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<table>
<thead>
<tr>
<th>(International Applicants)</th>
<th>(National Applicants)</th>
<th>Certificate Designer</th>
</tr>
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<tbody>
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<thead>
<tr>
<th>National Executive</th>
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TEAM

SUPREMO AMICUS
TABLE OF CONTENTS

   By Animesh Puneet Gupta & Adhiraj Bhandari

2. CRIMINALISATION OF POLITICS IN INDIA  
   By Archita Satsangi

3. ANTIDEFECTION LAW IN INDIA- A BOON OR A BANE  
   By Ayushi Saumya and Aishik Majumder

4. TRAFFICKING IN CHILDREN AND THEIR PLIGHT  
   By D.Vasanth & G.Santhanu

5. RIGHT TO EDUCATION ACT, 2010: IS THIS ACT MAKING “SCHOOLING” NECESSARY INSTEAD OF “EDUCATION”?  
   By Deepika Vijaywargia

6. POLITICAL INTERVENTION IN THE JUDICIAL SYSTEM  
   By Dixita

7. INDIAN JUDICIARY AND ITS ROLE IN PROTECTING ENVIRONMENT: CURRENT DRIFTS AND ANALYSIS  
   By Eshaan Bhardwaj

8. RESERVATION IN PROMOTION FOR SC/ST EMPLOYEES: AN ANALYSIS  
   By Gargi

9. HAS THE DIGITAL WORLD COME OF AGE, WITHOUT A LEGAL FRAMEWORK?  
   By Gayatri Dabir & Aishwarya Ganesan

10. DIGITAL REVOLUTION: LEGAL METHODOLOGY ON COMPUTERS AND INTERNET  
    By Gunish Aggarwal

11. RIGHT TO DIE WITH DIGNITY: A LEGAL RIGHT?  
    By Harshita Tripathi
12. NEED OF REFORMS IN LEGAL EDUCATION IN INDIA: GLOBALISATION AND JUDICIAL OUTLOOK  
By Isha & Somya Gaur .............................................................................................................. 137

13. CONCEPT OF NATURAL JUSTICE AND DISCRETIONARY POWER OF SUPREME COURT JUDGES 
By Janani.N ................................................................................................................................ 149

14. RECENT DEVELOPMENTS OF ADMIRALITY LAW IN INDIA  
By Jennifer Maria Dsilva ............................................................................................................. 155

15. EXPERT OPINION AND FINGERPRINT EVIDENCE  
By Juhi Mittal & Darshan Patankar ............................................................................................ 164

16. REVISITING THE L. CHANDRA KUMAR JUDGMENT AND DETERMINING THE CONSTITUIONALITY OF ARTICLE 323 
By Kaustubh Hardikar ................................................................................................................ 172

17. CAPITAL PUNISHMENT:- ABOLITION v. RETENTION 
By Komal Arora & Kajal Arora .................................................................................................... 177

18. PROTECTION OF RIGHTS OF A PROSTITUTE IN INDIA  
By Kumud Konnur ........................................................................................................................ 184

19. DECRIMINALISATION OF ATTEMPT TO COMMIT SUICIDE 
By M.N.Kaushika ........................................................................................................................ 193

20. CRUELTY AS A GROUND FOR DIVORCE  
By Maahi Mayuri ........................................................................................................................ 204

By Mayura Manohar Sabne ......................................................................................................... 211

22. THE “SUPERHERO” TRADEMARK  
By Medha PM ............................................................................................................................. 225

23. AJAY KUMAR CHOUDHARY V. UNION OF INDIA  
By Milendra Jain ......................................................................................................................... 230
24. A STEP TOWARDS CRIMINALIZING MARITAL RAPE
   By Minakshi Yadav.................................................................232

25. EUTHANASIA: IS IT A GOOD LAW?
   By Namra Mohanty & Ardhendu Sekhar Nanda.............................237

26. ANALYSIS OF SECTION 144 OF CRIMINAL PROCEDURE CODE
   By Namrata Jain........................................................................244

27. DEMYSTIFYING THE MYTH OF INDEPENDENT DIRECTOR
   By Navya Jain...........................................................................251

28. THE MEDIA WAR OF ISIS AND ITS IMPACT
   By Nida Negi............................................................................262

29. REVISITING ADULTERY AS A GROUND OF DIVORCE UNDER HINDU MARRIAGE ACT, 1955
   By Pallavi Raitani & Kashish Saxena........................................272

30. DEFENSE DIPLOMACY IN US-INDIA STRATEGIC RELATIONSHIP
    By Pallavi Sharma....................................................................278

31. UNDERSTANDING THE CONCEPT OF VIGILANTISM IN INDIA
    By Parika Bhardwaj & Virinda.................................................290

32. GENDER JUSTICE- STILL A FAR CRY IN INDIA
    By Pranav Anand Ojha..............................................................299

33. ARUNA SHANBAUG V. UNION OF INDIA
    By Pranay Bhattacharya............................................................312

34. COMPARATIVE ANALYSIS OF LANDMARK JUDGMENTS ON HOMOSEXUALITY IN INDIA: SECTION 377
    By Prisha Sinha..........................................................................315

35. SPACE DEBRIS- THE NEAR FUTURE DISASTER & FAILING INTERNATIONAL REGIME
    By Priya Kotwani.......................................................................322

36. ALTERNATIVE DISPUE RESOLTUION MECHANISM(ADR)
    By Ritayan Ghosh......................................................................330
37. RIGHTS OF PRISIONERS IN INDIA
   By Rohit Kumar Panjwani ................................................................. 335

38. EVIDENTIARY VALUE OF NARCO-ANALYSIS
   By S. Aishwarya ................................................................................. 343

39. RIGHTS OF CHILDREN AGAINST SEXUAL OFFENCES
   By S. Vishnuvarthan & K. Mondela Anand ......................................... 352

40. SEXUAL MISTREATMENT OF CHILDREN: A UNIVERSAL EPIDEMIC
   By Saloni Tejawat & Mradul Jain ..................................................... 358

41. JUDICIAL APPOINTMENTS IN INDIA: A QUEST FOR DEMOCRATIC LEGITIMACY
   By Samarth Khanna ........................................................................... 368

42. CAPITAL PUNISHMENT: A COMPARATIVE STUDY BETWEEN INDIA AND CHINA
   By Sanchit Baghel ............................................................................. 374

43. TRIPS AND GIS: ECONOMIC SIGNIFICANCE AND RATIONALE FOR PROTECTION
   By Sanika Malik .................................................................................. 387

44. PROS AND CONS OF PRIVATIZATION OF AIRPORT
   By Seenu Tiwari .................................................................................. 399

45. DEATH BEFORE BIRTH- A GROWING CONCERN FOR FEMALE FOETICIDE
   By Shana Sara Varughese & Vandana Jain ......................................... 416

46. DHARAMDAS V. STATE OF HIMANCHAL PRADESH
   By Shiralee Kinariwala ....................................................................... 426

47. FOURTEENTH FINANCE COMMISSION: A STEP TOWARD FEDERALISM OR NOT
   By Shivangi Roy .................................................................................. 428

48. TRIPLE TALAQ- A COMPLETE PARDAH ON RIGHTS OF MUSLIM WOMEN
   By Shuvneek Hayer ........................................................................... 436

49. RIGHT TO BE FORGOTTEN: A STEP FORWARD IN THE IMPLEMENTATION OF PRIVACY LAWS IN INDIA
   By Simran Chandok & Laksh Manocha ................................................. 445

50. HUMAN TRAFFICKING: A CRIME THAT SHAMES ALL
   By Simran ........................................................................................... 458

www.supremoamicus.org
51. MULTIPLE PERSONALITY DISORDER AS A LEGAL DEFENCE
   By Sofiya Mhaisale ................................................................. 472

52. GIAN KAUR V. STATE OF PUNJAB, (1996) 6 SCC 262
   By Sofiya Mhaisale ................................................................. 478

53. RIGHT TO PRIVACY AND DATA PROTECTION: INDIAN PERSPECTIVE
   By Sumaiyah Fathima ............................................................... 480

54. BIOPIRACY AND THE ECLIPSE OF TRADITIONAL KNOWLEDGE IN INDIA
   By Vrinda Singh & Vishal Singh Thakur .................................................. 491

55. RIVER DIVERSION & ETHNIC CONTESTATION
   By Yubraaj Chatterjee & Aakansha Singh ........................................... 502

By Animesh Puneet Gupta & Adhiraj Bhandari
From Army Institute of Law, Mohali

ABSTRACT

In the recent times, as technology and science have progressed, it has helped increase the overall quality of life and the overall life expectancy have increased, this has led to an increase in the percentage of elders in the population. This increase in the number of elders has led to the emergence of a legal grey-area. India is a welfare state and thus, it has general laws that are applicable on all citizens and, there are specific laws that are made for the protection of special groups like women, lower castes etc. But, there exists a problem in the legal framework when we consider the laws of the elders. While, certain legislations do exist in favour of the elderly, they are not conclusive and contain several loopholes which has led to a major deficit in the delivery of justice to a large segment of the population who are often left on the roads by ungrateful children.

