our constitution incorporates division of energy between three wings i.e. administrative, official and legal. The administrative and official can't impact legal. This guarantees free legal which is one of the mainstays of Dicey's run of law. In Union of India v. President, Madras Bar Association, the Supreme Court held that "Rule of Law has a few features, one of which is that question of natives will be chosen by Judges who are free and unprejudiced; and that debate as to legitimateness of demonstrations of the Government will be chosen by Judges who are autonomous of the Executive." Article 21 ensures Right to life and freedom. It checks the subjective energy of official and ensures that freedom of a man isn't diminished aside from in understanding of law.

The constitution first correction stunned the status of Rule of Law. In Shankari Prasad v. Union of India, the inquiry came whether major right can be revised under article 368. The Supreme Court held that the parliament can correct major right. The word 'law' under article 13 included
authoritative activity not the established correction. In this manner, protected revision is substantial regardless of whether it compresses with the basic right. In Sajjan Singh v State of Rajasthan\textsuperscript{ii}, the Supreme Court again held the lion's share judgment given in before case and reasoned that change of constitution implies correction of all arrangements of the constitution.

In any case, these two judgements were overruled in Golaknath v. State of Punjab\textsuperscript{ii}, where it was held that parliament can't alter Part III of the constitution. In this way, toward the end Rule of Law was connected. On account of Keshavananda Bharati v. State of Kerala\textsuperscript{ii} the Supreme Court by dominant part overruled the choice given for Golaknath's situation and held that Parliament has wide powers of changing the Constitution and it stretches out to every one of the Articles, however the correcting power isn't boundless and does exclude the ability to devastate the essential element or structure of the Constitution. There are suggested confinements on the energy of alteration under Article 368. Inside these breaking points Parliament can change each Article of the Constitution. In this manner, Rule of law won.

In various other judgements the court reinforced the doctrine of rule of law. In ADM Jabalpur v. Shivkanth Shukla\textsuperscript{ii}, the question came before the court that whether there was any other rule of law except article 21. This was during the emergency when article 14, 19 and 22 were suspended. The answer of the majority of the bench was in negative for the question of law. However Justice H.R. Khanna dissented from the majority opinion and observed that: "Indeed, even without Article 21 in the Constitution, the state has no energy to deny a man of his life and freedom without the specialist of law. Without such holiness of life and freedom, the refinement between an untamed society and one represented by laws would stop to have any significance… Rule of Law is presently the acknowledged standard of every single edified society".

Practical Application of Rule of Law in India

The application of Rule of Law in India can be traced in the constitution very clearly. There is separation of power between legislature, executive and judiciary. The law is made by the parliament who in turn is the representatives of people. The law making process is transparent and no one is above law. The judiciary is impartial and independent from other organs of government.

The part III of our constitution incorporates key rights which can't be taken by anyone regardless. In ADM Jabalpur v. Shivkanth Shukla\textsuperscript{ii}, which tested the authoritative request amid crisis, there was an inquiry whether there is govern of law with the exception of in Article 21. This was being referred to as requirement of Article 14, 21 and 22 were suspended amid the decree of crisis. The appropriate response was then in adverse in any case, Justice H.R Khanna influenced disagreeing sentiment and said "To even without Article 21 in the Constitution, the state has no energy to deny a man of his life and freedom without the specialist of law. Without such holiness of
life and freedom, the refinement between a rebellious society and one represented by laws would stop to have any significance…

Another critical part of Rule of Law is that there can be no activity of subjective power by government. The administration needs to act inside the structure of principles and direction which limits the abuse of power. In Som Raj v. Province of Haryana, Supreme Court said that absence of discretionary power is one of the signs of Rule of Law. In any case, beyond any doubt finish imbalance and mediation can't be killed. In a similar vein the reality of the matter is that the idea of lead on law is produced and predominant in the vast majority of the custom-based law nations, for example, India itself. In my view, the control of law is a kind of a trial of authoritative request at a given time. Article 14 says that no individual should be denied of his life or individual freedoms aside from as per technique set up by law. The administration authorities and the administration itself are not exempt from the laws that apply to everyone else. In India the idea is that there is uniformity under the watchful eye of the law and equivalent assurance of laws. Any lawful wrong dedicated by any individual would be rebuffed in a comparative way. The law settled in the standard official courtrooms applies to every one of the general population with measure up to compel. Openly benefit likewise the precept of equity is acknowledged. The suits for break of agreement against the state government authorities, open workers can be recorded in the standard official courtrooms by the general population.

In Chief settlement Comm Punjab v. Om Prakash, it was observed by the Supreme court that, “In our constitutional system, the central and most characteristic feature is the concept of rule of law which means, in the present context, the authority of law courts to test all administrative action by the standard of legality. The administrative or executive action that does not meet the standard will be set aside if the aggrieved person brings the matter into notice.”

India has modernised the concept of rule of law and made it supreme. There are numerous cases where the court has declared the doctrine of Rule of Law as a basic structure. In Keshavananda Bharti v. State of Kerala, Supreme Court has said that the parliament does not have unlimited power to amend the constitution and anything which violates the basic structure is ultra-virus. Again in Maneka Gandhi v. Union of India, the court said that equality before law is very important and is a part of basic structure of our constitution. It acts as a deterrent against arbitrary power of government or its officials. Thus, the case saw a high degree of judicial activism, and lead into a new era of growing horizons of fundamental rights and Article 21 in particular.

Indira Gandhi v. Raj Narain, the case that shaped the Indian politics showcases the same principle. Here under 39th amendment, a law was passed which provided immunities to certain class of person from judicial review (Article 329-A). The Supreme Court invalidated the article 329-A on the ground that it was violating the basic structure of constitution and it was beyond
the power of parliament to amend in such cases.

In the case of **Sukhdev v. Bhagatram** Mathew J. declared that whatever be the idea of the administer of law, regardless of whether it be the importance given by Dicey in his "The Law of the Constitution" or the definition given by Hayek in his "Street to Serfdom" and "Constitution of freedom" or the composition put forward by Harry Jones in his "The Rule of Law and the Welfare State", there is, as pointed out by Mathew, J., in his article on "The Welfare State, Rule of Law and Natural Justice" in "Popular government, Equality and Freedom," "significant understanding is in juristic suspected that the immense motivation behind the control of law thought is the security of the person against discretionary exercise of energy, wherever it is found". It is in reality incomprehensible that in a vote based system administered by the rule of law the official Government or any of its officers ought to have self-assertive control over the interests of the person. Each activity of the official Government must be educated with reason and ought to be free from assertion. That is the very substance of the rule of law and its exposed negligible prerequisite. Also, to the use of this standard it has no effect whether the activity of the power includes fondness of some privilege or refusal of some benefit.

In **Secretary State of Karnataka and Ors. v. Umadevi and Ors** a Constitution Bench of this Court has laid down the law in the following terms:

"Subsequently, plainly adherence to the administer of fairness in broad daylight work is a fundamental element of our Constitution and since the lead of law is the basis of our Constitution, a court would positively be handicapped from passing a request maintaining an infringement of Article 14 or in requesting the disregarding of the need to conform to the prerequisites of Article 14 read with Article 16 of the Constitution."

**Criticism**

We have seen how rule of law has been the basis for various judgements in our country. However, it is true that there are numerous cases where this concept has been departed. The foundation of rule of law lies in 'Equality', but there are some instances of inequality in our constitution such as no case can be filed against diplomats, no criminal proceeding against the President or the Governor, legal immunities enjoyed by Member of Parliament. Thus, it can be said that India does not follow this concept fully.

As it is said that law should develop with the changing society, it’s important that we plug the weakness present in this doctrine. Critics have said that there has been no clear distinction between ‘arbitrary power’ and ‘discretionary power’. It has also been pointed out the Dicey’s rule of law lacks to see the future as he cannot have imagined today’s need of discretionary power in the state.

Another aspect pointed out by the critics is that the Dicey’s concept of rule of law provides insufficient individual and civil rights as it is more concerned with the due process than the content of law.
The Dicey's idea of control of law has likewise been scrutinized. Law changes with time. As the general public advances, even the law of the nation ought to create. Some view the rule of law as nothing other than an apparatus of the capable to keep up business as usual in the lawful framework. The general agreement is that business as usual, a long way from being impartial, serves to ensure the capable to the detriment of the weakened. This absence of non-partisanship in the control of law runs in opposition to the perfect followed to Aristotle, that in light of the law each individual ought to be equivalent; that it is one's humankind not one's status in the public eye that requires that laws be fairly connected. More extraordinary faultfinders guarantee that "the liberal worldview has pulverized the run of law." The method of reasoning behind this announcement is that, thinking about the genuine condition of the world, many liken the rule of law with legitimateness. Notwithstanding, this is an imperfect condition as "legality essentially implies that there are laws and says nothing in regards to the nature of those laws." Hence, there are numerous lacunas in the idea of manage of law which servers the reason of non-execution of the idea legitimately.

Conclusion

The rule of law is a thought regarding law, equity, and profound quality. It thinks about what laws, standards, rules, methodology, frameworks, and structures ought to be and what they ought not to be. Standards ought to be broadcasted freely by the people groups or potentially their suitable agents. Intrinsic in this plan are three substances.

One is that the law oversees individuals and additionally the administration itself. Next, people ought to comply with the law. Third is that the standards we call law should be obey able - not just in the feeling of being known, understandable and unsurprising, yet in the most profound feeling of being simply. It is a vital component for popular government and great administration and furthermore a help to encourage soundness and peace. As indicated by a few, it might help keep wars from happening in any case. Also, Human rights can be considered as a check over the feedback of rule of law i.e. absolutism and tyranny.

The rule of law in the Indian culture has not accomplished the planned outcomes is that the profoundly settled in estimations of constitutionalism or maintaining the Constitution of India have not taken roots in the general public. Defilements, Terrorism and so on are all direct opposite to Rule of Law. As of late, customary law conventions, the Constitution of India, and the perseverant part of the legal have added to the improvement of manage of law. Yet, on events we have slipped over into government by will just to return sadder and more astute to the control of law when hard certainties of human instinct showed the childishness and self-love of man and reality of the announcement that power taints and supreme power adulterates totally. A couple of cases of how our legal framework has maintained the rule of law and guaranteed equity is plainly found in the formation of new roads looking for solutions for human rights infringement through PIL requests and advancement of honest to goodness intercessions by the legal in the territories of fortified and tyke work, prostitution,
spotless and solid condition and so forth yet on the darker side there have been violations of fundamental rights too. For e.g. the separation of eunuchs in light of their class and sex makes the group a standout amongst the most weakened gatherings in Indian society. Eunuchs may have an acknowledged place in Indian culture, yet it is a place basically at the base of the social load – making them a sexual as well as an exceptionally denied social minority.

The thinking concerning administration of law does no longer in basic terms paltry formal legality which assures discernment and consistency in the fulfilment yet enforcement of democratic order, however righteousness based about the attention and completed confession on the supreme value regarding the human persona then guaranteed through establishments offering a case because of its fullest expression.

Despite its inconsistencies, its crudities, its delays yet its weaknesses, Rule of Law still embodies then a whole lot of the results regarding that characteristic as like we may mutually impose. Without such one can't live; solely including such some may ensure the after as by right is ours. The superior over man's hopes are enmeshed of its process; so that fails he need to fail; the pardon among as such perform reconcile our passions, our wills, our conflicts, is the measure on our chance in conformity with locate ourselves. Man may also remain a short decrease than the angels, that has now not yet shaken away the animal and the brutish inside is strict in imitation of break unfastened over occasions. To barrage then government to that amount bestial yet after stop the downfall regarding class among a state of enamel yet claw, such as is required is the ‘Rule concerning Law’.

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CLASS ACTION SUITS: A NEW PROTECTION FOR MINORITY RIGHTS

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ABSTRACT

CLASS ACTION SUITS: A NEW PROTECTION FOR MINORITY RIGHTS
The protection of the minority shareholders within the domain of corporate activity constitutes one of the most difficult problems of contemporary company law. The aim must be to strike a balance between the effective control of the company and the interests of the small individual shareholders. In the words of the Palmer: “A proper balance of the rights of majority and minority shareholder’s is essential for the smooth functioning of the company.” The modern Companies Act, therefore, contain a large number of provisions for the protection of interests of investors in companies. The aim of these provisions is to require those who control the affairs of the company to exercise their powers according to certain principles of natural justice and fair play.

But the reality is that, most of the times minority shareholders’ voices are unheard and they are suppressed many a times. So the idea of Class Action suit in par with the oppression suits (1956 Companies Act) was brought in the Companies Act, 2013. The concept of a class action suit emerged in United States of America in the early 18th Century.

The biggest object behind the “Class Action Suit” is, providing protection to the minority shareholder, members and creditors to file an application before the NCLT on behalf of the all members/ creditors in the event that the management of company was being conducted in a manner prejudicial to the interests of the company or its members or creditors, assumed greater importance as a redressal mechanism separate from the traditional oppression and mismanagement application.

Finally, this article will analyse as to what is the peculiar difference between the Oppression suit and Class Action suit and why the idea of class action suit was brought in the 2013 Amendment.

Key Words: Class Action, Minority Rights, Oppression, Mismanagement.

INTRODUCTION
Once described as “the most important procedure, the law has yet developed to police the internal affairs of the corporation”. Are shareholder class action suits at successive steps in India; Answering this question is very interesting with reference to the Companies Act, 2013. Shareholder activism is an evolving term in India, which means an active participation of shareholders in all aspects of good corporate governance and fighting the fraudulent and incorrect acts of a company, in which the members on behalf of the company act outside the scope of the object clause and which are considered to be Ultra vires acts of the company.

The basic principle relating to the administration of the affairs of a company is that “the courts will not, in general,
intervene at the instances of shareholders in matters of the internal administration and will not interfere with the management of a company by its directors so long as they are acting within the powers conferred on them under the articles of the company”. ii

“Nothing connected with the internal disputes between the shareholders is to be made the subject of an action by a shareholders”. ii

Usually, individual shareholders do not take legal action against a company, either on the audit accounts for it is very difficult for them to initiate a suit which they find it as economically unaffordable, or because the laws put up certain requirement of members to initiate the suit against a company. These minority shareholders iii and small investors generally find it very difficult to invoke the suit against the majority shareholders on the behalf of the company and to protect the company from committing wrong.

So, by looking at the plight of the minority shareholders who are not protected at all, the Companies Act, 2013, subsequently provides for the shareholder activism and protection of investors of every kind. One such provision which is highlighted in the Companies Act, 2013 is Section 245 which exclusively deals with class action, and which has no corresponding provision in Companies Act, 1956. This is considered to be one of the major changes from the earlier Companies Act, 1956.

**GENESIS OF THE CLASS ACTION**

The history of the Class Action suits in India can be traced back to the Satyam Scam (2009), which is famously known as the “Indian Enron”, revealed the inadequacy and ambiguity of the Companies Act, 1956 with regard to the shareholders’ protection and prevention of white collar crimes. ii This case also highlighted on the concept of Corporate Governance and Good practise of the company.

This crises opened the eyes of the Indian investors and brought the need for the small investors and shareholder protection to the forfront. The introduction of the shareholder litigation by way of the introduction of the Class Action suit under Section 245 helped to protect the minority shareholders rights. Since, over a period of time, these small and dispersed investors have become active in protecting their rights taking lessons from the foreign counterparts especially after Rs. 7000 crores satyam fiasco. About three lakh investors in India lost around Rs. 5000 crores in the Satyam case, while the investors in the USA, who filed a class action against Satyam, were compensated to the tune of $125 Million around 675 crores. ii

So, a class action is a special kind of lawsuit which involves the interests of a large number of people. Only a few plaintiffs are named in the lawsuit to represent the claims of the entire class of people so that each one of them with the same injury doesn’t have to file their own separate lawsuit. iii In some cases, where the individual claims are too small to gain out of lawsuit, class action suits are the only
practical way to hold the companies liable for illegalities and irregularities.

The idea of class action was brought from the US, first originated in the year 1938, a class action suit is an old but certainly underutilized tool in the hands of the investors. A class action suit in US law is used to describe a “Sui generis” area of litigation. Federal Rules of Civil Procedure give comprehensive guidelines for the Class action suits under Rule 23.

**CLASS ACTION SUIT – NEED OF THE HOUR**

At common law, minority shareholders in a corporation had a very little protection in the face of the conduct by the majority or by directors controlled by the majority. If an act was claimed to be wrongful it could be ratified by the majority at a general meeting of shareholders, neither the corporation nor an individual shareholder could sue to redress the wrong.

The underlying principle of the Company law that existed prior to the companies Act 1956, states that every member holds equal right with other members in the same class and any differences amongst the members is to be decided by a vote of the majority. This is called as the **Rule of Majority** or **Supremacy of Majority**, this was upheld in the case of *Foss v Harbottle*. Court had observed that:

“Courts are reluctant to interfere in the internal management affairs of the corporation.”

The protection to minority shareholders is generally not available in the statute, when the majority does anything in exercise of the powers for the internal administration of the company. It can be ratified by the majority at the general meeting. The minority shareholders have no *locus standi*. This rule, also reiterated in the case of *Burland v Eagle* and *Pavildes v Jemsen* all these decision concentrates on the Majority shareholder’s decisions and the protection to the minority and their voices are unheard and there is no right to decision on the side of the Minority shareholders.

Even in India, the Honourable Supreme Court in the case of *Rajahmundry Electric Supply Co v Nageshwara Rao* observed that:

“The courts will not in general interfere, at the instance of the shareholders, in the matters of internal administration and the management of the company by its directors so long as they are acting within the powers conferred on them under the articles of the company. Moreover, if the directors are supported by majority shareholders in what they do, the minority shareholders can, in general do nothing about it.”

**EXCEPTIONS TO THE RULE OF MAJORITY**

The principle of majority rule has certain well established exceptions and these are generally said to be the exception of rule laid down in *Foss v Harbottle*.

When Minority shareholder can intervene:

1. **Ultravires and Illegality Acts:** Directors cannot take any action which is Ultravires the company or which is illegal. In such cases, every
shareholder has a right to restrain company from doing such an act, by bringing an injunction suit against the majority acts.ii

2. Breach of Fiduciary Duties:
Actions can be brought against promoters or directors for breach of their fiduciary duties to the company; if they can prevent the company from suing them.ii

3. Fraud on Minority: Majority shareholders cannot sue their powers to defraud the minority.ii “Fraud on minority” means taking decisions and passing resolutions which would discriminate between majority and minority shareholders, so as to give undue advantage to the majority shareholder.ii

Hence, strict application of the Foss case would be unfair to the minority shareholders in many cases. Hence, provisions of oppression and Mismanagement was introduced in the 1956 Companies Act. These are not derivative actions in the sense that these are not on behalf of the company.

Any member can approach the company law board for relief in case of mismanagement or oppression by those in control of the company. For Examples like allotment of shares, appointment of the new director, dismissal of the director are considered to be few important examples of oppression by majority over the minority shareholder.

**OPPRESSION REMEDY**

Prior to the introduction of the Class Action, the idea of Oppression remedy was only prevalent in India. The Act does not define what oppression is. Normally, oppression means violation of conditions of fair play. The complaining members must be under a burden which is unjust, harsh or tyrannical. It involves lack of probity or fair dealing to a member in the matter of his right as a shareholder.ii

There must be unfair abuse of powers and impairment of confidence in the probity with which the company’s affair are being conducted. The scope and meaning of the “oppression” with reference to the corresponding Section in the English Act, Section 210, in the famous case of Harmer (HR) Ltd Reii, the court held that:

1. “It is to be observed first, that the person permitted to apply to the court under Section 210 is any member of the company.

2. The Member of the company must show that the affairs of the company are being conducted in a manner oppressive to the some part of the members; including himself.

3. This further indicate that the oppression complained of must be complained by a member of the company and must be oppression of some part of members in their or his capacity as members or as members of the company”.

The term oppression is again defined in the case of Elder v Elder & Watson Ltdii,

“the term oppression means a string intent to defraud, fraud, misfeasance
or other misconduct and the essence of matters seem to be that the conduct complained of should be at the lowest involve a visible departure from the standards of fair dealing and of violation of the conditioners of fair play on which every shareholder who entrusts his money to the company is entitled to get.”

In the case of Stadmed Pvt. Ltd v Kshetra Mohan Sahaii, the Lord Keith observed that:

“It is not lack of confidence between the shareholders perse that brings section 210 (corresponding section 399 of 1956 Act and section 241 of the 2013 Act) into play; but lack of confidence springing from oppression of a minority by a majority in the management of company’s affairs and oppression involves, I think at least an element of lack of probity or fair dealing to a member in the manner of his proprietary rights as shareholders”.

The oppression dealt in this section is only oppression of members in their “character as such” and it is only in that character they can invoke this section, the idea of oppressing the minority is in the personal behaviour and not in the company sense. The oppression remedy is a personal remedy available to a complainant where a corporation, a board or a corporate affiliate acts in a manner oppressive or unfairly prejudicial to or which unfairly disregards that complainant’s individual interests.

The important speciality of this section is that oppression of a person as a director and not as a member is thus outside the purview of the section. For example if the majority of the Board over rides the minority directors the latter cannot resort to claim under the oppression remedy. The complaint was by a director and related to not holding the board meeting; held director cannot invoke this section.

Again in the famous case of Chatterjee Petro Chemical (I) Pvt Ltd v Haldia Petro Chemicals Ltdi; in para 61 and para 62, the court emphasised that:

“It had been emphasised that the oppression complained of had to be shown as having been brought about by a majority of members exercising a predominant voting power in the conduct of the company’s affairs and must relate to the manner in which the affairs of the company were being conducted. Such conduct must also be shown as being oppressive to a minority of the members in relation to the shareholding in the company. The person complaining of oppression must show that he has been constrained to submit to a conduct which lacks probity, conduct which is unfair to him and which causes prejudice to him in the exercise of his legal and proprietary rights as shareholder.”

In the case of Dale and Carrington Invt. Pvt. Ltd v P.K. Prathapan and Othersii, the court pointed out in P. 12 that:

“It was held that if a member who holds the majority of shares in a company is reduced to the position of minority shareholder in the company
by an act of the company or by its board of directors malafide, the said act must ordinarily be considered to be an act of oppression to the said member.’”

In the case of Needle Industries (India) Ltd. V Needle industries Newey, the Supreme Court pointed out that:

“[The illegal acts may not be oppressive and even illegal acts could be oppressive. Oppression claimed of must relate to the manner in which the affairs of the company are being conducted and the conduct complained must be such as to oppress the minority members].”

**Drawbacks Of Oppression Remedy**

One of the main limitations of the oppression remedy is that the minority shareholders cannot bring a representative suit on behalf of the company, rather they can only file an individual remedy namely oppression suit.

In order to bring a collective action by the minority shareholder against the company, there was no such provision till 2013, the idea of protecting minority shareholder rights as a class, when their rights are infringed and many cases where small investors/ shareholders gets easily defrauded; one such example is the Satyam scam where over 3 lakhs small investors and minority shareholders got defrauded and they could not get back the money, but whereas the investors in the USA, who filed a class action against Satyam and because of such suit they could able to get a compensation of $125 million dollars which is around 675 crores.

So, there is an alarming need to bring a class action suit in India, in order to protect minority shareholder rights and also by ensuring that the minority shareholder, has the right to bring collective representative suit on behalf of the company, in order to make sure the company does not act which is outside the object clause.

**Concept Of Class Action Suit**

By the amendment in Companies Act, 2013, the concept of “Class action” was brought in which aims in protecting the rights of the small investors and shareholders. The concept was strongly rooted in the Indian context in the aftermath of the Satyam Corporate Scandal which is famously called as “Indian Enron – Satyam Fiasco Case” where in numerous number of small investors of Satyam Groups in India were unable to seek an effective relief against the corporation (Satyam’s management) as against their counterparts in the US who brought class action suits against satyam and made their loss.

A class action suit is a kind of lawsuit that allows a large number of people as a class with a common interest in a matter to sue or be sued as a group. It is a procedural device enabling one or more plaintiffs to file and prosecute a litigation on behalf of a larger group or class, wherein such class has common rights and grievances. Class actions are particularly good for all small investors, depositors and minority shareholders who may not be able
to afford experienced and highly competent attorney on their own. At the same time, they increase the efficiency of the legal system by reducing the number of rulings for the same issue, thereby saving time and resources. It provides them with a medium to fight as one unit against the errant company or management, thereby reducing multiplicity of suits, costs of litigation and increasing their chances of success in the process.ii

The idea of incorporating class action in the companies act was first highlighted in the JJ Irani Committee report, where the committee pointed out for the protection of minority rights and held that:

**JJIRANI COMMITTEE REPORT**

Chapter VI para 10.1 of the Committee Report which talks about “Minority Interests”, states that “The fundamental principle defining operation of shareholders democracy is that the rule of majority shall prevail. However, it is also necessary to ensure that this power of the majority is placed within reasonable bounds and does not result in oppression of the majority and mismanagement of the company. The minority interests, therefore, have to be given a voice to make their opinions known at the decision making levels. The law should provide for such a mechanism. If necessary, in cases where minority has been unfairly treated in violation of the law, the avenue to approach an appropriate body for protecting their interests and those of the company should be provided for. The law must balance the need for effective decision making on corporate matters on the basis of consensus without permitting persons in control of the company i.e., the majority, to stifle action for redressal arising out of their own wrong doing”

The idea of Class Action/ Derivative suits under this, the committee stated that “In case of fraud on the minority by wrongdoers, who are in control and prevent the company itself bringing an action in its own name, derivative actions in respect of such wrong non-ratifiable decisions, have been allowed by courts. Such derivative actions are brought out by shareholders on behalf of the company, and not in their personal capacity (ies), in respect of wrong done to the company. Similarly the principle of “Class/ Representative Action” by one shareholder on behalf of one or more of the shareholders of the same kind have been allowed by courts on the ground of persons having same locus standi”. Though these principles have been upheld by courts on many occasions, these are yet to be reflected in law. The committee expresses the need for the recognition of these principles.ii

The minority shareholders rights as a class are not protected prior; but now after the 2013 amendment gives them the idea on Class Action under Section 245 of the Companies Act, 2013.

The main aim of the “class action are prosecuting, defending or discontinuing the action on behalf of the body corporate, which is considered to be ultra vires. Furthermore, it is an action for “Corporate relief” in the sense that the goal is to recover for wrongs done to the company”.ii
Class Action is the minority shareholders sword to the majority’s twin shield of corporate personality and majority rule.ii

In order to overcome the wrongful corporate conduct, which are done by the majority shareholders on behalf of the company, resulting in minority shareholders and investors suffer in silence, the idea of Oppression proceeding and Class action provide corporate stakeholders with statutory rights against corporation. The oppression remedy is a personal remedy which is already highlighted in the previous pages, but on the other hand, class action empowers complainant to commence an action on behalf of corporation to remedy alleged wrongs done to the corporation itself.ii

The words of the section 245 of the companies Act states that “... if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interest of the company or its members or depositors file an application ...”

The words of the section itself clearly states that the class action suit can be brought by the members only on behalf of the interest of the company and it is unlike oppression remedy where, section 241 states that “... the affairs of the company have been or are being conducted in a manner prejudicial to the public interest or in a manner prejudicial or oppressive to him or any other member or members ...”

From the words of the section 241 which clearly highlights that it is an individual remedy and the manner of the company affairs are conducted in such a manner as to causing prejudicial to the public interest and to the member, the particular member who feels oppressed can file an oppression remedy suit under section 241 of the Companies Act, 2013.

The court of Appeal Rea v Wilderboerii, the court said that, “Class action and oppression remedy are not mutually exclusive. There may be circumstances that give rise to both a derivative action and an oppression remedy. The court affirms that the oppression remedy and derivative action remain distinct remedies with separate rationales and statutory functions and the court held that the class action is a corporate remedy, while the oppression remedy is a personal individual remedy”.

Another important point that has to be taken into consideration is that the class action are considered in cases where the shareholders on behalf of the company if they think fit can bring an action, “... if they are of the opinion ...”, while on the other section, in case of oppression remedy, it can be taken as a defence only when the act is done to the minority shareholder or being done to him, “... have been or being conducted ...”

It is important to note here that, the rubric of an oppression proceeding, alleged wrongful conduct must impact the personal interest of the complainant. “The oppression remedy will not be available simply because the complainant asserts a reasonable
expectation that it holds in common with every other shareholder. Instead, the complainant must demonstrate that the alleged wrongful conduct has been oppressive, unfairly prejudiced or unfairly disregarded its personal interests.”

Section 245, provides for the application for class action suit can be filed before the tribunal “on behalf of the depositors or members”. But the problem is that will this apparently means that such an action is brought on behalf of all the members, or is it to certain shareholders of the company only who have violated the object clause of the company.

If the answer are in confirmatory, that it is against all the members of the company, would the damages be awarded to the class as whole or to only those who brought the action, is no who can be sued for class action and who can get the relief out of it?

As per section 245 (1) (g), a class action can be brought against “The Company, Directors of the Company, Auditors and Audit firm of the company for any false and misleading statement in the audit and finally any expert or advisor or consultant or any other person for misleading statements made to the company or any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part”.

In absence of such distinguishing factor, the underlying principle of class action, which aims at reducing multiplicity of suits, gets frustrated and nullified. It is also important to note that, no two class action can be entertained on the same issue.

The conditions for the instituting the suit remains same from the Section 399 of the Companies Act, 1956, whereas the only difference is that, oppression remedy is for the individual relief, whereas class action is for the corporate relief, to protect the company from wrongful acts of the members which are Ultra vires to the company.

|:------------------|------------------|------------------|
| SUBJECT MATTER   | OPPRESSION REMEDY | CLASS ACTION REMEDY |
| Filing of Application | Members of the Company | Members as well as deposit holders of the company |
| Filing of the Application is done against | Company and its statutory appointees | Company, Any of its directors Auditor, including audit firm Expert or advisor or consultant or any other person |

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Subject Matters for which application can be filed/entertained

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| Any current or past activity or to prevent recurrence
| Any current, past or future activity, including desisting from one or more particular action that has not been taken yet. |

Nature of the Remedy claimed

| Nature of the Remedy claimed | Individual Remedy | Corporate Remedy |

In the case of the persons eligible to file the suit:

A) MEMBERS:

1. For the corporation having share capital, subject to the condition that all are fully paid shares:

2. For the company not having share capital; not less than 1/5th of the Total number of its members.

B) DEPOSIT HOLDERS:

The above flow chart is the conditions for filing oppression remedy under 1956 Act (Section 399 – Right to apply under Section 397 and 398 [Filing for Oppression Remedy] now it is added in the Section 245 for the filing of Class Action Remedy, no changes in it.

CONCLUDING OPINION & SUGGESTIONS

It is concluded that the Class Action suit is a better platform the minority shareholders, investors and depositors to raise their grievances against the management of the company. The author feels that the:

"Class action suits maybe undertaken as a redressal tool by minority shareholders having common interest for promotion of transparent corporate governance".

But, upon perusal and deep interpretation of the Section 245, it is understood that, the provisions are neither purely “Class Actions” as prevalent in US nor purely “Derivative Suit” as prevalent in UK. The interpretations of the section overlap with remedies that are already applicable under Section 241 of the Act.

The introduction of concept like class action is certainly beneficial for the
investors of the company. It provides them with a medium to fight as one unit against the errant company, thereby ensuring less cost of litigation, reducing multiple suits on same subject matter and increasing their chances of success in the process.

Especially, the depositors, who had no option but to file a civil suit so far now, can take class action suit as a defence for any wrongful act by the company or the members of the company. These help in increasing the accountability of a company or its management towards its stakeholders and in containing any likely prejudice against the minority.

In order to make the class action more effective in India, it is necessary to modify it to fit into the Indian Legal and Procedural system. The role of investors associations and SEBI should be strengthened more in order to increase the shareholder activism and investors protection.

“We Want To Change, We Want To See, We Can”

*****
MYRAID GENETIC JUDGEMENT: GENE PATENTING AND PATENTIBILITY CRITERIA

By Rachit Ranjan & Saptarishi Ghosh
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INTRODUCTION:

Association for Molecular Pathology v. Myriad Genetics Inc. is the case which is popularly known as Myriad Genetics Case. It is related to grant of Patent Rights over human genes. The concept of patentability of a particular invention has been used and explained by the courts in this particular case. U.S. Code, title 35, part II, chapter 10, section 101 mentions the inventions that are patentable in United Nations. The point of conflict is that the Patent Act of U.S. permits patents to be issued to “whoever invents or discovers any new and useful ... composition of matter,” under Sec.101, but “laws of nature, natural phenomena, and abstract ideas” “are basic tools of scientific and technological work” that lie beyond the domain of patent protection, as established in a decided case. The Supreme Court thus had a question to determine whether the genes invented by the Myriad Genetics are patentable under the U.S. law or not. The court reasoned that the genes in question were invented by engineering of scientists on natural Deoxyribonucleic acid (DNA) and were not naturally occurring genes that have been discovered. The court recognized the boundary line between human inventions and discovery of naturally occurring phenomena. And thus held that genes invented by Myriad Genetics very much fall under subjects which are patentable under law.

BACKGROUND OF THE CONCEPT:

In general, each human cell has twenty-three pairs of chromosomes. The Human Genome Project has estimated that these chromosomes contain approximately twenty to twenty-five thousand genes. Genes are termed as deoxyribonucleic acid, commonly known as DNA. DNA are the source of traits of heredity and necessarily serve as the instructions to make molecules. DNA forms the shape of a double helix and can be imagined to be like a spiral ladder. It is made up of a sugar-phosphate backbone and is held together by ladder rungs comprised of two bonded nucleotides. Inside a DNA there are four possible nucleo-bases, namely adenine (A) and thymine (T) bonded together, and cytosine (C) and guanine (G) bonded together. In RNA, thymine (T) is replaced with uracil (U).

Ribonucleic acid which is referred as RNA, is a single-strand version of nucleotide. Various DNA nucleotides may or may not code to form amino acids. Introns code for nothing, while exons code for twenty different types of amino acids. Thus, the segments of gene known as coding regions are exon regions and the amino acids that exons make can be combined to make proteins. This essential transfer of information within gene from DNA to RNA and then into proteins is called as the Central Dogma of Molecular Biology.
There are two steps for production of proteins. In first process i.e. transcription, to transfer the stored genetic information within DNA to RNA molecule, the double-stranded DNA helix unwinds and one strand is used as a template for the production of single-stranded pre-RNA. Then, in a natural process, all the non-coding sequences i.e. the introns are spliced out of the single-stranded RNA and as a result mRNA strand containing only exons is created. In a second process i.e. translation, the mRNA is read by a ribosome that synthesizes or creates certain amino acids based on an mRNA nucleotide combination of three.

Complimentary DNA also called cDNA, is the mirror image of mRNA, a naturally existing product in both the processes of DNA replication. Thus, the name Complimentary DNA itself explains that the cDNA strand is ‘complimentary’ to its producer mRNA, i.e. each base in the cDNA can bind to the corresponding base in the mRNA from which it is generated.

In laboratories like Myriad Genetics, Inc., complimentary DNA is synthetically created from the mRNA strand by assessing the nucleotide bonding properties of the isolated natural mRNA product and making a mirror (inverse) image of the mRNA. The result is the manufacturing of an exon-only strand of DNA, i.e. cDNA.

THE CASE IN DETAIL:

In June 2013, the matter of human gene patentability reached the United States Supreme Court. Two issues were at hand: (1) “whether a naturally occurring segment of deoxyribonucleic acid (DNA) is patent eligible under 35 U.S.C. § 101 by virtue of its isolation from the rest of the human genome” and (2) the “patent eligibility of synthetically created DNA known as complementary DNA (cDNA).” Complementary DNA “contains the same protein coding information found in a segment of natural DNA but omits portions within the DNA segment that do not code for proteins.”

Petitioner Harry Ostrer, MD, as well as other physicians, advocacy groups, the American College of Medical Genetics, the American Society for Clinical Pathology, the College of American Pathologists, and number of medical patients brought suit against Myriad Genetics Inc. in 2009. The petitioners sought a court declaration that the BRCA1 and BRCA2 gene patents filed in 1997 and issued to Myriad in 2000 be deemed invalid.

The District Court concluded that Myriad’s claims, even those relating to cDNA, fell under the implicit law of nature exception and were therefore erroneously granted, therefore it granted the petitioners’ summary judgment on these claims. The District Court examined the United States Patent and Trademark Office’s (hereinafter USPTO) practice of awarding DNA patents so long as they were deemed isolated DNA, isolated implying a sequence removed from the human body. The court found fault in this approach and questioned such a method for determining patent sufficiency referring to it as a “lawyer’s trick,” inferring that a loophole exists with respect to the prohibitions on granting a patent on DNA.
Through this method, one can obtain a patent on exactly the same chemical composition of matter simply by extracting the DNA from the human. Thus, if you cannot claim the right to exclusion of a particular DNA sequence within someone, you simply remove the sequence you wish to claim, and now it becomes isolated. The District Court concluded that regardless of whether the segment of DNA is isolated or not, there is no finding of a fundamental alteration of the DNA upon extraction from the body; the information it encodes is exactly the same; thus the patent claims were declared invalid. With respect to cDNA, the District Court additionally found the patent claims invalid for the same reasoning.

The decision of the District Court was reversed by the Federal Circuit. In 2012, the Federal Circuit affirmed in part and reversed in part the decision of the District Court. While there was no dispute that Dr. Ostrer met the standing requirements, nor was there a dispute as to cDNA meeting patent eligibility requirements, there was a variance in the judges’ views pertaining to isolated DNA. The Federal Circuit court judges’ analysis of isolated DNA can also serve as a parallel argument for why cDNA is desired by many to be precluded from patent rights.

Judge Lourie examined the DNA sequence as a chemical compound that is held together solely by bonds. By cleaving (splitting) the bonds that keep the particular sequence intact in its natural form, a freestanding new molecule results. Such an alteration, as could be produced by a laboratory technician, was a dispositive finding since the resulting molecule differed from its larger and intact natural component, even though there was no change to the encoding information.

In Judge Moore’s analysis, the same conclusion was found except she gave deference to the USPTO, which considered the interests of patent holders.

Lastly, Judge Bryson’s opinion differed from both Judge Moore’s and Judge Lourie’s opinion. Judge Bryson did not feel that the USPTO should be given deference on these matters because “the PTO lacks substantive rulemaking authority as to issues such as patentability.” Judge Bryson also discussed that the severing of a chemical bond was not dispositive as found by Judge Lourie; the act of breaking a bond or creating one, for that matter, did not create a new product since the DNA sequence remained the same, and furthermore the process of breaking a bond or creating one was not sufficient to constitute an invention. Citing these reasons, Judge Bryson disagreed with his colleagues’ and he found that isolated DNA should be patentable. The process used by Judge Bryson to analyze isolated DNA to reach his conclusion does not appear to be thoroughly applied in the development of his conclusion for cDNA. In that regard he wrote that cDNA was instead created in a laboratory and since its resulting product no longer contains introns, as those found in the naturally occurring specimen, the native gene and cDNA are therefore not chemically identical. There was no discussion as to why his prior statement that “there is no magic to a chemical bond that requires us to recognize a new product when a chemical is created or broken” is not also applicable to cDNA, which would
consequently also render cDNA patent ineligible.

The Supreme Court then “granted the petition for certiorari, vacated the judgment, and remanded the case.” In 2013, upon such grant of the SC began its consideration of patent law and human DNA with a review of the language of the Patent Act of 1952, noting necessary adherence to the implicit exceptions of “laws of nature” that have been “long held.” The Court also observed the discussion in *Mayo Collaborative Servs., Inc. v. Promethus Labs., Inc.* that reiterated the fear that patents may infringe the use of basic scientific tools for the general community; such a consequence may likely depreciate creative progress and innovation. While there must be some limitation to the rules pertaining to patents so as to allow for innovation, since it is obvious that every invention must contain the use of the laws of nature and so forth, the Court did address the standard by which courts have historically evaluated patent eligibility claims. Patent protection must strike a “delicate balance between creating ‘incentives that lead to creation, invention, and discovery’ and ‘impeding the flow of information that might permit, indeed spur, invention.’”

The major contribution, as supplied by *Myriad Case*, was the locating of the BRCA1 and BRCA2 genes within the chromosome; the Court was tasked with determining whether or not such a discovery constitutes patentable claim.

The first case of similar fashion in biotechnology was *Diamond v. Chakrabarty.* In this case, a bacterium was manipulated by the addition of plasmids; the result was an organism that could break down crude oil. Because of the new bacterium’s composition and the acquired ability to process oil in a different fashion than the bacterium without the added plasmids, it was found that such a “non-naturally occurring manufacture” contained “markedly different characteristics from any found in nature” and, thus, could be granted a patent.

The Court distinguished *Diamond Case* from the facts in *Myriad Case.* In present case, there was not alteration of the specimen, nothing was being created, and mere separation was not deemed sufficient to be considered an invention. “Groundbreaking, innovative, or even brilliant discovery does not by itself satisfy the § 101 inquiry.” After passing through the millions of nucleotide base pairs that compromise chromosomes, Myriad’s patent descriptions provide detailed explanations of their particular process of discovery. Yet while the location of the discovered genetic mutation was otherwise unknown until Myriad’s discovery, the Court found that “extensive effort alone are insufficient to satisfy the demands of § 101.”

Lastly, regarding the issue of isolated DNA, Myriad argued that the USPTO’s practice of granting gene patents must be respected. Such deference was formerly granted due to Congress’s endorsement of prior legislation. This was not the case in *Myriad*; there was no previous Congressional endorsement with respect to genes or isolated DNA segments, nor did this court believe that such prior practice constituted sufficient justification for it.
The second holding in *Myriad* concluded that cDNA was not precluded from patent eligibility. Comparatively less debate is done over this second issue as it appears that the overall opinion of the Justices is that cDNA is one step further into the category of *non-naturally* occurring, since the process by which cDNA can result is through laboratory synthesis. There are no non-coding regions contained within cDNA because these regions are removed by a laboratory technician who, upon completely removing all introns, then bonds the exon-only segments together to create the desired strand of DNA.

One strong argument made by the petitioners is that nucleotide sequences are governed by the laws of nature and the resulting cDNA can only be created by applying the laws necessary to carry out nucleotide base pairing. Of course, the petitioners argue that the elementary nucleotide bonding steps carried out by a technician are not sufficient enough for a patent award to be granted to the resulting product. However, this Court refuted such an argument since a lab technician is required to create a composition of exons bonded together in order to produce cDNA. The contrasting opinions from the petitioners and the Court show that the Court is drawing a distinction whenever there is an introduction of assistance to an otherwise natural occurrence. Methods and process patents are not discussed within this case, instead the Court concluded that “genes and the information they encode are not patent eligible under § 101 simply because they have been isolated from the surrounding genetic material.”