The authors of this manuscript have tried to evaluate the said socio-legal conundrum with a critical analysis of the laws existing in India and a comparative study with respect to certain countries and have tried to bring to light the loopholes and grey-areas in the elder laws of India and have tried to communicate solutions that are drawn from the international legal framework in order to create a holistic, equitable and just legal framework for the Indian elders.

INTRODUCTION
“You know you must be doing something right if old people like you.”

The human race has survived for so long because we have been able to adapt and elongate our survival by bending the very rules of nature and changing, evolving the basic construction of man through science and medicine. As the times have progressed, so has man kind and through science, medicine and technology, we have managed to increase the life expectancy. The advance in medicine has led to an imbalance. Though, there has always been an imbalance in society, it has always tipped towards the availability of more resources for less people but, now, we have reached a junction where the birth rate has boomed and overtaken the death rate by millions. This has led to the increase in the segment of population of society that constitutes the elderly. The just and equitable legal system takes into account the needs and welfare of special social groups but unlike women and the discriminated, the elderly have not yet achieved so in many developing societies.

Before reaching a conclusion as to the position of the elderly and their rights, it first imperative to understand the context of the term “elderly” or “elder” which have been used to refer to “senior citizens” who can be any person being a citizen of India.
who has attained the age of sixty years or above\(^1\). The elderly population is the fastest growing portion of society\(^2\) and the need to implement policies for their benefit has been acknowledged and emphasized by the UN and its organs.

Indian society has a long and cherished culture of respecting and maintaining the dignity of elders of the family. Since time immemorial, older people have been granted a stature of respect, dignity and importance and played a pivotal role in the family system of India. The elders were considered mature, wise, economically and socially stable which led to social recognition and emotional fulfilment. Unfortunately, like all other systems, the family system too has been corrupted by the “modern” lifestyle. Rather than evolving, we have once again become savages as parents who once upon a time used to be a great asset to the family, have over time come to be regarded as liabilities. Those who were always revered and regarded as being equivalents of God are today being ill-treated, harassed, pushed into old-age homes and stripped of their properties or worse, inhumanly thrown out of the lives of the children. There are several excuses for the same ranging from generation gap, privacy, economic burden to nuclear family, migration to better lands for more opportunities etc.

Taking the example of India into consideration, while the literacy rate in the country is improving, the education rate is still mediocre and while the economy is progressing, the fact that India has the second largest population in the world does not help our case as the resources that are put in for the welfare of the elderly are not sufficient with regard to the large number that exists. While the government has tried to establish systems of health and welfare for the benefit of the elderly, they have not been implemented in the best manner and thus several loopholes and problems have continued to exist.

At the current point, there is a significant dearth of strong legislations with only the “Maintenance and Welfare of Parents and Senior Citizens Act, 2007” enforced for the benefit of the elders.

**INTERNATIONAL PERSPECTIVE ON AGEING**

The question of ageing was first debated at the United Nations in 1948 at the initiative of Argentina. The issue was again raised by Malta in 1969. In 1971 the General Assembly asked the Secretary-General to prepare a comprehensive report on the elderly and to suggest guideline for the national and international action. In 1978, Assembly decided to hold a World Conference on the Ageing. Accordingly, the World Assembly on Ageing, held in Vienna from July 26 to August 6, 1982 wherein an International Plan of Action on Ageing was adopted. The overall goal of the Plan was to strengthen the ability of individual countries to deal effectively with the ageing in their

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1. Sec. 2(h), Maintenance and Welfare of Parents and Senior Citizens Act, 2007.
population, keeping in mind the special concerns and needs of the elderly. The Plan attempted to promote understanding of the social, economic and cultural implications of ageing and of related humanitarian and developed issues. The International Plan of Action on Ageing was adopted by the General Assembly in 1982 and the Assembly in subsequent years called on governments to continue to implement its principles and recommendations.\(^3\)

**UDHR**

The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 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. The UDHR has provided in Sec. 25(1) that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.\(^5\)

**MAJOR PROBLEMS FACED BY ELDERLY IN INDIA**

The elderly in India are one of the fastest growing segments of our society, and it is necessary to understand the basic problems faced by the elderly and find ways to counter the problems and find appropriate solutions in order to create a holistic and developed nation. If we want to compare and stand tall amongst the developed and powerful nations of the world and dream to become a superpower in the coming future, it is necessary that we take steps in the direction of a complete development and the conversion of all liabilities into assets today.

A country is as strong as its weakest citizens and the weakest citizens today are the elderly who face several problems that need to be countered in order to integrate them back to the society.

1) **Pension**

One of the most root causes of a low standard of living is lack of money. Many such elderly rely on the pension that is granted owing to their age and some are given pension as relief granted for service in the central government. But, there are many disparities and issues that are encountered in the process of the pensions. There are many instances where the pension is not granted as the documents are not complete, or there is some discrepancy in the documents provided due to which, their pension is not released. A bigger problem however, is the non-release of the pension for several months by the government. This creates a mammoth problem for the elderly who rely solely on pension for survival. The lack of a proper system to ensure the smooth, efficient and timely release of pension is a major cause for a destitute and paltry life for many of our country’s veterans and elderly. The absence of a

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\(^3\) IJSARD, Vol. III, Issue I, Pg. 54-59, Efficacy of “The Maintenance and Welfare of Parents and Senior Citizens Act, 2007”: A Critical Analysis, Ashwani Kumar Dwivedi, Assistant Professor, Dept of Law, Inveritis University, Bareilly

\(^4\) General Assembly resolution 217 A

uniform pension regime adds to the woes of many pension holders, especially those who served the country in the Armed and Paramilitary Forces.

2) Harassment
There is no end to the harassment faced by the elderly in our country. The multiplicity of identification systems, the accessibility, rampant corruption in government offices etc. are just some of the examples of the harassment faced in daily life by the elders of our country. Gone are the days of respect and care for elders and now ill-treatment and abuse both at home and in public is a common site. The lack of patience and empathy has made the world blind of the physical, mental and emotional limitations faced by the elderly. The government processes add on to this burden of ill-treatment by the world in heaps as the duplicity and multiplicity of things coupled with the attitude and poor interpersonal skills of government officials greatly troubles the elderly. The inefficient and tiresome processes of government offices that require the filling of multiple forms, standing in long queues for hours and then being sent back with a new date to come, let alone elderly who face special difficulty as the physical limitations do not allow them to move and do things as efficiently. The Aadhar for identification, the PAN for taxation, the Voter ID for elections, Driving License for driving; are just a few examples of the different types of identifications that a person has to get made. The generation of these proofs is necessary to entitle availing of different government schemes. The argument that the digital applications and internet-based services are available is also not valid as many of the elders today are not conversant with the modern technology and may find it difficult to access and complete the application processes online due to the lack of understanding of the technology which may seem basic to the youth but is daunting for a person who comes from an era of letters and rotary dial phones.

3) Isolation
The generation gap and difference of attitude between the elderly and the youth has led to the isolation and separation of the elderly in a very painful manner. Moreover, the lack of accessibility for the elders is a huge hinderance to their assimilation in the society. With the fast pace of city life, the senior citizens are often unable to keep up and are left in the race. The lack of proper measures by the government and the lack of proper policy implementation in the country is a major cause of their isolation. The lack of a proper legislation to give effect to sanctions against domestic violence of the elderly is also a great cause of disadvantage to the elderly. Often, they are coerced to give up their assets to their children by employing different forms of abuse and they are left literally on the streets. Many children leave their parents at old age homes which are a necessity as per the laws but many districts do not have old age homes or the condition is so destitute that survival of a human is such conditions is a miracle. As per the existing provisions, there is a mandate for the state governments to operate old age homes with the capacity of 150 persons in every district and more if required as per demand, but, many states
like Kerala\textsuperscript{6} have not implemented the same as per the state rules.

4) Health-care

The biggest curse of old age is health problems and age-related ailments. The medicine and other required amenities cost through the roof and most are unable to afford them. Those who have completed a service in the government sector are secure with regard to most medicines and procedures but those who served in the private or unorganized sector face a lot of problems. The high cost of and lack of availability of medicines and medical procedures is a chief cost of death in old-age. Rural public infrastructure must remain in mainstay for wider access to health care for all without imposing undue burden on them. Side by side the existing set of public hospitals at district and sub-district levels must be supported by good management and with adequate funding and user fees and out contracting services, all as part of a functioning referral network. This demands better routines more accountable staff and attention to promote quality. One consequence is the huge regional disparities between states which are getting stagnated in the transition at different stages and sometimes, polarized in the transition. Some feasible steps in revitalizing existing infrastructure are examined below drawn from successful experiences and therefore feasible elsewhere.\textsuperscript{7}

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\textsuperscript{6} See Preliminary Study on Effectiveness of Maintenance and Welfare of Parent and Senior Citizens Act, 2007, Help Age India


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**ELDER LAWS IN INDIA AND EFFECTIVENESS**

In the light of the contemporary times, as people began to move away from their homes and families to live in bigger cities and families became nucleated, the elders in the family system became neglected. With a dearth of facilities and the absence of any care-takers, the responsibility of taking care of the parents moved from the children to the government. But, the government is not in a position to cater for the ever-growing population of the elders and it was necessary to form a set legislation and policy for the welfare of the elders. In the absence of a specific legislation, the following provisions were applied for the welfare of the elders of India.

**Constitution of India**

Art. 38: State to secure a social order for the promotion of welfare of the people

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

Art. 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.

Art. 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, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Art. 47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health.

Traditional Hindu Law
In traditional period most of the communities founded patriarchal pattern wherein the eldest male parents called “Paterfamilias”. He dominated the entire family included all its male, female member and children. The word of the paterfamilias was law for them, which they supposed to follow. There were also some communities which followed matriarchal pattern in which the eldest female of family was central authority to manage all affairs of the family.

HINDU ADOPTION AND MAINTENANCE ACT, 1956: This Act is the personal law in India which imposes an obligation on the children to maintain their parents. With the enactment of said Act the obligation to maintain their parents is not confined to sons only now the daughters also have an equal obligation or duty towards their parents whether she is married or unmarried. It is important to note that only those parents who are financially unable to maintain themselves from any sources, are entitled to seek maintenance under this Act.

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”.

Code of Criminal Procedure
Sec. 125 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.P.C, 1973 is a secular law and governs persons belonging to all religions and communities.

8 Ibid.
Daughters, including married daughters, also have a duty to maintain their parents.

The Cr.P.C, 1973 also maintains that in case of senior citizens, the recording of statement and filing of F.I.R can be done by a visit of the authorized personnel at the place of residence of such senior citizens in order to facilitate the proper course of justice without the hinderances caused by age.

Government Protections

The Government of India approved the National Policy for Older Persons on January 13, 1999 in order to accelerate welfare measures and empowering the elderly in ways beneficial for them. This policy included the following major steps:

(i) Setting up of a pension fund for ensuring security for those persons who have been serving in the unorganized sector,
(ii) Construction of old age homes and day care centers for every 3-4 districts,
(iii) Establishment of resource centers and reemployment bureaus for people above 60 years,
(iv) Concessional rail/air fares for travel within and between cities, i.e., 30% discount in train and 50% in Indian Airlines,
(v) Enacting legislation for ensuring compulsory geriatric care in all the public hospitals.

The policy was later renewed and revised in 2016 in order to account for the changing times and ensure that the grey areas left in the original framework would be covered and new guidelines issued in order to keep up with the times. The Ministry of Justice and Empowerment has also announced regarding the setting up of a National Council for Older Person, called age well Foundation. It will seek opinion of aged on measures to make life easier for them.

Attempts to sensitize school children to live and work with the elderly have been made in order to ensure that the future generations are more sensitive and accommodating to the elders. Steps for setting up of around the clock help line and discouraging social ostracism of the older persons are being taken up. The government policy encourages a prompt settlement of pension, provident fund (PF), gratuity, etc. in order to save the superannuated persons from any hardships. It also encourages to make the taxation policies elder sensitive. The policy also accords high priority to their health care needs. According to Sec. 88-B, 88-D and 88-DDF of Income Tax Act there are discount in tax for the elderly persons. Life Insurance Corporation of India (LIC) has also been providing several schemes for the benefit of aged persons, i.e., Jeevan Dhara Yojana, Jeevan Akshay Yojana, Senior Citizen Unit Yojana, Medical Insurance Yojana. Former Prime Minister A.B. Bajpai was also launch ‘Annapurana Yojana’ for the benefit of aged persons. Under this yojana unattended aged persons are being given 10 kg food for every month. It is proposed to allot 10 percent of the houses constructed under government schemes for the urban and rural lower income segments to the older persons on easy loan. The policy mentions. It may be pointed out that recently the Madurai Bench of the Madras High Court has ruled that the benefits conferred on a Government employee, who is disabled during his/her service period, under Section 47 of Persons with Disabilities (equal opportunities, protection of rights and full participation) Act, 1995 cannot be confined only seven types of medical conditions defined as ‘disability’ in the Act.
This 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. Parents can opt to claim maintenance either under Section 125 of the Criminal Procedure Code, 1973 or under this Act, however cannot opt for both. If a person has an application under Section 125 pending before the court, a request can be made to the court to withdraw the application. After the withdrawal, the person can file an application before the Maintenance Tribunal under this Act. Maintenance tribunals are empowered to fix monthly maintenance allowance up to Rs. 10,000 per month. If they are not complying, they can be fined up to Rs. 5,000 or imprisoned for 3 months or both. Further, the tribunals have to settle the applications within a maximum period of 90 days. Transfer of property can be declared void by the tribunal in case negligence is reported. In this Act, maintenance is defined as including “provision for food, clothing, residence and medical attendance and treatment”. The only condition for claiming maintenance under this Act is that, the persons must be unable to maintain themselves from their own earnings and property. Adult Children and adult grandchildren, both male and female, are responsible for paying maintenance to parents and grandparents. An application can be filed against any one or more of them. Senior citizens who do not have children or grandchildren can claim maintenance from a relative who either possesses their property or who will inherit their property of the senior citizen after their death. The relative must not be a minor and must have sufficient means to provide maintenance. If more than one relative is entitled to inherit the property, then maintenance must be paid by relatives in proportion to their inheritance of the property. The Act mandates that the maximum maintenance paid will be Rs 10,000 per month. The maintenance amount is determined by the needs of the claimant (parent) and the paying capacity of the opponent (children). The aim is to provide maintenance allowance for the parents to lead a dignified and normal life.

Any person who is responsible for the protection and care of a senior citizen and intentionally abandons the senior citizen is liable to pay a fine of Rs 5,000 or be imprisoned for 3 months or both. Additionally, senior citizens can file an application before the Maintenance Tribunal to declare the transfer of property void. The following conditions apply: The transfer of property, irrespective of whether it is a gift or not, must be after the commencement of the Act. The property must be transferred by attaching some conditions that require the person to whom the property is transferred to provide basic amenities and physical needs to the senior citizen. The other person must have failed to or refused to provide the amenities and physical needs to the senior citizen. If senior citizens have the right to receive maintenance from an estate and the estate is transferred, either partly or wholly, then the right to maintenance can be claimed from the person to whom the property has been transferred when: 1. The person to whom the property has been transferred for consideration has the notice of the right; or 2. The transfer is gratuitous.
Age well Foundation and Advocacy Centre in 2011 conducted a nationwide study and found that, only 11.5 per cent older persons were aware about MWPSC Act, whereas 88.5 per cent never heard about this Act. In urban areas, only 8.2 per cent had heard about this Act. Amongst those who were aware only 0.55 per cent accepted that, they had benefited because of this act directly or indirectly. 99.45 per cent elderly said that, they had not availed benefit of this Act essentially because of ignorance about the provisions of the law and procedures to follow. A legal awareness survey by Development, Welfare and Research Foundation in August 2007 from a cross section of elderly population in Delhi revealed that for many participants (55 per cent) special legislations like the MWPSC Act would increase resources and courage to respond to abuse. However, there was question about responsibility of the government to provide welfare through schemes for social pension to those who had children or would it be restricted only to those who were destitute.