Thus, from this opinion, it can be fairly inferred that a line is now being able to be drawn between genetic material that is patentable, for example, material resulting from the intervention of a laboratory technician to separate the intron segments and material that would be precluded from patent eligibility, for example, material existing without a technician’s involvement and therefore a specimen likely to be too similar to a naturally occurring substance. Of brief note, there is a process by which cDNA is naturally occurring, and the Court only slightly addressed such a possibility. Just as humans rely on proteins for reproduction, viruses do as well. Reverse transcriptase is an enzyme that reproduces RNA into cDNA. This rather backwards process observed by viruses generates naturally occurring cDNA however, since it is extremely rare that a near similar cDNA specimen may result, there is no determination that cDNA should be deemed non-patentable. With the discovery of the BRCA1 and BRCA2 gene mutations, Myriad was able to further the field of oncology by creating methods for which patients may be tested to evaluate whether or not they are carriers of the mutation. This provided many with a better calculation of their own risk, particularly those patients with a family history of breast cancer. Naturally, this test allowed for patients to then engage in early planning in addition to the other common measures and precautions patients take after gaining a better awareness of their health condition.

The controversy surrounding the granting of the patent rights for the gene isolation began when other medical facilities, such as the University of Pennsylvania’s Genetic
Diagnostic Laboratory, started offering BRCA1 and BRCA2 screening. Once Myriad filed patent infringement suits, settlements were reached to enjoin the other facilities from providing BRCA diagnostic testing; the result was that Myriad became the monopolist i.e. the sole company that could offer BRCA screening. It was not until several years later that a case was brought against Myriad by many members of the medical community questioning the validity of Myriad’s acquired patents, thus resulting in the *Myriad* controversy.

**MYRIAD EFFECTS ON SCIENTIFIC RESEARCH:**

The Supreme Court’s invalidation of Myriad’s isolated DNA patents creates greater real and perceived freedom to operate for researchers. The impact of the decision operates on two levels.

First, it ensures that direct research on isolated DNA can proceed without a license. Scientists need not parse the meaning of Myriad’s distinction between noncommercial and commercial research; any researcher may study isolated BRCA1 and BRCA2 DNA without fear of liability (assuming, of course, that he does not infringe any other patents).

Because of deficiencies in formulating and communicating Myriad’s research policy, some researchers were chilled in pursuing BRCA research. Notwithstanding Myriad’s recent policy articulations, the Supreme Court’s decision sends a powerful message to the scientific community that research on isolated DNA corresponding to BRCA genes can proceed without any threat of patent infringement.

Second, to the extent that the Supreme Court’s decision leads to greater diagnostic testing, such commercial use will also enhance scientific understanding of BRCA1 and BRCA2. Diagnostic use never qualified for Myriad’s research exception, but it holds considerable and enough research value. As mentioned, widespread diagnostic testing will reveal more genetic variants and provide insights into their biological importance. Widespread testing will not only generate more mutation data, it will also ensure the availability of such data to public. Based on its patents, Myriad Genetics has developed an exclusive database of BRCA mutations containing over 300,000 cases. This resource is highly valuable for interpreting individual test results as well as characterizing the biology of the BRCA genes. It is particularly useful for cataloging and interpreting so-called variants of unknown significance. Greater access to commercial diagnostic testing promises greater access to genetic data, thus advancing scientific understanding of these genes.

Of course, even after invalidation of its isolated DNA patents, Myriad has still asserted some intellectual property rights over BRCA testing. They were decided differently in different suits by the supreme court. For the time being, such testing and its research benefits are available on a wider basis.

In sum, the Supreme Court’s ruling loosens the constraints of Myriad’s patents and its research policy, allowing more direct
research on BRCA as well as knowledge-producing commercial testing to proceed.

Finally, *Myriad* is important as an expression of strident judicial opposition to patents on methods of making medical diagnoses. Myriad’s challenged method claims for detecting genetic sequence alterations were struck down unanimously by the CAFC, and the Supreme Court declined to take up the question on appeal. It will therefore be impossible for companies to mimic Myriad’s business model of identifying a gene sequence and attempting to control the production of diagnostics from it. Whether this will reduce private investment in genetic diagnostics and necessitate supplemental public research funding remains to be seen.

**INDIAN SCENARIO:**

India has laudably persisted in tailoring a patent regime that is best suited for its national interest and yet compliant with its international obligations.

The Patents Act under Section 3(c) specifies that the mere discovery of a scientific principle or the formulation of an abstract theory, discovery of any living thing or non-living substance occurring in nature would not be patentable. Another section that is relevant is 3(i) which states that plants and animals, in whole or any part thereof, other than microorganisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals – cannot be patented.

A gene occurs in nature and should therefore, not be patentable as per Section 3(c). While that is true, it must be noted that there is considerable skill involved in identifying its function, location and isolation. As far as Section 3(i) is concerned, while plants and animals as a whole or in part are not patentable, thus genes could be considered a part of a plant or an animal and therefore not patentable.

A novel and non-obvious innovation that has an industrial application is patentable in India. The Indian Patent Act does not provide any definition of the term “*patent*”. Instead, it has only provided for inventions which are not patentable as under Chapter III of the Indian Patent Act, 1970. Any invention, regardless of satisfying the novelty, utility, and non-obviousness test, if falls within any criteria under Section 3 and 4, is not patentable.

After Myriad Judgment, the USPTO issued lengthy guidelines (“the Guidance”) to their patent examiners, instructing them to reject any patent claim to a purified natural product. From all accounts the examiners have taken this guidance to heart and have been rejecting a wide range of life sciences inventions as a result. And India follows U.S. Law in this regard.

**CONCLUSION:**

This case presented the Court with a profoundly fundamental question, which is, where to draw the line between natural and man-made, in the face of very complex science. It represents a critical step in the Court’s efforts to delineate the boundaries of patent eligibility, particularly in the world of complex biotechnology. And as the science of biotechnology continues to advance,
conventional distinctions between natural and non-natural may only become more obscured. Regenerative medicine, for example, may present many interesting questions regarding the boundaries of natural versus patent eligible. If nothing else, the *Myriad* decision demonstrates that the complexity of the underlying science will not impede the Court from resolving fundamental legal questions, including the law regarding patent eligibility. The fact that technology presents difficult questions does not mean that our judiciary will avoid answering difficult questions. And in this instance the extent up to which the Court was required to draw a line, authors believe the line was drawn in the correct place.

The *Myriad* decision will be an important symbol for those who seek to foster scientific discovery by protecting and expanding the public domain. It also has symbolic resonance with the ideal that our common humanity cannot be owned. The Universal Declaration on the Human Genome and Human Rights declares the human genome to be “the heritage of humanity” and that “the human genome in its natural state shall not give rise to financial gains.”

More so, in reaching its decision, the Court echoed the well-established principle that a fundamental purpose of the patent laws is to "strike a delicate balance between creating incentives that lead to creation, invention, and discovery" and not "impeding the flow of information that might permit, indeed spur, invention." The Court’s reliance on this base guided it in maintaining the vital balance.
SUBCULTURAL THEORY OF CRIME CAUSATION: A CONTEMPORARY CRITIQUE

By Raghav Mittal
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ABSTRACT
The article attempts to find linkages between crime causation due to subcultures by tracing the development of various theories in the light of their circumstantial background, and critically analyses their efficacy by scrutinizing empirical data. Finally, the article concludes by applying the theories to some of the contemporary subcultures, to point out some of the pragmatic ambiguities in them.

I. INTRODUCTION
A. Subcultural Theory Development: A Brief Sketch
The term “subculture” although interestingly has been used to denote a variety of meanings today, it was first used generically, with reference to a number of cultural beliefs. It was also employed with reference to organic-physical factors underlying cultural products and by the British psychologists to refer to any group of people that were considered harmful to the society.

The genesis of the subcultural theories can be traced to the comparison of the ‘dominant’ cultures and deviant subcultures. These subcultures were conceived as a solution to the moral dilemmas. The Chicago school professed that cultures of the criminal area were distinct from the mainstream values, and such values were transmitted by cultural transmission. Later writers as Cohen emphasised on the internalisation of middle-class values and the reaction formation that occurred as a result of the rejection by middle-class society.

In the later theories, the idea of social disorganisation was replaced by focus on dissensus and conflict. American Structural-functionalist wave in 1950-60 and British Marxist in the 1970s were the two effective and dominant waves in the subcultural theory.

II. THEORETICAL FRAMEWORK AND CONTEXTUAL BACKGROUND
A. Chicago School Theories
Arguably, the first in a series of developments were the Chicago School theories, the chain of works at the University of Chicago since the 1890’s that emerged at a time when the city was experiencing rapid social changes and problems related to housing, poverty and strains on institutions.

1. Burgess’ Zonal Hypothesis
In the mid-1920s Ernest Burgess introduced the idea of concentric circles as a basis for understanding the social disorganisation of the city.
As per his theory, the innermost circle (Zone I) in those concentric circles represented the business district, a zone that had high propensity and a small residential population. Outside this was the Zone of Transition (Zone II), an area with a transient population living in poor conditions. Zone III was a zone of relatively modest residential homes occupied by people who have escaped Zone II. Zone IV had even
more affluent residences and Zone V consisted of the suburbs.ii

Burgess asserted that there was a tendency of each inner zone to extend its area by invasion of the next outer zone, and termed this aspect as succession. There were copious examples of deviant behaviour and social problems, disproportionately concentrated, in the zone of Transition.ii Conclusively, a geographical expression was converted into a locality with traditions and history of its own.ii

2. Cultural Transmission: Shaw and Mckay
Shaw and Mckay utilised the juvenile court records to test the zonal hypothesis and concluded that different parts of the city were characterised by different value systems. The areas of low economic status had a high delinquency rate and the children in such communities were exposed to a variety of contradictory standards and forms of behaviour.ii

Their research was built on the premises of Social disorganisation thesis and supported the Zonal thesis. They conceived the concept of cultural transmission, which stated that values are transmitted from generation to generation, and it is through such processes that areas become established as delinquent areas despite the turnover of the people in the area.ii

However, the idea of cultural transmission which although is persuasive does not clearly explain how particular cultural formations and subcultures come into being.ii

3. Differential Association
Shaw and Mckay’s ideas were then taken up and modified by Edwin Sutherland while conceiving the idea of differential association which may be defined as the notion that if an individual is exposed to more ideas that promote law breaking than those that demote it, than criminal conduct becomes highly likely. The learning covers ‘the specific direction of motives, drives, rationalizations, and attitudes’.ii

4. Differential Reinforcements
Ronald A. Akers and Burgess, in 1960s, expanded on Sutherland’s differential association theory using behaviourism. They developed the theory of Differential reinforcement which relates to the anticipated consequences of particular actions. An individual tends to do things that result in less punishment, and in doing so, is influenced by the imitation. Consequently, the initial delinquent activity results due to a combination of differential association and imitation. This initial participation may be wither positively or negatively reinforced.ii

This theory was a great influence and acted as a bridge between the early work of the Chicago School and the subcultural theory.ii The elements of this theory rely heavily on structural determinism and does not give importance to individual decision making.ii Arguably, the theories of differential association and cultural transmission fail to explain all the forms of crime. E.g. The impulsive or emotive offences where the offenders had little contact with deviant values or ideas.ii
5. **Evaluating the works of the Chicago School**
Critics have asserted the work of the Chicago sociologists as being overly descriptive and lacking clear, theoretically tested hypotheses. Much of the work is criticised for the uncritical use of the measures of the crime for understanding different parts of the city.

Although the works of the later subcultural theorists were different from the approach taken by the Chicago School, they were heavily influenced by this school.

B. **The Gang**
An early study of the groups in Chicago by Frederick Thrasher was done in 1927. He defined Gangs as an interstitial, having a collective behaviour which resulted in ‘the development of tradition, unreflective internal structure, espirit de corps, solidarity, morale, group awareness, and attachments to a local territory’.

C. **Albert Cohen**
Albert Cohen worked on Merton’s strain theory and in his model he viewed gang delinquency faced by many young men, as an upshot of their failure within the educational system. He asserted that a delinquent boy faces problems of adjustment, shame and status frustration. To search for a solution, the boy will join others in a similar position. This process arguably, provides a more realistic basis than strain theory.

Cohen’s use of reaction formation assumes that the delinquent boy is strongly ambivalent about status in the middle-class system which might not always be true. Moreover, his description of the delinquent subculture stresses only upon the negative aspects that have not been factually explained.

D. **Cloward and Ohlin**
Influenced by the differential association and strain theory, they argued for the existence of greater specification than suggested by Cohen, and utilising Sutherland’s ideas, identified the following types of delinquent subculture:

1) **Criminal** – In which the gangs worked largely for financial gains through robbery, theft and burglary. Established offenders acted as role models for the younger generation.
2) **Conflict** – where the primary form of delinquency was violence; such subcultures were more likely to arise in disorganized areas where access to criminal role models was restricted.
3) **Retreatist** – Dominant activities involved drug use, arising out of the failure to achieve success through legitimate or illegitimate means.

It has been claimed that Cloward and Ohlin failed to acknowledge that their theory could only account for some kinds of delinquency and not all.

E. **Sykes and Matza**
Gresham Sykes and David Matza departed from the assumptions that delinquent values should necessarily be understood as oppositional to the mainstream values. They maintain that the constraints of the dominant value system are merely loosened. Delinquent values merely enable some distance to be created from the dominant
values through the adoption of 'subterranean values'.

Delinquent activity is itself justified through the *techniques of neutralisation*, which are effectively rationalisations or justifications that individuals give themselves, in order to continue with the decision to break the law. They include the following:

1) Denial of Responsibility
2) Denial of Injury
3) Denial of the Victim
4) Condemnation of the condemners
5) Appeal of higher loyalties

Matza underplayed offending behaviour and over-corrected his own theory to the point at which his own theory under-predicts both its scale and, in particular, more violent forms.

F. Collective Efficacy
Robert J. Sampson explained the concept as the ability of members of a community to control the behaviour of individuals and groups in the community. He claimed that spatial dynamics coupled with neighbourhood inequalities in social and economic capacity consequently explain the urban violence.

G. American Subcultural Theory
Thorsten Sellin’s in 1938, building on the Chicago School work, focussed on the way in which normative systems come into conflict with more general social normative systems, as expressed in law. An extension of the ideas was proposed by Wolfgang and Ferracuti in 1967, focussing on the expressive or emotional forms of violence, conducted in the heat of the moment.

Elijah Anderson argued that competition and limited job opportunities for the poor led to the development of a sense of alienation, and this in turn generated a code of the street which was a set of rules governing public behaviour.

It has been contended that these theories are based on a stereotyped view of the working-class cultures.

H. British Subcultural Theory
John BarronMay in the 1960s, reasoned that delinquent values were learned by the relatively deprived young men seeking to cope with their restricted circumstances. Willmott’s study of the adolescent boys in East London also explored youthful delinquency. He opposed the idea of status frustration and asserted that the more serious offending behaviours were partly at least a product of group values and solidarity.

In David Downes’s view delinquency was not at heart rebellious, but conformist, and saw delinquency as a solution to some of the structural problems faced by young men. In the late 1970s due to increasing unemployment and poverty, the educated and adult population started forming their own subcultures for drug use and other illicit activities, and consequently, the concept of youth subculture became questionable.

Five major criticisms aimed at these theories are:

1) Determinism – The theories overemphasize the influence of structural and cultural constraints,
underlying the conscious choices made by the individuals.

2) Selectivity – British Subcultural theory tends to focus more on the unusual subcultures while ignoring the more mundane, and arguably, conforming youth styles.

3) Conformity – As pointed out by Matza, there is over-prediction. Even in the poorest of the communities, crime is not present in all lives.

4) Gender – The theories were gender-biased.

5) Anomie – The theory emphasises on the supposedly anomie circumstances of the delinquent lives, however the delinquent youth share much of the value system of the mainstream adult and middle-class world.

I. ASSESSING THE PRAGMATIC EFFICACIES OF THE THEORIES: EMPIRICAL RESEARCH

Although, arguably the studies made in this sector may to scattered and variable to arrive at specific conclusions to falsify or authenticate a theory, yet some of the important meta-analysis have been studied to give a broad view of the general traits and features of the subcultural theories.

Travis C. Pratt and Francis T. Cullen, in their Meta-Analysis of the theories of crime in relation to the subcultures, reviewed the existing quantitative criminological research

The above table displaysthe rank order of the mean effect size estimates from the thirty-different macro-level predictors of crime across all studies, models and sizes.

David S. Kirk and John H. Laub, have reviewed the relationship between neighbourhood change and criminal outcomes, and summarized the research in
relation to the association between population loss, gentrification, public housing, development and demolition, home ownership and foreclosure, and immigration.ii

David Weisburd and Alex R. Piquero tried to find out the descriptive validity of the theories of crime using empirical tests.  

Subsequently, in another research David claims that there are micro geographic hotspots where the crime is concentrated and it the data suggests that the law of crime concentration is of universal validity.ii

A. Key findings

After analysing the mentioned empirical researches, it may be inferred that:

1) Social Disorganization Theory – The key variables tested by Travis C. Pratt and Francis T. Cullen in their analysis were include socioeconomic status, urbanism, racial heterogeneity, residential mobility, family disruption, unsupervised local peer groups, and collective efficacy. The support of this theory was strongly evidenced across multiple tests.ii

2) Anomie/Strain theory – The degree to which this theory may be supported is not accurately known owing to the lack of empirical research.

3) Routine Activity theory – Although, not all the factors required, for this theory have been empirically tested, the opportunity to commit crimes serves as a major factor. This has also been corroborated by David Weisburd in his Criminology of place.

4) Support theory- The empirical support for this theory is promising.

5) Subcultural theory–the urban and southern regime, have not been substantially endorsed by the meta-analysis

III. CONSEQUENTIAL DEVELOPMENTS

A. Chicago Area Project

This program was one of the first community-based delinquency prevention program initiated by Clifford Shaw in the 1930s. It attempted to solve local problems such as gang violence, substance abuse and delinquency. The project has proven to be a successful alternative to prosecution and has been highly effective in reducing recidivism among participants.ii

B. Young people and street crime: Inner city Dublin community

Jonathan Ilan, focusses on the specific areas in Dublin, and the surveys undertaken in these areas indicated that the areas around Northstreet had more crime rates. These areas also had low income and less educated people.ii

IV. CONTEMPORARY PERSPECTIVES

A. Bandit Organisation

The case study elucidates the factors responsible for the organisational legitimacy of modern bandits and gangs, by evaluating the case of Christopher Coke. These illicit subcultures are legally and politically sanctioned by their political context,
pointing out the deficiencies in the State and International Organisations.ii
It is asserted that this subculture portrays the differential association and techniques of neutralisation.

B. The Israeli BDSM Community
As per the studies conducted, the people involved in the community were well aware of the illegality of the Act in Israel and also, of the social Stigma attached to it, however continued to join the community due to a personal desire and wished to hide their identity. ii This example refutes the traditional subcultural theories and instead shifts the focus on the ability of an individual to make personal decisions.

C. Taxi Dancers to Contemporary Lap Dancers
The case study compares the subcultures of Taxi-Hall Dancers, demonstrated by Cressy in 1932, to the modern ethnography of lap dancing, to hold that the Chicago School theories do not precisely fit in the present Scenario, while at the same time it is essential to study the same to understand and appreciate the post-subcultural position. ii

D. Street Youths
In a rather intriguing Survey conducted amongst 125 homeless male youths in the Mid-western Canadian cities, it was found out that the youths living under adverse economic conditions may acquire attitudes that support violence. Youths with violent peers and those with peer support for violent performances reported values towards violence. The research concluded that the males with subcultural values that support violence are more likely to perceive harm, become upset than those who do not adhere to these subcultural values. ii

E. India: Honour Killings
The Crime of Honour killings in the country could be correlated to the subcultural theory wherein a member of the family of is murdered by the other members of the family or social group, due to the belief that such person has brought dishonour or disrepute upon the particular family, cast or community. ii Although, they have been condemned time and again by the Supreme Court ii and International Conventions ii, these killings continue to be considered by certain members of the society as morally acceptable.

V. CONCLUDING OBSERVATIONS
After looking at the development trajectory of the subcultural theories of crime causation in their contextual backdrop and scrutinising the supportive empirical data, it has been argued that the Chicago School theories although do not hold much pragmatic relevance in the existing setup, they were quite influential in the development of the subcultural and post-subcultural theories.

Manifestly, the meta-analysis show a direct linkage between the theories and Crime causation. However, there is yet not enough empirical data to conclusively support the validity of most of the theories. Moreover, the contemporary illustrations of the Israeli BDSM community and the Lap Dancers reveal that these theories at the same time are not bereft of loopholes,
including but not limited to determinism and selectivity.

TABLE OF REFERENCES

JOURNALS


Oxford University Press on behalf of the Society for the Study of Social Problems, 128, P. 145


BOOKS

1. David M. Downes and Paul Rock, Understanding Deviance: A guide to the Sociology of Crime and Rule-

WEBSITES


ADDITIONAL BIBLIOGRAPHY

BOOKS


**JOURNALS**


**INTERNET SOURCES**


CALCULATION OF ADJUSTED GROSS REVENUE: A GAME OF TUG OF WAR?

By Rahul V. Chandramouli & Kaavya Hari
From NUJS Kolkata

The Telegraph Act, 1885 empowers the Central Government to establish, operate and work telegraph i.e. conduct telecommunication services in India. This power can be transferred to private parties by entering into a licence agreement in exchange of a consideration as deemed fit by the Government. Prior to the year 1999, the telecommunication licences issued by the Government to private parties levied a fixed amount as licence fee from telecom service providers. The National Telecom Policy 1999 ushered in a change in relation to payment of licence fee, it envisaged a scheme of levy of licence fee, under different service licences, as a percentage of the adjusted gross revenue of a telecom service provider. To this effect, the Department of Telecommunications introduced a migration policy to migrate the existing service providers who were paying fixed licence fee to this new regime. On a provisional basis, the migration package calculated licence fee on the entire revenue of the service provider companies (including non-licensed revenue) with an assurance of clarification of the definition of adjusted gross revenue on receiving the recommendation from the Telecommunication Regulatory Authority of India. But the exact definition of adjusted gross revenue remains a matter of constant strife between the Department of Telecommunication and the various telecom service providers to this day with multiple petitions filed and decisions heard in different judicial forums. This essay examines the debate surrounding the definition of adjusted gross revenue especially in the context of inclusion of non-licensed activities in its ambit.

i. Introduction
India currently has the second largest telecommunication market in the world with the subscriber base reaching approximately of 1,185.88 million (as on November 2017). Over the past few years, the reports from the Comptroller and Auditor General (“CAG Report”) on the sharing of revenue by the telecommunication service providers indicate severe under-reporting which has caused heavy losses equivalent to thousands of crores rupees to the exchequer. The reluctance on the part of the telecom companies to pay the licence fee (which is calculated as a percentage of Adjusted Gross Revenue (“AGR”) as provided under various telecom service licences) in accordance with the CAG Report is due to the uncertainty that is prevailing over the exact definition of AGR. More particularly, the different types of revenue inflows that constitute the gross revenue of a telecom service provider.
According to Section 4 of the Telegraph Act, 1885 ("Telegraph Act") the Government of India (the “Government”) is reserved with the exclusive privilege for establishing, maintaining and working of ‘telegraphs’ in India. This provision therefore allows the Government to operate instrument, apparatus to conduct telecommunication within India. This power can be given to private parties in exchange of a consideration determined by the Government. For conducting wireless telecommunication, a similar provision exists in the Indian Wireless Telegraphy Act, 1935 which confers similar power to the Government to issue licences to private parties to possess wireless telegraphy apparatus in exchange of payment of fee.

Pursuant to Article 77 of the Constitution of India, licences under the abovementioned acts are issued on behalf of the President of India, while the Department of Telecommunication, Ministry of Communication, Government of India (“DoT”) as a licensor is empowered to modify, amend its terms and scope of the licences (on its own and or on the basis of recommendations of the Telecom Regulatory Authority of India ("TRAI" or the “Regulator”)). After the liberalisation of the Indian economy in 1991, privatisation of the telecom sector was envisaged in the National Telecom Policy, 1994. The first telecommunication licences for cellular mobile telecom services were issued in 1994, while the entry of private players in the internet services space took place in 1998. These telecom service providers paid a fixed licence fee that was agreed upon with the DoT during the bidding process for issuing licences.

This mode of payment of licence fee was altered under the National Telecom Policy, 1999 wherein the licence fee, under various telecom licences issued by the DoT, were calculated as a percentage of the adjusted gross revenue accrued by the licensed entity annually.

After the National Telecom Policy, 1999 brought out the a new scheme for existing telecom service providers to migrate to the new regime as specified in the National Telecom Policy 1999 i.e. to pay licence fee as a percentage of the AGR ("Migration Package"). This Migration Package provided assurance to the telecom service provider that fixation of quantum of licence as well as determination of final definition of AGR will only take place on obtaining recommendations from TRAI. In the meantime, a temporary measure was used to fix the licence fee at 15% of the entire revenue of the licensee entity. The licensees, relying on this information signed the Migration Package. In the year 2001, the DoT incorporated a new definition of AGR and gross revenue in the telecom service licence agreements without taking into consideration the recommendations of TRAI. Subsequently, the DoT issued demand notices claiming licence fee on the entire revenue of the licensee company causing a stir in the telecom sector.

Although there have been claims by telecom service operators that the calculation of AGR on the basis of total revenue should be limited to only those telecom service operators who accepted the Migration Package in 1999 and not subsequent it was clarified that the definition of AGR remains an issue for each telecom service operator.
who has entered into licence agreement containing the same definition of AGR as it was first introduced in the licence agreement. This is because the same clause of two standard licence agreements for provision of a telecom services entered into with the DoT cannot be interpreted differently for two licensees whereby two licensees working under the same licence cannot be made to pay the licence fee based on two completely different computations.

**Calculation of Adjusted Gross Revenue**

Prior to the introduction of the Unified Licence Agreement by DoT in 2013, where different telecom services were combined under one umbrella licence, there were separate licences to be entered into by telecom service providers for provision of each service. The separate service licences that were prevalent at that time include (i) Unified Access Services Licence ("UASL") and Cellular Mobile Telecom Service for access service, National Long Distance Licence and International Long Distance Licence for long distance services, and Internet Service Provider Licence for provision of internet services etc. These licence agreements contained similar provisions for levying of licence fee as a percentage of AGR, definition of AGR and gross revenue. In case the licensee is in possession of spectrum, the spectrum usage charges were also calculated as a percentage of AGR. Currently, the licensee fee is calculated as 8% of AGR, while as spectrum usage charge is approximately 3-8% of AGR.

For the purpose of examining the definition of AGR, we have used the definition provide in UASL as the same has been used by most courts while deciding the definition of AGR, although the definition in other telecom service licences are similar in nature. AGR is calculated by making specific deductions to the gross revenue of a telecom service provider. AGR is defined in clause 19.2 of the UASL as follows:

"19.2 For the purpose of arriving at the "Adjusted Gross Revenue (AGR)" the following shall be excluded from the Gross Revenue to arrive at the AGR:

(i) PSTN related call charges (Access Charges) actually paid to other eligible/entitled telecommunication service providers within India;

(ii) Roaming revenues actually passed on to other eligible/entitled telecommunication service providers; and

(iii) Service Tax on provision of service and Sales Tax actually paid to the Government if gross revenue had included as component of Sales Tax and Service Tax."

While clause 19.1 of the UASL defines Gross Revenue as:

"19.1The Gross Revenue shall be inclusive of installation charges, late fees, sale proceeds of handsets (or any other terminal equipment etc.), revenue on account of interest, dividend, value added services, supplementary services, access or interconnection charges, roaming charges, revenue from permissible sharing of infrastructure and any other miscellaneous revenue, without any set-off for related item of expense, etc."
While the different inclusions in the abovedefinition provide much clarity as to the components of gross revenue, the term “any other miscellaneous revenue” remains ambiguous as to the nature of inflows that can be included. The DoT, giving an expansive definition to the term sent demand notices to telecom service providers/licensees for payment of licence fee. The licensees argue that the term ‘any other miscellaneous revenue’ denoted in this definition should exclude all such revenue (revenue accrued from non-licensed activities) that is not related to the telecom licence provided by the DoT. The DoT argues that that ultimately all the revenue of licensee exists due to its possession of the telecom service licence or can somehow be traced back to the telecom licence.

ii. Judicial Decisions
(a) First Round of Litigation

At the first instance, in 2003, the association of telecom service providers (including Association of Unified Telecom Service Providers of India, Cellular Operators Association of India etc.) (“AUSPI”) filed a petition at the Telecom Disputes Settlement and Appellate Tribunal (“TDSAT” or the “Tribunal”), a body set up to regulate the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom sector. The AUSPI opposed the view of the DoT as expressed in the demand notices that was sent in relation to licence fee and definition of AGR. The argument by the DoT was that it had ample power to collect consideration/payments in any manner as the same has been prescribed in the proviso to Section 4 of the Telegraph Act. The Tribunal decided that the power to determine the consideration/payments contemplated within the abovementioned proviso can only be used to the limited extent as prescribed under Section 4 of the Telegraph Act i.e. for establishing, maintaining or working of a telegraph and not beyond that. The Tribunal also questioned the DoT in relation to non-consideration of the recommendation by TRAI on calculation and definition of AGR, as offered in the Migration Package. The Tribunal then went on to direct the DoT to obtain fresh recommendations from TRAI before finally deciding the matter.

After the submission freshrecommendation by TRAI, the TDSAT revisited the petition on calculation of AGR. The Tribunal considered the different heads which are to be included within the purview of gross revenue for the calculation of AGR. Those heads of inflow of revenue which were determined to be not related with the licensed activities inter-alia include income from dividends, capital gains earned from sale of fixed assets, reversal of provisions and vendor’s credits, payments received on behalf of third party, discernible or stand-alone sale of telecom equipment which is not bundled with telecom service, receipts from universal service obligation funds, bad debts, waivers, discounts from AGR etc. should be excluded from AGR. At the same timerevenue accrued from sources such as rent of towers, dark fibres etc., rental income from properties utilized in establishing, maintaining and working of telecommunication, which are licensed
activities, have to be included in gross revenue while calculating AGR. ii

An appeal was preferred against both the decisions ii of the TDSAT in the Supreme Court of India (the “Supreme Court”) by the DoT, Government of India. A two judge bench of the Supreme Court in Union of India v Association of Unified Telecom Service Providers of India ii (“AUSPI case”) examined the jurisdiction of TDSAT to decide on the validity of the terms and conditions of the telecom licence including the definition of AGR incorporated in the licence agreement issued as per Section 4 of the Telegraph Act. It was decided that the order dated July 7, 2007 of the TDSAT ii in so far as it decides that the revenue realised by the licensee from activities beyond the licence will be excluded from AGR is without jurisdiction and is a nullity. However, the Supreme Court also clarified that the Tribunal does have the jurisdiction to decide ‘any’ dispute between the licensor and the licensee over the interpretation of the terms and conditions of the licence. ii Therefore, the power of the Tribunal is limited to dispute arising after the telecom service licence agreement has entered into and not the validity of the terms and conditions incorporated. ii The Tribunal has no power to decide on the definition of AGR but to adjudicate individual disputes where a demand notice is issued by the licensor to the licensee and the licensee disputes such a demand on the basis of an error in computation etc. ii

The Supreme Court also made an additional observation that if the wide definition of AGR includes revenue beyond the licence activities, then it is open to for the licensees not to undertake the activities for which they do not require licence under Section 4 of the Telegraph Act and transfer these activities to any other person, firm or company. ii Thus, licensees having agreed to the terms regarding payment of licence fee, which had been decided by the Central Government, it is not open to the licensees to plead for an alteration of the definition of AGR in the telecom service licence agreements ii. The Supreme Court also mandated the TRAI to reconsider the recommendations keeping in mind that all the revenue of the telecom service provider is to be included in the calculation of gross revenue and the Tribunal to examine the issue afresh. ii

(ii) Second Round of Litigation

After the decision by the Supreme Court in the AUSPI case, almost all the telecom service providers filed petitions before the Tribunal disputing the demand notice issued to them by the DoT claiming that there are errors in the computation used to calculate licence fee. The matter was taken up by the TDSAT and it gave its judgment in the year 2015. ii In this fresh examination, TDSAT observed that in cases preceding this judgment, there was a consideration with regards to the sources from where the inflow could be reckoned as part of gross revenue, in this case what is under examination is the nature of the inflow that may be included in the definition of gross revenue. The distinction was done in a limited interpretative framework as mandated by the AUSPI case. The Tribunal ousted the different reasoning of the Government in the demand letters that the definition of Gross Revenue can be read analogous with the definition of income under Income Tax Act, 1961 ii. The rational provided in the
abovementioned demand letters are that the definition of gross revenue in the telecom service licences contain terms like ‘any other miscellaneous revenue’ and ‘income from supplementary revenue’ which have to be given the broadest meaning and that only the deductions as specified in the definition of AGR are permitted etc., this indicate that all the income of the licensee company (irrespective of the source) should be included in the computation. The Tribunal made the following observations: (i) the term ‘any other miscellaneous revenue’ cannot be equated to mean ‘any other miscellaneous income’; (ii) the term gross revenue means all gross amounts, without any deductions for loss or expenditure – that is, without netting; and (iii) definition of “gross revenue” in clause 19.1 of the licence agreement is derived from AS-9 and the term “revenue” in the licence agreement carries the same meaning as recognized by AS-9, but this will include inflow from all its business activities, whether under the licence or beyond the licence.

Therefore, according to the Tribunal all receipts except capital receipts and revenue from non-core sources such as rent, profit on sale of fixed assets, dividend, interest and miscellaneous income, etc will be included in AGR. It laid down some pointers to determine whether an inflow should be included in AGR:

i. Capital receipts should be treated differently from revenue receipts; hence, capital receipts cannot be added to the definition of “gross revenue”.

ii. There cannot be double charge on the same revenue.

iii. No revenue can be earned from oneself

iv. One cannot treat someone else’s revenue as one’s own.

v. In order to be counted as “gross revenue”, the item of inflow must not be notional but real.

The Tribunal gave an indicative list of revenues inflows that are to be included in the calculation of AGR as follows:

<table>
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<tr>
<th>Inflow of Revenue</th>
<th>Inflow of Revenue liable to be included in the Calculation of AGR</th>
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</table>
| Capital receipts  | Different from revenue receipts; hence, capital receipts cannot be added to the definition of “gross revenue”.
| No revenue can be earned from oneself.
| One cannot treat someone else’s revenue as one’s own.
| No revenue can be earned from oneself.
| In order to be counted as “gross revenue”, the item of inflow must not be notional but real.

iii. No revenue can be earned from oneself

iv. One cannot treat someone else’s revenue as one’s own.

v. In order to be counted as “gross revenue”, the item of inflow must not be notional but real.

The Tribunal gave an indicative list of revenues inflows that are to be included in the calculation of AGR as follows:
• Commissions and discounts are allowed to be given to distributors (sale of prepaid vouchers) so long as the sale and invoicing are on MRP and any discount is provided separately.

• Discounts on international roaming are allowed only if the discounts are in the form of volume discount provided separately. The billed amount is always taken as revenue.

• Goodwill waiver, discount and rebates.

• Since the definition of gross

• Gain on sale of capital asset and receipts from sale of scrap.

• Insurance claims in relation to capital assets.

• Commission and discount allowed to distributors on sale of prepaid vouchers, if the sale is on a stated/agreed price, invoiced at that agreed price.

• Discounts on international roaming are permitted if the discounts are in the form of reduced billing.

• Any amount due to the liability of the telecom service provider being written off.

Simultaneously, in addition to filing petitions in the TDSAT, the telecom service providers also challenged the definition of AGR in different High Courts across the country. These petitions were based on the argument that the Supreme Court did not address the following questions: (i) what are inflows that constitute AGR; (ii) are the inflows restricted to activities under Section 4 of the Telegraph Act; and (iii) whether the definition of AGR which comprise of revenue from non licensed activities is in violation of Article 14 and Article 19 (g) of the Constitution.

In 2016, the Madras High Court heard the petition filed by Aircel Cellular Limited (“Aircel case”). The Petitioners advanced the argument that the first proviso to Section 4 of the Telegraph Act is violative of Article 14 and Article 19(1)(g) of the Constitution of India. The Court decided following:

(i) The licensee having accepted the terms of the agreement and taken advantage of the benefits under the licence cannot now claim that the revenue generated from other activities, which are not part of the licence agreement, does not fall within the definition of AGR; and

(ii) Since the government is trying to get the best available price for the valuable rights that is vested on it from Section 4(1) of the Telegraph Act, the claim of violation of Articles 14 and 19(1)(g) of the Constitution does not stand.

The Tripura High Court, in 2017, while disposing off the petition by Bharti Hexacom Limited (“Bharti case”) took the exact opposite stance to the one taken by the
Madras High Court in the Aircel case. The High Court laid emphasis on the intent of formation of contract for interpreting when a provision is in contention. The Court relied on the understanding in the Migration Policy to the extent that there was confusion in relation to the calculation of AGR, the understanding in the Migration Policy cannot be foregone. It also pointed out that the provisions of a statute cannot be expanded contractually, therefore, according to Section 4 of the Telegraph Act, consideration for establishing, maintaining and working a telegraph should be related to activities for which the licence was granted.

iii. Should Non-Licensed Activities of the Company be Included in the Definition of AGR?

While the final decision on the definition of AGR is awaited, we have examined some legal and economic reasons for the Government to loosen the liability of the telecom service operators.

(a) Levy of Excessive Licence Fee in India

In the recommendations released by TRAI in relation of definition of AGR for internet service provider licences, the telecom Regulator observed that both the licence fee as well as spectrum usage charges levied by the DoT in India from the telecom operators are exorbitant in comparison to the same levied in different jurisdictions around the world. The Economic Survey 2018 reveals that the telecom sector is crippling with losses and debts due contributed by increasing competition in the market coupled with excessive fee payments to the government. The last year saw many telecom service providers like Vodafone Limited and Idea Limited, Reliance Communications Limited and Aircel Limited entering into consolidation to benefit from the economies of scale while the rising debt in the industry mounts.

Further, in this year itself a major player in the market, Aircel Limited is set to file bankruptcy.

Considering the state in which the telecom industry finds itself, the Government should provide adequate relief for its continued sustenance. Much of the Government’s programmes to digitalise the Indian economy are dependent on the participation of a host of private players in the market.

(b) Clear case of unconscionable bargain/understanding things in the same sense

The principle of unconscionable bargain is a common law principle which recognises that certain contracts or clauses in a contract are entered into in circumstances where there is an in-equal bargaining power between the parties involved. In case of contracts entered into with the State, the court has recognised that there are myriad of instances where the State can thrust upon the parties, terms and conditions which are unreasonable as well as unconscionable. The apex court in Hindustan Times vs. State of U.P observed that in circumstances where unjust condition are imposed upon parties by the State, the same will have to be examined in the light of Article 14 of the Constitution of India and Section 23 of the Indian Contract Act 1972 (“Indian Contract Act”). Thus, it is established that where the parties have no effective choice to enter into the contract or assent to a term of the contract, such action by the party with higher bargaining power will be considered as unconscionable.
In the Migration Package only one option was offered to the telecom service providers, either accept the offer to migrate or stop conducting telecom services. The telecom service providers agreed to migrate to the National Telecom Policy 1999 regime relying on the assurance of the Government that the quantum and definition of AGR will be revised later. They had entered into the licence agreement and subsequently, the definition of AGR and gross revenues introduced by the Government. Here, the Government has time and again claimed that since the licensees signed the licence agreement (with the provisional clause on licence fee) they are bound to accept the fresh clause introduced subsequently. It is apparent that since the Government held the upper hand in the distribution of licences, the licensees were not in a position to negotiate the terms of the licence agreement at any point. The clause introduced subsequently can be considered as unconscionable and is deprived of the acquiescence of the licensees.

(c) Violation of Fundamental Rights
The Government has emphatically emphasised that the licence agreements entered into with the telecom service providers are purely commercial in nature and therefore interference from either the Regulator or the judicial bodies are not warranted. In the case it was held that like any other contract, contracts entered into with the Government are governed by the Indian Contract Act, but in case of such contracts, the onus is on the Government to ensure that it conforms to the test of equality under Article 14 of the Indian Constitution. This is due to the fact that the Government is entering into a contract on behalf of the general public this casts a duty upon State to exercise greater caution to avoid loss to the public. Additionally, in the case of contracts entered into with the State, the State has an upper hand in negotiating the terms and conditions.

In the case Bharati Airtel Ltd. and Ors. vs. Union of India, the apex court observed that the licences granted under the Telegraph Act are in the nature of largesse from the State and the State has to distribute the licences is subject to the conditions of Article 14 of the Constitution i.e. the distribution must be on the basis of some rational policy. In a similar decision the Supreme Court decided that “even the language of the proviso to Section 4 of the Telegraph Act, which stipulates that the grant of licence should be “on such conditions and in consideration of such payments as it thinks fit”, must necessarily be understood that the conditions must be rational and the payments forming the consideration for the grant of licence must be non-discriminatory.”

While deciding upon the judicial interference in the realm of contracts, the Supreme Court observed that the Government must be allowed to autonomy to ensure fair play in administrative functioning. At the same time, the decisions of the Government must be scrutinised by applying Wednesbury principle of reasonableness but must also be free from arbitrariness and must not be affected by bias or actuated by mala fides and while quashing decisions, heavy administrative
burden on the administration and increase on expenditure have to be kept in view.

In the case *Kerala Samsthana Chethu Thozhilali Union vs. State of Kerala*, it was laid down that when conditions are imposed on parting with natural resources of the state by virtue of a statute, the same cannot be deviated from. The licence conditions cannot be framed to include matters that have not been contemplated under the Act. The power to impose terms and conditions therefore, are subject to the provisions of the Indian Telegraph Act, 1885 and must conform to the legislative policy. The same must not be framed in contravention of the constitutional or statutory scheme. The conditions of the licence agreement must be such which would promote the policy or secure the object of the Act. The State has no power and/or jurisdiction to realise licence fee from the licensees by including revenue generated from their non-licensed activities in AGR in exercise of its monopoly powers. Such an action will clearly be violative of Section 4 of the Indian Telegraph Act, 1885.

In *Presidential Reference on the issue of Alienation of Natural Resources*, the court identified the different treatment required to be given to different natural resources, it took the example of bundling of exploration and exploitation contracts where there is requirement of heavy capital in the discovery of natural resources. The bundling of the two contracts are legally sound and economically justified to ensure that the exploration natural resources are exploited. This will spur growth in a specific industry. In case the State plans to promote development in an industry, then the norm of maximisation of revenue from a certain resource can be deviated from.