There are recorded cases of physical assault, excessive restraint, exposing older people to humiliating behavior. In case widows or ageing women if they have some money, they are more vulnerable to exploitation, deprivation of property, income and verbal humiliation as well as murders in some cases.

On 21 February 2009, Hon'ble Chief Justice of India released a booklet on the Maintenance and Welfare of Parents and Senior Citizens Act, prepared by National Legal Services Authority, to sensitize judicial officers and other enforcement agencies to educate the elderly about the rights of the senior citizens.

Adult Protection Legislation in the form of the Maintenance and Welfare Act is a "band-aid", not a solution to the intrinsic problem of improving quality of life of senior citizens. It seems more like a cover-up that makes it look like something is being done to help the older adults. Some help may be given by such legislation, but, it may not be the type of help that will resolve the abuse. Older adult victims of neglect need options to address their needs and help in bringing an end to the abuses that they are experiencing. This will not be achieved by passing an Act.

In yet another study, 40% of the respondents said that most favorable legal provision from an older person's point of view was MWPSC Act which has many provisions to favor senior citizens. “Adult Protection Legislation looks good; but, does not make

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9 www.agewellfoundation.org visited on 24th March, 2018
10 Ibid.
12 Ibid.

13 Shankardass Mala Kapur combating elder abuse in India A emerging social and public health concern in understanding measures for combating Elder Abuse in Asian countries. A Status Report. Tokyo, Japan 2003.
14 Group of Economic & Social Studies, A Legal Awareness about the rights of the elderly (2009).
available the services and assistance in a humane and dignified manner that an old person needs in all circumstances and environments” 16. A study by Indira Jai Prakash underlined the difficulty of a poor and demoralized older person to approach the tribunal to fight against their own family members. A supportive and user-friendly machinery at local level or in the neighborhood was required for people to feel emboldened to act for their rights. Filing legal proceedings against own children/relative is a very sensitive issue and needs to be tackled in a totally different way which is not envisaged in this Act17. Economic abuse was acknowledged especially by way of dispossession of property. This seemed also to be linked to neglect. Cases were cited by many old parents themselves wherein the children took over the property while the older parent was alive and then confined them/him to one corner of the house.

Old parents staying separately because yet another perception of what maltreatment was. One parent was made to stay with one child while the other stayed with the other child. This adjustment was made as one child could not take the burden of looking after both the parents. There were also cases of “rotation” wherein the parents stayed with one child for a particular period of time and then moved over to the other child to stay with him for the same period of time.

Even among the health care workers, physical cases of violence were the only ones that got acknowledged as abuse but they did not report physical violence as being seen by them. They however, did acknowledge symptoms of mental illness and frank pathological mental illness in older men and women who reported to have “family problems” 18

ELDERLY CARE IN OTHER COUNTRIES
NORWAY19

All older people in Norway receive retirement pension. The amount of this pension varies according to past income. Most older people in Norway live in their own home. Some receive assistance from the municipality (home nursing care, home aid, the possibility of attending a municipal adult day-care centres, etc.), but many manage on their own or with help from their


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19 Norway is the nation with the highest Human Development Index according to the United Nations Organization. It is a country famed for its long dark winter nights and high cost of living – but Norway should also, thanks to a new survey, be recognized as the best place in which to grow old. Its citizens benefit from decades-old policies designed to provide financial security in old age, plus an efficient public transport system, a strong sense of security and a high level of employment among senior citizens. “It’s a combination of good management of natural resources coupled with planning ahead,” said Gustavo Toshiaki, an economist and global ageing specialist based in Norway. “They have identified the issues and are dealing with them.” Research from HelpAge International, released on the UN International Day of Older Persons, showed that Norway had the highest global level of well-being for people over 60.
family. When older individuals are no longer able to take care of themselves, they can move into a nursing home. But only half of elderly people over the age of 90 live at a nursing home. Those who receive home nursing care and assistance pay a co-payment for these services. The municipality pays the remainder of the cost. The amount of the co-payment varies considerably from municipality to municipality. Elderly persons living at a nursing home also pay a co-payment. Living at a nursing home costs around 800,000 crowns per year. The amount of co-payment paid is based on income. The elderly often has special health problems:

As we grow older, our bodies begin to wear down. We may experience pain in our muscles and joints and are unable to do as much as before. This can lead to depression and isolation. Approx. 100,000 elderly people in Norway suffer from depression. The 2012 reforms shifted even more responsibility on to local officials. The national government provided bigger grants to municipalities and demanded more efficiency. One change calls for municipalities to pay a penalty of $700 a day if a patient stays in hospital after he is ready for discharge, says Terje Hagen, an economist at the University of Oslo’s faculty of medicine. “So, the problem of ‘bed-blockers’ in the hospital has disappeared. It’s cheaper for the municipalities to take home the patient from the hospital and invest in either home nursing or institutions.” The reforms are prodding the country toward the main goal: cut demand for beds in hospitals and nursing homes.20

RECOMMENDATIONS AND SUGGESTIONS
India has come a long way in terms of social welfare and the protection of the interests of those in need. Countries like Norway, Canada, Japan etc. have put into effect policies for the welfare of the elderly and that is one of the key factors in their development. It is the proper utilization of human resource that has led those countries to greatness.

The previous sections of the manuscript have established the major problems faced by the elderly in our country. There are several steps that need to be taken moving forward in order to mitigate the strains of the elderly in the Maintenance and Welfare of Parents and Senior Citizens Act:

• There should be a standard format to file the petition so that there is uniformity and all the relevant details are captured.
• There should be a contact sheet attached with every petition with the full address, nearest landmark, mobile number of at least of 2 persons, landline number if possible and a number of a neighbour or close relative.
• Digitization of the records so that the petitioner gets a receipt and a unique case id number on his/her mobile. This will make it easy for the petitioners to follow up with the authorities.
• Lawyers should be kept at bay. This provision in the Act should be strictly adhered to by the tribunals. Authorities.

location of the Tribunal should be away from the premises of district court to avoid any such informal interference.

- The office of the tribunal authority should be located on the ground floor with wheelchair access, waiting room, drinking water and toilet facility.
- There should be a designated social worker to help the older persons file the petitions and coordinate with them at each stage.
- A retired sessions Judge should be involved at all levels to expedite the process and also make it conducive to mediation; especially in cases where sibling rivalry on property is the root cause of the petitions.
- Government should conduct periodic review of the implementation of the Act.
- The multiple state government departments involved in the process should have convergence mechanism. There should be designated officers in police and social welfare department to coordinate with the tribunal office and facilitate the process.
- There should be an awareness campaign in local language and through local mediums about the provisions of the Act. The contact detail of the nodal officer/social worker should also be advertised.
- The helplines for senior citizens should be used as the second line for spreading information and ground level facilitation. The local police and a designated NGO should be involved in this process.
- Panchayats should be involved to spread awareness about the provisions of the Act in the rural areas.
- The upper limit of the maintenance allowance of Rs 10,000/- per month should be revised. It should be calculated on a standard formula keeping in mind the paying capacity of the adult children.
- Special consideration should be given to petitioners who are above 80 years of age, disabled or women. Such petitions should be settled within 30 days.
- There should be separate channels to file petitions for maintenance allowance and for annulment of property bequeath.
- There should be a provision for short stay homes for those older persons for the duration of the case. This facility should be available to all those who are victims of elder abuse.
- Respect for Age should be inculcated. Children living with grandparents should be given bonus mark at the time of nursery admission. Grandparents' day should be celebrated in every school on a periodic basis.

**IDENTIFICATION SYSTEM**

There is a major fallacy in the Indian Socio-Legal System that necessitates the existence of multiple identification systems for the very same person. This fallacy is further increased by the need to renew certain proofs after every few years. This process of renewal is painful at the least and as highlighted above, it becomes a strenuous task for the elderly to embark on day long trips to the government offices for more and more disappointment. There is a need to bring about uniformity and simplicity to the system of identification. It is recommended that the government creates a single database of information regarding a senior citizen and the same can be accessed by the several government mechanics using a single card or number, the Senior Citizen Card. The proposed Senior Citizen Card should replace the existing systems like
Aadhar, PAN, Voter ID, Driving License etc. and the data should be linked automatically to the said senior citizen card.

OTHER REMEDIES:

- It is suggested that the elders who are considered a liability be absorbed into the society and their resources be utilized by the government for the development of the country. A young person may have the time and energy to do work but, the elders prove time and again that their immeasurable experience and expertise cannot be matched. The saying ‘old is gold’ is not in vain, in fact, the people who are elders today are the youth of yesterday, the mistakes that the youth of today will commit have already been committed and remedied by the elders.

- A proper implementation of the pension system is required in order to achieve a content and actualized population. The OROP is all the more important because it pertains to the pensions of the veterans of the country. The men and women who have served the country, sweat and blood, seen comrades die on the battlefield deserve to be remunerated for their hard-work and service.

- The purpose underlying this policy is also to reduce the Government litigation in courts so that valuable court time would be spent in resolving other pending cases so as to achieve the goal in the principles incorporated in the National mission for judicial reforms which includes identifying bottlenecks which the Government and its agencies may be concerned with and also removing unnecessary Government cases. Prioritization in litigation has to be achieved with particular emphasis on welfare legislation, social reform, weaker sections and senior citizens and other categories requiring assistance must be given utmost priority.21

- It is also suggested that the government takes certain steps to facilitate the older people with respect to the different filing of papers. This is a necessary step as the elderly may not be comfortable in using the technology of modern times and may not be familiar with the use of internet.

At the end, it is important that the government officials be made aware of their duties as representatives of the government and should take utmost care in dealing with the senior citizens who are the bedrock of the society. Our efforts must strive to bring change in the present society and make it a better place to live in.

21 Director of Income Tax, Circle 26(1), New Delhi v S.R.M.B Dairy Farming Pvt. Ltd., Civil Appeal Nos. 19650 of 2017, Supreme Court of India
CRIMINALISATION OF POLITICS IN INDIA

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ABSTRACT
India, the largest democratic country and also home to the fair and regular elections is now giving rise to criminals in the political system. So criminalization of politics means to use politics or political power by self-interest seeking persons for pecuniary gains or various other advantages. Crime in political sense is usually described as to gain something not legal or normal which is punishable by law such as to get special position in administration or to rise to the higher stage of administration which is normally not feasible. So when we find that political power has been or is being used by some persons for the attainment of undue privileges and when this is rampant in the arena of politics we generally call it criminalization of politics.

As the scheme of research, this research paper deals with the question that how badly is the Indian political system criminalized and its consequences on free elections and democracy as concepts. This project will use case-studies, facts and figures published and also the articles and essays published by people on this topic, since the problem is an emerging one. This research paper will also use other research techniques.

Keywords: Criminalization of politics, politics, democracy, constitutional safeguards

Introduction to Criminalization of Politics

Criminalization of politics is when politics or political power is used by self-interest-seeking persons for pecuniary gains or various other advantages such as to get special position in administration or to rise to the higher stage of administration which is normally not feasible. It means to use politics or political power for nefarious gains.

To gain something not legal or normal has been called crime. Here the word crime is used in politics in special sense. For example an officer in administration wants to be promoted to higher post. But this is not his due. He uses politics or political power to
achieve this. The person succeeds. But the matter does not stop here. The person who helped to get undue privilege will again use this person for the achievement of his purposes which are, in normal course, not due. This is the policy of give-and-take and this happens behind the curtain.

Hence we find that political power has been or is being used by some persons for the attainment of undue privileges and when this is rampant in the arena of politics we generally call it criminalization of politics. To get undue favor through the use of political power is a crime. The term crime means an action which constitutes a serious offence against an individual or the state and is punishable by law. Hence, gaining something by the use of political power is a crime and is also punishable.22

Criminalization of politics has become an enduring phenomenon in Indian politics. It is crucial to discuss this because it is against the very spirit of democracy. A rule that was meant to be governed by law has rather ended up being a rule of money and muscle power. What is even more shocking is the acceptability of these elements both by the political entities and the masses, which means that it is people’s mandate acting against the values of democratic system.23 We can thus say that democracy has become the contradiction of democracy. This leads to the negation of all the democratic safeguards provided by our constitution; that is, the three organs which were supposed to keep a vigilant check on each other - legislature, executive and judiciary - are being weakened and its roots are corrupting. The count of political parties has been on enormous increase in the country. This rise in the number of political parties is not on the account of improvement in the standards of politics; rather it is an indication of the falling standards to abysmal levels and weakening of the spirit of nationalism. It can be derived from the pathetic living conditions of the people. The lives of the masses were worse under the colonial rule but even after the independence, the benefits of being a free and democratic nation have not reached to all the citizens residing in the country. There is still a stratum of people who dominate the policy-making either as a part of the government or by funding the government, which helps them to get their work done through the decision-makers. The political domain now pulls in criminals and rowdies with testified record of hooliganism, who aim for riches and dominating the functionaries and law-abiding residents. Thus, the politics in the nation has become a business yielding huge profits; rather than being a field of dedication and commitment towards ameliorating the welfare of the concerned subjects.

History and Development of Criminalization of Politics in India

After Independence, some of the first set of leaders emerged from the rural and urban elite. They were replaced by the rising aspirations of the Backward Castes who were numerically larger, and then by the

23SHUSHELA BHAN, CRIMINALISATION OF POLITICS IN INDIA, Pg 3 (1995)]
and fictitious ‘others’ or enemies. Money has become an important factor in campaigns.

Wealth is now concentrated, and income inequality is very high. The declared wealth of some ultra-high-net worth individuals (UHNI) is several times the combined declared wealth of all the politicians in Parliament put together. At the same time, inequality rose and India has the largest number of people below the poverty line. Exposure to consumer goods and lifestyles of the well to do has raised working class aspirations, and inequality has become more glaring. Voting percentages among the working class are much higher than those for the middle and upper classes.

Meanwhile the quality of representation in the Lok Sabha and State Assemblies has changed. In the early years after Independence, the ruling party obtained between 45% and 47% of votes in the years 1951 to 1962.\(^{25}\) In the recent 2014 elections where a single party came to power for the first time in 30 years, it was 31%. In the intervening years of 1989 to 2009, it was much less as we had coalition Governments. The average winner obtained between 45.6% and 47.7% of the votes cast in the last 5 general elections between 1998 and 2014. In 1951 it was 50.9%. If we look at the percent of votes that MPs in the ruling party got out of the total votes cast in 2014, it is about 25.2%, up from 19% in the 2009 ruling coalition. In 1951 it was 28.9%. In 1951 an MP on average represented 354,000 voters, while today it is 1.53 million – result

\(^{25}\) AVINASH KUMAR, CRIMINALISATION OF POLITICS: CASTE, LAND AND STATE, 52-57 (2\textsuperscript{nd} ed 2015)

\(^{26}\) Alok Gupta, All about Political Parties, INDIA BIX (2014) \url{http://www.indiabix.com/group-discussion/voters-not-political-parties-are-responsible-for-the-criminalization-of-politics/}

\(^{27}\) Dr. Mallikarjun I Minch, Criminalisation Of Politics And Indian Administration, 2 SAJMR 112, 117-167 (2013)
of the increase in population. So on all counts – total vote share of the ruling alliance, vote share of the MPs, vote share of the ruling alliance MPs, and number of voters an average MP represents, the quality of representation has declined. But the MPs in Parliament control the Government, large budgets, and new legislation. The revenue expenditure in the early 1950s was between Rs.400 and Rs.500 crores a year. In 2014 the revenue expenditure budget is over Rs.17.63 lakh crores – a increase of over 3900 times. Even at 10% growth, it should have gone up by about 500 times.