The Telecommunication sector can be equated to the exploration sector since the amount of capital required by the industries. The telecommunication sector is capital intensive and therefore, from the above decision proves that deviation can be made from the norm that is to reduce the licence fee and other fee to foster growth in the telecommunication sector.

(d) Absence of the term ‘any other miscellaneous revenue’ in Unified Licence

The DoT came out with a new regime under latest National Telecom Policy brought out in 2012, the policy unifies the various telecom services under one umbrella licence and there are separate services within the licence. The Unified Licence was released by the DoT on August 2, 2013. Although the DoT has vehemently argued that all even the non-licensed revenue of the telecom company would fall within the definition of gross revenue while calculating AGR, in the Unified Licence, the definition of Gross Revenue for different services are devoid of the term ‘any other miscellaneous charges’. Take for examine the definition of Gross Revenue under the internet service chapter (Chapter IX) of the Unified Licence:

“The Gross Revenue shall be inclusive of all types of revenue from Internet services, revenue from Internet access service, revenue from internet contents, revenue from Internet Telephony service, revenue
from activation charges, revenue from sale, lease or renting of bandwidth, links, R&G cases, Turnkey projects, revenue from IPTV service, late fees, sale proceeds of terminal equipments, revenue on account of interest, dividend, value added services, supplementary services, interconnection charges, roaming charges, revenue from permissible sharing of infrastructure etc. allowing only those deductions available for pass through charges and taxes/levies as in the case of access services, without any set-off for related item of expense etc.”

The absence of the term ‘any other miscellaneous revenue’ from the definition of Gross Revenue renders the definition to be exhaustive with no scope of broadening the interpretation. Thus, it amply clear that the DoT itself feels that the inclusion of the total revenue of a telecom operator in the calculation of AGR is unjustifiable.

In the AUSPI case, the Supreme Court had observed that the Government was open to the option of transferring non-licensed activities of the licensee company to any other person or entity (that doesn’t hold the licence) to avoid inclusion in the calculation of AGR. The DoT therefore never had the intention to include the revenue from non-licensed activities in the ambit of AGR.

(e) Non-consideration of the recommendations of the regulator

In the Migration Policy, the Government had assured that the Government will base on final decision on the percentage of revenue share to be considered as AGR and definition of revenue on consultation with TRAI.

According to Section 11(1) (a) (ii) of the Telecom Regulatory Authority of India Act (“TRAI Act”) the power is given to the TRAI to make recommendations in regard to terms and conditions of licence to be given to the service provider. The Government is also vested with the responsibility of seeking the recommendations of the Regulator with respect to issuance of new licences to the telecom service provider. Although recommendation provided under this provision is not binding on the Government, due weightage should be given to the recommendations of TRAI. In the absence of such a consideration, the entire consultation process is futile. In a series of recommendations by the TRAI, from the year 2000 to present, the Government has refused to give due importance to the view of the Regulator.

Even in 2015, the TRAI released a new set of recommendations for definition of AGR for all licences (other than internet service provider licence). Through this recommendation, TRAI introduced the concept of Applicable Gross Revenue (“ApGR”) which can be arrived at by deducing (i) revenue from other activities other than telecom activities (ii) receipts from Universal Service Obligation funds; and (iii) items specifically given by the TRAI such as income from dividend, income from interest, capital gains, income from property rent etc. Then AGR can be arrived at by making deductions for pass through charges.
iv. Conclusion
The Government is planning to introduce the National Telecom Policy 2018, conduct the auction for 5G spectrum with the objective to attract investments to the sector and to provide telecom services to the entire population of the country. In a recent statement, the Government had expressed the fact that revenue for the coffers is a secondary concern in comparison to the overall objective increasing the digital penetration in India. Recently, the TRAI in its inputs for National Telecom Policy 2018 has again suggested that the DoT considers revising the levies and rates to be paid by the telecom service provider. Several policies on the incumbent government, including digital India, introduction of virtual network operators were brought in with the participation of private players in the forefront. However, these programmes cannot take shape without resolving the issue in relation to the definition of AGR and lowering the burden on the telecom service providers.
TRADE UNION IN INDIA, OBJECT OF THE TRADE UNION ACT, 1926 AND VARIOUS SHORT COMINGS OF THE TRADE UNIONS IN INDIA

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ABSTRACT
This research paper deals with the purpose, scheme of the trade unions Act, 1926 and various short comings of the trade union in India. Trade union can be described as an association of wage earners, formed for the purpose of collective action for the defense of its professional interest. We see in this paper, the history of the trade union, events occurred in 1st world war and 2nd world the era of pre independence in subject related to working class. The condition of the working class is very worst and we see that after the independence parliament passed certain laws for the protection of working labour. Trade union Act was passed in 1926 before independence and we know that at that time british rule was existing no proper implementation was there, after independence certain amendments were came for proper implementation. This Act provide certain provision which is benefited to the practice of trade union, such power and immunities were given to registered trade unions, rules and regulation is drawn for the registration of trade union etc. But the implementation of Act is very necessary now we see various shortcoming of the trade union because of many reasons and one of the main reasons is no proper implementation of the government plans which is drawn for the workers protection to provide education, awareness etc, and the resultant conclusion is that the present situation in India related to workers is that majority of the workers had no knowledge about trade union, migrated worker cannot attempt to join trade union because they were very poor, lack of leadership qualities is there and many more short comings and certain problems. Implementation of such Act in several areas or industry is not proper, the labour who don’t have knowledge exploit easily. Government had to takes measures for the proper implementation and awareness programme.

INTRODUCTION
For the first time an association of mill workers was formed named ‘Bombay mill hands association’ this association was formed for the relief or redressal of grievances of the Bombay mill workers, there was a beginning of the trade unionism in India can be traced back to the year 1890, when the association of the Bombay mill workers was formed. After the event of the 1st world war occurred certain problems and difficulties was arise, the cost of living is effectively increased and the existing British ruled also gaining their interest and exploit Indian workers throughout the country. At that time the increase in cost of living in the world-wide and the economic dissatisfaction among the workmen or working class particular in the industries.

The industrial unrest and the economic dissatisfaction led to numbers of strikes by workers. On the many occasions these strikes was successful in getting the demand of workers fulfilled. The trade union movement in India got drifted by success of strikes in India and the establishment of International labour organization has also
influenced the growth to the trade union movement in our country. 
After the independence democratic spirit is gradually developing the welfare state among the Indian citizens and workmen in industries. An event had got occurred in the year 1920 that in High court of madras a suit file against the officials of the madras textile labour by Binny & co, granted an injunction restraining the unions officials to induce certain workers to break their contracts of employment by refusing to return to work. Obviously the leaders of the trade union found themselves liable to prosecution and imprisonment even for bona fide trade union activation. This was the event it was felt that some legislative protection of trade union was necessary. Mr. N.M. Joshi, the general secretary of all India trade union congress successfully moved a resolution in central legislative assembly to take measure by government for protection of trade union. The employers were so much opposed to any such legislative measure being adopted that the passing of the Indian trade union Act, but effectively the Act was passed in 1926 and Act was enforced only from 1st June, 1927.

1. HISTORY OF THE TRADE UNION MOVEMENT IN INDIA.
After 19th century industrial revolution in India bring about radical changes in the western world. Furthermore, significant changes in the method of production, shipping and transportation resulted in changes in Social set-up. With the technological and scientific development in the industrial sector reach in the emergence of the two classes. The two classes that is the Managerial class (Entrepreneur’s class) and the working class (labour or wage earning class). And these both the classes strive for conflicting interests. The working class claims for the higher wages and better conditions of service, while managerial class demands the maximum production at minimum wages.

There is a conflicting interest between the managerial class and wage earning class, with regard the evolution of Industrial relations are very much influenced by the government policy related to industrial relations. To end the disputes and problems between both the classes government bring some policies and it use legislation, administrative actions, tripartite consultation and education to solve the problems and the dispute between both the classes. With such problems and disputes, disputes regarding the wages of workers, no proper facilities to workers, no proper security to workers and so on. After the trade union moment came in India which had experienced or be subjected to Industrial revolution. The basic reason for the growth of trade union moment in India during 19th century and prior to 1st World war was the lack of Industrial development in the country and such other reasons like no proper wages is given to working class, deprivation of freedom of expression, instability of labour force, no proper participation of workers, exploitation of workers, and so on under the British rule.
The real credit for the organized Labour movement in India goes to N.M. Lokhande( Narayan meghaji lokhande) known as the father if the trade union
Movement in India, the purpose of N.M. Lokhande is to create attention of Government and public towards the unfairness of textile workers of Bombay and revision of Factories Act 1881. The period from 1904-1911 was the another phase for the trade unionism in India. In this period certain trade unions is formed. The leaders of Indian national congress founded the All India trade Union Congress in the year 1920 and it was the apex organization with a hierarchical setup of the associations at the provincial and regional levels finally linking the individual unions. For the first time in 1920 all India trade union Congress represented the Indian labour at the International labour organization (ILO).

Shri N.M Joshi, the father of the modern trade unionism in India, introduced a trade Union Bill in the assembly in the year, 1921. Thus, the struggle was begin for the legal recognition of the trade union in India for the protection of the working class and their existing adverse condition at that time the British rule was existing at that time the government was unwilling to pass the bill. But due to heavy pressure from the political parties the government was compelled to enact the Indian trade union Act in 1926. After the enactment of the Indian trade Union Act 1926 the sudden occurrence of the 2nd world war arise and the 2nd world war brought some difficult conditions to the business community and the economic difficulties to the working class, and during the world war the restraint of trade Union by the government invoking the defense of India rules which prohibited strike in essential services.

So, with the attainment of the independence in 1947 it will begin with the new era of the Indian Labour movement and after the Independence, the national government promising a fair deal to the working class and passed a number of labour legislations conferring rights and benefits on industrial workers.

**TRADE UNION IN INDIA: OBJECT AND SCHEME OF THE TRADE UNION ACT, 1926.**

Trade union is a voluntary association of workers in a particular industry or a Craft. Our Indian constitution of India under article 19(1)(c) guarantees freedom of association accords recognition to workers. However, this right is not available to certain categories of jobs. For instance government servants, who cannot form trade union under the trade union Act, 1926. Tamil nadu NGO union vs registrar, trade unions, AIR 1962, madras HC held that tamil nadu union, which was an association of sub magistrates of the judiciary, tehsildars, etc, was not a trade union because these peoples are engaged in sovereign and functions of the state. Under the trade union Act, 1926 a registered trade union enjoys certain privileges and immunities. The Indian trade unions Act was passed in 1926 and it came into force from 1st June, 1927. As we know at that era when the law (Indian trade union Act, 1926) was passed there was an British rule existing and the act itself identical to the English trade union law. After the independence an Amendment came in 1964 by the Indian
trade Unions (amendment) Act, 1964 the word ‘Indian’ has been deleted and Act is entitled as “the Trade Unions Act, 1926”.

OBJECT OF THE TRADE UNIONS ACT, 1926.
The main object of the Act is to provide machinery for the registration of the trade unions. The term trade union used in the Act is not only confined to the workers union but also includes employers association as well according to section 2(h) of the trade union Act, 1926. The definition of the trade union under section 2(h) is very wide and since it covers not only workers union but also employers unions/associations. The Act also prescribes the object for which a trade union may spend and generate its general funds and also provides for the constitution of a separate fund for the political purposes. Its main object is to ensure industrial harmony, proper functioning and peacefully assemble without any dispute. And in the provisions of the trade unions Act the registered trade unions are protected from various civil and criminal liabilities under certain situations.

TRADE UNION : MEANING AND DEFINITION
The trade union is commonly understood as ‘an association of wage earners/workers’. It is a voluntary association of workers in a particular industry or a craft. According to Chambersii, “A trade union is an association of wage earners, formed primarily for the purpose of collective action for the forwarding defence of its professional interest.

According to L.J. hanson, A trade union is essentially an organization of the workers. In the words of the N.M. joshi, a well known trade unionist, “a trade union is essentially an organisation of the employees, not of employers, not of co-partners, not of independent workers”. Webbs, define trade union as, “it is a continuous association of wage earners for the purpose of maintaining or improving the conditions of their working lives”. Sec. 2(h) ii “Trade Union" means any combination, whether temporary or permanent, formed primarily:

(a) for the purpose of regulating the relations between:

(i) workmen and employers or

(ii) between workmen and workmen,

(iii) or between employers and employers,

(b) imposing restrictive conditions on the conduct of any trade or business, and includes any federation of two or more Trade Unions:

INGREDIENTS OR ELEMENTS OF TRADE UNION:
To constitute trade union –
- there must be combination of workmen or employers;
- there must be of Business; and
- the main object of the union must be to regulate relations of employers and employees pr to impose restrictive conditions on the Conduct of any trade or business.

The definition of the trade union under Sec. 2(h)ii is too wide since it covers not only workers unions but also employers unions/associations. As express by N.M. Joshi a well known trade unionist, a trade
union should refer only to workers organisations.

RECOGNISATION OR IDENTIFICATION OF THE TRADE UNION

There is no provision under the trade Unions Act, 1926 for reorganization of the trade unions. The trade union (Amendment) Act, 1947 made provisions for the recognition of the trade unions by agreement and by order of court subject to fulfillment of such conditions. But the Act has not been implemented. Later the trade union bill, 1950 also provided for recognition where application was made by more than one union, but the bill was lapsed on the dissolution of parliament, again an attempt were also made to amend the trade union Act, 1926 in 1950 in the parliament providing for the inspection of books of trade unions by the registrar of trade unions. But this bill also lapsed with the dissolution of parliament. The Bombay industrial relation Act, 1946, the Madhya Pradesh and Rajasthan state Act provide compulsory recognition. On 06-09-1999 the central government had decided to give recognition to trade unions as central trade union for the purpose of representation in the world organisations and international conferences if the unions fulfills the following conditions:

- The union has a minimum of five lakhs memberships as on March, 1997.
- The union must have members from at least four states.
- The union must have membership at least in four industries

The central chief commissioner will make verification relating to the fulfillment of the above mentioned conditions.

RIGHTS OF RECOGNISED UNION

A trade union which is statutorily recognised must be entitled to the following additional privileges and rights compared to an unregistered union:

- The right to sole representation of the workers in any collective bargaining;
- To raise issue and enter into agreements with employers on general questions concerning the terms and conditions of employment;
- To collect membership fees and subscriptions payable by members to the union within the premises of undertaking or demand check off facility;
- To put up notice board in the premises of the undertaking and affix notices relating to meetings, statements of accounts and other announcements;
- To nominate representatives to grievance committee or statutory and non-statutory bipartite committees.
- To discuss with the employer the grievances of the workers.

The recognition of a trade union is different from its registration. A trade union registered under this Act is entitled to all the protections and rights given by the Act.

REGISTRATION OF TRADE UNION

For the permanent growth and stable unions, unions is encouraged by relying on the device of registration. A registered trade union is entitled to get some benefits and protection under the Act. Therefore the supporters of the trade union are prompted
to get their union registered under the trade union Act, 1926.

Chapter-2 of the trade Union Act, 1926, containing sections 3 to 14 lays down the provisions relating to the registration of the trade unions. Registration is a good device to ensure growth of permanent and stable unions. Registration of trade union is not compulsory, but the registration is desirable because a registered trade union enjoys certain privileges and immunities. Similarly, the rights and privileges are conferred on the members of a registered trade union. In other words, the members of a registered trade union are entitled to get protection, immunities, exemption from certain civil and criminal liabilities. However, it is to be noted that an individual dispute becomes an industrial dispute only when it is represented through a body of workmen or trade union, registered or not. Similarly, a civil servants union cannot be registered under the trade union Act.

In this case, the high court of madras on appeal by the N.G.O’s union dismissed the appeal. In this case, application for registration of the N.G.O’s union was refused by the registrar of the trade union on the ground that the unions of civil servants could not be registered under the trade union Act. Highcourt dismissed the appeal on the ground that, to get the union registered under the trade union Act, the members of the union must be workmen engaged in trade, business or industry and the applicants do not have such capacity, since they are civil servants engaged in the tasks of the sovereign and legal aspects of the state.

In the case, the Calcutta high court held that employees of E.S.I. Corporation would come within the meaning of workmen and hence, they could be registered under the trade unions Act.

PROCEDURE AND FORMALITIES FOR REGISTRATION

Chapter 2 containing sections 3 to 14 of the trade Union Act, 1926 and the central trade union regulations, 1938 containing 17 rules and forms A, B, C provide for the procedure for the registration of the trade union.

REGISTRATION (Sec. 3 and 4):

Empowers the appropriate government to appoint the registrar of trade union for each state:

The appropriate Government may appoint as many Additional and Deputy Registrars of Trade Unions as it thinks fit for the purpose of exercising and discharging, under the superintendence and direction of the Registrar, such powers and functions of the Registrar under this Act as it may, by order, specify and define the local limits within which any such Additional or Deputy Registrar shall exercise and discharge the powers and functions so specified.

Mode of registration

Any seven or more members of a Trade Union may, by subscribing their names to the rules of the Trade Union and by otherwise complying with the provisions of this Act with respect to registration, apply for registration of the Trade Union under this Act.

Application for registration

Every application for registration of a Trade Union shall be made to the Registrar, and shall be accompanied by a copy of the rules of the Trade Union and a statement of the following particulars, namely:--
- the names, occupations and addresses of the members making the application;
- the name of the Trade Union and the address of its head office; and
- the titles, names, ages, addresses and occupations of the office-bearers of the Trade Union.

A trade union is not entitled to registration unless the executive thereof is constituted in accordance with the provisions of the Act.

POWER OF REGISTRAR TO CALL FOR FURTHER INFORMATION

Section 7 of the Act empowers the registrar to call for further information and may suggest necessary changes with regard to name of the trade union. Power to call for further particulars and to require alteration of name.

REGISTRATION

According to section 8 of the Act, the registrar on being satisfied, registers the trade union by posting necessary entries in a register, and issues certificate to that effect under section 9 of the Act.

EFFECTS OF REGISTRATION

Incorporation of registered Trade Unions

Every registered Trade Union shall be a body corporate by the name under which it is registered, and shall have perpetual succession and a common seal with power to acquire and hold both movable and immovable property and to contract, and shall by the said name sue and be sued.

CANCELLATION OR WITHDRAWAL OF REGISTRATION

A certificate of registration of a Trade Union may be withdrawn or cancelled by the Registrar on the following grounds-

(a) if the certificate has been obtained by the trade union
- by means of fraud; or
- by mistake; or
- if the trade union is not in existence; or
- if the trade union has contravened any provision of the Act willfully; or
- if the trade union has incorporated any rule in its rules, which is inconsistent with the provisions of the Act.

Where the registration is cancelled or withdrawn on the application of the trade union, the registrar must satisfy himself, before granting such order. Where the withdrawal or cancellation of registration is for any other reasons, the registrar must give two months’ notice specifying the grounds on which it is proposed to be withdrawn or cancelled the certificate of registration.

PRIVILEGES AND IMMUNITIES OF A REGISTERED TRADE UNION

The registered trade unions have certain privileges and immunities. Registration of trade union is not compulsory/mandatory. In other words it is optional. Similarly, the members of the trade union also are entitled to these benefits; enjoy privileges and immunity, exemption from certain civil and criminal liabilities. The trade unions Act, 1926 provide certain privileges and immunities to the members/leaders of the registered trade unions. The immunities or privileges of the registered trade unions may be explained with reference to the following heads:
a. CIVIL LIABILITY

IMMUNITY FROM THE CIVIL LIABILITY.
This immunity is available to registered trade union, any office bearer or its member. No civil suit lie against them for an Act, done in connection with a trade dispute on the ground that:
- Such act induces some other person to break a contract of employment; or
- It interferes with the trade or business or employment of some other person.

Further the inducement should be lawful means and not prohibited by the law of land. There is no immunity against violence, threats or any other illegal means.

In the case of Kerala high court held, it was held that strike per se is not an actionable wrong. Further, it was held that the trade union, its officers, and its members are immune against legal proceedings linked with the strike of workmen by the provisions of section 18.

In the leading case of Patna high court held, it was held that employers do not have the right to claim damages against the employee participating in an illegal strike and thereby causing loss of production and business.

b. CRIMINAL LIABILITY

Criminal conspiracy in trade disputes – According to section 17 of the trade unions Act, 1926, the office bearers of the registered trade union are immune from criminal liability for criminal conspiracy. English law defines conspiracy as ‘an agreement of two or more persons to do an illegal act or a legal act by an illegal means’.

Section 120A of the Indian penal code, 1860, defines criminal conspiracy reads as follows:

“when two or more persons agree to do, or cause to be done-
1. An illegal Act, or
2. An Act which is not illegal by illegal means, such an agreement is designated as a criminal conspiracy,”

The trade union Act, 1926, gives immunity to registered trade union, this immunity is partial in the sense that it is available only with respect to the legal agreements created by the members of trade union for the stimulation of valid objects of a trade union. Registered Trade Unions have certain rights to do in stimulation of their trade disputes.
such as calling for strike, persuading members. Illegal act includes all Acts which provide ground for civil action. Thus for example, two men who agree to persuade workmen to break their contract with their employers are guilty of criminal conspiracy but section 17 of trade union Act, 1926, protects the trade unionist from criminal conspiracy where the agreement into which they have entered is not an agreement to commit an offence.

In the case of West India Steel Company Ltd. vs Azees 1990 Kerala, a trade union leader block or shut off work inside the factory for 5 hours leader was protesting against the delegation of a workman to work another section. It was held that while in a factory, the worker must submit to the instructions given by his superiors. A trade union leader has no immunity against disobeying the orders. A trade union leader or any worker does not have any right by law to share managerial responsibility.

MINOR AS A MEMBER OF TRADE UNION

Section 21 empowers a trade union to admit a minor who has attained the age of 15 years, as a member of trade union. The minor so admitted shall enjoy all rights and privileges, as are enjoyed by other members. He can utilize the right to vote. But he is not entitled to become office-bearer of the trade union, until he has attained the age of 18 years.

COLLECTIVE BARGAINING

Collective bargaining or negotiation is one of the methods for settlement of an industrial dispute. It plays significant role in promoting labour management relation and in ensuring industrial harmony. Collective bargaining is a process/method by which problems of wages and conditions of employment are settle peacefully and voluntarily between labour and management. In collective bargaining, the parties to the dispute that is the employer and workmen/employees settle their disputes by mutual discussions and agreements without the intervention of a third party. Such settlements are called bipartite settlements.

Therefore settlement of labour disputes by direct negociation or settlements through collective bargaining is always preferable as it is the best way for the betterment of labour disputes. Collective bargaining is recognized as a right of social importance and greater emphasis is placed on it by India’s five year plans.

GENERAL FUND AND POLITICAL FUND

Every registered trade union acquires certain rights and privileges on registration. As such, a registered trade union is entitled to maintain two kinds of funds namely:

- General fund
- Particular fund.

GENERAL FUND

According to section 15 of the Trade union Act, 1926, a registered union can create a general fund. Members of the trade unions
have to contribute, to the general fund. The fund can be utilized only for the purpose authorized by section 15 of the Act. The following purpose for which the general fund may be spend:

(i) The payment of salaries, allowances and expenses to office-bearers of the Trade Union;
(ii) the payment of expenses for the administration of the Trade Union, including audit of the accounts of the general funds.
(iii) The expenses in connection with prosecution or defense undertaken for the purpose of securing or protecting any rights of the trade union.
(iv) The conduct of trade disputes on behalf of the union or any member.

POLITICAL FUND

A registered trade union can create a separate fund for the purpose of promoting civic and political interests of its members. A registered trade union is not entitled to utilize its general funds for political causes of its members. For the political causes the trade union must create a separate political fund. The contribution to such fund must be collected separately.

- The payment of any expenses incurred, either directly or indirectly, by a candidate or prospective candidate for election as a member of any legislative body or of any local authority. The expenses includes the expenses incurred before, during or after the election in connection with his candidature.
- Maintenance of any person who is a member of any legislative body or of any local authority.
- The registration of electors or the election of a candidate for any legislative body or any local authority;
- The holding of political meetings of any kind, or the distribution of political literature or political documents of any kind to the members of the trade union.

RIGHTS, DUTIES AND LIABILITIES OF REGISTERED TRADE UNIONS

RIGHTS: the rights of registered trade union may be explained with the reference to the following heads-

Right of Admission: right to admission as a member in the trade union is not absolute right. A trade union may impose certain restrictions, qualifications for admissions subject to the provisions of the trade union Act and the rules and any other law in force.

Right of representation: A trade union can make a representation on the behalf of the employee or individual dispute, if such employee give written statement. With that statement, a trade union make representation before any conciliation officer, industrial tribunal, labour courts etc.

Right to contract: it can enter into contracts on its own name, being ait is a legal person.

Right to own property: it can purchase and own movable or immovable property on its own name.
(v) **Right to sue**: A trade union is a juristic person it can sue employer or any other person, it can argue before any labour court, authorities, and on behalf of itself, or it can argue on behalf of its members.

(vi) **Right to inspect books**: There is a valuable right to the members of the trade union or the office bearers, they can inspect the book of account at such time and this right is given under section 20 of the trade union Act, 1926. However they have no right to take copy of books.

(vii) **Right to Amalgamate**: According to section 24 of the Act, two or more registered trade unions may become amalgamated as one trade union with or without dissolution or division of funds of such unions.

**DUTIES AND LIABILITIES:**

The trade unions Act, 1926 imposes the following duties and liabilities on a registered trade union:

- The act imposes on a registered trade union, duty to spend the fund (general fund and political fund) allotted for the purpose.
- Every registered trade union must send annually to the registrar in the following matters:
  - A general statement, audited in proper manner of all receipts and expenditure during the year ending 31st December,
  - An audited statement of its assets as on year ending 31st December.
  - A statement showing change of office bearers or members made by the trade union during the year,
  - A copy of the rules of the trade union amended up to date.
  - Whenever any alteration is made in the rules of the registered trade union, a notice regarding altered rules must be sent to registrar within 15 days of such alteration.
  - When failure to submitted returns or give notice, shall make every office bearers or other person bound is liable to pay fine which may extend to Rs.5 and not exceeding Rs.50.
  - Any person who gives false information to any member of registered trade union with an intention to deceiving him is liable to punished with fine may extend to Rs.50.
- While selecting (or electing) a person as a member as a member of the executive committee or for any other office it must be seen that such person has completed the age of 18 and there was no conviction on him for any offence. And if such conviction and a period of five years has elapsed since his released then he is qualified for those post.
- A minister or a person holding an office of profit in union or state not be selected as the member of the executive or office bearer of a registered trade union(2001 Amendment).

**AMALGAMATION OF TRADE UNION:**

According to section 24 of the Act, two or more registered trade unions may become amalgamated as one trade union with or without dissolution or division of funds of such unions. Section 25 lays down the procedure for the amalgamation that notice is to be served to the registrar of other state/states also, and section 26 speak about the effects about the amalgamation that the
change in name does not affect the rights and obligation.

DISSOLUTION OF TRADE UNION
Section 27 of the Trade Union Act, 1926, deals with the dissolution of the registered trade union. Where a trade union is registered, a registered trade union may be dissolved at any time. Notice of such dissolution signed by secretary and any other 7 members must be sent to the registrar within 14 days of dissolution. If the registrar is satisfied that the dissolution has been effected in accordance with the rules of the trade union, the registrar will register the fact of dissolution. The dissolution will come into effect from the date of such registration. And where the trade union's rules provide for the division of funds, the division of funds should be made in accordance with such rules.

If the trade union is unregistered the rules do not provide for dissolution, then it may be dissolved with the consent of all the members, or by the order of the court.

SHORTCOMINGS OF TRADE UNIONS
- The multiplicity of the unions in the same industry lead to division among workers and the existence of rival unions is responsible for unhealthy growth of trade union, in this situation employers take advantages at the time of collective bargaining and exploit working class.
- Before independence there were only few industries were existing in country, employers that is managerial class paid very low wages to the workers making their economic condition worst and in present situation same problem is existing, therefor workers are unable to pay subscription member fee for the trade union and never join the trade union.
- Mostly trade unions in our country were very small because of the small unions members cannot make efficient pressure on government or industries to fulfill their demands and requirements.
- The implementation of trade unions rules and regulations of the trade union Act is not effectively and efficiently implemented, for this working class suffers certain problems.
- Establishment of trade union is because of dispute between employer and employee, so the working class of trade union have to face opposition from employers, so the employers try to discourage and given bribe to the union officials.
- Some migrated workers would get jobs through contractors and the contractors is a supporter of a industries or any establishment, the migrated workers are is a need of economic facilities and the basic requirements for fulfillment of their needs so they do not try to join a membership of trade union and cannot go against the managerial class because they were totally depend on managerial class.

CONCLUSION
In the above research conclusion is that the present situation in India related to workers is that majority of the workers had no knowledge about trade union, about their rights and so they are exploited easily. Trade union is an association of workers where all the workers are fight for their rights who had exploits their rights. The formation of trade union is very necessary for the working class but with the shortcomings of the trade union unhealthy growth of trade union takes
place. Illiteracy of workers is a big problem and the exploitation of working class is increasing day by day. Another problem is no proper implementation of such Act in several areas. Big industries have a low percentage of dispute but in small industries we see that the percentage of disputes is very high. So for the protection of the working class government had to bring some policies, awareness programme for workers relating trade union and their rights, effective implementation of the Act should be there on the part of government and protect the rights of the workers and their security.

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IMPACT OF GOVERNMENT OF INDIA ACT, 1935 ON THE INDIAN FEDERAL STRUCTURE

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Abstract

The Government of India Act, 1935 provides for the establishment of federation of India for establishing a constitutional government in India. It laid the foundation of the Indian federal structure. It is considered as the milestone in the development of a responsible constitutional government in India. In the Constitution of India, many provisions from this Act are adopted. The Constitution of India has both unitary & federal features. In India, a federal system of government has been adopted because a federal system is more effective as compared to a unitary one when the size of the territory of the country is as large as India & when diverse groups of the population of the country reside in a discrete territorial concentration as in India. This paper deals with the impact of Government of India Act, 1935 on the Indian federal structure. The Indian federal structure is based on the Government of India Act, 1935. Most of the provisions of this Act are adopted in the Indian Federal Structure because they are suitable for India. They are adopted after modifying them according to the requirements of India.

Introduction

With the achievement of Independence, there emerged the need of a Constitution. The Constitution of India is the fundamental & supreme law of India. All the laws in India must be consistent with the provisions of the Indian Constitution. If any law is against the provisions of the Indian Constitution, then it can be declared as void. In the Indian Constitution, different provisions has been adopted from the Constitutions of different countries according to the needs of India. The framers of the Indian Constitution adopted the best features of the different Constitutions of the world.

Before India achieved independence on 15th August, 1947, it was being ruled by the Britishers. The British rule was a foreign rule & it failed to meet the aspirations & just demands of the Indians. Thus, national movements were started by the Indians to end Britishers’ exploitation & attain independence. The British Parliament passed many acts from time to time such as Government of India Acts 1919 & 1935. It enacted the Indian Independence Act, 1947 to enable India to attain independence & to make certain temporary provisions. The lengthiest Act passed by the British Parliament was the Government of India Act, 1935 which provided for the distribution of powers, Indian federal structure, responsible form of government, provincial autonomy, bicameral system at the Centre and in some states, discretionary & emergency powers of the governors and governor-general. In the Indian Constitution, these provisions were adopted after modifying them according to the needs of India.
Thus, the Government of India Act, 1935 also influenced the Indian Constitution. The Indian federal structure is based on the Government of India Act, 1935. Most of the provisions of this Act were adopted in the Indian Federal Structure.

**Government of India Act, 1935**

The Government of India Act, 1935 was enacted by the British Parliament in August, 1935. It was the longest act passed by the British Parliament at that time. The main objective of this Act was to bring good governance in India & to ensure participation of Indians in governance of British ruled India. The Government of India Act, 1935 is considered as the milestone in the development of a responsible constitutional government in India. It was a lengthy document having 321 sections with 10 Schedules. The basic features of the Act are as follows:

1. **The All India Federation.**

The Government of India Act, 1935 made a provision for the establishment of an All India Federation consisting of the British India Provinces & such Indian State who would desire to come into the Federation. Under all the previous Government of India Acts, the Government of India was unitary, but the Government of India Act, 1935 envisaged a Federation taking the Provinces & the Indian States as one unit. However, the accession of the States to the Federation was optional. It could not be created until the States had provided their consent to join the Federation. At the time of joining it, each ruler of the State was required to sign an Instrument of Accession stating therein the extent to which it assented to surrender its authority to the Federal Government. The Rulers of Indian States never provided their assent & therefore, the Federation proposed by the Government of India Act, 1935 never came into existence.

2. **Dyarchy at the Centre.**

The Government of India Act, 1935 abolished Dyarchy at the Provincial level & introduced it at the Centre. The Executive power of the Centre was vested in the Governor-General. The Federal subjects were divided into two categories- the reserved & the transferred. The reserved subjects like external affairs, defence, ecclesiastic affairs & tribal areas, were to be administered by the Governor-General in his discretion with the help of Councillors appointed by him who were not responsible to the Federal Legislature whereas the administration of transferred subjects was to be done by the Governor-General who was required to act on the advice of the Council of Ministers who were responsible to the Federal Legislature. However, even in regard to this later sphere he could act against the advice provided by the ministers, if any of his special responsibilities were involved. As regards the special responsibilities, he was required to act under the control & direction of the Secretary of State for the Crown.

3. **Provincial Autonomy.**

The significant feature of the Act of 1935 was that it marked the beginning of Provincial Autonomy. The Act of 1935
distributed Legislative power between the Central & Provincial Legislatures & within their defined sphere, the Provinces were not delegates of the Central Government but were independent units of administration. To this extent, the Government of India assumed the role of a Federal Government in relation to the Provincial Governments, though the Indian States did not join the complete scheme of Federation. The executive power of a Province was also exercised by a Governor on behalf of the Crown & not as subordinate of the Governor-General. The Governor was to act on the advice of ministers who were responsible to the Legislature.

But in spite of the Provincial Autonomy, the Government of India Act, 1935 retained the control of the Central Government over the Provinces in certain matters in which the Governor was required to act in his discretion or in the exercise of his individual judgement in certain spheres. In such matters, the Governor was required to act without the advice of ministers & under the control & directions of the Governor-General & through him of the Secretary of State.


The Federal Legislature was to comprise of two Houses, the Legislative Assembly & the Council of States. The Council of States (Upper House) was to comprise of 260 members, out of which 104 members nominated by the rulers were to represent the Indian States, 6 members to be nominated by the Governor-General & 150 members elected directly (Out of 260 members, 156 members were to represent the British Indian Provinces & 104 members were to represent the native Indian States.). The Legislative Assembly (Lower House) was to comprise of 375 members, 250 of British Indian Provinces & 125 representing the Indian States. Its term was, unless dissolved earlier, 5 years. The powers of the Federal Legislature were extremely limited. They had in general equal powers but demands of supply of votes & financial Bills were to originate in the Legislative Assembly. If there was any difference between the two Houses, the Act of 1935 made a provision for a joint session of the two Houses for solving the deadlock.

5. Provincial Government.

The Provincial Executive was to comprise of the Governor & a Council of Ministers to advise him. The Governor was the head of the Executive. Three types of powers were provided to the Governor: (i) Discretionary; (ii) Powers exercised in his individual judgement; (iii) Powers to be exercised on the advice of the ministers. However, in regard to matters involving his special responsibility he could act against the advice provided by the ministers.

6. Provincial Legislatures.

After this Act, the Legislatures of Bombay, Bengal, Madras, Bihar, Assam and the United Provinces were made bicameral (i.e., two houses) and in other five Provinces unicameral. The composition of the Provincial Assembly varied from Province to Province. The voting qualifications for the membership of the Council were not the
same in all Provinces. The principle of communal electorate was preserved in the election of the members of the Assembly. The normal duration of the Assembly was of five years. The Provincial Legislature could make laws on the subjects provided in the Provincial List. They also had power to make laws on the subjects provided in the Concurrent List. They also had power to make laws on those residuary subjects which were assigned to them by the Governor-General. The previous sanction of the Governor & Governor-General for introducing almost all the Bills was obligatory. Financial Bills could only be introduced on the recommendation of the Governor. Bill passed by the Legislature could not become an Act without the assent of the Governor. The Governor could return Bills for reconsideration. The discretionary powers & the responsibilities of the Governor made him to act as a dictator in the Provinces.

7. Distribution of Legislative power between the Centre & the Provinces.

The Act provided for a three-fold distribution of power between the Centre & the Provinces- Federal List, Provincial List & Concurrent List. The Federal Legislature had exclusive power to make laws over the subjects enumerated in the Federal List. The Federal List comprised of 59 subjects. These subjects were subjects of national importance & essential & vital for the existence of the Federation. The most significant of them were currency & coinage, census, external affairs, military, naval & air force, etc. The Provincial Legislature had exclusive power of legislation over the subjects enumerated in the Provincial List. It comprised of 54 subjects which were subjects of local importance. The main amongst them were, provincial public services, education, police, etc. The Federal & Provincial Legislatures were to have concurrent powers to make laws over the subjects enumerated in the Concurrent List. The subjects in the Concurrent List were of a provincial & local nature but needed a uniform policy throughout India. It comprised of 26 subjects. Criminal law, civil procedure, criminal procedure, arbitration, marriage & divorce, etc. were most important subjects amongst them.

The Federal Legislature could make laws with respect to the subjects mentioned in the Provincial List, if a proclamation of emergency was made by the Governor-General. The Federal Legislature also had the power to make laws with respect to a Provincial subject, if the Legislatures of 2 or more Provinces desired this in their common interest. If there was repugnancy in the concurrent field, a Federal law prevailed over a Provincial law to the extent of the repugnancy. However, if the provincial law received the assent of the Governor-General or of his Majesty, having been reserved for the consideration of this purpose, the provincial law was to prevail. The residuary power of legislation in the Act was not vested in either of the Legislatures, Federal or Provincial. However, the Governor-General had power to authorise, either the Federal or the Provincial Legislature to make a law with respect to any matter which was not mentioned in any of 3 Legislative Lists.
8. The Federal Court.

The Government of India Act, 1935 made a provision for the establishment of a Federal Court. The Federal Court consisted of 1 Chief Justice & not more than 6 other Judges. The retiring age of these Judges was 65 years. The Act also provided the necessary qualifications for the Judges. The Judges were appointed by the Crown. The Federal Court had 3 kinds of jurisdiction that is original, appellate & advisory.

It had exclusive original jurisdiction in any dispute between the Federation & its units or the units inter se. The appellate jurisdiction of the Federal Court extended to appeals from the judgement of any High Court in India to the Federal Court, if the High Court certified that the case involved a substantial question of law regarding the interpretation of the Government of India Act, 1935 or any Order in Council made thereunder. An appeal could be filed before the Privy Council from the decisions of the Federal Court. The Federal Court had also advisory jurisdiction. The Governor could refer any question of law to the Federal Court to obtain its opinion whenever he liked to seek its advice.

The Government of India Act, 1935 came into force with regard to the Provinces on 1 April, 1937. However, the Central Government continued to be governed according to the provisions of the Government of India Act, 1919, with minor amendments. The election took place & popular ministries came into office in the Provinces. However, they lasted only for 2 years.

Indian Federal Structure

Constitution of a country is either unitary or federal. In India, a federal system of government has been adopted because a federal system is more effective as compared to a unitary one when the size of the territory of the country is as large as India & when diverse groups of the population of the country reside in a discrete territorial concentration as in India. The federal system can ensure unity of the country while assuring autonomy in matters of local importance.

For understanding the true nature of the Indian federal system, it is necessary to understand as to what is implied by a federal system & what its essential characteristics are.

A federal constitution is a constitution in which the powers are divided between the Federal & the State Governments & both are autonomous in their allotted sphere & not subordinate to one another. Such type of constitution prevails in the USA, Mexico, Brazil & many more larger countries.

K.C. Wheare says, “In a federal Constitution the powers of government are divided between government for the whole country & governments for parts of the country in such a way that each government is largely independent within its own sphere.”

A unitary constitution is a constitution in which the powers of the Government are centralised in one government namely, the Central Government. The provinces are subordinate to the Centre. Such type of
constitution prevails in the UK, France, China, Japan & a good number of other countries.

**Essential characteristics of a federal Constitution**

1. **Distribution of Powers.**

   It is an essential characteristics of federalism. Federalism can be defined as the distribution of the powers of the country between the Federal (Central) & the State Governments. Both are autonomous in their allotted sphere & not subordinate to one another. The basis of such division of powers is that in matters of national importance such as currency, external affairs, defence, etc., in which a uniform policy is required in the interest of the States, authority is entrusted to the Union & matters of local importance such as police, education, health, etc. remain with the States. The basic principle of federalism is that the legislative, executive (administrative) & financial powers are divided between the Centre & the States not by any law enacted by the Centre but by Constitution itself.

2. **Supremacy of Constitution.**

   A federal country derives its existence from the Constitution. Thus, every power, legislative, executive or judicial whether it belongs to the nation or to the individual State is subordinate to & controlled by the Constitution. In a federal country, the Constitution is the supreme law of the country. It has higher status than the ordinary laws of the country. All the laws enacted by the legislature must be consistent with the provisions of the Constitution. If Government is to be federal, the supremacy of Constitution is essential.

3. **A Written Constitution.**

   A federal constitution must necessarily be a written Constitution. The supremacy of the Constitution can only be maintained if the provisions of the Constitution have been reduced to writing in a document or collection of documents.

4. **Rigidity.**

   A federal constitution must also be rigid. Rigid Constitution is that which cannot be amended in the same manner as the ordinary laws. It means a special procedure is required for its amendments & the procedure of amendment is very difficult & complicated. It will be practically impossible to maintain the supremacy of the Constitution unless the method of amendment is rigid.

5. **Independent Judiciary.**

   In a federal country, the supremacy of the Constitution is necessary for the existence of the federal system. Federal Constitution involves a distribution of powers between the Central & State Governments. Such distribution is made by a written Constitution which is the Supreme Law of the country. It is possible that the disputes might arise between the Centre & the States regarding their respective powers. Thus, it is necessary to maintain this distribution of powers between the two levels of
Governments. Thus, for maintaining the supremacy of the Constitution, there must be an independent & impartial judiciary to decide disputes between the Centre & the States or the States \textit{inter se}. In a federal country, the judiciary has the final power to interpret the Constitution & guard the provisions of the Constitution. The judiciary has the power to declare any law unconstitutional, if it contravenes any provision of the Constitution.