Criminal records of candidates do not seem to play any role on election outcomes. An analysis of over 60,000 records of candidates and winners since 2004 shows that while only 12% of ‘clean’ candidates without any taint win, around 23% of tainted candidates win, and a similar 23% of seriously tainted candidates win. Either voters are not aware of these records, or for those who vote based on caste or religious affiliation, the question seems to be: when your leader commits such a crime, you all say and do nothing. Why do you blame my leader?”

**Overview of situation from 2004 to date**

The Supreme Court requires candidates to disclose cases where charges had been framed. Publicly available data from the EC and from databases was used in the following analysis.

**Criminalization of Politics**

a) **Candidates:** Data of over 62,800 candidates filed with the Election Commission show that 11,030 (18%) had 27,027 pending criminal cases against them while 5,253 (8%) candidates had 13,984 serious criminal charges including murder, rape, corruption, extortion, dacoity etc. These include were 1229 cases of murder, 2632 cases of attempt to murder, and 496 instances of IPC sections on other cases related to murder (culpable homicide, abetment to suicide etc.). An average of 9% of all candidates fielded by political parties had serious criminal cases. Without exception all parties had such candidates, varying from 4% to 17%. If we look at candidates with some criminal case, including so called ‘trivial’ cases, the average shoots up to 18%.

b) **Winners:** The proportion of winners with criminal cases is 28.4% while only 18% of candidates had such records. Similarly, 13.5% winners had serious criminal charges compared to 9% of candidates.

In every type of criminal case, the percent amongst winners is much more. Civil society and the Election Commission have therefore asked for candidates with serious criminal cases to be barred from contesting elections. The Courts have also been inclined to take this view although they are not empowered to enforce this.

‘Winnability’ and Serious Crime

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28 SHEFALI ROY, SOCIETY AND POLITICS IN INDIA UNDERSTANDING POLITICAL SOCIOLOGY 114-157 (2014)
A large percentage of candidates with serious criminal charges actually win the elections. While only 12% of candidates with a ‘clean’ record win on average, 23% of candidates with some kind of criminal record win, and more alarmingly, 23% of all those with serious criminal charges win. Nearly every party shows that a greater percentage of those with a serious criminal record win compared to those without any record. This partly explains the strong tendency of political parties to continue fielding people with badly tainted records.

<table>
<thead>
<tr>
<th>No who contested</th>
<th>No. who won</th>
<th>% of those with clean record who won</th>
<th>% of those with charges framed who won</th>
<th>% of those with serious charge who won</th>
</tr>
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<tr>
<td>62847</td>
<td>882</td>
<td>12%</td>
<td>23%</td>
<td>23%</td>
</tr>
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TABLE SHOWING RELATIVE CHANCES OF WINNING FOR CLEAN AND TAINTED CANDIDATES
(All State Assembly, LokSabha, RajyaSabha Elections from 2004 to September 2013)

The interaction between crime and money is even more alarming. The average assets of winners with some crime record was Rs.4.27 crores, and of those with serious crime records was Rs. 4.38 crores. Money seems to help in winning elections, and having a crime record seems to further increase the chance of being elected. The underlying reasons for this trend need to be understood with further research. The issue of crime in elections has been debated at length in the media. Anyone with such charges, even if they are false, would not be appointed to any non-political position, whether in the Government or the private sector. Perhaps the recent Supreme Court Judgments disqualifying convicted MPs and MLAs, and asking for speedy trials will help arrest this problem.

Causes of Criminalization of Politics in India

A lot of this can be attributed to the prevalent social structure in India and lack of an alternative people’s regime. India attained independence on papers but the masses still suffered from colonial hangover. Thus the Britisbers were replaced by local masters and roadies. And this led to a new kind of politics in India, degenerated and pervert, but characteristic to the land.

1. Emergence of vote bank politics: One of the major reasons of why the political parties bring in such candidates on the election field lies in the services that these rowdies offer to them. The ambit of the services provided by such people is vast and includes the help rendered by them in carrying on unlawful activities during strikes, bandhs, rallies, etc. And when such criminals attain the designation of political leaders, they attempt to accomplish their targets and ambitions on the stake of rules and regulations that should govern them but unfortunately it doesn’t. The political parties spend galactically to buy votes and conduct other

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illegal activities through these crooks or the so called goondas. The majority of Indians are ignorant of politics that goes on in the nation and thus remain unaware of whom they should to vote. Therefore most of the franchise holders of the country are purchasable which further lays an easier path for the political parties to acquire their support.

2. **Corruption:** The political parties claim to be different and better than the other existing parties but a common characteristic that runs almost through all the parties, is the criminal background of the candidate backed by them. But the fact that these candidates not only contest elections but also win and reach to the political office is evident of the failure of democracy as the greatest power a citizen has been armed with is to show the exit way to the incompetent contestants and such authority has not been exercised in a responsible manner by the people. Corruption is a two-tier process. First, the institutions get corrupt and then the corruption is institutionalized. Thus, corruption and institutions become complementary to each other making the whole superstructure of institutions hollow. The corruption in the governance of our country has now been institutionalized as can be easily observed through the various scams that are running across the country. The incapacity to cope with corruption has called forth the contempt of the law. The combination of contempt of the law and criminalization of politics leads to the flourishing of corruption. In the Corruption Perception Index 1998, India has been ranked 66 out of 85, by the German non-government organization Transparency International established in Berlin, which further implies that India is more corrupt nation than 65 countries.32

3. **Loopholes in the functioning of Election Commission:** Another reason for the nurturing of felons in the political system of the country is the loopholes in the working of the Election Commission. It is the function of the Election Commission to take required steps to bust the link between the politicians and criminals. The Election Commission has prescribed forms for the contestants of elections to disclose their property details, cases pending in courts, convictions, and so on while filing their nomination papers. This is a positive step taken by the Commission to make the voters known about the criminal history of the candidate but it has not been effectively applied. These disclosures only inform people about the candidate’s background and qualifications, but do not forbid them from casting their franchise, irrespective, in favor of a criminal. There has been a gap between the working of Election Commission and the electorates for many years and thus the common man barely comes to know about the rules drawn by the commission. It is essential to bridge this gulf not only to outcast the undesirable elements from politics but also for the endurance of our democratic polity. And this can be achieved by an increase in literacy rate in the country. The voters, while exercising their voting rights, have to make wise choice in the interest of the national. Also, the Commission has the authority only to de-register a party, which further interrupts in

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32 RAJVIR SINGH, CRIMINALIZATION OF POLITICS AND CORRUPTION, ASR Publications Pg 117 (2014)

www.supremoamicus.org
the functioning of the Election Commission.

4. **Denial of Justice and Rule of Law:** Criminalization has become a fact of Indian politics today. The political parties, electors and the whole machinery of law and order of the country are equally responsible for bringing in such a situation. There is very little belief in the country regarding the efficacy of the democratic procedure to actually deliver good governance, which extends to swallowing in of the fact of criminalization of politics. The laws made against convicted criminals who contest elections are weak and toothless in nature, which further leads to the encouragement of such practices. “If fundamental rights can be taken away from those who have been charged but not proven guilty, why cannot the same apply to politicians?” This allows the charge sheeted criminals, who are many a times habitual offenders, to contest elections and also attain the political office.

5. **Unholy nexus between politicians and bureaucracy:** Ramchandra Guha says, “In Jawaharlal Nehru’s time the civil service was shielded from politics, transfers, promotions and the like were decided within the executive branch itself. From the 1970s, however, individual bureaucrats came increasingly to ally with individual politicians or political parties. When the party they allied with was in power, they get the best postings. In return, they energetically implemented the partisan agenda of the politicians”.

6. **Interference of politicians in the administration:** Guha’s says, “In a letter to the prime minister, the retired civil servant M. N. Buch has highlighted the consequences of this politicization of the administration. The way the government is now run means that the disciplinary hierarchy of the civil services has completely broken down. A subordinate who does not measure up and pulled up by his superior knows that he can approach a politician, escape the consequences for his own misdeeds and cause the harm to his superior”. In the 1970s this started in embryonic form and today this has assumed an epidemic. Most of the politicians of modern India interfere with administration in one form or another. The civil servants are becoming more and more corrupt, so also the politicians. The net result is politics is, ultimately, criminalized.

7. **Caste and religion:** Caste and religion both are equally responsible for the criminalization of politics. In bureaucracy there are certain fixed procedures and rules in the promotion. But caste and religion both interfere in this process. Less qualified and inefficient civil servants get promotion. The quota system is fully responsible. It has been found that a

33 RAMCHADRA GUHA, INDIA AFTER GANDHI: THE HISTORY OF THE WORLD’S LARGEST DEMOCRACY, 221-222 (2011)

34 Id
8. System of party government: The system of party government is also responsible for the criminalization of politics. On the eve of general election the leaders of the party give promises to the electorate. The purpose is to win the election. If the party luckily comes to power, the members of the ruling party try to implement the promises. The dark side of this situation is the party in power does not consider the feasibility and rationality of the action or promises unreasonable and impractical ways and techniques are adopted. This is a cause of criminalization of politics. In post-independent India strong public opinion against corrupt practices has not developed. Each person knows that that system or practice is corrupt. But there is nobody to protest against it. Rather, he thinks that this is the system and he accepts it. This tendency has finally opened the door of the criminalization of politics. But if anybody objects to the corrupt practice he is either penalized or deprived of his due.

9. Un-development, illiteracy, poverty and prismatic nature of Indian social system: Un-development, illiteracy, poverty and prismatic nature of Indian social system are collectively responsible for the criminalization of politics. The shrewd and self-interest-seeking politicians — in collaboration with corrupt civil servants — adopt various types of unfair means to satisfy their greediness and ill-motives. The Indian society is in transition. From various sources the government of India is getting funds for development. The government also spends huge amount of money through Five Year Plans. A large amount of money is laundered by politician and bureaucrats. There is a close alliance between the two and this has led to the worst type of criminalization of politics.

Impacts of Criminalization of Politics in India

The primary sacrifice at the altar of criminalization is that of governance, along with transparency and accountability. Expensive election campaigning favors candidates with strong financial background. Such candidates, when elected, seek to recover their expenses besides securing a corpus for the future election as quickly as possible, especially in the era of coalition governments with tenuous stability.

The average number of years that criminal cases against MPs have been pending is seven (until 2009). Kameshwar Baitha, JMM, Palamau, Jharkhand, has declared 10 cases of murder, which have been pending for an average of 12 years. Ramakant Yadav, BJP, Azamgarh, Uttar Pradesh, has declared a murder case which has been pending for 25 years.

Not all is lost though. A comparison of top 10 MPs with criminal charges in 2004 and 2009 Lok Sabha elections reveals that the number of MPs with serious criminal backgrounds has declined. For the top 10 MPs with serious criminal charges, the total number of cases decreased by 42 per cent, count of serious IPC charges reduced by 32
per cent and murder charges were reduced by 55 per cent.35

The law breakers today are now the law makers and they do not allow the parliament to enact sufficient laws to effectively administer the country. The parliament loses the moral authority to legislate laws. Further, it has led to increased violence which overtime has trickled down into the society creating a cruel and nasty atmosphere. The money power used during elections has led to increased corruption in public life. This creates a vacuum created by the non-performance of field level infrastructure affecting the poor and the rich alike. It is the problems created by this void which leads to evils like Naxalism.

Justice Chandra Shekhar aptly wrote in his book36 –
“Jeetgaye to Minister, Haargaye to Governor, Retire ho gaye to Vice Chancellor, Our kuchnai to SarvodaySansthashai hi.”

12 bombs blasts that shook Bombay on 13 march 1993, had involved the collaboration of a diffuse network of criminal gangs, police and customs officials as well as their political.

Patrons, a commission were institutes to investigate the so-called nexus. The report by N.N.Vohra found such deep involvement of politicians with organized crime all over India that it was barred from publication. Here Vohra observes "the various crime syndicate/mafia organizations have developed significant muscle and money power and established linkage with governmental functionaries, political leaders and other to be able to operate with impunity. As highlighted by the Vohra Committee Our elections involve a lot of black money and it is this use of black money in elections which has also brought about the criminalization of politics. After all, the story of the Hawala scam started by the police stumbling to the Jain diaries in their effort to trace the money received by the Kashmir militants. The scam brought out the linkage between the corrupt businessmen, politicians, bureaucracy and the criminals. The 1993 Bombay blasts which took away the life of 300 people was made possible because RDX could be smuggling by allegedly bribing a customs official with Rs.20 lakhs. Some 15 years ago Vohra committee submitted its report to curb criminalization of politics but the fact is that no application in this way is being made.37 This was mentioned in the petition submitted by the Speaker of LokSabha and President of India on 16th may that- “The subject of criminalization of politics is one that concerns the entire nation closely. It is deeply disturbing that on the one hand, our polity is tolerant of ‘fake encounters’ (summary executions) of alleged criminals and terrorists, while our highest representative body – Indian Parliament – harbors people caught red-handed in acts of human trafficking, and convicted on charges of abduction and suspected murder.”

Criminalization also includes the following impacts on this society:
- A criminal is on the wrong side of the law and hence cannot be expected to make

35 Id 13
36 Id 10
37 Id 13
positive contributions to the legislative and administrative process.

- It brings a sense of futility among the administration particularly the police administration and demoralizes them.

- Presence of tainted candidates in the law making institutions creates embarrassment for the country as well as the people.

- Rise of a criminal to high levels of powers has an adverse effect on the society. The immunity and success of these people lures more and more youngsters to follow in their footsteps. This brings in degeneration and moral values in the society.

- Stand of Political Parties: Politicians and Political Parties take a stand that the charges are politically motivated. They also contend that the candidate fielded by them has not been proved guilty. This argument is based on the accepted legal principle that every man is innocent once proved guilty. The logic is correct from an individualistic point of view, but it is expected that a political party would give precedence to the larger public interest. The question is: will a politician having criminal case pending against him, be able to gain confidence of people of the country. The answer would be no. Therefore, it would prudent if the political parties retrain from taking a call on the innocence of such candidates and give a thought to their social responsibilities.

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ANTI-DEFECITION LAW IN INDIA- A BOON OR A BANE

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ABSTRACT
The 52nd Amendment to the Constitution added the Tenth Schedule which is the ‘Anti-Defection law’ with an aim to combat political defections. The Law has succeeded in some ways in fulfilling its aim to bring party stability and curb defections but due to some of its erroneous provisions, it is unable to achieve the best it can. This article seeks to provide a brief analysis of when and how the law was introduced, further highlighting the provisions of the Tenth Schedule mainly dealing with the definitions, what would not amount to defection and the powers of the Speaker. The article also summarises the salient features of a landmark case, i.e. the insertion of Schedule X i.e. Kihota v. Zachillu&Ors. Apart from discussing the issues brought by numerous cases, the article uses various political scenarios and fiascos which led to the law being enforced in the first place. Furthermore, it discusses the merits of the law along with its demerits to understand the reasons for its implementation and execution. Through this article, we have tried to objectively analyse the loopholes in the law which has allowed defectors to suit the law to their personal needs and thereby take undue advantage of it. Apart from incorporating recommendations that were given by different bodies set up to make changes in the law the article, lastly, also suggests a few proposals which seeks to assist the law in achieving its aim of discontinuing undemocratic political defection by members of the legislature.

INTRODUCTION
In the Indian Constitution various grounds have been provided on the basis of which both Members of Parliament (MPs) and Members of Legislative Assemblies (MLAs) may be disqualified from the Legislature and one such ground is ‘defection’. The term defection signifies an act of a legislator wherein he transfers from the party on whose platform he was elected to that of another political party.38 In India, the issue of defection and the immense need to take a step to curtail this problem was addressed in 1967 elections which truly was a seminal moment in India’s electoral history. It was in 1962 when a large number of defections was witnessed where approximately 142 MPs and 1900 MLAs committed defection and this was the event which also lead to the formation of the very popular phrase ‘Aaya Ram Gaya Ram’ in reference to a Haryana MLA Gaya Lal who changed his party thrice within the same day in 1967.39 Therefore it was in 1967 when the Government took the decision to take a step towards this menace and went on to pass a resolution. A committee was formed by the Union Government under the chairmanship of the then Union Home Minister Shri Y.B. Chavan and consisted of eminent people such as M.C. Setalvad, Jayaprakash

Narayan, H.N. Kunzru, M. Kumaramangalam and Madhu Limaye among others. Their suggestions was inclusive of ones like political parties must have a code of conduct among themselves, if the defection was for ideological reasons then the defector shall be disqualified to continue as a legislator but could stand again and in cases where the defection took place for pecuniary reasons then the defector shall not only be disqualified from office but also be prevented from standing for a specified period. These recommendations by the Chavan Committee was sought to be implemented by means of The Constitution (Thirty Second Amendment) Bill but due to the dissolution of the House before the bill could be passed, it remained an unsuccessful attempt. Further, after another failed attempt to check defection by way of the Constitution (Forty Eighth Amendment) Bill, it was finally in 1985 that the eradication of this travesty of the democratic process was put to action.