A federal constitution makes provision for bicameral legislature. The Upper House of Legislature provides representation to the States & the Lower House of Legislature provides representation to the people.

The Constitution of India has all the essential characteristics of a federal Constitution mentioned above.

It establishes a system of double Government with the Central Government at one level & the State Government at the other. There is a distribution of powers between the Central & the State Governments. Each level of Government is independent in its own sphere. There are three lists mentioned in the Seventh Schedule of the Constitution of India, i.e., the Union List, the State List & the Concurrent List. The Union List contains subjects of national importance such as defence, foreign affairs, banking, currency, etc. which are entrusted to the Union. The State List contains subjects of local importance such as police, agriculture, forest, etc. which are entrusted to the States.

The Concurrent List contains subjects of common interest to both the Union & the States, such as marriage, divorce, adoption, succession, etc. which are entrusted to both the Union & the States.

The Indian Constitution is written. It is also supreme. The Constitution of India makes provision that some amendments require a special majority. Such an amendment has to be passed in each House of Parliament by a majority of the total membership of each House & by a majority of not less than two-thirds of the members of that House present & voting. But, in addition to this process, some amendments must be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President of India for assent. Since in the Indian Constitution, important amendments can be made through this procedure, it can be called rigid.

The Indian Constitution establishes a Supreme Court to decide disputes between the Centre & the States or the States \textit{inter se} & to interpret finally the provisions of the Indian Constitution.

It also makes provision for bicameral legislature at the Centre which consists of the House of the People (Lok Sabha) & the Council of States (Rajya Sabha). The House of the People mainly consists of the elected representatives of people & the Council of States mainly consists of the representatives elected by the State Legislative Assemblies.
The above characteristics of the Indian Constitution indicate that it is federal in form. However, in certain circumstances the Indian Constitution empowers the Centre to interfere in the matters of State & therefore, places the States in a subordinate position which violates the principle of federalism. The Constitution of India makes provision for a federal system of government. However, the word ‘federation’ has nowhere been used in the Indian Constitution. Article 1 of the Constitution of India describes India that is Bharat as a ‘Union of States’. This expression implies two things: (i) the Indian federation is not the outcome of an agreement among the States. (ii) the States cannot secede from the federation. In fact, the States of India not have any independent existence of their own.

In the following matters, the Constitution of India contains the modification of the principle of federalism:

1) Appointment of Governors.

The President appoints the Governors of the States who are answerable to him. They hold office during the pleasure of the President. The Governor is the constitutional head of the State who normally acts on the advice of his Ministers. The executive power of the State is vested in the Governor. The Governor is the agent of the Centre in the States. Under Article 200 of the Indian Constitution, the Governor has the right to withhold his assent to a bill passed by the concerned State Legislature & he can also reserve the bill for the assent of the President. This enables the Centre to exercise control over the States.

2) Parliament’s power to legislate in the national interest.

Under Article 249 of the Indian Constitution, Parliament has power to make laws with respect to any matter mentioned in the State List, if the Council of States (Rajya Sabha) passes a resolution by two-third majority that it is necessary in the national interest.

3) Parliament’s power to form new States & alter boundaries of existing States.

Under Article 3 of the Indian Constitution, Parliament may form new States. It may increase or diminish the area of any State & it may alter the boundaries or name of any State. Thus, the very existence of the State depends upon the Centre.

4) Single Citizenship

The Indian Constitution provides for only a single citizenship for the whole of India, i.e., the citizenship of India. There is no State citizenship. However, usually the federal constitutions make provisions for dual citizenship, i.e., national & State citi- zships.

5) Emergency provisions.

The Indian Constitution provides for 3 types of emergencies: (i) emergency caused by war or external aggression or armed rebellion (Article 352); (ii) emergency caused by failure of constitutional machinery in States (Article 356); & (iii)
financial emergency (Article 360). When the proclamation of emergency is made under Article 352, the normal distribution of powers between the Centre & the States undergo a vital change. Parliament is authorised to enact laws with respect to any matter mentioned in the State List. The Centre is authorised to give directions to any State as to manner in which the executive power of the State is to be exercised. Also, the President may by order direct that all or any of the provisions of Article 278 to 279 relating to distribution of revenue between the Centre & the State shall take effect with such modifications or exception, as he thinks fit. Under Article 356, if the President is satisfied that Government of a State cannot be carried on in accordance with the provisions of the Constitution, he has the right to dismiss the State ministry & dissolve the Legislature & assume all the functions of the State. Hence, the normal distribution of powers between the Centre & the States, which is the fundamental element of a federal constitution, is completely suspended. These provisions enable the Centre to convert India into a unitary State which vitally affects the federal nature of the Constitution of India.

6) Single Constitution for Centre & States.

In India, there is a single constitution for the Centre & the States. Usually, in federations, the States have their own constitution separate from that of the Centre. However, the States of India have not been allowed to frame their own constitutions. Also, they have no power to initiate an amendment to the Indian Constitution. Such power vests entirely in the Indian Parliament.

Thus, the Indian Constitution is neither purely federal nor purely unitary but is a combination of both. It incorporates the principle that in spite of federalism, the national interest should be paramount. Therefore, the Constitution of India is mainly federal with unique safeguards for enforcing national unity & growth. It can be called as federal in form but unitary in spirit. Thus, the Indian Constitution is described as quasi-federal. India can be called as a unitary State with subsidiary federal features rather than a federal State with subsidiary unitary features.


The impact of Government of India Act, 1935 on the Indian Federal Structure can be studied under the following heads:

1. **Unification of India.**

The Government of India Act, 1935 provided for a Federation taking the Provinces & the Indian States as one unit. This provision has been adopted in the Indian Constitution with a modification. In the Indian Constitution, it has been provided that India consists of States & Union territories. Unlike the Government of India Act, 1935, the word ‘Federation’ is not used in the Indian Constitution. Instead, it is provided that India shall be a Union of States.

2. **Union Executive.**
Under the Government of India Act, 1935, the Executive power of the Centre was vested in the Governor-General. The transferred subjects were to be administered by the Governor-General who was required to act on the advice of the Council of Ministers who were to be chosen from the federal legislature & were responsible to it. This provision also has been adopted in the Indian Constitution with a modification. Under the Indian Constitution, the executive power of the Centre (Union) is vested in the President of India. He exercises, either directly or through officers subordinate to him, all the executive powers of the Union of India. He always acts in accordance with the advice of the Council of Ministers with the Prime Minister at the head, who are to be chosen from the Union Legislature (Parliament) & are responsible to the House of the People (Lower House of Parliament).


The Act of 1935 distributed Legislative power between the Federal & Provincial Legislatures & within their defined sphere, the Provinces were not delegates of the Federal Government but were independent units of administration. Under the Indian Constitution also, there is a distribution of Legislative power between the Central & State Legislatures & within their defined sphere, the States are not delegates of the Central Government but are independent units of administration.

4. Union Legislature.

Under the Government of India Act, 1935, the Federal Legislature was to comprise of two Houses, the Legislative Assembly (Lower House) & the Council of States (Upper House). Under the Indian Constitution, it is provided that Parliament (Union Legislature) consists of two Houses, the House of the People & the Council of States. Under the Act & the Indian Constitution, the term of the Lower House is, unless dissolved earlier, 5 years & the Council of States is not subject to dissolution.

5. State Executive.

Under the Government of India Act, 1935, the Provincial Executive was to comprise of the Governor & a Council of Ministers to advise him. The executive power of the Province was vested in the Governor. Three types of powers were provided to the Governor: (i) Discretionary; (ii) Powers exercised in his individual judgement; (iii) Powers to be exercised on the advice of the ministers. Under the Indian Constitution, the executive power of the State is vested in the Governor. He exercises, either directly or through officers subordinate to him, all the executive powers of the State. He acts in accordance with the advice of the Council of Ministers with the Chief Minister at the head, except in so far as he is by or under the Indian Constitution required to exercise his functions or any of them in his discretion.


Under the Government of India Act, 1935, the Legislatures of Bengal, Bombay, Bihar, Madras, Assam & the United Provinces were made bicameral (i.e., 2 houses) & in
other 5 Provinces unicameral. The term of the Provincial Assembly was, unless dissolved earlier, 5 years. Under the Indian Constitution also, there is a provision for a Legislature for every State in the Union. The Legislature in the State is either unicameral (comprising of one House) or bicameral (comprising of two Houses). The Legislature in Tamil Nadu, Andhra Pradesh, Telangana, Maharashtra, Bihar, Uttar Pradesh & Karnataka, is bicameral. In the remaining States, the Legislature is unicameral comprising of only one House, that is, the Legislative Assembly. Every Legislative Assembly of every State, unless sooner dissolved, continues for 5 years.

7. Supreme Court of India.

The Government of India Act, 1935 provided for the establishment of a Federal Court. The Federal Court consisted of 1 Chief Justice & not more than 6 other Judges. The Act also provided the necessary qualifications for the Judges. The Federal Court had 3 kinds of jurisdiction that is original, appellate & advisory. The Indian Constitution also provides for the establishment of the Supreme Court of India. The Supreme Court has similar powers & functions as of Federal Court. The Indian Constitution provides that the Supreme Court consists of a Chief Justice & 30 other Judges. The Indian Constitution also provides the necessary qualifications for the Judges. The Supreme Court also has 3 kinds of jurisdiction, that is, original, appellate & advisory. It is an independent & impartial judicial body which maintains the supremacy of the Indian Constitution.

8. Distribution of Legislative power between the Centre & the States.

The Government of India Act, 1935 provided for a three-fold distribution of power between the Centre & the Provinces-Federal List, Provincial List & Concurrent List. The Federal Legislature had exclusive power to make laws over the subjects enumerated in the Federal List. The Provincial Legislature had exclusive power of legislation over the subjects enumerated in the Provincial List. The Federal & Provincial Legislatures were to have concurrent powers to make laws over the subjects enumerated in the Concurrent List.

The Indian Constitution also provided for a three-fold distribution of power between the Centre & the States-Union List, State List & Concurrent List. Parliament has exclusive power to make laws over the subjects enumerated in the Union List. The Legislature of a State has exclusive power of legislation over the subjects enumerated in the State List. Parliament & the Legislature of a State have concurrent powers to make laws over the subjects enumerated in the Concurrent List.

Conclusion

The Government of India Act, 1935 has a great impact on the Indian Federal Structure. Most of the provisions of this Act are adopted with modifications or without modifications in the Indian Federal Structure according to the needs of India. Thus, this Act has played a vital role in the constitutional development of India.

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GIRL CHILD: AN INNOCENT VICTIM
OF SEXUAL HARASSMENT IN INDIA

By Rekha kumari & Arvind Kumar
From BPSMV, Haryana

Introduction

“*There are no two opinions that the convicted in minor rape cases should be given the harshest possible punishment so that it could act as a deterrent. It is high time that the state made it clear that society has no place for wolves on the prowl.*”

-According to R.D Sharma

It is quite an embarrassment for Indian government when reports of child rape at different places in India made daily to the headlines in newspapers and television since from New Year 2018. This could be plight of every child that within a month of January 2018, a number of girl child rape cases have been reported. The two young sisters were strangled to brutal death after gang rape. A 10 year old girl was raped by her known. Many more offences of such nature are reported daily in India. In India, a child is sexually abused every 15 minutes, according to the latest government figures. Such frequent reports tell that the horrified story of the odds and average Indian child has to face to survive and grow in an environment that is not child friendly. Yet for every case that is highlighted, there are thousands which go unreported because of the silence and tolerance to such violation of human and fundamental rights of children. There is need to raise the curtain from the culture of silence that surrounds the treatment of children.

World on Child: International Mechanism

THE United Nations convention on the rights of child (CRC) is an international treaty that legally obligates nations to protect children’s rights.

Articles 34 and 35 of CRC requires states to protect children from all form of sexual exploitation and sexual abuse.

This includes outlawing the coercion of a child to perform the sexual activity, the prostitution of children, and the exploitation of children in creating pornography. States are also requires to prevent the abduction, sale or trafficking of children. As of December 2014, 195 countries have rectified the convention, including every member of united nation except the United States and South Sudan.

Children Protection: A State’s Duty

Internationally, what the states commit for the welfare and development of children and on child rights protection has been described below:

- Children must be respected as human being esteemed as members of society and raised in good environment- Japan.
- Children are one of the most important assets of any nation- Philippines.
- State must respect and depend the rights of children- China.
- Children is entitled to special care and assistance and the child is by reason of his physical and mental immaturity, needs special safeguards and care including appropriate legal protection.

www.supremoamicus.org
before as well as death- United Nations convention on Rights of Child.

- Children are significant members of society. It is the states fundamental duty to protect and care for them- India
- The child for the full and harmonious development of his and her personality should grow up in the family environment, in atmosphere of happiness, love and understanding, thereby recognized the rights of child to live an individual life in society and brought up in the spirit of peace, dignity, tolerance, freedom, equality and solidarity- Convention on the Rights of Child

Scale of Child Rape in India

The distressing case of sexual assault on an infant happened on Sunday, 28 January, 2018 has shocked India and made national headlines. The extent of her injuries has horrified many and prompted them to wonder whether we have reached a new low.ii

It is true that state of children is not as rosy as painted. As far as India is concerned the Indian report recently released by National Crime Records Bureau statistics for the year 2016 show crimes against girl child continue to rise. According to a 2007 study conducted by India's ministry of women and child development, 53% of children surveyed said they had been subjected to some form of sexual abuse.

As per the latest data by National Crime Records Bureau, 2016 shows that 19,765 cases of child rape being registered in India - a rise of 82% from 2015 where at that time 10,854 cases were recorded.ii

The following are the reports on child rape in India:

| **Recorded cases of child rape in the year 2016** | 19765 |
| **Girls married before 18 in India** | 240 million |
| **Children participants in government study reports sexual abuse** | 53.22% of total |
| **"Persons in trust and care-givers" of child** | 50% of total |
| **Cases recorded under Pocso, Act** | 36,022 |

Sources: Indian government, Unicef

As per the above finding we can analysis that the crime against the girl child during last few years gone up rapidly in India. And the most extreme form of violence is rape of a minor girl child and worryingly, these numbers are rising daily. When we look at the statistics, compiled by the government, shows that such crimes are not uncommon. The National Crime Records Bureau report, shows a steady rise in incidents of offences against children.

Child and the Law in India

As everyone knows child is a national asset. They require proper care, love, affection and nourishment but reports say that children are subjected to maltreatment in some situations. ii A child is treated with distinguished type of harassment and
violence in India. In many compelling circumstances and having no shelter for their protection a child gets associated with crimes and criminals. Girl child exploitation in India is an outcome of the macabre family circumstances, social environment, poverty, ignorance of family planning and unchecked population control, lack of care and attention, and lack of love and affection from parents.

Who is a child? 
The child can only be determined solely on the basis of her age. In India, there are various legislations relating to the age of child such as following:

- A) The Children Act, 1960,
- B) The Child Labour (prohibition and regulation) Act, 1986
- C) The Juvenile Justice Act, 2000
- D) The Factories Act, 1948
- E) Prevention of Immoral Trafficking Act, 1956
- F) Section 27 of Criminal Procedure Code, 1973

As provided under 2(a) of the Immoral Traffic Prevention Act, 1956, a minor means a person whose age lies between 16 and 18 years.

The Children Act, 1960 fix the age of child as 16 in case of boy and 18 in case of girl. According to the convention on rights of child, a child means a person male or female who is below 18 years of age.

Whereas, section 27 of criminal procedure code stated that a juvenile means a person who is under the age of 16 years. This can be said that the various regulations prescribe various age of a child, but at max it is limited to the 18 year of age.

Child under Constitution of India 
There is no doubt in saying that children are the future of nation and they need special care and protection because of their mental and physical faculties they possess. There are constitutional provisions relating to child. The state government under article 15(3) of the Indian constitution is empowered to make special provisions for children. Also provided under article 39(c) of constitution the children of tender should not be subjected to abuse and they should be given opportunities and facilities to development in a healthy manner. Freedom and dignity of children should be protected carefully.

Apart from above the constitution has in several provisions including clause (3) of article 15, article 39 (e) and (f), article 45 & 47, impose on the state a primary responsibility of ensuring that all the needs of children are met and that their basic human rights are fully protected.

Whereas, at international level, on 29th Nov, 1989 the United Nations general assembly has adopted a convention on the rights of child. This convention does not emphasis on judicial proceedings but prescribes a set of standard to be followed by the all member nations. It insists on social reintegration of child victims on the part of state parties to secure the best interest of child.
Juvenile Justice (Care and Protection of Children) Act, 2000
This act aims to provide proper care, protection and treatment by catering to their development needs, and by adopting a child friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under this enactment.

Judiciary on “In cest” Children Sexuality
As per the reports of national crime records bureau, 2016 the almost half of the rape case were done by the known of the victim. A person “in trust and care-givers of child” usually found guilty of rape on minor girl. The term ‘in cest’ refers to a sexual relation between persons who are within certain degrees of consanguinity, or are so closely related to one another that such relationship is prohibited by law. For example, brother-sister and father-daughter, mother-son, uncle-niece and so on. Such relations are forbidden in many societies. The incestuous behavior with the children is child abuse hence it is a juvenile delinquency.

In India, there are no separate provisions for incest in the Indian penal code. It is however covered under the definition of sexual harassment under section 376 of the code. The punishment may be of life imprisonment for such crime or depends upon the facts and circumstances of each case.

The apex court in M.H Kakkad v. Naval Dubey convicted the accused who had raped a girl and had also committed a similar sexual assault on his niece and other girls of that locality. The court while inflicted severe punishment and observed that-

“Though all sexual assault on female children are not reported and do not come to light yet there is an alarming and shocking increase of sexual offences committed on children. This is due to reason that children are ignorant of thee at of rape and are not able to offer resistance and unscrupulous, deceitful and insidious act of luring female children and young girls. Therefore, such offenders who are a menace to the civilized society should be mercilessly and inexorably punished in the severest terms.”

National Plan of Action for the Girl Child
National plan of action for the girl child for 1991-2000 AD has been drawn up by the government. The plan recognizes the rights of girl child to equal opportunity, to be from hunger, illiteracy, ignorance and exploitation.

Towards ensuring protection of girl child following are the objectives:
- Relief for those who are economically and socially deprived and belong to special groups;
- Intervention to sensitize various agencies on the need to protect the girl child and adolescent girls from exploitation, assault and physical abuse;
- Education and sensitization of male members of the family to the special needs of the girl child;
- Equal treatment, dignity and respect for girl children in the family and community as well as providing support and help in their day to day work, so that they get time.
to avail of the opportunities for self-development;
➢ Rehabilitation services to reduce the growing instances of exploitation of girl children and adolescent girl;
➢ Protection of girl children and adolescent girls from prevalent social evils such as dowry, child marriage, prostitution, rape, incest, molestation etc. through appropriate legislation and proper enforcement.

Way Forward-
It is necessary that political, religious cultural and administrative as well as community resources are to be mobilized to create methods of care and value for the girl child and adolescent girls and also involve them in planning, implementing and evaluating of such developmental activities. It is only such an ethos that can eventually eliminate deep rooted gender inequalities.

This has been endorsed at a recent SAARC Workshop on girl child at Delhi: The approach includes the following:
➢ To raise consciousness levels of parents who are decision makers within the family units;
➢ To provides inputs for personality development of the girl child so as to enhance herself image and enable her to take her own decision, specially major ones relating to education and marriage;
➢ To provide child care facilities in school to help those girls who are preoccupied in the nurturing of their younger siblings;
➢ To eliminate all form of violence, overt and covert, perpetuated against the girl child within the family unit and communities;
➢ To enact stringent laws on offence against girl child;
➢ To strive to end such socio-cultural practices those are discriminatory to the girl child.

Conclusion
Children are the precious gift of human culture. They are one of the most important assets of any nation. Present laws against rape in India suffer from numbers of flaws. Primarily, it makes no distinction between rape of a minor and adult as a criminal offence. Hence, the same judicial investigative and evidentiary procedures are followed for both, in which the child is further traumatized and the accused finds many loophole to escape. Children should not be victimized for any kind of criminal act or evil. Any brutal or heinous crime to a child gives mental agony which lasts for long time in the minds of children. It’s a need of hour to put a halt on crime against a girl child. It could only be possible through stringent laws and punishment provisions. The Parliament and our Indian government must fix deterrent punishment for such crimes. Also, the courts must pass such an order which convict the accused of rape until death. And most importantly, the trail of girl child victim of rape should be accomplished within the period of six months. Moreover, in our sovereign, democratic, republic India, one should not forget that even an infant or minor girl also possess the fundamental right to life and liberty.

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CONSTITUTIONAL CONVENTIONS IN INDIA

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The British model of parliamentary system of government has exercised a profound influence on the development of Parliamentary institutions overseas, particularly in the Commonwealth Nations. The Constitution of India envisages a Parliamentary system of government both at the Union and the State level. The form of government introduced by the Constitution of India is similar to the British type of Parliamentary Government. Since the Constituent Assembly of India adopted Parliamentary System of Government based on Westminster Model of the British type, there is a need to understand the significance of the unwritten rules that is the important Constitutional Conventions that are the basis of parliamentary system of government. The fact that the Indian Constitution is one of the most elaborate in the world does not imply that it does not have in addition tacit provisions. It is based on the recognized conventions of a parliamentary form of government which it establishes both at the Centre and in the States. For quite some time people, politicians, and others professed not to see anything but the written word, and rejected the conventions altogether. The court has recognized that the provisions of the Constitution are based on certain British conventions regarding the cabinet and that to ignore the latter would be to misinterpret the former.

Origin:

There has been a long historical difficulty in determining what ideas and documents have “constitutional status” within any given political system. Unwritten constitutional conventions have long been understood to be integral to the operation of Westminster parliamentary systems. The British legal scholar A.V. Dicey emphasized that “constitutional morality” supplemented legal rules in regulating the exercise of political power and limiting the discretion of government officials the presence of a written constitution and judicially enforceable constitutional rules has sometimes been thought to render constitutional conventions superfluous. As way of a starting point, conventions according to AV Dicey are defined as:

“Conventions, understanding, habits or practices which, though they may regulate the conduct of the several members of the sovereign power...are not really laws at all since they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed the conventions of the constitution, or constitutional morality...”

This definition concentrates on what conventions are supposed to achieve. However, this view is not entirely accurate and it is important that conventions are distinguished from habits and practices. Conventions are conceptually different from...
habits or practices in that these concepts do not prescribe or dictate what ought to happen but are merely descriptive of what in fact does happen. A further definition of the purpose of conventions was given by Sir Ivor Jennings as:

"The short explanation of the constitutional conventions is that they provide the flesh that clothes the dry bones of the law; they make the legal constitution work; they keep it in touch with the growth of ideas." 

Constitutional law, however, always threatens to displace constitutional morality. The concept of a constitutional convention was popularized by the nineteenth-century British legal scholar A.V. Dicey. Conventions were understood to be key features of Westminster parliamentary systems. With long traditions of unwritten constitutions, England and many of its progeny nonetheless established and maintained limited governments and well-ordered polities. Conventions helped fill the space that might have otherwise been filled by written constitutions. Constitutional conventions, in Dicey’s reading, may have written components, but they do not have the force of law and are not enforceable by courts. They can also vary over time, subject to change “from generation to generation, almost from year to year.” Although not enforceable in court, Dicey thought constitutional conventions are best understood as “precepts for the guidance of public men,” the “constitutional morality of the day.” A convention “defines duties or obligations,” but so “morally and politically” not “legally.” Notably, this purposive character of constitutional conventions moves them out of the realm of mere description. The idea of a convention is not simply an analytical device to close the gap between the ideal and the reality of political power and account for how political power is actually organized and structured within a given political system. Conventions serve a normative function within constitutional politics, leading political actors to better realize constitutional ends.

Constituent Assembly Debates:

In a joint meeting on June 7, 1947, the Provincial Constitution Committee and the Union Constitution Committee of the Constituent Assembly decided that, it would suit the conditions of this country better to adopt the parliamentary system of constitution, the British type of Constitution with which we are familiar. The Decision of the Constituent Assembly of India favouring Parliamentary Democracy was based on the Indian Experience of running partial responsible government in the provinces under the Government of India Act of 1919 and full responsible government under the Government of India Act Of 1935. Both The Acts Contained provisions that were partly codified form of British Parliamentary Conventions.

K.M. Munshi, a member of the Constituent Assembly remarked regarding the conventions in the pre-independent India. He said that, during the British period political tradition of Britain was engrained on our way of thinking. Our Constitution in consequence has come to be based largely on the British model having an unwritten constitution. The Constituent Assembly faced the challenge of codifying the
conventions into the written constitution of India. At various stages of constitution making, efforts have been made by the framers of the Constitution to take note of the provisions of the Government of India Act of 1935 and the then existing conventions in the United Kingdom. In The early stage of Constitution making, the leaders who dominated the proceedings of the Constituent Assembly of India felt that the conventions must be written and codified in order that uncertainties of memory and difficulties of interpretation might vitiate the sanctity of the convention. This was because, it was understood that the conventions are usually respected because they are reasonable rules.

Only a few members of the Constituent Assembly, proved themselves well conversant with the principles and the conventions of British Parliamentary Government. K. Santanam was a leading member who objected to the vague nature of the Constitutional provisions regarding parliamentary government. The Reports of the committee also reminded that these institutions cannot easily be transplanted from one part of the world to another. Everyone adopt institutions which conform to its history and tradition.

The Question present before the Assembly was that:

Should the conventions of Parliamentary Government prevailing in England, be included in the constitution in the form of provisions? But the opinion on this was divided as to whether the conventional form should be the written or unwritten. At The end the Constituent Assembly decided that there would be no written conventions.

More importantly, the nature of things shows that, it is not possible to reduce all the rules of Convention into writing and the framers of the Indian Constitution have made no such attempt. There is no doubt that Convention must invariably grow up in order to fill up the blanks in the Constitution and to serve as a link between the letters of the constitution to meet the exigencies as they arise. Though the framers of the Constitution of India had plans to codify the important Conventions in the form of clauses of the written constitution of India they were unable to do that. And therefore we must infer that Conventions that were not included in provisions were deliberately left out.

Prof K.C. Wheare observed that the system of the Parliamentary Executive is not always described or laid down in the actual constitution but rests upon other rules of law and even more upon usage and conventions. Further, distinguishing between the written and the unwritten Constitution a written Constitution is fixed, solid, petty much written in stone and amending it requires a lengthy process whereas, unwritten Constitution rests significantly on Conventions that have never been enshrined in Law. The benefit of an un-codified Constitution over a Written Constitution is its flexibility. Unwritten Constitution adapts it with discarding out of date or unworkable bits in favour of new procedures and formations.

During the framing of the Constitution it was understood that, the president must act
on Ministerial advice. Durga Das Basu observed that, though the aim of Articles 74 and 75 was to put into writing the *Principles of Responsible government* as they existed in England upon which the Cabinet government rested but have not been embodied therein, and even on some fundamental Points the Framers of The Constitution have left the matter to the Conventions, Usages and the personal factor. The object of the framers which appeared from the Constituent Assembly debates, was to make the President a Constitutional and formal Head of the Executive and to make him act with the advice of the Council of Ministers.

He argued that in matters on which our Constitution is silent we should invariably follow the English Convention on the point. There is no question of following a different rule. He said that unless the language of the Constitution itself points out that the framers of the Constitution intended to depart from the English rule, it would be safer to adhere to the latter; for, once it is conceded that we adopted the English System of Parliamentary Government because we found it more conducive to representative democracy and orderly administration. Even where there is a provision in a Constitution, but generally worded, it may have to be interpreted in the light of Conventions which have grown up by the passage of time.

**India and Constitutional Conventions:**

Constitutional Conventions consist of various customs, practices, maxims and precepts of political ethics. Statutes together with the conventions constitute Constitutional law of the land. A study of the Constitution focussing only on the study of only Statute law without looking into the conventions would be incomplete and distorted. No Constitution is perfect nor can a Constitution provide for every contingency that may arise in the future. Besides, conditions change and new concepts emerge as a result of changes in the social, political and economic conditions and growth. The law that does not change with the newer conditions and perceptions will soon become antiquated, archaic and stagnant. Conventions serve as the means of bringing about Constitutional developments without formal amendments to the law. But it is wrong to imagine that Conventions are peculiar to unwritten Constitutions like the British.

The Constitution of India is a very comprehensive document and many conventions in the British Constitution form a part of the mandatory provisions of our Constitution. Yet it has many grey areas that are filled by Conventions. There are still a few dark corners which need to be lit with the lamp of Conventions.

Even before the 42nd Amendment to the Constitution, the Supreme Court in *Shamsher Singh case* in 1974 held that the President was only a Constitutional head and was bound to act in accordance with advice of the Council of Ministers. Article 74 of the Constitution postulates that “there shall be a Council of Ministers with the Prime Minister at the head,” Article 75 states that “the Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister”. Under our Constitution, there must be a Council of
Ministers at all times and that there cannot be a vacuum. The President cannot act *suo moto* pleading that there is no Council of Ministers in existence. He has to create one and act accordingly to the advice of the Council.

Otherwise, the President may go on appointing the leader of the largest party in the Lok Sabha as the Prime Minister, despite the fact that the appointed Prime Minister is not in a position to secure majority in the Lok Sabha. The main purpose of conventions is to guide the use of constitutional discretion. Thus, every time there is a general election or a request for dissolution of the House of People, the questions that start doing rounds are—Whom will the President invite to form the next government? What if the President invites someone to form a government who does not have a clear majority in the Lok Sabha? Will the President heed to the advice of the Cabinet to dissolve the House? One such convention is the appointment of Cabinet ministers. In legal theory, the Queen appoints ministers to the Cabinet when in fact the convention illustrates that the Prime Minister is responsible for the appointment of Ministers. A similar convention operates in India where President appoints ministers to the Cabinet but in reality it's the Prime Minister who makes those choices.

The constitution is silent on what the President should do if no party is in a position to command a majority in the House. In a Bi-polar party system as in Britain one or the other party secures a majority and therefore there is no British Convention in this regard. Such a situation arose in India after the general elections in 1989. The Congress, though not the majority party, was the largest single unit with Janata, BJP and others in descending order of strength. After the elections, the opposition parties agreed among themselves to support the Janata Party from outside without forming a coalition. The issue before the President was: who should be invited to form the Government. There was one precedent in Britain, though by no means a convention, where the Crown was faced with similar situation. The Congress which was defeated in the polls in 1989 but which had the largest membership in the Lok Sabha did not stake its claim to form the government. Rajiv Gandhi realising the mood of the country wisely decided not to press his claims. The President, following the British precedent cited above, called the Janata Party, which was the next party in order of strength, headed by V.P. Singh to form the government. When other political parties later met the President and pledged support to V.P. Singh the President told them that he had called the next largest party to form the government and that it was for the other parties to demonstrate their support in the House.

The Sarkaria Commission while laying down guidelines for Governors in the choice of the party for forming the Government said is any party fails to gain and absolute majority, the next opportunity should be given to a combination of parties which is able to command a majority in the House. This introduces an element of subjective judgment on the part of the President or the Governor in the choice and exposes them to charges of partisan or biased decisions. State Assemblies have seen various occasions where the ruling
party had split and rival claims were presented to Governors for forming the government. In some cases, the responsibility of trying to find out which group had a majority was assumed by the Governor himself.

In Indian context, the words used in Article 74 Clause (1) of the Constitution are that the President shall act in accordance with the advice of the Prime Minister and Council of Ministers. If strictly interpreted, the President is left with no option but to order dissolution of the House even if the advice was perverse or the conditions did not warrant such action. In 1990, when Prime Minister V.P. Singh lost the confidence motion, he did not advise the dissolution of the House but tendered resignation “so that the process of formation of a new government could begin”. Therefore the President engaged himself in the task of finding an alternative government by sounding the other parties successively in order of their strength. In 1991, when Prime Minister Chandrasekhar resigned without facing a vote of the House on the Motion of thanks, he sought dissolution of the House. Though technically Chandrasekhar was not defeated in the House, it was obvious that he did not have the support of the majority. In view of the fluid Constitutional Law on the issue, since no political party had staked a claim to form a government, the President on that occasion relied on an additional factor for ordering dissolution.

Again the use of the word “shall” in Article 74 (1) if interpreted as mandatory will rise to a host of problems in dealing with a ministry which has resigned but has been asked to continue till alternative arrangements were made.

It is however, a well established British Convention that the Crown has a clearly defined “right to advice, the right to encourage and the right to warn” the Prime Minister. The Crown can also seek for information, clarification and official reports. As stated by Ivor Jennings the Sovereign’s capacity to influence the government and course of events “depends upon his personal qualities”. The same position is maintained in India under Article 78 of the Constitution. The 42nd Amendment, which inserted the part that the President shall act in accordance with the advice of the Council of Ministers was not only redundant but has the potential of being harmful. Even without this amendment, the Supreme Court had ruled in 1974 in Shamsher Singh case that the President is a Constitutional Head of State and is bound by the advice of the Council of Ministers. That ruling admitted a flexible approach in extraordinary situations such as those noted earlier. It also noted that developing a Convention acknowledging the power of the President to refuse the advice of the Council of Ministers in extraordinary circumstances is necessary in the interest of good governance.

The National Commission to review the working of the Constitution argued that strengthening the institution of the Prime Minister could be one of the methods of restoring the stability and cohesion of functioning in the parliamentary system of government and one of the ways of doing so is to empower the Prime Minister to advise dissolution of the House whenever he thinks
that the House has exhausted its mandate and a fresh appeal to the electorate is called for. This is based on the view that the recognition of such power in the Prime Minister would impart much needed stability to the political system in the country and would enable the leader of the House to address determinedly issues of development, national security, etc. But, such a proposition contemplates a power in the Prime Minister even after he has lost confidence of the House. The Commission however, finally concluded that the present constitutional position warrants no modification.

Writing about the importance of Constitutional Conventions, Ivor Jennings said that Constitutional Conventions provide the flesh which clothes the dry bones of the law; they make legal Constitution work; they keep in touch with the growth of ideas. Expressing his opinion about codification of British Conventions and Customs relating to Parliamentary Government he said that we must be aware of assuming that the incidents of responsible Government must everywhere be the same or that the Conventions must be repeated. Responsible Government is not the same in Britain, Canada, New Zealand, South Africa, and Eire; still less in the Countries of Europe, which have adopted it.

Role of Judiciary:

In the case of U.N.R. Rao vs. Indira Gandhi, the Court held that, the position with respect to appointment of Prime Minister is similar in India since our constitutional practices are to a large extent derived from English usages, customs and practices.

In the case of Vidadala Harinadhababu and Etc. vs. N.T. Ramarao, Chief Minister, it was held that, it is clear that the rules of conduct do not have a constitutional or statutory sanction, and cannot be enforced by the Court. The Code of Conduct evolved by the Union or the State Government does not confer any rights upon citizens and, therefore, cannot be enforced through Court. The respective Codes specify the authority empowered to enforce the same. The Court does not enter the picture. Indeed, we had been, at pains to point out to the counsel for the petitioners from the very beginning that it would neither be permissible, nor advisable for this Court to evolve a Code of Conduct by itself, though we do not deny the necessity of such a Code in the interest of good Government and fair administration.

The Indian Supreme Court had also recognized as much in the 1977 case of State of Rajasthan vs. Union of India, finding that “... it is not for Courts to formulate, and, much less, to enforce a convention however necessary or just and proper a convention to regulate the exercise of such an executive power may be.” Again in the Judicial Accountability case, the Supreme Court refused to interdict a member of the Judiciary from continuing to perform judicial functions pending an inquiry into alleged misbehavior.

Reliance on English authorities on the subject of constitutional conventions is questionable with respect to India insofar as the English constitution is unwritten. Scholarly works on conventions in England primarily deals with codes of political behavior and not express constitutional
provisions. Therefore, Jennings’ enquiry was often with respect to political behavior, and not justifiable or even express codes of conduct. Consequently, its application to a written constitution should be, at most, limited to governing unwritten codes of behavior and not those which are explicitly and clearly provided for by the constitution. A similar view was adopted by The Calcutta high Court in Ashok Sengupta vs. Union of India, where despite the existence of an English convention that the Prime Minister is generally appointed by the elected members of parliament, the Court refused to interfere if an appointment is made otherwise by the President in light of textual Constitutional provisions, opining that “A characteristic of a convention as far as India is concerned, is that a convention cannot be used to cut down or limit any constitutional position whatever the pedigree of the convention.

At present, the doctrine of separation of powers states that there is to be a complete separation between the three branches of governance. The legal enactment of constitutional conventions would produce a breach of the doctrine of separation of powers and present a shift in the power amongst the three bodies of the state. The judiciary would have an exceptional amount of power in regulating the power of the legislative and executive. Apart from being unconstitutional this would create an issue of balance of power. At present, the there has to be a complete separation between the judiciary and any political matters.

Conclusion:

There are many things which cannot be written in a Constitution and are required to be done by Conventions and in such scenario, Indian Constitution even though the lengthiest and most elaborate one in the world is not different. Deviating from certain Conventions may create complications in the working of the governmental machinery. Modern political thinker Harold Laski, giving his observations about the Constitution of India in 1950, said that “I think that the Indian Constitution is too complicated. I believe in simple Constitutions. The admixture of British, American and Australian Constitution may not work well in India. At any rate, the chances of success are much better if India follows Conventions more than the written laws. Rigid Constitutions do not make for elasticity in the political organization of a country”.

But within the limits of its Constitutional framework, Indian Parliamentary System has worked admirably well. Unlike so many new countries, the essentials of a free polity are preserved in India. Parliamentary democracy forms the bedrock of Indian Constitution. It is a basic Structure of the Constitution of India. All theorists are united on the question regarding the principle against arbitrary government. India, therefore a virtually unique among contemporary post colonial countries since independence, have functioned well with parliamentary system despite some challenges and it may be said that although Indian Constitution seeks to give maximum possible expression to the principles of parliamentary government, it leaves a vital gap to be filled in by conventions for the actualization of parliamentary form of
government. But to make conventions into laws means that it would be a subsequent break from a system which is primarily ridden by tradition however, to make conventions enforceable by courts would mean lack of flexibility and adaptability to modern change.

Last year while hearing a petition filed in the Supreme Court regarding the issue as to whether the Governors of both the states of Goa and Manipur were correct or not to call a party to form the government which was relatively a distant second and not the one which has won the most number of seats in the legislative assembly election where neither had the full-fledged majority thereof. From the remarks Hon'ble Chief Justice it can be inferred that it was only a Convention to call the single largest party to form the government and it is clear from various precedents that Conventions are not enforceable in the Court of Law. Moreover, if in the floor test that particular political party is able to prove the required majority then the act of the Governor cannot be questioned. Furthermore, enforceability of conventions by courts would be an infringement of the doctrine of the separation of powers. Therefore, at present there is no reason to enact legally the conventions as there would be very little or even no change in the problems and issues surrounding the country currently.

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SURROGACY: WOMB FOR RENT

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“Little souls find their way to you, whether they’re from your womb or someone else’s”

Sheryl Crow

A woman has an alluring capacity to procreate a life within her and every woman loves to cherish the experience of motherhood. Unfortunately, though, for some people, the inability to have their own off springs can be extremely heartbreaking and devastating to their future plans. Such people then search for alternative solutions.

Introduction to Surrogacy

The word surrogate has its origin in Latin ‘surrogatus’ past participle of ‘surrogare’, which means ‘substitute’. So a surrogate mother is the substitute for the genetic biological mother. A surrogate mother is a mother who carries a child for someone else, usually an infertile couple. In other words, a surrogate mother is a person who is hired to bear a child, which she hands over to her employer at birth.

According to Artificial Reproductive Technique (ART) Guidelines, surrogacy is an “arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a ‘surrogate mother’ is a woman who agrees to have an embryo generated from the sperm of a man who is not her husband, and the oocyte for another woman implanted in her to carry the pregnancy to full term and deliver the child to its biological parent(s).”

According to the National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India “Surrogacy is an arrangement in which a woman agrees to carry a pregnancy that is genetically unrelated to her and her husband, with the intention to carry it to term and hand over the child to the genetic parents for whom she is acting as a surrogate.”

History of Surrogacy (From Biblical times to Modern day surrogacy)

The pathology “female infertility” gives rise to the idea of surrogacy. The first venture to solve the problem of female infertility was far from the real concept of surrogacy. The first case of surrogacy is written in The Holy Bible. According to the Chapter 16 of the “Book of Genesis” Abraham’s wife Sarai, could not bear him a child. She gave him her Egyptian slave Hagar so that she could build a family through her. This story is somewhat related to ‘traditional surrogacy’.

In ancient times healthy and young slaves were used for carrying heirs and they were the biological mothers for these babies.

On July 25, 1978 the first ‘test-tube baby’ ‘Louise Joy Brown’ was born through the efforts of Dr. Robert G Edwards and Dr. Patrick Steptoe. But this was not a case of
surrogacy. The first traditional paid surrogacy arrangement was steered in 1980 where a 37 year old woman acted as a surrogate and was paid $10000 upon the successful delivery of the baby. After the case of successful traditional surrogacy, pregnancy via egg donation was attempted. In this case a woman was able to give birth via the use of eggs donated by another. This later led to the first successful gestational surrogacy in 1985.

Today, surrogacy has achieved new heights of popularity. In 2005, a 58 year old woman donned the role of a surrogate mother to give birth to her own twin granddaughters.

**Types of Surrogacy:**

1. Traditional Surrogacy
2. Gestational Surrogacy

**Traditional Surrogacy:** In traditional surrogacy, the surrogate is the genetic/biological mother of the resulting child because surrogate’s own egg is used. In other words, the surrogate acts as both the egg donor and as the actual surrogate for the embryo. In this process surrogate mother is artificially inseminated with the sperm of the intended father or a sperm donor. In simple words the sperm that is taken from the biological father or sperm donor is transferred into the surrogate’s uterus. In traditional surrogacy, fertilization takes place naturally and the process for impregnating a woman by this process is also known as intrauterine insemination or IUI.

**Adoption of Child:** Usually, the intended father’s name is put directly on the birth certificate and the intended mother will need to do a step-parent adoption, however, laws regarding this issue vary from state to state.

**Gestational Surrogacy:** In gestational surrogacy, the surrogate is not the genetic/biological mother of the resulting child because surrogate’s eggs are not used at all. The surrogate just carries the embryo through the pregnancy term until its birth. She acts as the carrier of the embryo only. The embryo that the surrogate carries is actually created by using both the biological father’s sperm and the biological mother’s egg through a process called IVF (in vitro fertilization).

In this process embryo is developed in the laboratory. It can take 3-5 days for the embryo to develop and then it is transferred to the uterus of surrogate. The rate of success will depend upon many factors like the age and health of the biological mother whose egg is being used. In many cases, the rates of pregnancy are actually higher when using eggs that are taken from biological mothers who are otherwise infertile versus when eggs are taken from fertile woman.

**Adoption of child:** In many areas, the intended parents may petition the court during the third trimester of pregnancy to have both of their names placed directly on the birth certificate; however, laws regarding this issue vary from state to state.

**Surrogacy in Modern India:**
The world saw the first successful birth through gestational surrogacy in 1985. On
June 23rd, 1994, in Chennai, this happened for the first time in India. 3 years later, in 1997, an Indian acted as a gestational carrier, and got paid for it. In 1999, an Indian newspaper carried the story of a villager in Gujarat who served as a surrogate for a German couple. In the past couple of years, the number of births through surrogacy doubled with estimates ranging from 200 up to 350 in 2008.

India is rising as a popular destination for surrogacy arrangements for many foreigners due to some reasons like cheap medical facilities, easy availability of surrogate etc. Foreigners come to India in search of surrogate mothers. Women from lower socio-economic background to lower middle socio-economic backgrounds easily agree to become a surrogate mother in India, in return for money, as compared to western countries as hiring a surrogate is not only difficult, but the treatment is also very costly in western countries. The laws of some countries also lead the foreigners to come to India for surrogacy. For example, a 37 year old Russian came to Bhopal as the expense for surrogacy is prohibitive in her country – between Rs. 1500000 and Rs. 2000000 - as compared to the Rs. 200000 cost in Bhopal.

Dr. Randhir Singh, Director, Bhopal Test Tube Baby Centre, elaborates, “Women source information about the availability of surrogate mothers in Bhopal over the Internet and then contact us. In foreign countries, surrogate mothers are not easy to find. Therefore, the interest in India.”

Laws on Surrogacy in India:

Presently, there is no law governing surrogacy in India. Eventually the commercial surrogacy or renting a womb was considered legitimate till the introduction of the new Bill i.e. Surrogacy (Regulation) Bill, 2016. In the absence of any law on surrogacy, the Indian Council of Medical Research (ICMR) working under the auspices of Ministry of Health and Family Welfare, issued national guidelines for accreditation, supervision and regulation of ART (Assisted Reproductive Technology) clinics in India in 2015. Under these guidelines, there were no restrictions for the use of ART by a single or an unmarried woman and the child born would have legal rights on the woman or the man concerned. But there is need for legislation as ICMR guidelines being often violated and reportedly rampant exploitation of surrogate mothers and even cases of extortion also. Therefore the draft ART (Regulation) Bill, 2008, the draft ART (Regulation) Bill, 2010 & the draft ART Bill, 2014 were drafted for legalizing surrogacy in India. The draft ART (Regulation) Bill, 2014, if passed, would establish a National Board for Assisted Reproductive Technology, with a head office to be located in New Delhi, at the Department of Health Research in the Ministry of Health and Family Welfare. In addition, the draft law includes a number of provisions on rights and duties in relation to surrogacy, which include requirements regulating commercial surrogacy. It stipulates that “surrogacy for foreigners in India shall not be allowed but surrogacy shall be permissible to Overseas Citizen [sic] of India (OCIs), People of Indian Origin (PIOs), Non Resident Indians.
(NRIs) and [a] foreigner married to an Indian citizen. Moreover the surrogate mother is required to be an “ever married Indian woman with minimum twenty three years of age and maximum thirty five years of age…”

Recently the scope of bill was narrowed down to surrogacy only and hence the bill now titled is Surrogacy (Regulation) Bill, 2016. This Bill completely bans the commercial surrogacy. Defining commercial surrogacy as “Surrogacy or its related procedures undertaken for a monetary benefit or reward (in cash or kind) exceeding the basic medical expenses and insurance coverage”. The Union Cabinet has given its consent for the introduction of the Bill.

The Surrogacy Bill 2016:

The Bill addresses the issues and concerns associated with surrogacy only. The Bill is aimed at making parentage of such children “legal and transparent” noting that there may be some cases of exploitation of woman by elements of money.

The Minister of State for Health, Shripad Yesso Naik, said in a written reply in Rajya Sabha, “Yes to make issues of parentage of children, born out of surrogacy legal and transparent, provisions have been made in the draft Surrogacy (Regulations) Bill, 2016. In the absence of a statutory mechanism to regulate commissioning of surrogacy in the country at present, there may be some cases of exploitation in the name of commercial surrogacy of women in the vulnerable section of the society by unscrupulous elements for monetary benefit. In order to prevent this, the government has prohibited foreigners from commissioning surrogacy in the country and has drafted a comprehensive legislation, namely the Surrogacy (Regulation) Bill, 2016 for safeguarding the interest of surrogate mothers and the children born out of surrogacy.”

The Union Cabinet headed by the Prime Minister Shri Narendra Modi has given its consent for introduction of the “Surrogacy (Regulation) Bill, 2016” on August 24, 2016.

Provisions of the Bill:

The Surrogacy (Regulation) Bill, 2016 will apply to whole India except the State of Jammu & Kashmir. According to the Bill, there will be establishment of National Surrogacy Board at the central level and State Surrogacy Boards and Appropriate Authorities in the States and Union Territories.

This Bill will ensure the complete prohibition of commercial surrogacy and permission of ethical surrogacy to the needy infertile couples. Altruistic Surrogacy can be offered by close relatives only, not necessarily related by blood.

- Besides protecting the rights of surrogate mothers and the children born out of surrogacy, the Bill will avail benefits to the Indian married infertile couples who want to have children.
- Commercial Surrogacy will be prohibited including the sale and purchase of human embryo and gametes which was recommended by the 228th report of the Law Commission of India.
- 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.

- Besides banning the commissioning of surrogacy by foreigners and Overseas Indians, it also bans unmarried people, live-in couples and homosexuals from opting for surrogacy.
- All ART (Assisted Reproductive Technology) Clinics will need to be registered and they have to maintain records of surrogacy for 25 years.
- Surrogacy clinics can charge for the services but the surrogate mother cannot be paid except paying towards medical expenses.
- The rights of the surrogate child will be the same as of the biological child. Commercial surrogacy, abandoning the surrogate child, exploitation of surrogate mother, selling/import of human embryo have all been categorized as violation that are punishable by jail term of at least 10 years and a fine of up to Rs. 10 lakh.

**Flaws of Surrogacy Bill, 2016:**
1. The choice of finding a womb within the family becomes difficult and limited. For example if a sister is not able to conceive then the daughter in law can be forced to become a surrogate. Thus it creates a social pressure.
2. The right to life enshrines the right to procreation and parenthood. Thus it is for the parent to decide the modes of parenthood and State constitutionally cannot interfere in it.
3. A homosexual or a single parent is deprived of the happiness of parenthood through surrogacy.

4. The Bill leaves several questions unanswered such as ensuring protection of health of surrogate mother, maternity relief available to her etc.
5. A woman who bears a child for another one is actually performing a service and needs to be compensated for it. If altruistic surrogacy is enforced, the commissioning parents have to find some non-legal means to pay the woman who has spent a year or more of her life trying to ensure the birth of a healthy baby or babies.
6. Further, as per a Supreme Court ruling, live-in relationships are on a par with marriage and children born out of long-standing live-in relationships are legitimate. By limiting the option of surrogacy to legally married couples, the government is countering the acceptability of live-in relationships and setting a wrong precedent.
7. The bill faced backlash from women who are currently involved in commercial surrogacy – these would be women who go from having a stable source of income to nothing at all.

**Suggestions:**
It is often said that in a surrogacy arrangement, “the barren gets a baby, the broke gets a bonus”. If we talk about the primitive ambition of surrogacy, then surrogacy seems very beneficial to both the infertile couple and the surrogate mother but using surrogacy for commercial purpose becomes a bane for the society. This is because in order to make more and more money, people make misuse of the surrogacy arrangements. The need to make laws on surrogacy arises, when in 2008, a Japanese couple commissioned a baby in a
small town in Gujarat. The surrogate mother gave birth to a baby girl. Till the time the couple had separated and the baby suffers because she was now parentless and stateless, caught between the legal system of the two countries. The child is now in Japan but cannot obtain citizenship because surrogacy is not legal in Japan. Another case was observed in 2012 when an Australian couple who had twins by surrogacy, rejected one child and took home the other. In the surrogacy arrangement it is the surrogate child who suffers the most.

Banning commercial surrogacy is not the solution to the problem. In order to overcome the flaws of the Surrogacy Bill, 2016, the following suggestions can be implemented:

1. There should be a universal law in all the countries for surrogacy.
2. Interstate surrogacy should be permitted after applying universal law in all the countries.
3. A debate at international level is also needed to discuss the problems and the solutions of surrogacy at the state level and at the international level. The countries should make universal law regarding interstate surrogacy, adoption of the child and citizenship of the surrogate child.
4. The name of the surrogate mother should also be written on the birth certificate of the child so that the surrogate mother could get the identity as the true mother of the surrogate child.
5. There should be provision for the insurance and emergency needs that the surrogate mother may require during pregnancy and after giving birth to the child. In fact health insurance for the surrogate mother and surrogate child should be made compulsory.
6. If the intent of the law is to protect surrogate mothers and children, then it must provide a legal framework that restricts the exploitation of surrogates and their children, and penalise those who do not honour contracts.
7. Surrogacy has prevailed in India since a long time and now the government cannot neglect going into the specifics and just eliminating commercial surrogacy altogether. Instead, the government needs to suitably regulate it thereby streamlining the process and avoid abuse.

Conclusion:

Nature says no; science said yes.

Detailed study on Surrogacy has lead to a beautiful conclusion. India is the land where female deities are enshrined in the temples. It happens only in India that a mother is given regard equal to the God. The exploitation of woman is not only a crime but also a sin in India. While making laws on surrogacy, it should be kept in mind that it won’t violate laws or ethics. The Surrogacy (Regulation) Bill, 2016 introduced by the government is an adorable step. Till now, the laws are imposed on socially and educationally weaker women just for the sake of welfare measure. The educationally weaker women did not know much about surrogacy and she is paid very less for being a surrogate mother. Socially and educationally weaker women are being exploited. Not only, the surrogate mother, but also the surrogate child suffers. When the child is born, he is transferred to the employer (biological parents) even before
the breast feeding. It is the child who suffers the most. The bill has already made a provision for banning commercial surrogacy but only banning is not the solution. Strict laws should be made for the safeguard of the surrogate mother and the surrogate child. The altruistic or non commercial surrogacy should be legalized only after making strict laws.

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THE CRITICAL ANALYSIS OF DEBT RECOVERY TRIBUNALS

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INTRODUCTION
Banks and money related organizations had been encountering extensive troubles in recuperating credits, and implementation of securities accuse of them. The system for the recuperation of obligations because of the banks and money related establishments was moderate and brought about a huge part of the assets being seized.

The Committee on Financial Systems, headed by Shri M Narasimhan, had considered the setting up of the "Special tribunals" with specialized forces for arbitration and rapid recuperation of such issues as fundamental usage of the monetary division changes. A critical need was in this manner, learned about to work a reasonable component through which the duty to the banks and money related establishments could be acknowledged immediately.

In 1981, Shri T Tiwari headed a committee which had analyzed the legitimate and different challenges looked by banks and budgetary foundations and proposed healing measures incorporating changes in law. The Tiwari Committee had additionally recommended setting up of specialized courts for recuperation of duty of the banks and money related organizations by following an outline methodology. So, the Recovery of Debts Due to Banks and Financial Institutions Act 1993 in short DRT Act was passed. Keeping in consideration with the worldwide patterns on helping budgetary foundations recoup their awful obligations rapidly and productively, the Government of India has constituted thirty-three Debts Recovery Tribunals and five Debts Recovery Appellate Tribunals the nation over.


Motive: The central motivation behind the 1993 Act was to evacuate cases of banks and money related foundations from the common frame to specific courts. The admitted motivation behind the statute was to guarantee the expedient transfer of cases of banks and money related foundations planned to be administered by it. The basic motive behind the Act is contained in the Tiwari Committee Report, which expressed: "The Civil courts are troubled with assorted sorts of cases. Recuperation of duty because of Banks and Financial Institutions isn't given any need by the common courts. The Banks and Financial Institutions like some other prosecutors need to experience a procedure of seeking after the cases for recuperation through common courts for unduly long stretches." The introduction of the Act accommodates the foundation of Tribunals for speedy trials and recuperation of obligations because of banks and budgetary establishments and for issues associated therewith or accidental thereto.
Under the Recovery of Debts Due to Banks and Financial Institutions (RDBDBFI) Act, 1993 banks are eligible to approach the Debts Recovery Tribunal (DRT) while, under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests (SARFAESI) Act, 2002 borrowers, underwriters, and other some other individual distressed by any activity of the bank can approach the Debts Recovery Tribunal (DRT).

Offers against orders go by Debts Recovery Tribunal (DRT) lie before Debts Recovery Appellate Tribunal (DRAT). Each obligation of Recovery Tribunal (DRT) is guided by a Presiding Officer. The Presiding Officer of a Debts Recovery Tribunal is the sole legal specialist to hear and pass any legal request.

Every obligation Recovery Tribunal has two Recovery Officers. The work among the Recovery Officers of a Debts Recovery Tribunal (DRT) is assigned by the Presiding Officer of the Tribunal. The Debts Recovery Tribunal (DRT) is completely enabled to pass extensive requests and can go past the Civil methodology Code to render finish equity. A Debts Recovery Tribunal (DRT) can hear cross suits, counter claims and permit set offs. Be that as it may, a Debts Recovery Tribunal (DRT) can't hear cases of harms or inadequacy of administrations or break of agreement or criminal carelessness with respect to the loan specialists. Also, a Debts Recovery Tribunal (DRT) can't express a supposition past its area, or the rundown pending before it. The Debts Recovery Tribunal can choose Receivers, Commissioners, pass ex-parte orders, transitory requests, interval arranges

DEBT RECOVERY TRIBUNAL

Section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, constitutes the Debts Recovery Tribunal. The basic motive of the Debts Recovery Tribunal was to get assert applications from Banks and Financial Institutions against their defaulting borrowers. For this the Debts Recovery Tribunal (Procedure) Rules 1993 were also framed.

While at first the Debts Recovery Tribunals performed well and helped the Banks and Financial Institutions recoup considerably huge parts of their non performing resources, or their awful obligations as they are usually known, yet their advance was hindered when it came to expensive and capable borrowers. These borrowers could slow down the advance in the Debts Recovery Tribunals on different grounds, especially on the ground that their cases against the loan recovery were pending in the civil courts, and if the Debts Recovery Tribunal will settle the issue, it will result in unsalvageable harm to their properties.

Aside from the above enormous lacunae, there were various weaknesses as well. The duty of work men against an organization, the State levy, and the contribution of other non secured loan bosses all got enmeshed before the Debt Recovery Tribunals. As though these were not sufficient, there was conflict of powers between the Official Liquidators delegated by the High Courts and the Recovery Officers of the Debts

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Recovery Tribunals. The Official Liquidator, a nominee of a predominant expert, took into his ownership every one of the properties, which had a place with secured leasers before the Debts Recovery Tribunal. The High Courts likewise disliked on the exercises of the Recovery Officers who unlike the whole sums and paid off to the banks leaving nothing for alternate inquirers, including the work men. All these and different issues prompt extraordinary alterations to the Recovery of Debts Due to Banks and Financial Institutions Act by methods for a changing warning in the year 2000.  

This new Act, the SRFAESI Act, engaged the loan specialists to take into their ownership the secured resources of their borrowers just by giving them sees, and without the need to experience the rigors of a Court method. At first this got part of consistence from borrowers, and numerous a prepared defaulters hacked up the Bank contribution. However the harder ones punched entire in the new Act as well. This drove Supreme court striking down specific arrangements and permitting the borrowers an adjudicatory discussion before their properties could be assumed control by the loan specialists.

The Debts Recovery Tribunal need to manage remarkable complex business laws inside the restricted ambit of the two laws. Throughout the years the Debts Recovery Tribunals have advanced into fine bodies with parcel of ability. There are many judgments of the Supreme Court and in addition the different High Courts which have prepared of the Debts Recovery Tribunals to outline their scope and procedure. The Debts Recovery Tribunal of India have turned out to be show foundations for some, a nation to take after.

With the sanctioning of the DRT Act, the managing an account area expected that the majority of the NPAs would be anything but difficult to recuperate, as against the traditional arrangement of recuperation of advance via civil courts, where extensive time, cash and endeavors were required to recoup obligation. Nonetheless, disregarding DRT Act, by virtue of non-acknowledgment of the NPAs, the Banks and Financial Institutions were confronting issues identifying with liquidity and resource obligation befuddle, since their benefits were obstructed for impressive time in useless resource. There was no lawful arrangement for encouraging securitisation of money related resources, and banks had no influence to claim securities made to support them with a specific end goal to secure the offices. This prompted many changes all the while and reducing the deferral in settling.

In advancement of money related changes and broadening the question of RDDBFI Act, 1993, the Government has brought The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. It is the SARFAESI Act that got a more noteworthy change the obligation recuperation situation in the nation. One of the critical changes that SARFAESI has brought is that it permitted the banks (as per Sec.13 SARFAESI) to assume control ownership from the defaulter, without experiencing the stringent
court technique, once the credit account has been arranged as a NonPerforming Asset.  

Definition: Section 2(d) “bank” means- (i) banking company; (ii) a corresponding new bank; (iii) State Bank of India; (iv) a subsidiary bank; or (v) a Regional Rural Bank; Section 2(h) “financial institution” means- (i) a public financial institution within the meaning of Section 4A of the Companies Act, 1956 (1 of 1956); (ii) such other institution as the Central Government may, having regard to its business activity and the area of its operation in India by notification, specify;  

Section 2(g) “debt” means - any liability (inclusive of interest) which is alleged as due from any person by a Bank or Financial Institution or by a consortium of Banks. But, it should be subsisting one and recoverable also. Since the Act is a fiscal law, the delegated authority i.e. the Tribunal has to act strictly within the parameters of the authority delegated to it under the Act. Jurisdiction conferred in relation to debt is a very special kind of jurisdiction conferred upon the Tribunal and is strictly limited in extent though; without doubt the ambit of the powers exercisable within those limits is wide.  

Jurisdiction of debt recovery tribunals: The term ‘jurisdiction’ means the authority to enforce laws or pronounce legal judgments. Section 1(4) of RDDB Act, 1993 deals with pecuniary jurisdiction of the Tribunal providing that the Tribunal shall be lacking jurisdiction to deal with the case of a Bank or a Financial Institution if the crystallized liability is below one lac rupees. Thus following conditions will be necessary for ousting a claim from jurisdiction of the Tribunal.  

(a) when the amount of debt has been less than “Rs. 10 lakhs”; or such other amount has not been less than one lakh rupees;  

(b) for both the purposes the specification by the Central Government through notification is necessary; as a condition precedent.  

“Section 17 – Jurisdiction, powers and authority of Tribunals.—(1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debt due to such banks and financial institutions.”  

Section 18 restricts the jurisdiction of all courts in relation to the matters specified in Section 17 (except of the Supreme Court and of a High Court under Articles 226 and 227 of the Constitution). The most relevant section is section 34 which is provided below:  

Act to have over-riding effect.—(1) Save as provided under sub- section (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.  

In Cofex Exports Ltd. vs. Canara Bank Delhi High court ruled that Debt Recovery Tribunal is not a court but a Tribunal formulated by a statute, provided with a special jurisdiction to hear only applications by banks or financial institutions for
recovery of any debt. Although keeping in view the provisions given in clauses (a) to (b) of sub-section (2) of Section 22 of the Act it had every one of the trappings of a court yet it was held not to be a court thusly. It was held by the Supreme Court in the judgment of Ranjan Chemicals Ltd that a court has the power in a proper case to exchange a suit for being attempted by the DRT.

Remedy: Withdrawal of the first application pending before the DRT under RDB Act, 1993 isn't a pre-condition for taking plan of action to the SARFAESI Act. It is for the banks/FIs to practice its caution as to cases in which it might apply for leave to pull back and cases in which it may not do as such.

Contrast: The principle distinction between RDDBFI Act, 1993 and SARFAESI Act, 2002 is as per the following: The RDDBFI Act, 1993 empowers the Bank to approach the Tribunals when the obligation surpasses as far as possible i.e. Rupees Ten Lakhs. Under RDDBFI Act, 1993, the Debt Recovery Tribunal will settle the sum due and passes the last honor. While, the SARFAESI Act, 2002 gives a strategy wherein the bank or monetary establishment itself will arbitrate the obligation. Simply after settling by the bank or money related establishment, the borrower is offered appropriate to favor an interest to the Tribunal under SARFAESI Act, 2002. The Banks or Financial Institutions can summon the arrangements of SAFAESI Act, 2002 just in regard of secured resources and it should goes under the meaning of NPA and the measure of due must surpass Rupees One Lakhs NPA advance record is more than twenty level of the main and premium and not all advance.

RECOVERY OF DEBT OF COMPANY DURING WINDING UP

Leave of the Company Court for transfer of cases

Any bank or FI is not required to take leave of company court (the tribunal i.e. NCLT) to initiate with its claim before the DRT or, for the execution proceedings against the company before the Recovery Officer in liquidation. Neither the proceedings can be transferred to the Company court. One of the pioneer cases where the ambit of the overriding effect of the Act was roughly mention was in Industrial Credit and Investment Corp. of India Ltd v. Srinivas Agencies where the issue was whether leave should be granted by the Company Court to carry on proceedings in other civil courts and whether all proceedings should be transferred to the Company Court. The court was of the opinion that the approach to be followed by the Company court does not required to be framed in a straightjacket formula. The watchfulness to be practiced needs to rely upon the certainties and conditions of each case. While practicing this power, the Company Court ought to likewise shoulder as a top priority the method of reasoning behind the sanctioning of the RDDBFI Act.

The non-obstante clause

In the case of Industrial Credit and Investment Corporation of India Ltd v. Vanjinad Leathers the non obstante clause in given in the RDDBFI Act and the non obstante clause as in the Companies Act were considered, where the court is of opinion that Section 18 of the Act puts a bar
on jurisdiction of other authorities and courts with the exception to the Supreme Court and High Courts provided under Articles 226 and 227 of the Indian Constitution. The court additionally expressed that the RDDBFI Act and the Companies Act is exceptional enactment.iii

Assets in custody of Liquidator- DRT may take inventory
During liquidation of a company when a Provisional Liquidator has been appointed, the DRT can use its powers provided under Sections 19(18)(e) of RDB Act and can appoint an Advocate Commissioner for framing of an inventory of the properties and assets of the company in liquidation. Earlier leave of the organization judge i.e. the Winding up Court or the Company Court [the Tribunal (NCLT)] under the arrangements of the Companies Act isn't important. The DRT without a doubt forces energy to give constrained bearings to the liquidator to co-work with the Advocate Commissioner delegated by it under Section 19(18)(e) of the 1993 Act to take the stock. The liquidator ought to follow the bearings.iii

Right of Official Liquidator- Pari passu distribution
The company court has the privilege to guarantee that the conveyance of the Assets regarding Section 326 of the Companies Act. The Official liquidator speaks to the whole assortment of banks and furthermore holds rights in the interest of the employees to have a dispersion pari passu with the secured loan bosses and the obligation to promote circulation of the returns based on inclination contained the Companies Act under the bearing of the company Court. At the end of the day, the dispersion of the deal continues under the headings of the company court is the obligation of the official liquidator. To guarantee the correct working out of the plan of appropriation, it is important to connect the Official Liquidator with the procedure of offer so the Official Liquidator can guarantee, in the light of the headings of the company court that a legitimate cost is brought for the advantages of the company in liquidation.

Function and position of official liquidator
The official liquidator has an obligation combined with the ability to found or protect any suit, indictment or other lawful procedures both civil and criminal in the name and for the benefit of the company. Such power incorporates the ability to bear on the matter of the company so far as might be fundamental for the advantage of the company in liquidation. The position of authority liquidator is basically that of an operator utilized to wind up a company. As the assurance of the claim of the laborers ought to be likewise done alongside the claim of the secured lenders before DRT it is vital for the official liquidator in light of a legitimate concern for the workers to take an interest in the procedures previously the DRT. The official liquidator has the obligation to speak to successfully in the procedures previously DRT for conveyance of the deal thought to the secured leasers, laborers and investors of the company.iii

Recent efforts to rejuvenate DRTs: the RDDBFI amendment 2016
To revise the circumstance, government has tried a few endeavors. Significant one is the alteration to the RDDBFI Act 1993 out of 2016. So also, the new Insolvency and Bankruptcy Code offer forces to DRTs to
think about instances of Bankruptcy from people and boundless risk associations. Following are the primary changes made to the RDBBFI Act in 2016 however the alterations are yet to be upheld.

The revision gives timetables for different strides in the mediation procedure before the obligation recuperation councils. Time confine for documenting of composed articulations, going of requests, bids, and so on have been lessened. The Act Empowers the Central Government to accommodate uniform procedural guidelines for the procedures in the Debts Recovery Tribunals and Appellate Tribunals.

The amendment has increased the retirement period of Presiding Officers of Debt Recovery Tribunals from 62 years to 65 years and that of the Chairpersons of Appellate Tribunals from 65 years to 67 years. It additionally makes Presiding Officers and Chairpersons qualified for reappointment to their positions.

The alteration enables banks to document cases in DRTs having locale over the region of bank office where the obligation is pending, rather in the DRT which have purview over the respondent's region of living arrangement or business.

Essentially, to decrease delays, the he cost on a borrower to defer recuperation timetables through extended interests and procedures has been expanded.

Borrowers should store no less than 25% of the extraordinary sums with the obligation recuperation re-appraising court (DRAT) under the DRT Act to benefit an interest.

Already, this arrangement was required just under the SARFAESI Act.

CONCLUSION AND SUGGESTIONS

With the goal, along these lines, of furnishing banks and money related foundations with a speedier and more effective method of recuperation of obligations, the council has accommodated the foundation of uncommon courts for the reason, assigning them as Debt Recovery Tribunals.

Absence of legal preparing for recuperation officers as they are officers named by the GOI for helping the managing officers, conflicting systems took after by various DRTs, noteworthy deferral in procedures as the prescribed time is a half year, though procedures in reality keep going for a long time or more, are a portion of the explanations behind sick working of DRTs.

The working of DRTs needs to enhance to guarantee banks can recoup their current credits and offer crisp advances at less expensive rates. In the present plan, there is no system set up to guarantee that the council arranges the case in an opportune way. There is a solid need to get greater responsibility for the DRT.

There are Small number of DRTs and Debt Recovery Appellate Tribunals, where judgments of DRTs can be offered. While there are 33 DRTs, there are just five Debt Recovery Appellate Tribunals in the nation. There is positively a requirement for more number of DRTs. The greatest test, it shows
up, is their capacity to manage a subject with speed. The framework that was composed is obviously not working. Most likely, there ought to be a criticism component and individuals required with DRTs ought to be urged to bring up the territories of agony.

Our legal framework is both obstructed and lacking in foundation, which backs off any redressal procedure. Recuperation can be speeded up just when there is a settled time span for all transfers, and acknowledgment of benefits could be speeded up by having unique courts to manage such recuperations.

The working of DRTs is additionally keeping the Reserve Bank of India (RBI) stressed. On the off chance that financiers can't recover their cash, they are not going to give credits at modest cost. In this way, ensuring obligation recuperation councils work better, ensuring that we don't have abundance number of stays, overabundance number of requests – this is additionally should have been engaged.

At long last, the law ought to be reinforced to guarantee compulsory time-bound transfer of cases. Likewise, execution pointers of the arbitrating officer could be utilized to enhance the proficiency of the framework. Also, stay petitions ought to be broke down before being acknowledged as there have been occasions where advocates abuse the provisions of the Act and argue for stays, prompting heaping.

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COMPANY – A SEPARATE ENTITY (SALOMON V. SALOMON)

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ABSTRACT

This case note has been prepared highlighting the landmark judgment in the field of corporate law. Salomon v. Salomon & Co. Ltd. [1896] UKHL 1, [1897] AC 22 set the founding stone for the most essential feature of a company i.e. Separate legal entity. This paper initiates by describing the meaning of word ‘Company’ through various statutes and legal precedents. It also highlights the main characteristics of a company. Thereafter facts of the Salomon’s case are presented along with contentions of both the parties and issues involved in the case. A thorough interpretation of the decision of High Court, Court of Appeal and House of Lords is described in the later part of this paper. Many case laws supporting and opposing the Salomon’s judgment are also emphasized upon. This case note concludes with the principles evolved through this landmark judgment along with its implication.

INTRODUCTION

A business can be conducted through many ways. An Individual can start business in a capacity of sole proprietor or through a partnership firm or starting his own company. In the modern era, the most successful form of conducting business is in the form of a company. Before moving to the reasons why company is the most suitable form of business, it is important to understand the meaning of the term company.

The word “Company” is the combination of two words “Com” and “Panies”. The word “Com” means together or with and the word “Panies” means bread. The word company can be referred as an association of persons who took their meals together. It is an association of persons for some common objects. In simple terms company may be described to mean voluntary association of persons who come together for carrying on some business and sharing profits there from. A company in the broad sense may mean an association of individuals formed for some purpose.

Lord Justice Lindley said a company is an association of persons who contribute money or monies worth to a common stock and employed in some trade or business and who share profit and loss arising there from. The common stock so contributed is the share capital of the company. The persons who form it are members. The proportion of capital which member is entitled is his ‘share’. The shares are always transferable although the right to transfer may be restricted.ii

Professor Haney said a company is an artificial person created by Law having separate entity, with perpetual succession and common seal.iii

Talking about separate legal entity, unlike partnership, a company is distinct from the persons who constitute it. Section 7(3) of
the Companies Act 2013\(^{ii}\) says that on registration, the association of persons becomes a body corporate which shall be distinct identity by the name contained in the memorandum.

FACTS OF THE CASE

In this case, Mr. Salomon who carried on a business of shoe manufacturing sold his business for the sum of £38,782 to ‘Salomon & Co. Ltd’ which consisted of Salomon himself, his wife, daughter and four sons. The purchase consideration was paid by the company by allotment of 20,000 fully paid £1 share and £10,000 in debentures conferring a floating charge over all the company’s asset to Salomon and the balance in cash. One share of £1 each was subscribed for in cash by the remaining six members of his family. Salomon was the managing director of the company and he virtually held the whole of its stock, he had absolute control over the company. Only a year later, the company went into liquidation. On winding up the statement of affairs was roughly like this: Assets £6,000, Liabilities: Salomon as debenture holder £10,000 and unsecured creditors £7,000. Thus the assets were running short of its liabilities by £11,000. The unsecured creditors claimed propriety over the debenture holder (Mr. Salomon) on the ground that a person cannot owe to himself and that Salomon and the company were the same person. They further contended that the company was mere “alias” or agent for Salomon, the business was solely his, conducted solely for him and by him and the company was mere sham, fraud, hence Salomon was liable to indemnify the against its trading debts.

ISSUES INVOLVED

1. Is Company separate from its owner and management?
2. Is Mr. Salomon liable to pay to unsecured creditor?
3. Is ‘Salomon & Co. Ltd’ mere sham and fraud?
4. Does full control over ‘Salomon & Co. Ltd’ make Mr. Salomon personally liable for all the trading debts?

HELD

Firstly before the High Court, the case titled Broderip v Salomon\(^{ii}\) Vaughan William J, held the claim of Broderip valid against Mr. Salomon. According to him, ‘Salomon & Co. Ltd’ was just Mr. Salomon in another form. The signatories of the MOA of the company were also the family member of Mr. Salomon, hence they were only dummies. Mr. Salomon had full control over the affairs of the company and he should be liable towards all the trading debts before self payment of his own debentures.

Secondly the Court of Appeal upheld the decision of Vaughan William J against Mr. Salomon but on different grounds. According to him Mr. Salomon abused the ‘limited liability and incorporation’ characteristics of a company. Lindley J held that Mr. Salomon is personally liable to indemnify all the trade debts of his company. He also mentioned that Mr. Salomon’s intention was to defraud his creditors.
When the matter was brought in front of House of Lords, they unanimously overturned the pronouncement of lower courts. All the arguments relating to agency and fraud against Mr. Salomon were rejected. They emphasized that nowhere in the Companies Act it is mentioned that subscribers of the Memorandum of Association should be independent from majority shareholders. Also ‘Salomon & Co. Ltd’ was formed fulfilling all the requirements of the statute. Lord Halsbury LC stated that if ‘Salomon & Co. Ltd’ was formed legally then it has its own separate identity different than Mr. Salomon.

PRINCIPLES EVOLVED

Decision of Salomon v. Salomon gave birth to the doctrines of separate corporate personality and limited liability. These doctrines are the fundamental pillars of modern time Company Law. The essence of separate corporate personality is that the corporation is a separate legal entity which is distinctive from its owners (shareholders). On the other hand limited liability means that the shareholders are only liable to pay amount which are due on their subscribed shares. Unlike partnership firms, companies can sue or can be sued in their own name.

Other concept which is established due the doctrine separate legal entity is “Corporate Veil”. The Black’s Law Dictionary defines piercing the corporate veil as follows: “the judicial act of imposing personal liability on otherwise immune corporate officers, directors, or shareholders for the corporation’s wrongful acts.” This definition reveals the main essence of veil piercing. Once the court decides to disregard the statutorily imposed boundaries for corporate liability, it may hold personally liable different parties, such as the corporate officers, directors, or the shareholders of the company that might be either natural or legal persons. Hence, the spectrum of possible liable persons is fairly wide. This leads us to the Exceptions of the Corporate Veil. The doctrine of juristic personality of a company has been subject to certain exceptions. The courts have in many cases disregarded the corporate personality to look at the facts which actually exist behind the corporate veil. The advantages of corporate veil are allowed to be enjoyed only by those who want to make an honest use of company. In case of dishonest and fraudulent use of the facility of incorporation, the law lifts the corporate veil and identified the persons who are behind the scene and are responsible for the perpetration of fraud. In Workmen of Associated Rubber Industry Limited v. Associated Rubber Industry Limited it was found that the sole purpose for the formation of new company was to use it as a device to reduce the amount to be paid by the way of bonus to workmen. Supreme Court upheld the piercing of the veil to look at the real transaction. Other important judgments where courts upheld the piercing of corporate veils are (1) New Horizon Limited v. Union of India, (2) PNB Finance Limited v. Shital Prasad Jain, (3) Gilford Motor Company v. Horne, (4) Daimler Company Limited v. Continental Tyre and Rubber Company and many others.

IMPILICATIONS
The principles evolved in the Salomon’s case was upheld in *Lee v. Lee Air Farming Limited* in which Mr. Lee held all but one share in the company, and by articles was appointed as governing director of the company and chief pilot. Lee was killed while piloting the company’s aircraft, and his widow claimed compensation for his death under the Workmen Compensation Act. The company opposed to claim on the ground that Lee was not the worker as the same person could not be employer and employee. It was held that there was valid contract of service between Lee and the company, and Lee was therefore, a worker. Hence his widow was entitled to workmen compensation.

In the Apex Court of India, principle of separate legal entity was first held in the case of *State Trading Corporation India v. Commercial Tax Officer*.

**CONCLUSION**

The decision of House of Lords in the case of Salomon v. Salomon & Co. Ltd set a landmark in the field of corporate law. This case expressly shows that existence of a company is completely different from its owner. It laid down various principles relating to limited liability and juristic personality. There are however, many exceptions to it which are also upheld in many cases across the globe. At the end it can be concluded that Salomon v. Salomon & Co. Ltd was the founding stone of the most essential characteristic of a company i.e. separate legal entity and directly or indirectly it leads to the development of corporate legislation throughout the world.
A CHILD’S RIGHT TO EDUCATION: LAWS AND FLAWS

By Sushma
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Introduction
Food, shelter and clothes are the basic requirement of all human beings. This has been admitted and well accepted phenomenon since the evolution of human civilization. As we have passed through various phases of evolution and landed in today’s era. Gradually, Education has become another important and most valuable basic requirement of human life. A critical examination of the concept of education will definitely prove that without education the evolution development in today’s era would not have been possible. It is undoubtedly fact that the education (practical, theoretical or any other form) has been the sole basis of growth of human civilization. On the other hand, at this point of time the human beings existence without education cannot be imagined. The life of a human being is considered to be merely an animal existence if good quality food, shelter and clothes aren’t provided to them, in the same manner denial of good quality education is also considered to be merely an animal existence for a human being.

Considering the importance of education, Various laws have been formulated to ensure proper education to citizens of our country. Since the inception of Constitution of India, Underthe Directive Principles of State Policy, in Article 45 the provisions for free and compulsory education has been enumerated likewise various other state legislations are /were to ensure proper education to the fellow citizens. But, in order to achieve the sole purpose of making the society educated and impart proper education and to ensure that no person should be deprived of proper education. In the year 2002, the Indian parliament amended the constitution and inserted Right to education as a fundamental right. Accordingly, A statute titled “Right of children to free and compulsory Education Act” was enacted in the year 2009. Rules have been framed by the State governments for smooth implementation of the Act for ensuring a developed environment in future.

The Right of Children to free and Compulsory Education Act, 2009

The Right of children to free and compulsory Education Act, (herein after referred as RTE Act) had received the assent of the president on 26th August, 2009. This Act has been enacted to provide free and compulsory education to all children from the age of 6 to 14 years. The said act focuses not only in quality education but also proper eliminator education. Further, the act also focuses on the difficulties faced by the disadvantaged sections of the society. As a result of which, several children have been dropping out of the school. Therefore, some other important aspect of the RTE Act is to provide equal opportunity of education to all irrespective of class, religion, race, sex etc. When we talk about equal opportunity then a very popular scheme of Government
of India comes to mind i.e. “Sarva Shikshya Abhiyaan” (herein after referred as SSA).

Sarva Shikshya Abhiyaan Under HRD ministry Government of India

The Sarva Shiksha Abhiyaan or SSA has been operational since 2000-2001 to provide for a variety of interventions for universal access and retention, bridging of gender and social category gaps in elementary education and improving the quality of learning. SSA interventions include inter alia, opening of new schools and alternate schooling facilities, construction of schools and additional classrooms. Toilets and drinking water, provisioning for teachers, regular teacher in service training and academic resource support, free textbooks and uniforms and support for improving learning achievements levels outcome. With the passage of the RTE Act, changes have been incorporated into the SSA approach, strategies and norms. The changes encompass the vision and approach to elementary education, guided by the following principles:

- Holistic view of education, as interpreted in the National Curriculum Framework in 2005, with implications for a systemic revamp of the entire content and process of education with significant implications for curriculum, teacher education, educational planning and management. Equity, to mean not only equal opportunity, but also creation of conditions in which the disadvantaged sections of the society – children of SC, ST, Muslim minority, landless agricultural workers and children with special needs, etc can avail of the opportunity.

Access, not to be confined to ensuring that a school becomes accessible to all children within specified distance but implies an understanding of the educational needs and predicament of the traditionally excluded categories – the SC, ST and other sections of the most disadvantaged groups, the Muslim minority, girls in general and children with special needs. Gender concern, implying not only an effort to enable girls to keep pace with boys but to view education in the perspective spelt out in National Policy on Education 1986/92; i.e. a decisive intervention to bring about a basic change in the status of women. Centrality of teacher, to motivate them to innovate and create a culture in the classroom, and beyond the classroom, that might produce an inclusive environment for children, especially for girls from oppressed and marginalized backgrounds.

Moral compulsion is imposed through the RTE Act on parents, teachers, educational administrators and other stakeholders, rather than shifting emphasis on punitive processes. Convergent and integrated system of educational management is pre-requisite for implementation of the RTE law. All states must move in that direction as speedily as feasible.

Even though, the Right to education has become a fundamental right in the year 2002. Much before that, Our Government had started the above programme i.e. SSA with a view to achieve freedom from illiteracy. In that process, Government (including various state governments) have implemented various programmes in order to attract the poor and disadvantaged
sections of the society. From among such programmes, "Mid-day Meal", Supply of clothes, books etc. play a major role in encouraging the children towards education and in the process of achieving the legislative intent of the RTE Act. However, the Act, along with equal opportunity for education focuses on eradication of barriers in the way of education which is of equal importance. Whereas, various barriers in the path of providing education varies from time to time and area to area. In rural areas, there might be different difficulties and the situation might not be the same as that of the urban areas. Due to the difficulties or the barriers proper environment has not been created and the rate of drop outs is increasing day by day. Thus, broadly the right to education act provides or takes care of few important aspects :

(i) Equal opportunity for Education
(ii) Eradicating the barriers in the path of education
(iii) Reduction of the rate of Drop outs.

According to a paper published, about drop out in secondary education, the various causes and its effect with regard to drop out are purely socio-economic, some are individual reasons and some are very practical. As per as socio-economic reasons are concerned, early marriage, lack of awareness, lack of exposure, very less per capita income, poor financial conditions are generally found to be the major reasons for the dropouts. So far as individual reasons are concerned poor health, poor performance, safety and security are certain difficulties which not only creates barrier but also becomes a burden for an individual to go for proper education. Coming down to practical reasons, the distance of schools, infrastructure issues, attitude of teachers etc. discourages the implementation of the RTE Act. An Article published in “THE HINDU” newspaper in the year 2016, has provided a data obtained from ministry of Human Resource & Development which states that the national drop-out rate at the primary level was 4.34% in the year 2014-2015 and in case of secondary level the percentage of drop outs are more than 17.36%. Further, the Article reveals that the problem of child labour can never be over ruled.

CRITICAL ANALYSIS OF THE RTE ACT

Admittedly, the RTE act is an welfare statute and has been enacted with an holistic aim but the same is also not free from practical difficulties as far as implementation is concerned. It is quite surprising that many states have not yet framed the rules so as to implement the RTE Act. Further, Section 4 of the Act provides special provision for children not admitted or who have not completed elementary education.

Special provisions for children not admitted to, or who have not completed, elementary education -

“Where a child above six years of age has not been admitted in any school or though admitted, could not complete his or her elementary education, then, he or she shall be admitted, could not complete his or her elementary education, then, he or she shall be admitted in a class appropriate to his or her age:

Provided that where a child is directly admitted in a class appropriate to his or her age, then, he or shall, in order to be at par
with others, have a right to receive special training, in such manner, and within such time-limits, as may be prescribed:

Provided further that a child so admitted to elementary education shall be entitled to free education till completion of elementary education even after fourteen years.”

However, there is no such provision to provide the elementary education to children as mentioned in the above section. On the other hand, there is nowhere mentioned about any specific device or system which will take the responsibility of facilitating the admission process of those students/children who could not complete their elementary education. Moreover, Admission in a class appropriate to the age of the concerned child is not justifiable it is because if a child who have not completed the elementary education and have attended an age of 12 years then admitting a child in the higher class is a frustrating act for him/her. Subsequently, as far as the special training to be provided to such children is concerned there needs to be an institutional approach and a specific system of implementation is to be developed.

Further, Section 11 of the Act enumerates or empowers appropriate government to provide pre-school education.

Appropriate Government to provide for pre-school education –
With a view to prepare children above the age of three years for elementary education and to provide early childhood care and education for all children until they complete the age of six years, the appropriate Government may make necessary arrangement for providing free pre-school education for such children.

Pre-school education is important in order to encourage the children as well as parents towards education. But, unfortunately, In Government level there has been no such action taken for ensuring pre-school education in order to strengthen the foundation of free and compulsory education. For an example, In the State of Odisha the pre-school education is been imparted in a specific category of centre called “Aanganwadi Centre”. But, the Aangwadi workers and the centre has been facing lot of practical difficulties with regard to pre-school education. The persons engaged in such pre-school education and activities are not provided with the basic requirements such as proper remuneration, job security, proper status in the service as a result of which they are not encouraged to take up or perform the responsibility for imparting proper pre-school education.

Section 13 of the Act provides:

**No capitation fee and screening procedure for admission :-**

“No school or person shall, while admitting a child, collect any capitation fee and subject the child or his or her parents or guardians to any screening procedure. Any school or person, if in contravention of the provisions of sub-section (1):

1. Receives capitation fee, shall be punishable with fine which may extend to ten times the capitation fee charged;
2. Subjects a child to screening procedure shall be punishable with fine which may extend to Rs 25,000 for the first contravention and Rs 50,000 for each subsequent contravention.”
As per the above provision the school will not take any capitation fees and the school will be prohibited from conducting any kind of screening process in the event of admitting children into the schools. Therefore, there arises very practical difficulty with respect to imparting quality education. When the government is not adequate to provide necessary funds, then schools generate funds from the students and try to impart quality education by providing good environment to the students. But, strict implementation of such provision makes it difficult for the management of the schools for imparting the quality education. Accordingly, Screening, Interview, entrance test is concerned in my humble opinion it is required, atleast for schools which are known for their rich culture, good reputation and excellent result. If the entrance procedure is stopped then admission of good and meritorious student will be restricted. Then, there will not be healthy competition between the students. As a result of which, not only the healthy competition between the students is restricted but quality education is also affected. In this process the competitive spirit is lost somewhere. In my personal opinion, mere education is not sufficient but quality education and development through healthy competition is much more important. Practically, I have seen that some schools which have been established ages before and have been very well known for producing meritorious students, they are unable to take good or at least average students with minimum basic knowledge as a result of which the good will of such schools are going down and meritorious students are losing interest in prosecuting their studies in such schools.

For an instance, Ravenshaw collegiate school which was established in the year 1851 by T.E. Ravenshaw, in the city of Cuttack, Odisha has got a very rich heritage and exceptional good will in terms of results. It has produced great sons of the soil like Netaji Subhash Chandra Bose, Madhusudhan Das, Kartar Singh, Biju pattnaik etc. Since long this school has been securing 100% result along with top rank holders in the state level board examination. But, after implementation of the above provision of no screening/no entrance the school authorities are unable to take good students thus, the teachers are facing difficulty in maintaining proper environment for the studies and good students are getting discouraged resulting in poor performance in state and national level. Furthermore, the guardians are also discouraged because like previous year they are unable to encourage their students to take admission in such schools which was an honor by itself. Therefore, entrance test should be allowed to certain extent. Furthermore, this provision can be properly/successfully implemented only when pre-school education is extended with 100% success rate.

Prohibition of physical punishment

Section 17 provides that, **Prohibition for physical punishment and mental harassment has been incorporated**:

The research has revealed that the above provision has been misutilised and abused by the students and parents as because when the teacher tries to become a bit strict for the development of the student and takes the liberty of punishing the student for his benefit then also, this becomes an offence.
for which the teachers are refraining themselves from taking extra effort for quality education. Many educationalist, have opined that modern technology which are cordial and friendly should be adopted for imparting education but the appropriate governments have not devised proper training programmes for the teachers.

Another, important provision which needs to be looked into and worked upon i.e. School management under Section 21 of the RTE Act:

**School Management Committee:** (1) A school, other than a school specified in sub-clause (iv) of clause (n) of section 2, shall constitute a School Management Committee consisting of the elected representatives of the local authority, parents or guardians of children admitted in such school and teachers: Provided that at least three-fourth of members of such Committee shall be parents or guardians: Provided further that proportionate representation shall be given to the parents or guardians of children belonging to disadvantaged group and weaker section: Provided also that fifty per cent. of Members of such Committee shall be women.

(2) The School Management Committee shall perform the following functions, namely:-- (a) monitor the working of the school; (b) prepare and recommend school development plan; (c) monitor the utilisation of the grants received from the appropriate Government or local authority or any other source; and (d) perform such other functions as may be prescribed.

[Provided that the School Management Committee constituted under sub-section (1) in respect of,-- (a) a school established and administered by minority whether based on religion or language; and (b) all other aided schools as defined in sub-section (ii) of clause (n) of section 2, shall perform advisory function only.]

As far as this provision is concerned, the school management committee has got an important role to play in development of Environment for quality education and for monitoring the working of educational institution. But, most of the time the interference of the school management committee is so high that kills the essence of quality education and smooth management of the schools. The most vital aspect which needs to be implemented in order to achieve the sole purpose of the Act is school’s responsibility in extending at least 25% of the strength of a particular class as reserved for children belonging to weaker section and disadvantaged group in neighbourhood and provide free and compulsory elementary education till its completion but we are yet to achieve success in identifying weaker and disadvantaged group in the neighbourhood of a school, and the proper procedure for extension of such benefits to the beneficiary is yet to be developed.

An enactment is always done on the basis of socio-economic and educational scenario of the contemporary society in the relevant time but that needs to be modified in course of time as per the requirement. Thus, Many supreme court judgments on various contexts have quoted *Bhagvad Gita*:
For doing so, the role of executive, judiciary and legislatures are very much essentials and all these three wings should work in proper coordination. When the Right to Education have been made as a fundamental right the role of judiciary becomes very crucial so far as protection for the same is concerned.

The judiciary is expected to play a significant role in enforcing the RTE Act. Courts have been acting and have to continue to act as first port of call in the absence of proper statutory bodies and grievance redressal mechanisms. However, it is imperative that judicial efforts be supplemented by building awareness and strengthening grievance redressal mechanisms under the RTE Act. This will lead to saving of litigation costs as well as remove the barriers to secure rights for parents and their children. Side by side, strategic litigation across High Courts should also be explored, for pushing implementation of the RTE Act by state governments. In a PIL filed in 2014 by National Coalition for Education in SC, it pointed out that at least 3.77 crores children between the age of 6 to 14 years were not in schools. It also highlighted sluggish implementation of the RTE Act, leading the Apex Court to direct all states and union territories to respond to these issues. Thus, more such efforts by civil society organizations will be useful in getting targeted judicial orders for the effective implementation of the Act. RTE is here to stay as its focus on educating all children is core objective of a developing India. Now the executive has to strengthen education delivery mechanisms and summon necessary political will to implement Act. Simultaneously, judiciary will continue hold government accountable and ensure the Act’s enforcement.

Right to Education Act It’s been eight years since the Right to Education Act, 2009, came into force. The RTE Act has been touted to be a landmark legislation that seeks to realize the fundamental right to education for all children in the age group of 6-14 years. Yet it is being perceived as an ill-drafted and poorly implemented legislation. Many schools in country still suffer from lack of adequate drinking water facilities, playgrounds or the necessary infrastructure prescribed by the Act. There still exists cases of corporal punishment which has been banned by RTE. The learning outcomes which are the indicators of quality of classroom instruction have been found to be badly low. Thus, it shows that bureaucratic apathy and weak institutional mechanisms are some factors
that have contributed to poor and less significant implementation of the Act.

However, there is relatively unexamined indicator of how the law has worked is its contestation in courts.

As discussed above, the judiciary alone cannot protect the rights of the citizens if proper awareness and information is not circulated among the members of the society. There, the role of media and social organizations becomes very crucial. Hence, All the responsible pillars of our society should come forward and join hands for achieving the greater goal with regard to Right to Education.

Conclusion

Education is the best tool or weapon to wipe out all the difficulties from personal and social life. Without education, growth of individual and society as a whole is next to impossible. Understanding the above idea laws have been formulated and various steps have been taken by the Government and various other agencies to ensure proper education to each and every individual as a matter of right. But, the concept of education should not be confined only to theoretical or conventional educational system rather vocational, artistic and creative areas are to be included within the scope and ambit of Right to education. The statutes including constitution needs to be amended as to inclusion of vocational, artistic and creative trainings in right to education.

On the other hand, the existing provisions of law needs to be extended with a practical and holistic approach in order to make it convenient for implementation of the laws without any practical hindrances. It is high time to develop a system of strong monitoring unit either by way of enactments and by way of awareness. If there would be institutional approach to implementation of the existing laws then also a drastic change in a positive direction can be seen. Lastly, without disputing the existing provision of law or the prevailing practice in implementation of laws. I suggest for creating awareness with regard to implementation of the said Act.
RIGHT TO FREEDOM OF PRESS

By Sushmitha. R
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INTRODUCTION
Freedom is a universal human right. It is not the prerogative of the politician. Nor is it the privilege of the journalist. In their day-to-day work, journalists are simply exercising every citizen’s right to free speech.

A free press is fundamental to a democratic society. It seeks out and circulates news, information, ideas, comment and opinion and holds those in authority to account. The press provides the platform for a multiplicity of voices to be heard. At national, regional and local level, it is the public’s watchdog, activist and guardian as well as educator, entertainer and contemporary chronicle. The universal declaration of human rights is generally accepted as the international human rights law, adopted in 1948, towards enjoying universal enjoyment of human rights.

INTERNATIONAL HUMANITARIAN LAW
International humanitarian law (IHL) and human rights law are complementary. They both seek to protect human dignity, though they do so in different circumstances and in different ways. International human rights law is the body of international law designed to promote human rights on social, regional, and domestic levels. As a form of international law, international human rights law is primarily made up of treaties, agreements between sovereign states intended to have binding legal effect between the parties that have agreed to them; and customary international law.

UN CHARTER
The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945. The Statute of the International Court of Justice is an integral part of the Charter.

B) INTERNATIONAL BILL OF RIGHTS
UNIVERSAL DECLARATION OF HUMAN RIGHTS
It acknowledged “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”

ICCPR&ICESCR
the UN General Assembly compiled the International Covenant on Civil and Political Rights (approved in 1966 together with the International Covenant on Economic, Social and Cultural Rights and they were put into force in 1976). Also in Article 19, the Covenant clearly says: “1) Everyone shall have the right to hold opinions without interference. 2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in
writing or in print, in the form of art or through any other media of his choice…."

**C) UN Core Conventions and Specific Instruments**

**UNESCO Convention 1945**

On the global scale, the UN Educational, Scientific and Cultural Organization (UNESCO) is always on the forefront in pushing ahead the freedom of speech and the freedom of the press; protecting the interests of the journalists. The UNESCO Convention (1945) points out the objectives of this organization as to “encourage the freedom of exchange of opinions by languages and images”, “freedom of exchange of opinions and intellect”…. in order to enhance the understanding, making a contribution to consolidating solidarity in each society as well as the friendship among nations. The realities in the past 70 years of its existence show the close association in the activities of this Organization with Article 19 concerning the praise of freedom of speech and the press.

**European Convention on Human Rights**

The European Convention on Human Rights (Article 10), the American Convention on Human Rights of the African Charter on Human Rights and the rights of nations (Article 9) have acknowledged the rights to freedom of speech and of the press. The Human Rights Charter of Asian National approved by the Association of Asian Parliaments for Peace (AAPP) in Pataya (Thailand) in November 2005, in Article 12, says “The freedom of opinion and the freedom of speech” provide quite concretely the right to freedom of speech, similar to the content already provided in the UN human rights documents.

**American Convention on Human Rights**

Every person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights. All people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.

**Declaration**

**Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda**

On 3 March 2017, the UN Special Rapporteur on Freedom of opinion and expression, David Kaye, OSCE Representative on Freedom of the Media, issued a Joint Declaration on freedom of expression, focusing this year on “fake news”, disinformation and propaganda. The Declaration identifies the human rights standards that should apply to any efforts to deal with disinformation and propaganda, encourages the promotion of diversity and plurality in the media, and emphasizes the particular roles played by digital intermediaries as well as journalists and media outlets.
INTERNATIONAL DECLARATION ON PROTECTION OF HUMAN RIGHTS
The International Declaration is based on thorough research and analysis of existing international mechanisms in the area of journalist safety as well as on best practices among journalists and media organizations to ensure maximum safety. The Declaration is intended to contribute to ongoing efforts to ensure implementation of international mechanisms related to journalists’ safety and reduce the risks journalists face in covering the news. As part of that overall process, IPI also encourages our colleagues to join the Global Safety Principles and Practices for Freelancers, which have already been endorsed by over 60 media and press freedom organizations.

RESOLUTIONS
RESOLUTION BY UN HUMAN RIGHTS COUNCIL
It has adopted a ground-breaking, comprehensive resolution aimed at protecting journalists and demanding the release of all journalists who have been arbitrarily detained. It urges the reform of laws designed to obstruct editorial work, and calls on states not to interfere with the use of encryption and digital security tools that enable anonymity.

RESOLUTION ON THE SAFETY OF JOURNALISTS AND MEDIA PRACTITIONERS IN AFRICA
This declaration was made by noting that killings, attacks and kidnapping of journalists, which are contrary to international humanitarian and human rights law, are after committed in an environment of impunity, and by concerning frequency of allegations of the violations of killings and injury against journalists and media practitioners.

GENERAL COMMENTS
GENERAL COMMENT NO.34: ARTICLE 19: FREEDOMS OF OPINION AND EXPRESSION
This general comment replaces general comment No. 10 (nineteenth session. The Committee reiterates its observation in general comment No. 10 that “because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression”. The State should not have monopoly control over the media and should promote plurality of the media.

GENERAL RECOMMENDATIONS
GENERAL POLICY RECOMMENDATION ON FREEDOM OF EXPRESSION FOR CIVIL SOCIETY AND THE STATE: MOROCCO
In this recommendation both suggestions were given to state and civil society. The recommendation conclusively stated, Freedom of expression in the Moroccan Internet is an area that still has many challenges ahead, as we have seen in this short analysis. Unfortunately, so far there is no specific law to cover this area. As a result, the judgment that is applied is random and arbitrary, as it is the offline jurisdiction that is used. In order to change
this situation, the state ought to adopt a multi-stakeholder approach, and collaborate more with civil society and other actors, in order to come up first with a much-needed fair online law, and second to allow freedom of speech for all, in accordance with the international treaties that Morocco had ratified in that sense.\textsuperscript{ii}

REPORTS OF SPECIAL REPORTERS

MICHEAL MASSING, a former Executive Editor of The Columbia Journalism Review, frequently writes about the press. He gave his views about the new generation of digital journalism.

INDIAN LAW

CONSTITUTION

The Freedom of the Press is nowhere mentioned in the Indian constitution. The Right to Freedom of Speech and Expression is provided in Article 19 of the Indian Constitution. It is believed that Freedom of Speech and Expression in Article 19 of the Indian constitution include freedom of the press.\textsuperscript{ii}

ENACTMENT AND RULES

Few enactments and rules regarding freedom of press are:

2. Defense of India act 1962
3. The working journalists and other news paper employees(condition of service and miscellaneous provisions act).
5. Copyright act 1957.

RELATED CASE LAWS

HAMDARD DAWAKANA VS UNION OF INDIA\textsuperscript{ii}
The Supreme Court held that, an advertisement is no doubt a form of speech and expression but every advertisement is not a matter dealing with the expression of ideas and hence advertisement of a commercial nature cannot fall within the concept of Article 19(1).

TATA PRESS LTD VS MAHANAGAR TELEPHONE NIGAM LTD\textsuperscript{ii}
The Court, however, made it clear that the government could regulate commercial advertisements, which are deceptive, unfair, misleading and untruthful.

BOBBY ART INTERNATIONAL VS OM PAL SINGH HOON [ 1 MAY 1996 ]
The Supreme Court re-affirmed the aforementioned view and upheld the order of the Appellate Tribunal (under the Cinematograph Act) which had followed the Guidelines under the Cinematograph Act and granted an ‘A’ certificate to a film. The Supreme Court struck down the Order rejecting the State’s argument. The Court opined that, the right of freedom of speech and expression couldn’t be taken away with the object of placing restrictions on the business activity of the citizens. Freedom of speech can be restricted only on the grounds mentioned in clause (2) of Article 19.
R. RAJAGOPAL V. STATE OF T.N[ OCTOBER 7 1994 ]
The Supreme Court of India has held that freedom of the press extends to engaging in uninhabited debate about the involvement of public figures in public issues and events. But, as regards their private life, a proper balancing of freedom of the press as well as the right of privacy and maintained defamation has to be performed in terms of the democratic way of life laid down in the Constitution.

PAPANASAM LABOUR UNION V. MADURA COATS LTD.
The Honorable Supreme Court has laid down some principles and guidelines to be kept in view while considering the constitutionality of a statutory provision imposing restriction on fundamental rights guaranteed by Articles 19(1)(a) to (g) when challenged on the grounds of unreasonableness of the restriction imposed by it.

D.C. SAXENA (DR.) V. CHIEF JUSTICE OF INDIA
The Honorable Supreme Court has held that no one else has the power to accuse a judge of his misbehavior, partiality or incapacity. The purpose of such a protection is to ensure independence of judiciary so that the judges could decide cases without fear or favour as the courts are created constitutionally for the dispensation of justice.

By these above observations and the judgment we can say that restrictions imposed by Article 19(2) upon the freedom of speech and expression guaranteed by Article 19(1)(a) including the freedom of press serve a two-fold purpose viz. on the one hand, they specify that this freedom is not absolute but are subject to regulation and on the other hand, they put a limitation on the power of a legislature to restrict this freedom of press/media. But the legislature cannot restrict this freedom beyond the requirements of Article 19(2) and each of the restrictions must be reasonable and can be imposed only by or under the authority of a law, not by executive action alone.

CONCLUSION AND SUGGESTIONS
In democracy, the Government cannot function unless the people are well informed and free to participate in public issues by having the widest choice of alternative solutions of problems that arise. Articles and news are published in the press from time to time to expose the weaknesses of the governments. The daily newspaper and the daily news on electronic media are practically the only material which most people read and watch. The people can, therefore, be given the full scope for thought and discussion on public matters, if only the newspapers and electronic media are freely allowed to represent different points of views, including those of the opposition, without any control from the Government.

The following suggestions are offered in this connection.

REFERENCES:
https://www.importantindia.com
www.servicesindia.com
www.thehindu.com
www.heritage.org
www.lincoln.edu
The Quest for PRESS FREEDOM – MESERET CHEKOL RETA
For Press Freedom- Edward Boubet
Press Freedom in India, Legal and Ethical Dimensions- Tripura Sundari
EXPORTING PRESS FREEDOM- Craig L. LaMay

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SUSTAINABLE MANAGEMENT OF CONVENTIONAL SOURCES OF ENERGY

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The human wellbeing and development is totally dependent on the state of the natural environment. Sustainable management of natural resources deals with natural landscape and people interact. As Dennis J. Hall stated that “we don’t inherit the earth from our ancestors, we borrow it from our children”.

In the present scenario, due to increase in population, the needs are increasing which is resulting in the depletion of resources. Even though the resources are decreasing day by day, the craving for these resources are increasing. As said by Mahatma Gandhi, people are using resources for their greed rather than for their need. As the resources are depleting they must be used judiciously and efficiently. Such resource management must be regulated through stringent laws such as Renewable Energy Act.

This thesis defines sustainable management and conventional sources of energy. This paper also elucidates on the history of sustainable management and origin of conventional sources of energy. This research throws light on efficient and innovative usages of conventional sources of energy under the purview of sustainable management. This study throws light on conventional sources of energy in India. The paper analyses and compares the judicial and optimal usage of conventional sources in India with that of other countries. The research also discusses and compares energy laws of India with that of the world. The study explains laws related to sustainable management of conventional sources of energy in India. Lastly, the researcher(s) prescribe probable trends in future of conventional energy law in India.

(Key words: Sustainable management, conventional sources of energy, energy laws.)

I. INTRODUCTION

Energy is the building block of life. The two most important issues the world is facing are the energy security and the environmental concerns regarding exploitation of energy sources. In today’s world, our existence depends on addressing these two issues. Hence, there is a need for sustainable development and sustainable management of energy.

Energy related issues have become paramount since industrial revolution. Industrial evolution has heralded an era of economic development which is haphazard and iniquitous. This economic development based itself on indiscriminate exploitation of natural resources, mostly conventional in nature. This gave rise to imbalance between environment and development.

The sources of energy are broadly classified as:

- Non-conventional sources
- Conventional sources
II. NON-CONVENTIONAL ENERGY AND CONVENTIONAL ENERGY:

a) Non-conventional sources:
Energy generated by using natural sources like, wind, tides, solar, geothermal heat, and biomass including farm and animal waste as well as human excreta is known as non-conventional energy. This source of energy is also known as renewable source of energy as it can be recycled. Non-conventional energy is considered the energy of the future. Considering the benefits of non-conventional energy generation, many countries have started producing this energy in large scale.

b) Conventional sources:
The sources of energy which are limited and cannot be recycled. e.g., Fossil fuels like coal, oil and natural gas are conventional sources of energy. Reserves of these fossil fuels are limited and are depleting in nature. At the present rate of their consumption it is estimated that oil reserves would last for another 30-40 years and coal for another 210 years. These fossil fuels cause contamination when utilized, as they emanate smoke and fiery remains. They are exceptionally costly to be kept up, put away and transmitted as they are helped over long separation through transmission matrix and lines.

Apart from fossil fuels, hydro power is also a conventional source of energy. Hydro power is an exception to the properties of conventional sources of energy.

In the present scenario, due to use of coal, petroleum products and natural gas in excessive quantities, resulted depleting. This act of excessive use of conventional sources of energy led to an idea of sustainable management. This idea prompted people to search for alternative sources of energy to maintain equilibrium in the environment.

III. CONCEPT OF SUSTAINABLE MANAGEMENT

To know about sustainable management, one must initially know about sustainable development because management happens only when once it is developed. Hence, the concept of sustainable development and sustainable management are interlinked. Sustainable development means to develop the country or an economy by maintaining equilibrium between the development and environment with an eye to preserve conventional energy for future generations.

Sustainable management is an asset management strategy that looks to make any collecting or utilization of regular assets as sustainable as could be allowed. The principle objective is to recharge any assets as quick as they are drained.

Keeping in mind the end goal to fulfil its objective, sustainable management regularly takes a gander at two distinct elements: the rate of utilization and the rate of recharging. As a rule, the objective is to keep these two factors in balance.

➢ History:
As mentioned above, sustainable development and sustainable management are interdependent. Initially, sustainable development was declared as the solution to the problems of environmental degradation discussed by the Brundtland Commission in the 1987 report. Then later, the concept got
The concept of sustainable development has evolved over time. The term was popularised 15 years later in “Our Common Future”, the report of the World Commission on Environment and Development, which included what is deemed the ‘classic’ definition of sustainable development: "development which meets the needs of the present without compromising the future ability of future generations to meet their own needs". With the evolution of the concept of sustainable development, the idea of sustainable management evolved. The idea of sustainable management evolved because development alone is not enough to conserve conventional sources of energy. The development must be managed because without management, development will go in vain.

To take measures to manage conventional sources of energy sustainably, one should know the types and quantity of such energy with special reference to India.

### IV. CONVENTIONAL SOURCES OF ENERGY IN INDIA

- **Coal (56%)**
- **Petroleum & other liquids (33%)**
- **Natural gas (8%)**
- **Hydroelectric (3%)**
- **Nuclear (1%)**

- **Coal** - This is the most abundantly available fossil fuel. It provides a substantial part of the nation’s energy needs. It is used for supply energy to industry and for domestic needs. Coal is formed due to the compression of plant material over millions of years. Coal is mainly found in North-Eastern states, Meghalaya, Assam, Arunachal Pradesh and Nagaland, Jharkhand and West Bengal.

- **Petroleum** - It helps in providing fuel for heating and lighting lubricants for machinery and raw materials of manufacturing industries. Petroleum is found in traps between porous and non-porous rocks. 63% India’s petroleum production is from Mumbai high, 18% from Gujarat and 16% from Assam.

- **Natural Gas** - It is an important clean energy resource found in association with petroleum. It is used as a source of energy as well as an industrial raw material in the petrochemical industry. Large reserves of natural gas are discovered in the Krishna – Godavari basin.

- **Hydroelectricity** - It is generated by fast flowing water, which is renewable resource. India has a number of multi-purpose projects like the Bhakra Nangal, Damodar Valley Corporation, the kopili Hydel project, Teri Dam etc. these are some projects by the government for producing hydroelectricity power.

- **Thermal electricity** - It is generated by using coal, petroleum and natural gas. The thermal power stations use non-renewable fossil fuels for generating electricity. There are over 310 thermal power plants in India.

- **Nuclear energy** - It is still an ongoing debate that whether nuclear power is a source of conventional source of energy or
non-conventional source of energy. It is obtained by altering the structure of atoms. When such an alteration is made, much energy is released in the form of heat and this is used to generate electric power. Uranium and Thorium are used for generating nuclear energy, which are available in Jharkhand and the Aravalli ranges of Rajasthan, are used for generating nuclear power.

IV. WHY SHOULD CONVENTIONAL SOURCES OF INDIA MUST BE SUSTAINABLY MANAGED?

The reason for sustainable management of conventional sources of energy lies in the consumption pattern of the energy and demand and supply statistics of the energy.

a) Levels of consumption of conventional sources of energy by India’s population:

At present India is a large consumer of fossil fuel such as coal, crude oil etc. Over a past few decades, energy is needed for everything. Below are the statistics of sector wise energy consumption pattern in India:

- Transport 30% of energy consumption
- Industry 29% of energy consumption
- Domestic 27% of energy consumption
- Commercial 9% of energy consumption
- Others 5% of energy consumption

The energy requirement is increasing at an alarming rate due to rise in population & industrial growth. This rapid increase in use of energy has created problems of demand & supply. This results in the future of conventional energy becoming uncertain. The below subsection rates consumption level based on economic demand and supply of each resources.

b) Demand and supply of energy resources in India:

The major commercial (non-renewable) sources of energy are coal, oil, natural gas and nuclear power. The share of commercial and non-commercial sources of energy in our country is 4: 1 from 2000.

COAL:

India has about 5% of world's coal production. Coal accounts for 75% of country's commercial requirements. 25% coal consumption for other purposes. Coal supply in India which was just 35 million tons in 1951 went to over 180 million tons in 1988-89. Per capita demand of coal has increased from 135 kg to nearly 225 kg in the instant situation.

OIL AND NATURAL GAS:

The oil reserves are unevenly distributed across India. In 1951, our total petroleum supply was 269,000 tons while in 1990 it was 40 million tons. The total demand of crude oil in India rose from 146.55 MMT in 2006-07 to 232.87 MMT in 2015-16 with a CAGR of 4.74%.

Natural gas reserves are generally found in association with oil fields. Natural gas supply was 2,500 million, m3 in 1980-81 which rose to 9,810 million m3 in 1987 and 15,000 million m3 in 2000. Total gas
reserves of India are estimated to be 5,41,000 million m³. The consumption of natural gas is accounted for 38% of petroleum products.

- HYDRO ELECTRICITY:
  India is endowed with economically exploitable and viable hydro potential assessed to be about 84,000 MW at 60% load factor. In addition, 6740 MW in terms of installed capacity from Small, Mini, and Micro Hydro schemes have been assessed. The hydropower electricity is not yet fully harnessed. At present we are using only 25% of the total hydropower potential of our country. The present installed capacity is approximately 40,661.41 MW which is 16.36% of total electricity generation in India.

- THERMAL ELECTRICITY:
  India’s electricity sector consumes about 75% of the coal produced in the country. The quality of Indian coal is poor in terms of heat capacity. This poor heat capacity is converted into electricity and gas and even oil. That is the reason why many of thermal power stations are located on the coal fields to produce electric power to feed regional grid.

- NUCLEAR POWER:
  As of 2016, India has 22 nuclear reactors in operation in 8 nuclear power plants, having an installed capacity of 6780 MW and producing a total of 30,292.91GWh of electricity while 6 more reactors are under construction and are expected to generate additional 4,300 MW. This power sector is yet to take off.

The above demand and supply statistics indicate that the country is facing negative Energy Balance for decades. As per 16th electric power survey, the anticipated demands require an additional 1,00,000MW supply. The task is overwhelming but not unachievable, because India has significant potential for generation of power from renewable energy sources.

The conventional sources of energy are depleting not only due to high rise of demand but also due to one’s greed. As said by Mahatma Gandhi, people are using resources for their greed rather than for their need. As resources are life-saving agents, one must not be greedy for the economic benefit of the resources.

Apart from preservation of the conventional sources and condoning excessive use of their energy, these sources of energy must be used sustainably developed and managed as they are limited in nature. Apart from being limited, these conventional sources energy pollute the environment and some of them are vital in nature. Burning of coal results in gaseous emissions including oxides of sulphur and nitrogen resulting in pollution. Oil spills causes Marine pollution and harm to marine biology. Mining of these fossil fuels also result in large scale degradation of land and ecology. Hence, to maintain equilibrium between the development and environment, the conventional sources of energy must be sustainably managed.

To maintain control over the use of conventional sources of energy, there a few laws laid down in India related to conventional sources of energy.
VI. LAWS RELATING TO CONVENTIONAL SOURCES OF ENERGY IN INDIA:

i. Environment conservation Act, 2001
This Act’s main objective is to provide necessary legal framework for promoting energy conservation measures in the country. It establishes systems and procedures to verify measure and monitor energy efficiency improvements ii.

ii. Electricity Act, 2003
The Electricity Act 2003 is to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity. This Act helps in taking measures conducive to development of electricity industry, promoting competition therein, and protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff. It also ensures transparent policies regarding subsidies, promotion of efficient and environmental friendly policies ii.

iii. The Atomic Energy Act, 1962
This Act was provided for the development, control and use of atomic energy for the welfare of the people of India and for other peaceful purposes ii.

iv. The Coal Mines (Conservation and Development) Act 1974
This Act was provides for the conservation of coal and development of coal mines and for matters connected therewith or incidental thereto ii.

The further section discusses the above mentioned laws of sustainable management of conventional sources of India in the form of hypothesis.

VII. HYPOTHESIS

SUSTAINABLE MANAGEMENT OF CONVENTIONAL SOURCES OF ENERGY WITH RESPECT TO ENERGY LAWS AND INDIAN ECONOMY:

- SUSTAINABLE MANAGEMENT OF CONVENTIONAL SOURCES OF ENERGY THROUGH INDIAN ENERGY LAWS:

Energy Conservation Act, 2001:
Under this Act, under Section 14, it has discussed about the Power of Central Government to enforce efficient use of energy and its conservation ii. Clause (a) of this section specifies the norms for processes and energy consumption standards for any equipment, appliance which consumes, generates, transmits or supplies energy ii. Clause (t) of this section states all measures necessary to create awareness and disseminate information for efficient use of energy and its conservation ii. Clause (u) of this section arranges and organise training of personnel and specialists in the techniques for efficient use of energy and its conservation ii. Clause (v) of this section takes steps to encourage preferential treatment for use of energy efficient equipment or appliances ii.

- Electricity Act, 2003:
The Act 2003 has several enabling provisions, with a view to promote accelerated development of nonconventional energy based power generation.
According to this Act, under Section 3 (1), Government of India (GoI) shall, from time to time, prepare the National Electricity Policy and Tariff Policy, in consultation with the State Governments for developing the power system based on optimal utilization of resources such as coal, natural gas, nuclear, hydro, and renewable sources of energy. Section 4, GoI shall, after consultation with the State Governments, prepare a national policy, permitting stand-alone systems (including those based on renewable sources of energy) for rural areas.

Section 86(1) (e), projects Section 3 of this Act in a nutshell by stating that “The State Commission shall promote co-generation and generation of electricity from renewable sources of energy and provide suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution license.”

- The Coal Mines (Conservation and Development) Act, 1974:
  
  Chapter 2 Section 4(1), of this Act states that, The Central Government for the purpose of conservation of coal, exercise powers and take necessary measures when required. In same chapter, under Section 5 (2)(1)(c), the Government guides the coal mine owner to undertake research in relation to conservation of coal. Therefore, there are only three legal provisions to talk about sustainable management of conventional sources of energy. Two Acts clearly states sustainable management of conventional sources of energy. The other Act talks about conservation conventional energy but not its sustainable management. Hence, the Central Government must draft more Act related to conventional sources of energy in order to conserve sustainable development and management.

Apart from legal provisions of sustainable management of energy, the paper also discusses sustainable management of conventional sources of energy in the perspective of Indian economy.

**DOES INDIAN ECONOMY FOLLOW SUSTAINABLE MANAGEMENT WHILE TRADING CONVENTIONAL SOURCES OF ENERGY?**

India's energy and economic development has a cause and effect relationship. With India being a developing economy, there is external resistance for sacrificing economic growth for the sake of protecting environment in the future. But India needs to keep up the pace of economic growth to ensure the good of its citizens. The initial five year plans focused on the urban development which resulted in inequitable distribution of wealth across the urban and rural areas.

To ensure the desired rate of growth of the economy it needs adequate energy either indigenously or by means of import. This entails that in order to maintain the required economic growth India would have to exploit the natural resources in the form of coal, hydro, gas nuclear, and wind.
But the challenge is how it can harness the energy resources so as to ensure its energy needs and at the same time make it sustainable for its future generations.

India faces hindrances in meeting its energy needs and in providing adequate energy of desired quality in various forms in a sustainable manner at competitive prices. India needs to sustain an 8% to 10% economic growth rate, over next 25 years, if it is to eradicate poverty and meet its human development goalsii.

India needs to establish energy markets so as to optimally utilize indigenous resources and externally trade energy sources to meet the demand at affordable prices with environmental responsibility. The restructuring of the energy sector is urgent in the near future. The restructuring process needs to be strengthened with theoretical knowledge and rich international experience, so as to develop globally competitive, efficient and environmentally compatible operations.

Using energy laws and the present scenario of Indian economy, let’s know how the Indian government acted.

VIII. EXISTING APPROACHES TO SUSTAINABLY MANAGE CONVENTIONAL SOURCES OF ENERGY:
Presently, to conserve energy, the government is developing and promoting renewable sources of energy which help in sustainably managing conventional sources of energy. The government also established a ministry on the development of renewable sources of energy.
A few important steps opted by Ministry of renewable sources of energy are:

- The Ministry has programs of resource assessment, R&D, technology development and demonstration in the areas of solar energy, wind energy, biomass, bio gas and tidal energy. Several renewable energy systems and products are made economically viable in comparison to fossil fuels, particularly when the environmental costs of fossil fuels are taken into accountii.


The Ministry is encouraging the setting up of grid-interactive power projects based on renewable energy through private investment routeii.

All these steps are drafted in the form of legislation or order but not implemented properly by executives to achieve the sustainable management of conventional sources of energy.

To improve the present energy laws, legislations and Indian economy with respect to sustainable management of conventional energy, it must be compared with other countries and to be rated accordingly.
IX. COMPARITIVE ANALYSIS OF ENERGY LAWS OF USA, INDIA AND SRILANKA:

• **USA:** Energy Policy Act, 2005 - Section 406, of the Act authorizes innovative technologies that avoid greenhouse gases, which might include advanced development of renewable sources of energy. The Act also seeks to increase coal as an energy source while also reducing air pollution, through authorizing $200 million annually for clean coal initiatives. It adds ocean energy sources, including wave and tidal power under renewable technologies. It includes provisions aimed at making geothermal energy more competitive with fossil fuels in generating electricity. It requires the Department of Energy to study and report on existing natural energy resources including wind, solar, waves and tides.

• **INDIA:** The Energy Conservation Act, 2001 - The Act provides the much-needed legal framework and institutional arrangement for embarking on an energy efficiency drive. One of the key features of the Act is Standards and Labelling (S & L) has been identified as a key activity for energy efficiency improvement. The main provision of EC acts on Standards and Labelling is evolving minimum energy consumption and performance standards for notified equipment and appliances.

• **SRILANKA:** National Energy Policy and Strategies of SriLanka - Chapter 2 Point 3, discusses about Promoting Energy Efficiency and Conservation. This point explains energy supply systems will be efficiently managed and operated while ensuring efficient utilisation and conservation of energy. Efficient management and operation of the energy sector utilities are vital to ensure minimum cost of supply to consumers. Chapter 2 Point 9, discusses Protection from Adverse Environmental Impacts of Energy Facilities. This point elucidates on the necessary steps that will be taken to minimum adverse environmental and social impacts caused by electricity and petroleum sub-sector development and operational activities. Adverse impacts on society and the environment arising out of the electricity and petroleum sub-sector activities have not been receiving adequate attention. The state recognises that it is the prime duty of the state to protect the public and employees in this respect. All developments and operations of energy sector facilities shall follow the relevant environmental regulations and standards of Sri Lanka.

The laws related to sustainability in the above countries are similar with minor differences. All the countries talk about conservation of conventional energy but their approaches to treat the problem differs. USA has advanced mechanism to conserve conventional sources of energy. It aims at using 100% renewable sources of energy. Even if it prefers to use conventional source, it makes sure that the energy is used to its full potential. While coming to India, it has a good mechanism to conserve such energy but not executed properly. It strives between the development of the country and energy
conservation. Lastly, Sri Lanka, it has mostly concentrates on the development of the country. It takes fewer measures to conserve conventional energy. Therefore in order to conserve energy, the countries must be interdependent. Like, USA must share it energy conservation policies with India and Sri Lanka. India must set up a specific set of executives for proper implementation of existing and borrowed energy conservation legislations. Sri Lanka should develop more legislation to conserve the energy apart from borrowing the legislations from other countries.

X. WAY FORWARD:
Before proceeding for conclusion, one must consider the case study of Haryana state’s policies on conservation of conventional energy.

❖ HARYANA STATE’S ENERGY CONSERVATIVE INITIATIVES:
Haryana Renewable Energy Development Agency (HAREDA) has been designated by the Govt. of Haryana to co-ordinate, regulate and enforce the provision of the said EC Act, 2001 in the State of Haryana.

The Government of Haryana has issued a comprehensive notification for adoption of various energy conservation measures namely, mandatory use of solar water heating systems, compact fluorescent lamp (CFL) and energy efficient tube lights in all buildings, use of ISI marked motor pump sets and accessories and promotion of energy efficient building design in government aided Sector.

Haryana is one of the first States in the country to adopt comprehensive energy conservation measures to conserve electricity in all sectors of the economy. The rest of the states must get inspired from Haryana and take innovative steps to conserve conventional sources.

❖ CONCLUSION:
India today happens to be amongst the largest producers and consumers of energy in the world. In the present scenario, the use of conventional energy is raising at an alarming rate. Use of coal and petroleum products must be reduced as they are limited in nature and cannot be recycled. Hydro power is an exception to this characteristic. In the case of nuclear power, it is still a debating topic whether it is conventional or non-conventional source of energy. If nuclear power is declared as conventional energy, then even it will have an exception as that of hydropower. The only drawback of hydro power is that it raises many environmental concerns and the problems of resettlement and rehabilitation of the people due to hydro power projects. One such example is, Sardar Sarovar dam on Narmada River led to a huge protest by the people which was supported by Medha Patkar. The drawback of nuclear power plant is that, if there is any damage in the plant, it may affect the people around the plant with its high radiation properties. This radiation may affect people along with their future generations with genetic disorders. Chernobyl accident happened in Ukraine stands as a best example for nuclear plant disaster. Considering the drawbacks of
hydro power plant and nuclear power plant, the government must take additional precautions before setting up such power projects.

Today, India has significant potential for generation of power from renewable energy sources. But, the country doesn’t have enough technology to use its energy to the complete potential. The major drawback lies in the hands of the government because Indian energy sector is structurally handled by five separate ministries (Coal, Petroleum and Natural Gas, Atomic Energy, Power and Non-Conventional Energy Sources) which work in silos and make independent policy and decisions which are neither optimal nor in the best interests of the country.

**SUGGESTIONS:**
Following are the suggestions which might be useful for the government to increase the efficiency of the energy.

- The five separate ministries should be integrated into one Energy Ministry so as to frame holistic policies for the best interests of the nation.
- Adequate technologies and allocation of funds for energy related R&D needs to be promoted for developing indigenous solutions which are typical to India.
- Adopt energy efficiency measures, go for Demand Side Management in the entire value chain and reduce import dependence by domestic fuels.
- Novel technologies to extract coal efficiently which is economically viable and sustainable.
- Villages must be electrified through LEDs and CFLs.
- Government should encourage Private Public Partnership in developing infrastructure.
- Government must provide incentives for the private companies which are developing energy conserving technology.
- Levy high taxes on conventional sources’ consumers.
- Use measures opted by Haryana state throughout the country.

Government alone cannot strive for sustainable management of conventional energy, as a citizen of this country, under Article 51A clause (g), every citizen must contribute for the safeguard of the environment. And as part of this duty, sustainable management of conventional energy also comes in the ambit of this Article. Following are a few such ways that can be followed:
- Use public transport instead of private vehicle.
- Carpooling.
- Switch off electricity when not in use.
- Use cycles and battery vehicles to reduce the consumption of crude oil.
- Use power saving devices.
- Organise rallies, exhibitions to promote renewable sources of energy.
- Write articles promoting renewable sources of energy and efficient use of conventional sources of energy.

India’s high rise in energy consumption and unprecedented economic growth has to be sustainable in the sense of catering to both present and future needs of people acknowledging the fact of limited potential of Mother Earth to regenerate. One should also remember that “we not only inherit
Mother Earth from our ancestors but should act as custodians for our future generations”.

XI. References

➢ Book

1. Social Science Contemporary India grade X textbook by National Council of Educational Research and Training (NCERT)

➢ Sites

1. Fossil Fuel Resources: http://fossil-fuel.co.uk/
5. Conventional sources energy by Anubha Kaushik: http://www.ddegjust.ac.in/studymaterial/pgdem/pgdem-05.pdf read on 20/08/17
15. Government of India Ministry of Coal: http://coal.nic.in/content/acts-and-notifications

16. Petroleum and Natural Gas: https://india.gov.in/topics/power-energy/petroleum-natural-gas


19. India Energy Policy, Laws and Regulations Handbook.no:1: https://books.google.co.in/books?id=DY2ICQAAQBAJ&pg=PA24&lpg=PA24&dq=comparison+of+energy+laws+of+india+with+other+countries&source=bl&ots=AHk5lNdh8c&sig=1XEC8wx17XjmHea40_LWzGZpGKU&hl=en&sa=X&ved=0ahUKEwjZu_jG8P7WAhWBL48KHV_4CUoQ6AEIazAN#v=onepage&q=comparison%20of%20energy%20laws%20of%20India%20with%20other%20countries&f=false

20. What laws are being made around the world to encourage use of alternative energy: https://blog.ipleaders.in/global-laws-alternative-energy/

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COPYRIGHT PROTECTION IN CYBERSPACE: CHALLENGES AND CONCERN

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ABSTRACT

With the emergence of Intellectual Property Rights the human achievements have received an all new heights. The transformation of the mankind from scripts to screen has been achieved with the advent of technology in this digitalized world. And such invention in works has demanded protection under a legal framework. This has been protected under the Copyright Law, 1957.

Most of the countries seek to protect the database under the Copyright Laws. This paper mainly focuses on the question of intellectual skills in the creation of databases pertaining to the protection of it under the Copyright laws, 1957. This paper tries to explain the problem of the infringement of the copyright in the cyberspace and also aims to provide ideal solution for the same in the Indian context.

Keywords- Intellectual Property Rights, Copyright, Database, Infringement, Open access, etc.

INTRODUCTION

“The Works of founders of States, law givers, tyrant destroyers and heroes cover but narrow spaces, and endure but for a little time, while the work of the inventor though of less pomp is felt everywhere and lasts forever.”

This eloquent tribute speaks a lot about the immense services, rendered to the humanity by the ingenuity of the human mind. Since the inception of mankind, the man with the superior intellect has always dominated the overall living and non-living things on the earth. In all fields human activity including politics, administration, economy, statecraft, culture, medicine etc, the man with his superior intellect, is calling the shots and is bringing glory to himself and his nation. This holds a great place in the intellectual property rights as well.

The concept of Intellectual Property has, during very recent times, transformed from its theoretical foundations as a juridical concept, into a pragmatic aspect of the law relating to International Trade. IPR is a branch of law which protects some of the finer manifestations of human achievements. An Intellectual property system which effectively protects innovation and creative expression, to a great extent invisible, is a condition precedent for any creation and application of new technology. The protection boosts and accelerates the process of economic growth and development and renders an opportunity to the inventors to disclose their inventions and the publications of patent specifications, paves the way for worldwide exchange of technical information. Protection and
regulation of intellectual property has the potential not only enriching the economic prosperity and skill of the individual owner or user but also enhances the living standard of the people at large throughout the world. For instance, the grant of patent is recognition and also a reward of the human mind or human intellect and the basic rationale of the patent system are to provide an incentive for the creation of new technology. So, in this present digital world, Internet is the most suitable medium for global trade and exchange of services. The services available in the Internet include software entertainment, information products and professional services, which has elevated mankind to another level in respect of commercial services and thus brought a great variation in the history of mankind. Commerce, specifically on Internet involves the sale licensing of Intellectual Property. Moreover, the present day realization and appreciation of the compulsions of privatization, liberalization as a part of the emerging “New World Economic Order” has further enhanced the growing need for the application and perfection of the intellectual property rights and hence the urgent need for its protection.

The term “intellectual property” broadly includes the reward of the creativity of the mental faculty of the man in various fields and ideas. For instance, trademarks are protected against imitation so long at least as them continued to be employed in trade, etc. Thus, the subject matter of Intellectual Property is very wide and includes literary and artistic works, films, computer programming, inventions, designs and marks used by traders for their goods and services and so on. Intellectual property in its literal sense means the things which emanate from the exercise of the human brain. There are several different forms of rights that give rise to rights that together make up intellectual property. They may include: copyrights, rights in performance, the law of confidence, patents, registered designs, trademarks, passing off, trade libel, etc. However, with the advancement in modern world and technology, “Intellectual Property” has acquired a brief concept that includes all rights enumerated in Article 1(2) of the Paris Convention as well. But, this expanded meaning is discernable from Article 2(viii) of the Convention Establishing the World Intellectual Property Organization 1970, which defines “intellectual property” as including the rights relating to basically literary, scientific discoveries, different designs which includes industrial designs as well and commercial designations. In consonance with the same idea, the World Trade Organization (WTO) has offered its own definition that “Intellectual property rights are right given to people over the creation of their minds.” But these rights do not include the most basic product of the mind, ideas, which are not generally protected as intellectual property.

Thus, Intellectual Property can be regarded as a single generic term that protect ideas, special symbols, design, information and their applications that are of commercial value. Intellectual property rights are increasingly gaining importance as compared to the physical assets of any enterprise, which normally comprise land, plant, machinery, intellectually static manpower, as they are negligible in contrast to intangible assets in various forms of
IPR’s. In India, intellectual property falls in the Union List of the Seventh Schedule under Article 246 of the Constitution, which has itemized same as “patents inventions and designs, copyrights, trademarks and merchandise marks.”

**CONCEPT OF IPR : COPYRIGHT AND CYBERSPACE**

The term Industrial Property had its origin in Paris Convention for the protection of Industrial Property. Article 1(2) of the Paris Convention for the protection of Industrial property 1833 stated:

“The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indication of services or appellation of origin and the repression of unfair competitions.”

Intellectual Property is a vague concept has its many aspects. The object of intellectual property, are the creation of human intellect or human mind. Being a creation of human intellect it is protected as intellectual property and possesses similar proprietor rights by certain limitations, as limited duration. In a broader sense, Intellectual Property Rights includes basically two aspects. On one side it considers ideas, concept, know-how, and other creative abstractions, and on the other it takes into account the literary, artistic, or mechanical expressions that embody such abstractions. Intellectual Property usually consists of two branches: “industrial property” and “copyright”. Mainly inventions, trademarks, and industrial designs are generally called industrial property and literary, musical, artistic, photographic and audiovisual works are called copyright. The Internet matrix comprising both the hardware and software infrastructure date remains non-proprietary; No one owns it, no one licenses its use, and no one restricts access to it. It can be termed as sui generis i.e., a class by itself apart from the traditional classification as moveable and immoveable. Normally speaking, the law relating to intellectual property is value free or value neutral. It is a grant of privilege of monopoly and quid pro quo (consideration of price) is full disclosure of new inventions. Intellectual property is related to pieces of information or ideas which can be incorporated into tangible objects. Like all other moveable and immoveable property rights, the owner or proprietor of this also enjoys certain rights, the owner or proprietor of this also enjoys certain rights without his authorization in recognized limits.

As the technology has expanded its arena, the people started being dependent on the technology advancements. Now the people are dependent on the technological products rather than actual product that were used before the introduction of technology. And this poses a great threat for IP laws and their enforcement in the digitalized world. Technological changes always create challenges to the basic principles of Intellectual property laws. The three technological advances, namely, the digitalization of information, networking, and Internet, have primarily turned the economics of reproduction: networking has changed the economics of distribution; Internet has changed the economies of publication. The change is far reaching because costs have decreased to unimaginable level, as a result of which
traditional assumptions about IP laws have to be rewritten. With each new passing technological breakthrough, we are confronted with difficult questions about the relationship between the new technology and copyright law. The term “copyright” has added dimensions today because in the internet environment the difference between the original and the copies seems to vanish completely, it is the most widely breached and the least fully understood by anybody but intellectual property lawyers. The copyrighted work as ‘property’. Thus, though the form is tangible and cannot be perceived through our senses but like all the other rights the copyright also empowers the holder of it. A lot of copyrighted products and works can be easily accessed with the help of computers, software and internet.

Taking into consideration, the example of movie and music, people used to go multiplex and theatres to watch movie and to buy CDs and DVDs to watch them. But now buying CDs and DVDs has become almost obsolete seen even in the case of music. The easiest way of these sources of entertainment is that people just download them from different websites such as torrent effortlessly causing the loss to the copyrighted movies and music album. The concept of copyright existed previously before the introduction of internet sites, the introduction of the CD burners allowed people to make copies of the copyrighted software, movies and music. The one of the example can be taken into the reference is the use of pirated Microsoft software in the laptops and computers that are even available in the market at the very lowest price than the original software. Almost 90 percent of music downloaded online is illegal and 42 percent of the software running in world is illegally downloaded. The convenient and economical way has triggered the people to violate the copyright infringement law unconsciously.

There are some problems that arise in IP protection due to the introduction of digital media as follows:

Firstly, the distribution, the digital medium creates difficulties in the way in which copyrighted products are distributed. In digital medium, a copyrighted work is licensed for tenure rather than sold. This involves the complete transfer of ownership providing rights in a copy to be transferred from the vendor to the purchaser and to the next purchaser in sequence. For example, distribution by way of Internet as well as in the form of prerecorded compact disks (CD’s) and DVD’s, wherein the owner’s identity can be easily changed, is another major problem calling for Electronic Right Management Systems and their regulations in terms of WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).

Secondly, there is an intimate connection between access and copying in the digital environment problem posed by Internet is the question of what constitutes copying in the digital medium. The essence of IP laws is to confer upon authors the exclusive right to control the reproduction of their works in copies. Protection of this right in digital media possesses difficulties. For a user to view a document, a copy of the document must be loaded into the memory of the computer. Whether this, temporary copy in memory should be considered a
reproduction under the copyright law is not free from controversy. The Berne Convention does not provide for general right of distribution or right of communication to the public. Article 8ii of the WCT provides that the authors of literary and artistic works shall enjoy the exclusive right of authorizing and communications to public of their works by wire or wireless means including the making available to the public of their works in such a way in such a way that members of the public may access these works from a place and at a time individually chosen by them. Cyberspace is a place where copyright infringements and acts of piracy flourish; computer programme codes are easily copied. The new concept of virtual property is eager to enter the field of IPR. Article IO(I) of the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides copyright protection to the computer programmes. Article 4 of EIPO Copyright Treaty (WCT) also provides protection to computer data as ‘literary data’. In India as per Section 79 of the IT Act 2000, network service providers are not liable in certain cases.

Thirdly, problem posed by Internet relates to search engines. A search engine builds periodically a directory of frequently accessed sites and also of the metatags which are primarily the key words. Question arises whether a return produced by search engine links a content that contains infringing material, and it may constitute a copyright infringement?

Fourthly, Linking and deep linking pose new problems for copyright HTTP(Hyper Text Transfer Protocol) as such facilitates linking of one website with another without the knowledge or consent of the owner of the linked site. Linking raises question, whether the link provider is liable for copyright infringement or not? Similarly, deep linking occurs when selective contents of subordinate pages of a home page are linked by another person thus bypassing the top page in the hierarchy leading to loss of revenue due to the fact that the user will not be aware of the real owner of the site.

Fifthly, the problem faced by the digital medium is the issues include what is protectable confidential information? What is an obligation of confidence? How does an obligation of confidence arise? How does an obligation of confidence last, how is confidential information protected?

Sixthly, the issues include patenting and protecting ideas, patenting the computer software in general and that of Internet, business method patents, Internet publications, Patent Infringement, etc.

Seventhly, the issue is that a trademark may clash on the Internet with somebody’s Internet domain name and vice versa forming genuine trademark versus domain name disputes, domain name registry dispute policies, corporate trademark and domain name protection policies. Mega-tags, word stuffing and search engine keyword sales etc.

Lastly, there are different liabilities related to defamatory statement over networks, liability for virus dissemination, liability of online intermediaries (IT Act 2000), e-mail and Internet access policies etc and problem of controlling different activities such as gambling, pornography, and sexual
offences, contempt of court, financial services, advertising on Internet, encryption policy, computer misuse, hacking, etc).

PROTECTION OF DATABASE THROUGH COPYRIGHT

A very important aspect of the new digital age is the personal nature of new technology. An individual can copy copyrighted work from his personal computer easily. It is of course very difficult for copyright owners to file case against these individuals who may be all over the globe.

International Convention

The International perspective in respect with the protection of database includes the Berne Convention which provides for the protection of collections and compilations of literary or artistic works by reason of the selection and arrangement of their contents constituting intellectual creations. The protection under such is without prejudice to the copyright in each of the works forming part of such collections. WIPO Copyright Treaty, which was adopted by the Diplomatic Conference on December 20, 1996, extended the provisions of the Berne Convention to the compilations of databases following the same principles of protection. Similarly the TRIPS Agreement under World Trade Organisation (WTO) also provides protection to the databases on similar lines.

WIPO Draft Databases Treaty of December 1996, on the other hand also aims to harmonise national laws in respect to protection of databases. This treaty mentions increasing risks due to the possibilities of making exact copies of whole databases or parts thereof with little costs. And thus establishes a new form of protection of databases granting rights to enable the makers of databases to recover the investments made.

In India, the copyright Act, 1957 has been amended five times in the years 1983, 1984, 1992, 1994 and 1999. The amendment of 1984 was noteworthy for extending the scope of copyright protection to computer software. The Copyright Amendment Act 2012, inserted section 31D that any broadcasting organization communicating to the public of any literary, musical work or sound recording, to follow the compliances under the Copyright Act, which including but not limited to, giving prior notice of the broadcast, duration, territorial coverage and pay the royalties to the owner of rights in each work, announcing the names of authors and performers. It has prescriptive process of prior intimation for any modification or alteration to the literary or musical work. Further, the broadcaster has to maintain records, books of account and render copies to the owners of the copyright.

Sec.2(ffc) of Indian Copyright Act, 1957 defines ‘Computer Program’ as a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result. Indian Copyright Act, 1957 protects “Databases” as ‘literary works’ under Section 13 (1) (a) of the Act which states that Copyright shall subsists throughout India in original literary, dramatic, musical and artistic works. The
definition of literary works has been provided under Section 2(o) of Copyright Act, 1957 which includes computer programmes, tables and compilations including computer data basis. In the case of Burlington Home Shopping Pvt ltd v. RajnishChibber\textsuperscript{i}, the Delhi High Court has recognized that a copyright existed in a compilation that was a client list. Moreover, in the case of Diljeet Titus v. Mr.Alfred A. Adebare\textsuperscript{ii} where customer lists stored on a computer were recognized as a protectable compilation under Copyright Act, 1957. The concept or idea of algorithm is not capable of copyright protection but programmes which are operating computers are accepted to be within the ambit of aristic and literary work and thus protectable.\textsuperscript{ii}

However, to establish protection and to be ensured that these are not copied and used without legitimate protection legal mechanism needs to be established. The key issue in the light of this, which arises, is the protection of databases and the conflict of interests between the developers and authors of the databases on the one hand and the users of the databases, on the other. Since, authors or developers are interested in receiving remuneration from databases which is based on their intellectual and skill inputs, so they want to restrict it copying from databases while users are longing to make use of the information either without paying for it or at a relatively lesser cost.

Sec.14 of the Copyright Act, 1957 empowers authors of original literary, dramatic, musical, artistic works, computer programmers etc with various rights in relation to their works. They have exclusive right to reproduce their work, make copies, perform their work in public or display, make translation of their work, adaptation of work etc. The term “originality” has been interpreted by the Indian Courts in consonance with the interpretation of the British Courts.\textsuperscript{ii} The owner of a copyright in computer programs shall have all the copyrights, assignment of copyright, special rights,\textsuperscript{ii} rights of owner in respect of infringed copies, etc.\textsuperscript{ii} The computer program under the Copyright Act, 1957 must be original. The infringement of non-literal part or the copying of computer design will constitute copyright infringement. The question in computer software cases has been regard to the limits of substantial copying and as to what are the portions which come under the copyright protection.\textsuperscript{ii}

In the case of Eastern Book Company v D B Modak\textsuperscript{ii}, the Supreme Court substantially raised the threshold for “originality”, when it ruled that an exercise of skill and judgment was required to qualify as an original work. The works at dispute in this case were copyedited judgments with head-notes. The apex court held that copy-edited judgments did not satisfy the threshold of originality. The head-notes were however protected since the court was of the view that substantial skill and judgment went into creating head-notes.

Sec.14 (a) (vi) of the Copyright Act, 1957 confers the right of adaptation on the owner of the copyrighted work. Here, ‘adaptation’ refers to the right of making derivative work taking some elements from the framed sites and some from the multimedia setting and combining them to some other fit into the definition of adaption. The Supreme Court relied on the case of CCH Canadian ltd vs Law Society of Upper Canada \textsuperscript{ii} and
observed that derivative work must have some sufficient distinguishable quality or features which the original work does not possess. Only trivial inputs will not satisfy the test of copyright of an author. Novelty or innovation is not the requirement of copyright but it does require minimum degree of creativity. The Court observed that copyedited texts of judgments of appellant deserved protection of copyright and partly allowed the appeals directing that though respondents may sell their CDs with their own editorial content and headnotes during pending of the matter in high court but it can do so without using the footnotes, headnotes, editorial comments and inputs of the appellants. Therefore, framing using internet technology infringes the rights of the creators.

In the light of this, a recent Indian case, Gramaphone company of India v Super cassette Industries ltd, the court took the view that plaintiff had infringed the copyright of plaintiff in sound recordings wherein a remix version of a song was being sold by defendant on the internet or as mobile tune. The court observed that right of a copyright holder in a recording version to sell, give on hire or offer for sale or hire to public or distribute is not curtailed by the format in which it may be sold online.

In the case of Feist Publications v. Rural Telephone Service Co., the Supreme Court rejected the "sweat of the brow" doctrine that provided copyright protection for databases and compilation based upon the effort use to create the compilation. Instead, the court decided that compilations and databases are protected by copyright only when they are arranged and selected in an original manner. Although the level of originality needed is not very high, the white pages of a phone books are not protectable because the selection of the data and the arrangement of the data were not sufficiently original as to come under the protection of the Copyright Act. Consequently, the competing telephone directory publisher was allowed to extract all of the data from the white pages without liability for copyright infringement.

However, not all databases are protected under the law, only those databases which feature some degree of originality in compilation of the facts are protected. Copyright protection granted to a database, does not automatically grants copyright to the data inside it. It depends on the data in which it is stored may or may not protection. The US Supreme Court, in Rural Telephone v Feist laid down a three prong test to decide whether the compilation is original or not. Firstly, there must be a collection of “pre-existing materials or data”, secondly the data must be “selected, coordinated, or arranged” in a particular way and thirdly the resultant work as a whole “constitutes an original work of authorship”.

Section 51 of the Copyright Act, 1957 lays down the provisions relation to the infringement of copyright. It does not expressly provide as to whether such infringement occurred in cyberspace or in physical world. If we read the language of the Section 51 along with the Section 14 of the Copyright Act, 1957 it becomes clear that reproducing any copyrighted work, issuing copies of the work to the public or communicating the work to the public would amount to the copyright violation under the
Act. But, in case of linking or in-lining there is no reproduction of any copyrighted work. The reproduction takes place at the end of the user who visits the linked page via link.

In the famous and well recognised case of Napster\textsuperscript{ii}, a college student by name Napster developed a software called Napsters. Music share software by which any person by using which can access to any computer databases in the network by breaking the secret codes and download music CD's or albums stored their in. This resulted a sudden fall in the sale of music albums and CD's of recording companies. After considerable effort and expenditure of money the music recording companies located the source. In a series of litigation by these companies, Napster was indicated and punished.

However, it seems impossible to completely cease the infringement of violation of copyright laws as there is no such remedies have been provided in any of the laws whether it be in India or outside India. For instance, the case of Pirate Bay can be taken into consideration. The biggest BitTorrent tracker site on the web revels in copyright infringement. As such it has attracted perhaps more legal attacks than any other website. In 2009 three administrators of the site and their investor were convicted of copyright offences in a Stockholm court. They were sentenced to one year in jail each and millions of dollars in fines, but the website remains online and the four remain free. The case is currently going through the Swedish appeals process, which could take years. But, by this time already, many more similar sites have already been introduced. Considering the data related to piracy, it can be inferred that around 22 percent of all global internet bandwidth is used for online piracy and 70 percent online users find nothing wrong in online piracy. Only, 1 out of 1000 pieces of the most popular content on the OpenBitTorrent tracker is non-copyrighted due to which the various economic losses amounts to $2.5 billion\textsuperscript{ii}.

The Indian legal protection of software copyright meets international standards partially. The Indian law does not prevent a properly registered software package from being copied for use on multiple computers, and does not object to copying of the software for non-commercial use.\textsuperscript{ii} Section 63B of the Indian Copyright Act provides that any person who knowingly makes use on a computer of an infringing copy of computer program shall be punishable for a minimum period of six months and a maximum of three years in prison. Deterrence regarding copyright infringement is insufficient because of difficulty in procuring evidence and the simple punishment the law gives. Conviction rates in this field are low due to multiple reasons.\textsuperscript{ii} The Bern Convention says that “there will be a copyright infringement when an individual copies a work held in electronic format without the authority of the copyright holder.”\textsuperscript{iii}

Apart from the piracy, a new trend has emerged in the global field as authors and the writers are no longer look up at publishers for the publication of their work. They have started using Internet for the publication of their work and publishers offline fear a decline in their business. There is emergence of new concept of open access. Rights of exclusion are the core of
copyright; copying, distributing or making some other privileged used of another’s work is infringement in absence author’s permission. This right of the author gets a blow with open access policy as the mandate in itself gives permission to publish the work without the author’s permission.

The world of computers is made up of both tangible and intangible property. In India too, open access is gaining momentum as it is believed that ‘free open and digital access to scientific research will ensure percolation of cutting edge research at a rapid pace into higher education curricula, thereby raising the standard of the technical and scientific education in the country. This in return will foster a richer research culture.

But it must be considered that open access is made possible by the internet and copyright-holder consent. The only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited. In an open access environment, the work remains under copyright, but a variety of creative commons licenses may be applied to the work. As open access continues to build momentum and debates about copyright become more intense, the importance of the law is only going to grow.

CONCLUSION

The main aim of the open economic market, is the transparent and effective commercial laws so that the intervention of the government can be reduced in the working of the business. The economic policies in India are being liberalised for a competitive market economy, which has demanded for new relationships between science, law, commerce and trade. Therefore, the laws for database protection would require a sufficient degree of certainty in their application to be effective in supporting the commercial activity. On the other hand, equally important are the needs for scientific and technological enterprise for free exchange of information and that data and information in the public domain should not be lost to the private interests. Both interests must be balanced by any legal treaty or instrument for protection of databases.

The copyright law needs to ensure a balance between open access and usage of it. The main motive behind the idea of open access is that free access of the information to the public at large in an efficient manner. But, it must keep in mind that the originality of the work of the authors must not be infringed as they have the copyright in it. The present day scenario demands the situation of inclusion of such provision in the copyright act, 1957 so that it could enrich a better research to the public at large and also the rights of the authors are not infringed.

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MENSTRUATION LAWS
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Abstract
Menstruation is a natural process which is seen as a taboo in most of the world. Fighting for the cause of menstruation related issues is primarily seen as a first world cause. Women suffer gravely due to this mind-set especially in developing and under developed nations. Secular states which are truly secular make their women suffer less. Women of the theocratic nations suffer the worst at the hands of religion as practises are associated with periods to make them worse. People in India are living almost as if it were different realms all together, the modernist of the lotliving with people of the most ancient views. India and its people are at the dawn of a new chapter of freedom for women.
Women miss out a lot because of periods. Islamic countries have their laws that confine a lady forever. Periods have travelled a long legal path in many parts of the world. In countries like Indonesia, Korea and Japan women are entitled to menstrual leaves some being even paid; the acts being almost as old as India itself. Some nations have gone even to the extent of considering Pre-Menstrual Syndrome as a defence to Criminal Offences. From cheaper and free menstrual hygiene related items to established criminal theories. Nations are realising the importance of women and related issues and are tackling them with an ease. It is high time that India learns from these forward looking legislations and kills the taboo of periods right in time.

Menstruation laws
Introduction
Menstruation or periods as they are usually called have been around since the beginning of time, they remain a taboo. Menstruation is one of the most important topics of women health and upliftment. In fact, it is the most basic of all issues related to women. It needs more impetus and more encouragement. Governments need to advertise and publicise the need of doing away with this taboo.

General statics
Periods change the life of a female. In many cases they can be the defining point of a female’s femininity. Islamic families in some countries mandate a female to be under strict purdha for the rest of their lives after menarche. Certain pockets of the world
can be worse in this matter. In Nepal, for an instance there is a social custom called Chhaupadi. Chau means menstruation in the Rawte dialect of Achham and padi means woman. It is a social tradition in the western part of Nepal for Hindu women which forbid a woman from participating in normal family activities during menstruation because they are considered impure. UNICEF organised a survey and some 44% women responded that they had to observe this ritual when they had their first period.ii The taboo about talking about periods even with your own parents only adds to more problems. A survey conducted in Rajasthan and Uttar Pradesh reveals that some 56% and 66% of women respectively had no clue about menstruation prior to menarche (when a female has her first period.)ii The same survey revealed that 89% ladies use clothes or rags to absorb the blood and some 11% even share menstrual clothes and rags. While a 27% don’t use anything at all.i Religion attaches superstitions to periods which range from keeping the female out of the sight of the non-menstruating, not being allowed to eat certain things or not bathe. A study conducted by ministry of education and public health of Afghanistan revealed that a 70% of the women are not allowed and don’t bathe on their period.iii Major religions of the world see periods as a negative thing. In Hinduism, a menstruating female is despised and is not seen any less than a witch of sorts. Rampant discrimination related to periods has become so wide that men are demanding machines to check if the females entering the temples are bleeding or not is a regular thing.ii Hinduism doesn’t allow menstruating females to undertake religious ceremonies.

In Islam, a menstruating woman is considered ritually impure. She is supposed to discontinue certain forms of worship, e.g. the five daily prayers, fasting during Ramadan (she fasts for an equal number of days later) or visiting a mosque. She is also not allowed to touch the Quran (recitation is allowed but no physical touch of the Qur’an can recite it a recent adaption, or from memory, or read it from a computer).ii She is not allowed to have sex. In Christianity as well, the case is similar. The Old Testament of the Bible indicates that a menstruating woman is impure, and that most things she touches become impure.iii If a man touches her bed during this period he also becomes unclean.iii Sanitary Protection: Every woman’s health right, a study conducted by A C Nielsen and reviewed and endorsed by the community development organization Plan India, reveals that only 12% of India’s 355 million menstruating women use sanitary napkins. Almost a quarter of adolescent girls in the age-group 12-18 drop out of school after they begin menstruating because of inadequacy of menstrual protection like sanitary napkins; those who are in school absent themselves for an average of 5 days per month.ii Women who can’t afford such menstrual protection resort to old clothes, newspapers, husks and even mud.

Hence, it is very important that every nation across the globe promotes menstrual hygiene as it is directly related to women empowerment and gender equality. It will lessen the school dropout rates, increase literacy rates and lessen the economic
burden arising out of diseases caused by poor menstrual sanitation. This shall lead to healthier and happier families. Herein after the paper shall deal with all that is legal and deals with periods.

Menstrual leaves
Some nations have taken this race of progressive menstrual legislation ahead by making laws that grant a female employee with a paid holiday for a day or two while she is menstruating. Menstrual leaves as a piece of legislations divide the common people into debate whether it is a sexist law or not. The Indonesian labour law lays down provisions for a paid holiday for the first two days of “those days of the month”.ii Similarly the champion of the menstrual leave, Japan also provides such a leave.ii Article 71 of the Labour Law in South Korea provides for a menstrual leave for 1 day.iii Taiwan allows a day of leave (with an amendment now of 3 days) with half of the day’s wages. iv Similar bills have been discussed in various countries like Russia, Santiago etc. It is debated that menstrual leaves are good to keep employees not only happy but also safe. It increases the productivity of the employees. It is criticized for being sexist and discriminatory as against men. However, menstrual leaves are the new thing now. Feminist groups are fighting for this right. Even companies have started giving such holidays. Coexist is a British company that has become the first to do this in Britain.iv Nike by a memorandum of understanding also provided for this right.iv

Periods and crime
A study published in 1945 which was based on the presidential address to the American Association of Obstetricians, Gynaecologists, and Abdominal Surgeons, by W. R. Cooke said that according to a Parisian prefect of police 84% of all the crimes of violence committed by females are perpetrated during the premenstrual and early menstrual phases of the cycle.ii “The Mood Swings of Women” is one of the earliest literatures about periods and was written down by a Greek Philosopher poet From Semonides.ii Periods and crime are related to each other. Symptoms reported to crop up near the onset of menstruation have been jointly termed the “premenstrual syndrome”; they include corporal symptoms such as stomach cramps and back pain as well as various psychosomatic symptoms such as gloominess, anxiety, and irritability.ii The study of 1945 was not the only one, another one published in 1894 by Lombroso (and Ferrero) formed the base of the biological deterministic theory of female criminality. They found that out of 80 women arrested for ‘resistance to public officials’, 71 were menstruating.iii Established legal theories across the world accept that women are prone to violence while menstruating or just before it. Oleck in 1953 was the first one to suggest that defending lawyers should relate offence of the female with her periods, but no one really listened to what he had to say. Wallach and rubin then in 1972 wrote about the same thing.ii Since then a lot of research has been to establish the same. Flowing out of this, PMS has also been used as a legal defence in the court. It began with Regina v. Craddock.ii In this case, Craddock
with 45 prior convictions was charged with stabbing a fellow barmaid in the heart thrice causing her death. Doctor Katharina Dalton, the most prominent advocate for the defence of PMS; established that Miss Craddock had been suffering from PMS and was convicted under diminished liability thereof. Miss Craddock was found guilty of manslaughter on the basis of diminished responsibility and sentenced to three months' probation.

After this eyebrow raising case, Doctor Katharina Dalton fought the case of R v. English. The facts of the case were that Miss Christine English after a quarrel with her lover crushed him to death against a utility pole using her car. Miss English was granted a conditional discharge on the condition that she received progesterone therapy due to the excellent advocacy skills of Doctor Dalton.

This defence has arisen from the defence of insanity which is based on the M'Naghten rules which necessitate that, at the time of the crime, the accused "was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." These defences are not only limited to Britain but have also been used in Canada, France and the US. In the US the defences have been negated by the court of appeals.

Such defences have a debate arising out of them whether or not these are sexist in nature and promote gender distinction. This only depicts how short we fall, how the rest of the world is doing the unthinkable. In India we haven’t been able to get people to talk about periods and other countries are coming up with historical criminal theories on periods.

**Government schemes**

The Indian government is also catching up pace with the rest of the world by declaring for reforms. Though, it does not include any kind of legally accepted criminal defence of PMSing or declaring a menstrual leave for all female employees. In December 2015, the ministry of rural development and drinking water and sanitation, of Government of India acknowledging the hardships faced by women during periods, released national guidelines on Menstrual Hygiene Management. The guidelines were launched under the Swachh Bharat mission (Clean India mission.) The guidelines set down a number of goals to be achieved and delegate the power of generating more awareness. It also fixes what all should a female must know about periods. It conducts little surveys, conducts workshops on safe disposal of sanitary pads.

The union health ministry has put the biggest step forward by bringing up a ₹150-crore scheme to boost the access to and use of sanitary napkins to adolescent girls in rural areas. Under the scheme a pack of 6 sanitary napkins is provided under the NRHM’s brand ‘Freedays’. These napkins are sold to the adolescents girls at Rs. 6 for a pack of 6 napkins in the village by the Accredited Social Health Activist (ASHA). It is nice to notice that even though these schemes were launched under the congress regime these have not been done away with and are still continuing. These schemes are also being followed in schools. Steps have also been taken to do away with VATs of
sanitary hygiene items. Such steps are great on the part of the government.

Conclusion
The death of this taboo shall be written by the glorious hands of awareness. As Harold Laski said “Eternal vigilance is the price of liberty,” the government needs to safeguard these rights of the people by making the people aware. The major setback of any governmental action is always due to the lack of awareness amongst the people. The government also needs to come out to be secular and stop all who are misusing religion. The judiciary should also not be shy to not touch topics of religion and should come out in the favour of equality when in context to females entering temples. Such steps shall open up the people and they shall understand that menstruation is a natural and healthy process which needs a little compassion of the general population.

The research paper has touched upon unusual kind of ideas, but the point is not to suggest the use of PMS as a legal defence to murder. But it definitely does means that the Indian society needs to open up when in context to such taboos. Menstrual leave is a beautiful concept and if provided of the daily wage working ladies, it might prove to be a boon for them all. This will not only keep the women happy but also increase the productivity rate of the workers bringing profits to the employers.

The steps being undertaken to help in the present case by the Indian government are commendable. The government truly understands Pads and Tampons are no luxury and that the percentage of ladies who have an access to these must increase. Indian government should cut the tax on all kinds of things related to sanitary hygiene until if they cross a certain price and exceed to be a luxury, for which of course the government must put a cap. Sex education is another very important topic that needs to be touched upon in schools so as to open up and prep young ladies and lads for the future. This will make these people better citizens who are more compassionate and understanding. People on an individual basis also need to open up and understand how ordinary periods are.

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ADVERTISING AND SALE OF UNHEALTHY FOOD PRODUCTS INEFFECTIVE ADMINISTRATION

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INTRODUCTION:
It is pertinent to note that with the increasing means of exposure to media through the rapid increase in technology, there has been an unprecedented increase in the sale of products including food and otherwise, where only the quantity is increasing with decreasing quality.

It is now more than ever that a complete screening and regulation of the products being sold and advertised is needed, for every new product a corresponding side effect or health hazard can be observed among the consumers.

This article primarily focuses upon the unregulated sale and advertising of products that are shown to be healthy but in fact are not. The many hurdles the Government faces in the administration and regulation of such sale and advertisement along with the possible remedy available to deal with this ineffective administration will be dealt with hereunder.

THE ADMINISTRATIVE AGENCIES:

FOOD:
In India, The Food Safety and Standards Authority of India (FSSAI) is the apex food regulator. It is empowered by and functions under the Ministry of Health and Family Welfare, Government of India. The FSSAI implements and enforces food regulations as prescribed in the Food Safety and Standards Act, 2006 (FSS Act). The FSS Act is an Act of Parliament, popularly known as the Food Act. Previous to the FSS Act there were a number of food legislations. All these have been consolidated into a homogenous whole in the FSS Act. The regulations of the FSS Act became effective in 2011 with FSSAI as its regulatory body.

WORKING:
In the FSSAI regulations, food products fall into two categories—standardized and non-standardized. The standardized food products are those for which standards are prescribed and do not require product approval prior to manufacture, sale, distribution, or import.

Non-standardized food products do not have standards as their safety parameters are either not known or not yet ascertained.

Presently FSSAI has standardized only 380 articles of food in 16 categories so all other foods require product approval if they are not listed among these 380 food items.

Traditional foods also do not require product approval as they are being consumed for centuries in India. The ingredients and preparation methods are well known and this guarantees their safety. If, however, traditional foods use any new ingredients or
food additive or new technologies in preparation, they need product approval.

If a new or unknown food article is introduced for import, it is considered non-standardized and requires product approval. The FSS Act, 2006 does not apply to foods being exported out of India.

Non-standardized food products, awaiting product approval, are assessed for safety in four categories. To expedite product approval, a 90-day outer limit is now in place for completion of the application review process. However, if the product is referred to the Scientific Panel for further scrutiny, the time limit could be extended. The 90-day time limit has three, 30-day cycles that constitute the various application review stages. This facilitates applicants in tracking the application status at various stages of the approval process and on approval they can immediately apply for license.

ADVERTISING :-

At present in India, there is no central statutory agency or uniform legislation regulating the advertising industry. The Indian advertising market as a whole is regulated and controlled by a non-statutory body, the Advertising Standards Council of India (ASCI). In the absence of uniform integrated legislation, it is necessary for advertisers to ensure that an advertisement is in compliance with all local and national advertisement laws.

Some of the objectives of this council include –

- To ensure the truthfulness and honesty of representations and claims made by advertisements.
- To safeguard against the indiscriminate use of advertising for the promotion of products regarded as hazardous to society or to individuals.

With these objectives in mind, there are a list of products and services that are banned from advertising such as Tobacco, Human organs, Advertising to Children (advertising during and immediately before and after children’s programming) etc.

THE ISSUE :-

Though there are well laid down standards, rules and regulations for the food products being advertised and sold, there is not any effective screening of the products since the basic underlying standard set is already wrong. The products being approved for sale and advertisement are not necessarily and factually healthy (in the short or long run after consumption or usage) as proposed yet are being cleared for the same reason that they conform to the norms set by these administrative agencies.

Taking the example of fast foods,

Consumption of fast foods has become almost a global phenomenon. India’s fast-food industry is expanding at the rate of 40% every year. India ranks 10th in the fast food per capita spending figures with 2.1% of expenditure in annual total spending.
Popularity of these food stuffs due to its great taste, attractive appearance along with advertising played a major role in attracting people particularly adolescents to the selling joints. However, the sale and advertisement of such fast foods followed by its consumption has lead to the following health problems. The energy density of fast foods had been found to be more than twice the recommended daily allowance for children. Experts therefore attribute the current childhood obesity epidemic to fast foods. This increase in childhood obesity has led to increase in life-threatening conditions particularly non communicable diseases in developing countries. 

Dental cavities another common ailment in school children can result due to dense sugar content in fast foods. Food additives used in these food stuffs are found to be carcinogenic and can be allergic causing asthma and rashes which are also seen frequently among children. Added to this in developing countries there are problems like poor hygiene during preparation storage and handling of fast foods leading to contamination by microorganisms.

Moreover, Studies have also found that youngsters who watch more television are more susceptible to unhealthy eating habits and unhealthy conceptions about food substances compared to others who watch minimally. This is because the current food advertising rarely promotes healthy choices and rather promotes frequent consumption of unhealthy foods making it even difficult for most parents to promote healthy eating at home. Therefore advertisement guidelines related to quality of food products in mass media needs formulation and strict implementation.

This is just one example among many were the products like fast food are being advertised and sold in huge numbers after being cleared by these administrative agencies. So there is a prevalent need to look into the administration of such matters leading to proper implementation and regulation of such products so that only the actual healthy ones reach the consumers.

**THE REMEDY :-**

Marketing of food product has a powerful influence on the health of the consumers. The Food Safety and Standard Regulations (Packaging and Labelling) aimed at encouraging food packaging and advertisements to focus less on taste and convenience, more on education and health. The regulations have clearly defined as to what constitutes the Health Claims and Nutrition Claims. Even after these rules and regulations, various food product manufacturing companies continue to advertise unhealthy food products to this vulnerable group. The Advertising Standards Council of India (ASCI) in collaboration with FSSAI Food Safety and Standards Authority of India are in process to keep a check on errant advertisers and to modify the advertisements based on prescribed guidelines. Professional bodies like Indian Academy of Pediatrics (IAP) and Indian Association of Preventive and Social Medicine (IAPSM) need to generate guidelines regarding the content of food
advertisement that can be permitted to be displayed on mass media and other sources of exposure.\textsuperscript{ii}

The \textit{FSSAI} and \textit{ASCI} are both primarily focused upon ensuring that only healthy products are being approved of and advertised. One of the functions of the \textit{FSSAI} include the collection of data regarding food consumption, incidence and prevalence of biological risk, contaminants in food, residues of various, contaminants in foods products, identification of emerging risks and the introduction of rapid alert system.\textsuperscript{ii} However, this function is not effectively administered since the very fact that products like fast food are being approved of even though its evident that they are a health hazard. The safety and health of the consumers must be the only goal of these administrative agencies and it is the responsibility of the government to ensure that proper administration through the necessary regulations are put in place so as to ensure that the right and truly healthy products are being approved of and sold.

Viewers of advertisements are not necessarily passive consumers who will believe everything they are told. They are frequently skeptical of positive advertising claims. If a company is honest and straightforward about potential hazards, it can reduce its potential liability while increasing its credibility with consumers. This can make the company's positive advertising claims more believable. For instance, if a lawn care company tells its local customers that its lawn chemicals are beneficial to the environment, they are likely to view the claim with skepticism. If it acknowledges the chemicals to be potentially harmful but explains how to use them safely and dispose of them properly, the information will be more credible.\textsuperscript{ii}

\textbf{CONCLUSION :-}

The administration and regulation of the food products being approved of and advertised need to be made more effective since it is the lives of the consumers at stake. The sale of such products is sure to bring profit to the companies but it is the consumer who are affected in the end due to ineffective administration of the same. Proper consultation and research must be done with regards to the consequences from the consumption of such products with standards set really high so that there is not the slightest discrepancies in the consumption of the same. The advertising of such products must also be regulated and must strictly conform to the objectives mentioned by the ASCI.

With the rapidly developing world and increasing population, there is a need to ensure that only the healthy food products are sold and advertised for the greater good of the consumers and this can only be done at the grass root level where the Government has to step up taking measures for more strict implementation of the standards leading to an effective administration of the agencies concerned.
REFERENCE :-

Articles :-


Websites :-

- http://www.fssai.gov.in/home.html
- http://www.foodqualityandsafety.com
- http://www.mondaq.com
- http://smallbusiness.chron.com

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INTRODUCTION: -

Right to Information Act was essentially enacted to increase the transparency in the Indian Government, and empower the citizens, according to which, any citizen of India can request any public authority or a body of the government to furnish them with certain information, and the same needs to be acknowledged by the latter expeditiously or within thirty days. This enactment was passed by the legislature on 15 June, 2005 and came into force only on 12 October, 2005, replacing the Freedom of information Act, 2002. As it is well-known that democracy is ‘for the people, of the people and by the people’, this enactment was put forth with an objective of making ‘of the people’ a reality. But has it succeeded in bringing about transparency? is a question to be asked.

Transparency - A Necessity: -

There isn’t any specific or agreed definition for transparency, but it is generally agreed upon, that, it relates to the right to know and public access to information. In a broader sense, transparency encompasses the extent to which there is access to internally held information by the citizens; the scope, accuracy and timeliness of this information and what citizens (as "outsiders") can do if "insiders" are not sufficient enough, in providing such access, or furnishing the requested information.

Excessive secrecy can hamper the quality of public decision-making and prevent the check on the abuse of public power, by the citizens. This can have a degrading effect on predominantly, all aspects of society and governance. Transparency (in terms of both information disclosure and dissemination and access to decision-making) is therefore very important as it better enables civil society to:

• hold government and/or key decision-makers accountable;
• encourage good governance;
• promote public policy and efficiency;
• fight corruption.

Benefits of transparency: -

Inaccessibility of information, many a times tends to create a sense of disempowerment, mistrust and frustration. The International Human Rights NGO – “Article 19” has described information as "the oxygen of democracy" ii, while the UNDP Human Development Report 2002 describes informed debate as the "lifeblood of democracies." ii

Information by itself is not power, but it is an integral primary step to being politically and economically empowered. People can truly participate in the democratic process, only when they have information about the activities and policies of government. Having knowledge of what the state and
other institutions do, is fundamental to the power of people to hold them accountable and improve the way in which they work.

Transparency is an integral part of good governance, as a degree of clarity and openness about how decisions are made can incorporate the participation of the underprivileged, to play a role in policy formulation and its implementation. Transparency is also considered to be a primary aspect of public policy and efficiency.

As noted in Transparency International's Global Corruption Report 2003, "information is perhaps the most important weapon against corruption."ii Access to information plays an important role in curbing corruption and in controlling its impact, since:

- Unrestricted access to information enables citizens, the media and law enforcement agencies to use official records as a means to uncover cases of corruption and maladministration;
- Transparency increases the risk of the corrupt practices being detected and this can act as a deterrent to further corruption in the future.

The 2005 UN Convention against Corruption (UNCAC), which is so far signed by 140 countries around the globe and ratified by 95 nations, calls upon all state parties to ensure public transparency generally.ii

**Right to Information and Art. 19(1)(a) :-**

In *STATE OF UTTAR PRADESH v RAJ NARAIN*ii,

Supreme Court held that, Art.19(1)(a) not only includes freedom of speech and expression but also ensures right of citizens to know and right to receive information regarding matters of public concern.

In *ASSOCIATION FOR DEMOCRATIC REFORM v UNION OF INDIA*ii,

The Supreme Court upheld the Delhi High Court’s order, mandating the Election Commission to obtain and disclose to the public, information relating to candidates running for office, including information on their assets, criminal records, and educational background. The SC ruled that the right to know about public officials (Right to Information) is derived from the right to freedom of expression embedded in the Constitution. It has a wide scope, covering Central Government, State Governments, Panchayati Raj Institutions, Local Bodies and recipients of government grants.

**RTI- Necessity:** -

Administration is made more accountable to people and the gap between administration and people is minimized. Right to Information brings about awareness of administrative decision-making among people. Most importantly it maximizes people’s participation in administration. It induces public interest by discouraging arbitrariness in administrative decision-making.ii

Shekar Sajjanar, The Chief Information Commissioner, Karnataka State Information
Commission, described the Right to Information Act as the strongest weapon in the country to promote transparency and accountability in administration.ii

“Improving Transparency and Accountability in Government through Effective Implementation of the Right to Information Act”, a scheme sponsored by the Centre, was launched in August 2010. The main objective of the Scheme was to promote an accountable and transparent government. The main purpose of this Scheme was the effective implementation of the RTI Act. The scheme aimed to achieve the following:

a. RTI requests to be filed by public with ease. The aspects designed to achieve this were:

Creating Awareness through Mass media campaign

Simplifying the processes for filing of RTI Requests and Appeals to central Government Authorities,

which essentially included setting up of a call center and portal for filing of RTI requests in GOI office, etc.

b. Improving the quality and speed of disposal of RTI requests and appeals.

Setting up of Information Commissions, that are effective in ensuring compliance with the provisions of the Act.iii

Data from the Central Information Commission suggests that RTI as a method of ensuring public accountability is gaining popularity year by year. A CIC report says that the number of requests pending with public authorities rose from 6,26,748 in 2009-10 to 9,62,630 in 2013-14, an increase of 53.5 percent.ii

Mumbai-based RTI activist Sunil Ahya says, “On the whole, the right to information appears to be going in the right direction and it is for citizens to take it forward. Public information officers have been appointed to government offices and appointments for appellate authorities have also been made. In present times, the RTI Act is particularly important as the cure for all corruption is transparency.”

However, Data compiled by NGO Commonwealth Human Rights Initiative suggests that there have been 289 attacks on RTI activists in India since the enactment came into being. The actual number could be higher, as the data is based on news reports compiled over a decade.

RTI activist Anil Galgali - “In several cases, the government and the judiciary have not been proactive in ensuring the protection of RTI activists who expose misdeeds of various departments.” Regarding the attitude of public authorities towards disclosing information, Galgali said, “Government authorities are often reluctant to disclose information to the public. The provisions of exceptional cases under which information can be withheld are sometimes unfairly used to deny information.”iii

Nevertheless, there has been many instances in the past where RTI Act has proved to be successful :-

Adarsh Society Scam: The links between politicians and military officials was brought to light by the applications filed by RTI activists like Yogacharya Anandji and
Simpreet Singh in 2008. A building that had 31 stories, which was permitted to have only 6 floors was occupied by politicians, bureaucrats and relatives, instead of war widows and veterans, for whom it was originally built. The scandal led to the resignation of Ashok Chavan, the former chief minister of Maharashtra. Other state officials are also under the scanner.

**Public Distribution Scam in Assam:** In 2007, members of the Krishak Mukti Sangram Samiti, an anti-corruption NGO, based in Assam filed an RTI request that brought to light, irregularities in the distribution of food meant for people below the poverty line after which, several government officials were arrested.

**Appropriation of Relief Funds:** RTI application filed by an NGO based in Punjab, in 2008 provided information, which revealed that money that was originally intended for victims of the Kargil war and natural disasters was used to buy cars, air-conditioners and to pay off hotel bills, by bureaucrats heading local branches of Indian Red Cross Society. Local courts charged the officials found responsible with fraud and the funds were transferred to the Prime Minister’s Relief Fund.

**IIM’s Admission Criteria:** Vaishnavi Kasturi, a visually-impaired student, despite scoring impressively in the entrance examination, was denied a seat in the Indian Institute of Management in Bangalore, one of the country’s premier management institutes in 2007. Ms. Kasturi wanted to know why, and wondered whether it was because of her physical disability. She filed an RTI application requesting the institute to disclose their process of selection. Though she failed to get an admission in the institute, her RTI application meant that IIM had to make its admission criteria public. It emerged that the entrance exam, the Common Admission Test, was given little importance as compared to Class 10 and 12 results.

**CONCLUSION:**

Hence, in conclusion, we can say that RTI Act which was essentially put forth for increasing transparency in the working of government bodies and curbing corruption by making the concerned authorities accountable to the public or citizens, has certainly succeeded in fulfilling its objectives to a great extent. However, it has its own loopholes and drawbacks which resulted in it not being able to work to the full extent. Nevertheless, RTI Act has definitely brought about transparency to a considerable extent by making information accessible to the general public, in order to empower them, and keep them informed regarding the internal aspects or working of the government or related bodies.
REFERENCE :

1) **Statutory Material:**

   The Right to Information Act, 2005.

2) **Secondary Sources (Books):**


3) **Online Articles:**


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SEXUAL HARASSMENT AT WORKPLACE

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Abstract
Women are permanent part of the waged workforce and the union movement in present world. Building strong economy requires equal opportunity. When women and girls are not represented, we all lose out on a huge range of skills, ideas and perspectives. However, violation of their right including not being afforded with safe environment for work is ongoing impediment that women face in day to day life. Sexual harassment by the other counterpart is one of such kind. To overcome this, the government initiated Sexual Harassment against Women at Workplace Act, 2013 and rules for facilitation of protection, preventive measures and providing remedies for aggrieved. The Act to prevent incidents of sexual harassment at workplace was enacted after 16 years of the Supreme Court judgment in the case of Vishaka & Ors. v. State of Rajasthan & Ors, this was filed by NGOs because of the brutal gang-rape of a social worker while she was at work. The important feature of this Act is creation of administrative committee in every company to look after the complaints initiated by women employees. According to the NCW, the complaints of sexual harassment at the workplace have doubled from 249 in 2013 to 526 in 2014 and at present there is no chance of being less. Articles 14, 15(3), 16(4), 17, 19(1) (g), 21 and 42 of the Indian Constitution pronounced potential assurance on social and economic rights. However, these rights have no lateral application to non state actors which resulted to enact laws and policies in public-private division. In this Article, the author will focus on working of complaints committee and available remedies in the path of rendering justice to women.

Key words: Sexual Harassment, Sexual Harassment against Women at Workplace Act, 2013, NCW, Complaints Committee, Remedies, Justice.

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1.0 Introduction

Gender equality is a fundamental human right and forms basis for peaceful, prosperous and sustainable world. The rights of women and girls with equal access to education, health care, decent work, and representation in political and economic decision-making processes will develop economies and benefit societies and humanity at large. Gender bias is a tremendous waste of world’s human potential. By denying equal rights to women, we deny half of the population to live the life to the fullest. The Constitution of India provides right to equality and equal protection to its citizens in Article 14 and in Preamble by ensuring social economic and political justice, equality of status and opportunity, liberty of thoughts and expressions. But in spite of this women’s rights are not recognised as that of men.

The right of women in the workforce is the advancement resulted from many social and feminist movements. The contribution of women in both public and private sector paved way for substantial transformation in the Indian economy. But most of the women experience hostile working condition which discourages equal participation at work, thereby affects their social and economic empowerment and the goal of inclusive growth. Because of abuse of dominant position by men at work, sexual harassment, patriarchy and bias against gender high numbers of women are dropping out of work. According to Global Gender Report 2015, India was ranked 136 among 144 countries on the economic participation and opportunities index. Hence there is a need to afford secure environment for women in order to curb sexual harassment at workplace.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 came into force on 9th December 2013 for Redressal of complaints of sexual harassment. The government enacted this law to curtail the insecurity of employment and vulnerable nature at workplace which superseded the Vishaka guidelines introduced by Supreme Court of India. In this Article, the author will focus on effective implementation of the Act, the mechanism of the committee in recourse of complaints and its protection of women from sexual harassment.

2.0 Understanding Workplace Sexual Harassment

2.1 Nature of workplace harassment: Sexual harassment at work is the most oppressive form of sex discrimination that undercuts women’s potential for independence and equality. It disrupts a woman’s drive for autonomy outside the home and family by sexualising her work role and by making sexuality a condition of economic survival. It symbolises men’s use of sexuality in exerting control and dominance over women which thereby
makes them vulnerable to sexual victimisation and violence. It occurs at the intersection of social and economic inequalities by expressing the unequal social power, sexualising their subordinates and deepening their powerlessness as women.

The workplace harassment takes place under two instances, namely quid pro quo sexual harassment and the sexually offensive hostile work environment. In the first type, the person in authority or supervisor demands for sexual favour of a subordinate as a condition of getting or keeping a job benefit. In this case, the offence is directly linked to individual’s terms of employment or forms the basis for employment decisions affecting the individual.

The abuse by hostile work environment arises when a co-worker or supervisor engaging in unwelcome and inappropriate sexually based behaviour renders the workplace atmosphere intimidating, hostile and offensive e.g. by displaying pornographic materials or by engaging in vulgar and lewd behaviour. In Apparel Export Promotion Council v. A.K Chopra the Indian Supreme Court relied upon Vishaka guidelines whether the perpetrator’s conduct had created an intimidating and hostile working environment. Sexual harassment at the workplace is wrong not simply because it may lead to adverse job related consequences but because it is demeaning practice, one that constitutes a profound affront to the dignity of employees.

2.2 Definition of Sexual Harassment:
Louise Fitzgerald defines sexual harassment based on the premise that it occurs in gender stratified context and differential power relationships both formal, informal and sexism. She observes that Sexual harassment consists of the sexualisation of an instrumental relationship through the introduction or imposition of sexist or sexual remarks, requests or requirements, in the context of a formal power differential. Harassment occurs even when no such formal power differential exists, if the behaviour is unwanted by or offensive to the woman. Instances of harassment can be classified as gender harassment, seductive behaviour and solicitation of sexual activity by promise of reward or threat and sexual imposition or assaults.

2.3 Scope of workplace harassment:
Sexual harassment is a syndrome of discrimination and exploitation that women are subjected to. The harm caused by sexual harassment to the victims is tremendous. Victims suffer from stress, humiliation, loss of dignity, psychological harm and in some cases physical injury. They also suffer from damage to their professional reputation and career, and loss of income while they have to make a choice between keeping their job and avoiding the harm. The dangerous effect of this scenario is the negative impact on the economy, which cannot be seen in particularly given number of victims. In recent years, the number of sexual harassment complaints filed under complaints committee has climbed dramatically. In addition to significant impact has on individual, the financial cost of sexual harassment to businesses is exorbitant. The losses to the private sector caused by the ramifications of sexual harassment are also quite significant. This is the result from absenteeism, lower
productivity, increased healthcare costs, poor morale and employee turnover. In addition to those costs, there are litigation costs and court awarded damages. There is also the loss of reputation to a business that is not vigilant in preventing and correcting sexual harassment in the workplace.

2.4 Proving sexual harassment: The first step to confronting sexual harassment in the workplace is to tell the harasser that his behaviour is illegal and it must stop immediately. If the harasser continues the behaviour after having been told to stop, the employee may have to resort to the company’s internal complaint procedure to end the harassment. It is important to determine whether there is a sexual harassment policy and should follow the procedures outlined. It is essential to consider the question of what is a workplace in the context of sexual harassment at the workplace. In Saurabh Kumar Mallick v. The Comptroller and Auditor General of India, the women employee was sexually harassed by a co-worker who trespassed into her room in the residential hostel. The defendant argued that the term workplace cannot include a place of residence, which by definition is not a place of work. The court observed that to prevent sexual harassment of working women in changing world, the pedantic view of what constitutes a place of work cannot be taken. Provided the test for workplace is that the place where sexual harassment has been alleged is a place in the proximity of working activity and under immediate control of the employer, relating to which affairs have been managed by the government. With the passage of 2013 Act, the sexual harassment at the workplace categorically prohibited across all workplaces whether public or private domain, whether rural or urban, whether in the organised or unorganised sector. In the preparation for making a complaint, one should gather as much evidence as possible about the harassment, including offensive letters, photographs, cards or notes that have been sent. The employee should keep detailed journal, and retain copies of every document contained in their personnel file. Keeping accurate records is essential in proving sexual harassment. If all remedies under internal and local complaints committee have been exhausted, the next step would be to consider appeal to court or tribunal.

3.0 Building of Sexual Harassment at Workplace Act

3.1 Governing Law: Sexual violence in its many forms is being increasingly used to control Indian women and to prevent them from claiming their legal rights. Earlier sexual harassment at workplace was neither covered under the statutory civil law nor under criminal law. The offences which are legally recognised under the heading of sexual harassment were rape, outraging modesty of women by way of unwelcome physical contact and by verbal or gestural teasing only with no physical contact. In Rupan Deol Bajaj v. Kanwar Pal Singh Gill, the court recognised sexual harassment as a crime falling squarely under section 354 of the Indian Penal Code, by interpreting “outraging modesty of a women” to include outraging the dignity of women. The provisions under Indian penal code are highly inappropriate along with outdated terminology and hence there is need for
different judicial interpretation for this subject\textsuperscript{ii}.

The problem in India was exacerbated by the fact that the legislation preventing sexual harassment was so inadequate, rarely enforced in terms of workplace and non-existent until Supreme Court introduced Vishaka guidelines. The major advancement is the emphasis on International law as a source for law in India in the absence of any other governing statute which prevents such violation of a fundamental freedom. The judgment, while recognising the need for legislation on this subject, puts in place a declaration of law that sexual harassment at the workplace is a constitutionally wrong and a crime.

The sexual harassment would be discriminatory to the woman if it created harmful working conditions or if the woman had reasonable grounds to believe that her objection to such behaviour would affect the chances of promotion or result in adverse consequences. In Saudi Arabian Airlines v. Shehnaz\textsuperscript{ii} the court recognized that dismissal of a women worker following a complaint of sexual harassment was an unfair labour practice and illegal, and reinstated the woman who had been dismissed.

3.2 Vishaka v. State of Rajasthan\textsuperscript{ii}: In 1992, Bhanwari Devi a women employed as a village worker under the Women’s Development Programme by the government of Rajasthan. She has to work within the community to spread awareness about child education and impact of child marriage. Her brutal gang rape by five upper caste men as revenge for her campaign against child marriage was a backlash. Vishaka, a conglomerate of women’s organisations working in Rajasthan, along with three other women’s organisation active in campaign to bring justice to victim, filed a writ petition in Supreme Court with three-fold aim: to assist in finding suitable methods for the realisation of gender quality; to prevent sexual harassment and to fill the void in the existing legislation. The petitioners sought to invoke the Article 14,15,19,21 of the Constitution. The court held that sexual harassment at the workplace necessarily violates the rights of gender equality, the right to life and liberty, the right to work with dignity.

The Supreme Court has laid down guidelines and norms for compliance at all workplaces and institutions. It also incorporated the provisions contained in General Recommendations 23 in relation to Article 11 of CEDAW pertaining to violence and equality in employment.

3.3 Effect of the Vishaka guidelines: The amendment of service rules and standing orders to include the prohibition of sexual harassment at workplace. Accordingly, the Industrial Employment (Standing Orders) Central Rules, 1946 the Civil Service Conduct Rules, 1964 and the Central Civil Service (Classification, Control and Appeal) Rules, 1965 which govern government employment, were amended and rules remain in full force and effect\textsuperscript{ii}. The judgment specifically provides that private employers must take steps towards the prohibitions contained in standing orders; The creation of awareness of the rights of female employees; To allow disciplinary action to be taken if an Act of sexual harassment amount to misconduct; To help
an employee if a third party causes the
sexual harassment; To allow initiation of
appropriate criminal action with a complaint
when the conduct amounts to a specific
offence; To setup complaints committee, to
be headed by a woman, comprising of at
least 50% women, and which includes an
NGO member; To permit workers to raise
issues of sexual harassment at worker’s
meetings and allowed it to be discussed at
employer-employee meetings.

The judgment still resulted in alarming lack
of clarity amongst the public as to definition
of sexual harassment, obligation of
employers and recourse available to victim
because of lack of collated information
summarising Vishaka guidelines which do
not provide comprehensive remedy for
victims. It is unambiguously applicable only
to employment situations but not clear to
non employment situations and unorganised
sector.

4.0 Requirements for Redressal
Mechanism

According to National Commission for
Women (NCW), there is a noticeable
increase in sexual harassment at workplace.
At present Prohibition of Sexual Harassment
at Workplace Act and Rules, 2013 aims at
Redressal of complaints of sexual
harassment and connected matters. Nearly
36% of the Indian companies and 25% of
the MNCs are non-compliant with the Act.

The Indian Court gave a verdict on a case
relating to sexual harassment at the
workplace where the employee was working
at a leading company. The Court observed
that the company had failed to constitute an
appropriate committee to deal with
complaints relating to sexual harassment.
The victim claimed damages against the
company as per the provisions of the Act for
failing to constitute an Internal Complaints
Committee.

4.1 Structure of Complaints Committee
(Section 4)

- Every offices or administrative units
  must consist of Internal Complaints
  Committee provided that it should be
  in any sub-divisional level to it or
  can be located in different places.
  Members are nominated by employer
  namely:
    - Presiding officer (woman at a senior
      level) in the same office or if not
      available, any eligible member in
      other offices or units are nominated
      or if there’s no senior member
      available then member from other
      workplace of same employer or other
      Department or organization shall be
      nominated.
    - Two members among the employees
      must have the experience connected
      with social work relating to women
      or with a legal knowledge. One
      member among them must be
      associated with the NGOs and other
      associations that likely to relate with
      sexual harassment of women
      provided at least one half of the total
      members so nominated shall be
      women.
  - Tenure: 3 years from the date of
    nomination.
  - Members associated with NGOs and
    other associations shall be paid (fees
    or allowances) by the employer.
• If presiding officer or any member associated with the committee acts contradictory to the section 16 (prohibition of publication of complaint and inquiry proceedings) or convicted for any offence that may be in pending (or) found guilty for any disciplinary proceedings (or) that may be in pending (or) misused his position against public interest shall be removed from the committee.

4.2 Procedure for initiation of complaint
(Section 9): An aggrieved woman can make complaint in writing to the internal committee if constituted or to the local committee if not constituted; such complaint can be made within 3 months from the date of incident or series of incidents. In such situation when complaint cannot be made in writing, the presiding officer or chairperson or any member in internal committee or the local committee shall make help for making such complaint in writing. For this reason, the time limit shall extend not more than 3 months if it is satisfied that this reason prevented the woman to make a complaint against the respondent. When she is unable to make a complaint on the cause of physical or mental disability or death, her legal heir or as person may be prescribed shall file a complaint.

4.3 Functions of Complaints Committee
(Section 10, 11 and 13)

4.3.1 Conciliation: The committee shall entertain conciliation before starting inquiry under section 11 provided no monetary compensation shall be given as settling the dispute. When the settlement has been made, the committee shall have right to record and forward it to the district officer or the employer to take action as prescribed. The committee shall collect the recorded copies of settlement and can provide it to the plaintiff and the defendant. When the settlement is arrived under this section no further inquiries can be made by internal and local committee.

4.3.2 Inquiry into complaint: In case where respondent is an employee, then the service rules comes into play. When no rules exist, as domestic worker the local committee can make such complaint to the police within period of 7 days for registering case under section 509 of IPC and relevant provisions when prima facie of the case exist, provided no conciliation should be made. Both the parties shall have the opportunities to hear and get the copies of findings and shall make representation against it. Not against anything to the section 509 of IPC, the court shall make respondent to pay sums to the aggrieved party as it may thinks fit as per the section 15 of this act. For the purpose of inquiry under service rules the committee shall have powers similar to that of civil court containing civil procedures. Time period allotted for attendance, discovery and production of documents is 90 days.

4.3.3 Consolidation of the Inquiry report:
When the inquiry has been completed as per the act, the committee shall provide report to the employer or the district officer within period of 10 days from the date of completion of inquiry and it can be made available to the parties concerned. If the allegation against the respondent has not been proved then no action is needed. If the allegation is proved, the report can
recommend the employer or the district officer to proceed with the action for the misconduct in accordance to the provisions under service rules. Not against anything to the service rules, the employer can deduct any sum from the salary or wages of the respondent and can provide such amount to aggrieved woman or legal heirs in accordance with the provisions of section 15. When the employer is unable to deduct on the ground of cessation or his absence from duty, he shall order him to compensate the aggrieved woman. When the respondent fails to pay, the committees can forward an order stating to pay the sum as an arrear of land revenue to the district officer. Time period allotted to employer or district officer to act upon the recommendation is 60 days from the date of its receipt of recovery order.

4.4 Safety Policies of the Company for Women:

A flexible work environment and accountability should be provided by every company for women. There must be defined Anti Sexual Harassment policy which ensures safety and equal rights for women along with other initiatives like self-defense workshops, sessions with women police officers and NGOs to create awareness about women safety and rights are to be organized. The Policies should focuses on women empowerment and they should have access to extended maternity leave, part time or flexible working hours, work home options and options to take a short-term break in careers which enhances favorable working conditions. The companies should make more strong policies that encourages and benefits the women workers as per the Indian scenario.

5.0 Conclusion

Women are prone to injustice for many decades in every walk of life. The perception towards female as weaker sex is still a taboo which has not changed in the mindset of Indian people. The education that provided the strength to question for equal rights paved way for the participation of women in various fields. This is the development in patriarchal setup of society yet they face discrimination and inequality in various workplaces from highest office of India to lowest informal position. In their role in economic development, they tend to be exploited by both physical extraction of their professional skills and by the encumbrances of offensive working conditions. It is internationally true for all women who balance their routine with pandemic sexual harassment. Some initiate complaints to seek remedy and rest of the cases go unnoticed. This pathetic situation has to be changed and women workforce should be courageous in handling sexual harasser and spot the dark light to justice. Women are always inclined to be submissive and it can be changed only when they are strong enough to face aftermath consequences of complaint against any sexual perpetrator. The Sexual harassment has to be eradicated in order to prevent the occurrence of additional heinous crimes like rape, sexual assault and other violent expressions. The rights of women has to be respected, protected and fulfilled in workplace. In the rapidly changing work environment, utmost importance should be given to the job security, social protection,
decent work, financial regulation and fair taxation for enhancing women participation in workforce. Since there are several issues relating to concept of sexual harassment, the legal redressal mechanism has become very complex. There is a need for liberal approach to deal with the procedures right from the first stage of initiation of the complaint till appropriate remedy has been granted to sexually harassed victim. The members of the complaints committee should be elected without any bias and should not be nominated in order to impartial delivery of justice. As per the Act, the employers play a significant role in providing safe working environment. They should be a qualified person to know and apply the provisions of the Act for its effective implementation. The proper solution can be given to any problem which affects the dignity of women if the roots of sexual violence are identified. If accurate remedy is accessible for every victim at workplace, the justice can be done to gender equality.

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CYBERCRIME AGAINST WOMEN IN INDIA

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Abstract
In the digital age, Information technology has widened itself and has become the axis of today’s global and technical development. With the numerous advancement of internet, crimes using internet also widened and it pose a great threat to individuals. Cybercrime is broadly used to describe the activities in which computers or network are a tool, a target, or a place for criminal activity. Women are the soft targets of this new form of crime. They became victims to cybercrime like cyber defamation, harassment via email, cyber stalking, E-mail spoofing and morphing. Cybercrime causes stress and trauma which thereby affects the mental health of women. In India, cybercrime against women is increasing in an alarming rate. Even though India is one of the few countries to enact the Information Technology Act 2000 to combat cybercrimes, issues regarding women are not covered fully by the Act. The IT Act has been amended by the Information Technology Amendment Act 2008, but still it has many defects. The Act has many undefined terminologies, ambiguities and vague definitions in dealing with matters related to women which makes it inefficient to curb cybercrime against women. Though there are other laws which can be used as a recourse to protect women from cybercrime, a specific law to deal with this issue is the need of the hour. In this paper the author analyses the effectiveness of Indian laws to protect women from cybercrime, loopholes in the existing laws and the measures to overcome it.

Key words

SYNOPSIS
1.0 Introduction
2.0 Cybercrime against women in India
2.1 Cyber stalking
2.2 Cyber defamation
2.3 Cyber bullying
2.4 Morphing
2.5 Cyber harassment via email
3.0 Legal protection to Indian women
3.1 Information Technology Act 2000
3.2 Indian Penal Code (IPC) 1860
4.0 Impediments towards women’s safety in cyber space
4.1 Social impediments
4.2 Administrative impediments
4.3 Legal impediments
5.0 Conclusion
1.0 Introduction

Violence against women is a violation of human rights and it is not a new phenomenon. It always takes new shapes from time to time in Indian history. Though many feminists fought against women violence and for their empowerment in the society, there is no end of her vulnerable life and her exploitation. The advent of information technology brought a drastic change in the women’s standard of living and paved way for equal realization of their rights. Although these inventions came with huge benefits it too has some negative effects.

Cyber violence is a new form of violence against women which is facilitated by the internet and information technology. Women are more prone to cyber violence than men. Seventy five percent victims are believed to be female but these figures are more on assumed basis. The actual figures can really never be known because most crimes of such types go unreported as there is no direct physical threat and laws dealing with it are not much clear or implemented properly. So this turns to be the major reason for increase in cybercrime against women. Although it is very difficult to curb cybercrime against women, effective laws and proper implementation of such laws will help in protecting women to some extent.

This paper mainly focusses on the various types of cybercrimes against women in India, effectiveness of the laws in India pertaining to it and the defects in the system which lead to increase in cybercrime. The paper also suggests some solutions to curb cybercrime against women in India.

2.0 Cybercrime against women in India

The expanding reach of computers and internet has made it easier for the people to keep in touch across long distances. In India, the information technology sector has seen a quantum leap since 1990s which is still continuing. It has exposed the society to a new world in which we can share our ideas. But it is not a danger free zone. Cyber space has become an instrument for offenders to victimize or infringe women. In India cybercrime against women increases in an alarming pace. Amongst the various cybercrimes, women are exposed to crimes like cyber stalking, harassment via e-mail, cyber defamation, morphing and cyber pornography. Yet, most women are still unaware of these crimes which makes the offenders to use cyber space as a playground to victimize women.

2.1 Cyber stalking

Cyber stalking is defined as ‘the repeated use of internet, email or related digital electronic communication devices to annoy, alarm or threaten a specific individual.’ It is the use of internet or other electronic means to stalk or harass a person. It is one of the most prevalent cybercrimes which affects women. It is believed that over seventy five percent of the victims are female. Often the victims of cyber stalker is new on the web and inexperienced with the rules of internet use and safety. The main reasons behind cyber stalking are for sexual harassment, for revenge and hate, for obsession love and for ego. Women are targeted via websites, discussion forums, chat rooms, blogs emails etc. One of the first cases of cyber stalking in the country in 2000 was Manish Kathuria
case. In this case he pretended to be Ritu Kohli, wife of former colleague in internet chat rooms, made her phone number public and solicited sex. He was booked under section 509 of IPC for outraging the modesty of women.ii

2.2 Cyber defamation

Cyber violence which includes libel and defamation is another common online crime against women. It occurs when someone posts defamatory matters about someone on websites or send emails containing defamatory information. 71.1% had been defamed in cyber space and also in offline due to cyber defamation as surveyed by Center for Cyber Victim Counseling report 2010. The harm through defamatory statements about any person on a website is irreparable, as the information is made wide open to the entire world.ii

2.3 Cyber bullying

Cyber bullying is the use of mobile phones and internet, deliberately to upset someone else. The offender willfully and repeatedly inflicts harm through the use of computers, cell phones or other electronic devices, by sending messages of intimidating or threatening nature. Women are twice as likely as men to be a victim. India is third on the list behind China and Singapore in the cases of cyber bullying according to a report.

2.4 Morphing

Morphing is editing the original picture by an unauthorized user. When unauthorized user with fake identity downloads victim’s pictures and then uploads or reloads them after editing is known as morphing. It was observed that female’s pictures are downloaded from websites by fake users and again reposed on different websites by creating fake profiles after editing them.

2.5 Cyber harassment via email

The issue of harassment is a major issue offline as well as online in the cyber environment. ii Harassment of female netizens through email is not new in the internet world which may include vulgar messaging to the profiles’ wall and personal email id which is shown in the profile. E-harassment is similar to letter harassment, but creates a problem quite often when it is posted from fake ids with the intent to terrify, intimidate, threaten or humiliate female netizens.ii

3.0 Legal protection to Indian women

This chapter discusses about various laws in India to which women could recourse when affected by cybercrime. The Indian Penal Code 1860, Information Technology Act 2000 and the Indecent Representation of Women (Prohibition) Act 1986 are some of the laws which comes to rescue women affected by cybercrime.

3.1 Information Technology Act 2000

India is one of the very few countries to enact IT Act to combat cybercrime.ii The primary source of cyber law in India is the Information Technology Act 2000 which came into force on 17 October 2000. The main aim of the Act is to provide legal recognition to electronic commerce and to
facilitate filing of electronic records with the government. The IT Act also penalizes various cybercrimes and provides stringent punishments. In relation to women, this Act seems to be the first logical recourse when she is affected by cybercrime. Section 43 and section 66 of the ITA 2000 deals with cyber hacking. Section 67 of the Act prevents publishing of obscene information and prescribes punishment for the same. The IT Act was amended in the year 2008 and became operational on October 24, 2009. This amendment brought some changes, which helped in protecting women to some extent. Section 66A of the Information Technology Amendment Act (ITAA) 2008 prohibits sending of offensive messages through a communication device. The types of information this covers are offensive messages of a menacing character, or a message that the sender knows to be false but is sent for the purpose of ‘causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will.

Bloggers, Tweeters, journalists and Facebook users with prominent profiles face rape threats, violent pornographic vitriol, sexual harassment, accusations of promiscuity, and various forms of humiliation on a daily basis – simply because they are women. For women who face such abuse, the first law to which they could logically recourse is Section 66A of the IT Act.

Concerning the law pertaining to the offence of cyber obscenity, S.67 and S.67A of the Information Technology Act, 2000 are the first provisions dealing with obscenity on the internet in India. These sections deal with obscenity in electronic spheres and provide punishment for publishing or transmitting obscene materials in electronic form. Punishment for publishing or transmitting of material containing sexually explicit act etc., in electronic form extends from three to seven years of imprisonment and fine ranging from five to ten lakh rupees.

3.2 Indian Penal Code (IPC) 1860

The IPC as amended under the IT Act penalizes several cybercrimes. In addition to the ITAA 2008, some sections of IPC protect women from cyber violence. It protects women from online sexual harassment. Section 509 provides punishment for outraging the modesty of women, section 228a prevents one from publishing images or videos of rape victim online, section 415, 419 and 465 can be used to punish offenders of email spoofing. Offenders of cyber hacking are punished under sections 379 and 406 of IPC. The offence of cyber defamation is also well defined under section 500 of IPC which mentions punishment with simple imprisonment for a term which may extend to 3 years with fine. Sections 292, 293 and 294 deals with obscenity, which can be used along with section 67 of the ITA. However, it must be noted that the test to determine offence of cyber obscenity as per the Information Technology Act, 2000 has identical ingredients as provided under Section 292 of the Indian Penal Code, 1860. Even the term ‘indecency’ can be interpreted so as to fall within the preview of the definition of obscenity. Also, the legal understanding of pornography and obscenity have often overlapped with each other. This
clearly shows that the IPC turned to be very useful in dealing with cybercrime and in protecting women from it.

4.0 Impediments towards women’s safety in cyber space

4.1 Social impediments

Indian society is predominantly patriarchal in nature, and this is the major reason for women becoming victims of cybercrime. Females are generally taught to shun their voice for the fear of being stigmatized which makes them vulnerable to cyber violence. A

Most of the cybercrimes remain unreported due to the hesitation and shyness of the victim and her fear of defamation of family’s name. Many times she believes that she herself is responsible for the crime done to her. The fear of future problems restricts her from reporting the cybercrime. Humiliation, mental torture, stress, depression aggravates the situation. The women are more susceptible to the danger of cybercrime as the perpetrator’s identity remains anonymous and he may constantly threaten and blackmail the victim with different names and identities. A

The Center for Cyber Victim Counselling an NGO, has presented a report on cyber victimization in India, in which the center has taken 73 respondents of which 60 were females and the rest 13 males. These respondents are from different parts of India and have some knowledge about computer. They have faced different types of victimization such as receiving abusive emails, profile being hacked etc. from that survey it has been found that 35% of the women have reported about their victimization, 46.7% has not reported and 18.3% has been unaware of the fact that they have been victimized. This report proves that women prefer not to report owing to social issues. A

4.2 Administrative impediments

It is the duty of the state and the law enforcement authorities to take effective measures to curb cybercrime. According to Debarati and Jaishankar, at times there are not enough female cyber cells, no female judges and female cops to deal with the situation. On account of delayed justice, people have lost faith in the law enforcement authorities. Lack of legal awareness makes it more complex. A

According to a report, out of 4356 cases registered under the IT Act only 20.35% of the offenders were convicted. The poor rate of cybercrime conviction in the country has also not helped the cause of regulating cybercrime. A Police personnel also lack training to tackle and handle cybercrime. They lack better understanding of such kinds of victimization and fail to respond quickly to complaints. This turns to be major impediment in curbing cybercrime against women.

4.3 Legal impediments

The main reason for the increased number of cyber-crimes against women in India is mainly due to lack of legal security. A Though India is one of the few countries to enact the Information Technology Act 2000 to combat cybercrimes, issues regarding women are not covered fully by the Act. The object of the IT Act is crystal clear from its preamble which shows that it was created mainly for enhancing e-commerce and failed to
concentrate on the safety of net users. The majority of the cybercrime against women are being prosecuted under section 66 and 67 of the IT Act. Cyber defamation, email spoofing, hacking are some of the very common cybercrime against women, but the Act fails to speak about these crimes specifically. These crimes are booked under section 67 of the IT Act. It is evident that these sections are not sufficient to deal with the crimes and specific section is the need of the hour with the increasing crime rate. Section 66A of the IT Act which speaks about sending of offensive messages is vague and ambiguous. It has various undefined terminologies. Though there are other Act like the IPC and Indecent Representation of Women (Prohibition) Act to aid the IT Act in protecting women they do not perfectly fit the cases as it happens in cyber space.

It is evident that present India’s Information Technology Act includes only few sections for dealing with cybercrime. Hence to curb cybercrime against women the Act should be re-modified or a separate law to deal with these crimes should be enacted.

5.0 Conclusion

The digital technology has grown faster than the laws governing the technology. The existing laws fall short to tackle the situation. India must bring in more rigid and stringent laws in protecting women from cybercrime. Such crimes cannot be curbed solely by enacting laws, unless it is implemented properly. For effective implementation police personnel must be trained efficiently in dealing with cybercrimes. Workshops and seminars should be conducted by police, legal departments in creating awareness on cybercrime against women. The menace of cybercrime is not just restricted to India, but to the whole of world. Hence, there is a need for coordinated and integrated effort on part of the world community. The mindset of the Indian society towards women should also change. Women should be courageous to deal with the situation. Stringent laws and proper implementation alone won’t suffice to curb cybercrime against women unless the crime is reported by them. Indian women netizens still hesitate to report the crime which makes them more vulnerable to cybercrime. The problem would be solved only when the women netizens come forward to report the crime to the authorities. Proper implementation of laws along with public awareness and education of women concerning their rights and legal remedies will play a crucial role in eradicating cybercrimes from our society.
INTRODUCTION

“To Err is Human” Negligence can be described as failure to take due diligence which results in injury. A medical professional is expected to have the requisite degree of skill and knowledge. One may find instances of medical negligence resulting in irreparable damage to the victims or their relatives. These cases may have to be definitely brought under the scanner of law. The professional can be sued for providing low quality of treatment and care. The professionals may also be subjected to various laws in case of negligent acts done by them during their practice. Medical negligence is punishable under various laws such as Torts, Indian Contract Act, Consumer Protection Act, Indian Penal Code etc. According to ARM trust, around fifty-two lakhs (5200000) medical injuries are recorded every year in India and eighty-eight thousand (88,000) people in the country lose their lives in a year because of medical negligence. In order to deal with this emerging issue, medical negligence reduction unified nation development programme (MNRUNDP) had taken many steps to provide an effective solution and one of the most vital step is nothing but creating public awareness of medical negligence. On verifying the statistics of medical negligence, the legal structure relating to this issue is not up to the mark.

1. Negligence

Negligence is the infringement of a legal obligation to care. It indicates carelessness in a matter in which the law directs carefulness.

Types

- Medical misdiagnosis
- Surgical negligence
- Prescription and medication errors
- Negligent medical advice

1.1 Medical Negligence

“No doctor knows everything. There’s a reason why it’s called “practicing medicine.”

Medical negligence also known as medical malpractice is improper, unskilled, or negligent treatment of a patient by a physician, dentist, nurse, pharmacist, or other health care professional.

1.2 Negligence as a Tort

A tort is a residuary civil wrong. Duties in tort are fixed by the law and such duties are owed in rem or to the people at large generally. Such wrongs can be remedied by filing for unliquidated damages. There may also be cases where concurrent liability may exist under tort and contract. For instance, if there is a contract existing between a patient and a doctor, then the doctor, for his negligence, will be liable under contract.

1.3 Negligence under Contract

A contract may have express or implied terms. There are situations where there is a
contract between medical practitioners and patients. Even in the absence of an express stipulation to the effect that the practitioner will exercise reasonable skill and care in treatment of a patient, it is taken as an implied duty arising out of the contract. Breach of this duty thus results in violation of the contract.

1.4 Negligence as a Crime

Negligence as a crime has a different yardstick. Negligence under tort is determined on the extent of the loss caused whereas negligence under criminal law is dependent on the degree or amount of negligence. Courts have repeatedly held that the burden of proving criminal negligence rests heavily on the person claiming it. Criminal law requires a guilty mind. If there is a guilty mind, a practitioner will be liable in any case. But if, under the criminal law, rashness and recklessness amount to crime, then also a very high degree of rashness would be required to prove charges of criminal negligence against a medical practitioner. In other words, the element of criminality is introduced not only by a guilty mind, but by the practitioner having run the risk of doing something with recklessness and indifference to the consequences. It should be added that this negligence or rashness or must be ‘gross’ in nature.

1.6 Negligence under Consumer Protection Legislations

Ever since professions have been included under the purview of consumer protection laws, medical practitioners too have felt the heat. It is on a footing different from any other kind of negligence. Under consumer protection laws, medical negligence is another form of deficiency in service. It is most akin to the liability under the law of torts. But there is stricter and broader liability in this situation as failure to exercise skill and care as is ordinarily expected of a medical practitioner is the test under consumer protection laws.

2. Doctor acting in a negligent manner

A doctor or a medical practitioner when attends to his patients, owes him the following duties of care:

- A duty of care in deciding whether to undertake the case
- A duty of care in deciding what treatment to give
- A duty of care in the administration of the treatment
In Gian chand v. Vinod Kumar Sharma\(\text{ii}\) it was held that shifting of the patient from one ward to another in spite of requirement of instant treatment to be given to the patient resulting in damage to the patient’s health then the doctor or administrator of the hospital shall be held liable under negligence. Also in Jagdish Ram v. State of H.P\(\text{ii}\), it was held that before performing any surgery the chart revealing information about the amount of anesthesia ad allergies of the patient should be mentioned so that an anesthetist can provide ample amount of medicines to the patient. The doctor in above case failed to do so as a result of the overdose of anesthesia the patient died and the doctor was held liable for the same.

3. **Steps/ Procedure to file complaint pertaining to medical negligence**

Medicine is a noble profession and practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is that the law requires.

- Damage to organ due to negligence.
- Wrong treatment due to wrong diagnosis.
- Money receipt or prescription or discharge summary or test reports when not provided.
- When treatment not chosen as accepted and established in medical norms/ as per medical research/ available under medical literature.
- Theories of res ipsa loquitur [ a thing speaks of itself] – in case any instrument left in the body, a wrong part removed, allopathic treatment given by a homeopathic doctor etc.
- Government hospital liable if contribution from the employee’s salary deducted or payment made by insurance company.
- Negligent if three steps necessary are not observed by the medical practitioners. First - to decide whether he has to take up the case or not: Third- whether the treatment given as per the diagnosis made.

Hospital can also be negligent if ‘it is a case of non- availability of oxygen cylinder either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty.

4. **Conclusion**

Medical requires lot of calmness and care. Often many medical professionals be unsuccessful or infringe their duty towards the patients. Medicine one of the noblest professions requires application of mind rather than presence of mind. People in our country are already under pain of many diseases, let’s make effective measures to pull down these deaths and concentrate on extemporizing the profession so that people will get effectual medical care.

**Reference :-**
Books :-

2. Tapas Kumar Koley, “Medical Negligence and the Law in India”, OUP India; (6 January 2010).

Websites :-

1. www.wikipedia.org
2. http://ijme.in