The much awaited anti-defection law was passed by the parliament in 1985. The 52nd amendment to the Constitution added the Tenth Schedule and amended various Articles like 101, 102, 190 and 191 and its purpose was the incorporation of the process by which legislators could be disqualified in case of defection committed by them. Prevention of the frequent change of parties by members was essential since it was hampering the stability of the political system. This was a very important step taken by the Rajiv Gandhi Government and as stated in the reasons for the amendment “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 principles which sustain it.” Therefore this Article aims to analyse that the anti-defection law which was introduced to discontinue undemocratic political defection by members of the legislature is in reality a bane or a boon, in other words how successful has it been and if not fully successful in what are its drawbacks and lastly few suggestions to overcome those drawbacks.

PROVISIONS OF SCHEDULE X

The tenth schedule was inserted in the Indian Constitution by the 52nd amendment and it was for the purpose of curbing unethical political defections. Further giving a brief overview about the schedule before analysing it, it wholly contains of 8 paragraphs out of which the first paragraph deals with various definitions important to understand the law. The second paragraph incorporates the disqualifications on ground of defection. The third paragraph which was deleted vide the 2003 amendment dealt with splits within the party and the fourth paragraph is about disqualifications not applying in case of mergers. The fifth paragraph throws light on the various exemptions, the sixth and seventh

41Gulab Gupta, Anti-Defection Law – An Introspection, 1966 (IX) CILQ 127 at 130.
paragraphs deal with who decides with questions related to defection and jurisdiction of courts. Lastly, the eight paragraph gives power to the Speaker or a Chairman to make rules for a House in order to enable smooth working of the provisions of Schedule X.\textsuperscript{44}

Thereafter throwing light specifically on paragraph 2 which literally forms the crux of the schedule mentions that for disqualification on the ground of defection the member must have voluntarily given up his membership to the party or he must have voted or abstained from voting, disregarding a directive of the party. The above conditions were pertaining to members of a political party. Further it specifies that if an independent candidate joins a political party after the election then also he can be disqualified on the ground of defection and lastly if a nominated member of a house joins any political party after the expiry of six months from the date when he becomes a member of the legislature.\textsuperscript{45} Thereafter there are certain exceptions to the conditions mentioned above for disqualification of a member on the ground of defection. Firstly, there would be no disqualification if a person is elected as speaker or chairman and then he has chosen to resign from his party, in that scenario he can re-join the party if he resigned from that post. Secondly, there is an exception with respect to one party merging with another and that would not be considered as defection. Earlier if one third of the elected members of a political party defected, it was considered to be a merger but with the introduction of the 91st Constitutional Amendment Act, 2003, this was changed to the requirement of at least two thirds of the members of a party to be in favour of a merger, further for all switching political parties, now they have to seek re-election first if they defect. Further, the Tenth Schedule lays down that the power is with the Chairman or the Speaker of the House to disqualify a member and even if the complaint is about the Chairman/Speaker then a member who shall be elected by the House shall take the decision. Lastly, dealing with the jurisdiction, it was earlier when the rule persisted that no court would have any jurisdiction and that all proceedings related to disqualification would be of the Parliament or in the Legislature of a state but this was struck down by the Supreme Court and currently the anti-defection laws comes under the judicial review of courts.

**ADVANTAGES OF THE LAW**

Ever since the law had come into existence in 1985, it had largely curbed the problem at hand. Foremost, providing stability in the government elected by the people. The representatives of the people who were elected for a seat in the assembly could not change their affiliation to the party they contested for the seat from. This provided for the prevention of unsteadiness in the government as there were no more party shifts.

Prior to the amendment made in 2003, a defection under the tenth schedule was permitted if one-third of the elected members from that party would ‘split’ away and join or form another political party. The amendment which eventually came into force in January, 2004 did not recognise for

\textsuperscript{44}MPJain, *Indian Constitutional Law*, (LexisNexis, 8th ed. 2018)

\textsuperscript{45}6, Schedule 10, Constitution of India.
the split anymore in this schedule. It recognised, or rather, included a ‘merger’ between two political parties or a formation of a new one when two-thirds of its members joined another political party or formed a new one.

Apart from stability, which is the core of the anti-defection law, it aims to check the accountability of the representatives of the people.

Citizens vote for candidates based on numerous factors which could include the individual’s traits and promises or the party’s beliefs. Its agenda, manifesto and ideologies constitute several other factors which the people consider before the casting a vote. Hence, if there lies any chance for the person to defect to another political party where there lies its own nature would defeat the very purpose of the voting system.

There would be no accountability from the government to the people despite the candidate being bound by the promises made by them during their campaign. Political Leaders, earlier, after elections used to tend to see politics only in terms of short term interests and, therefore, be unbound by party ideology and beliefs which created a new political outset. However, this had all changed courtesy to a decision made by the Union Cabinet to amend the provisions related to Anti-Defection Law in the Constitution. It removed the clause that permitted the political defection if it constituted a split, i.e. amounts to one-third of the strength in the party and included the provisions stating that a merger between two political parties or a formation of a new one when two-thirds of its members joined another political party or formed a new one would not constitute to be defection.

In Jagjit Singh v. State of Haryana\(^{47}\), the Supreme Court inter alia affirmed that the test of an independent participant joining a party is to establish whether the individual in question has given up his independent personality on the basis of which he was elected as the representative of the people from that constituency. A mere appearance of outside support would not suggest joining a party. Each case has to be definite on the basis of material on record.

Anti-Defection law was introduced to increase the cohesive quotient in the parliament within and among political parties. The invention was necessary to curb with fallacious instances of horse trading arrangements and alarmingly high rates of corruption and fraud. A sense of party-spirit politics is one of the most important highlight in the insertion of the schedule, meaning it instilled the sense of loyalty of members towards their own party. It is pertinent to note that Parliament and state legislatures are institutions where there ought to prevail a culture of healthy debate and discussion. These institutions ought to serve as a platform for free exchange of ideas and this is also protected by certain privileges conferred on members of the Parliament and members of state legislature under Article 105 and Article 194 of the Constitution. The Laws inserted vide Schedule X also aims to uphold this

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platform of productive discussion for the benefit of the people at large.

**CRITICISM FACED BY THE LAW**

The anti-defection law was brought about to enable political parties to not lose their members over unfair practices of leaving the party from which they were originally elected and it was also with the aim to bring stability to the government. The law has been successful in its attempts however it has also resulted into some outcomes that were not intended and therefore it is criticised on certain levels. Since this paper aims to discuss the anti-defection law both as a boon and a bane, it is essential to be familiar on the grounds on which this law is criticised.

i. The first and foremost criticism faced by this law is that it curtails right to freedom of speech and expression. This point can be further elaborated by throwing light on the fact that right to vote for or against the party lines is a genuine exercise of an individual’s freedom of free speech and expression under Article 19 (1) (a) and also results in placing restrictions on the freedom of free speech guaranteed under Article 105 and 194 to members of the Parliament by curbing dissent against party policies.

ii. The second ground on which the anti-defection law is criticised is regarding its policy on splits and mergers. Under paragraph 2, one exemption from disqualification is that if the requisite number defect, they are not hit by the disqualification i.e. two thirds members. The law’s drawback on this particular point is evident on its unreasonableness by differentiating between individual defection and mass split. There is no rationale behind this idea since ideally if defection by an individual member is not permitted then the same should stand for a group of larger number of people. Therefore this criticism pertains to exception being based on the number of members rather than the reason behind the defection and this apparent dichotomy has been heavily criticised as being prejudicial to the individual member as opposed to a faction.

Thirdly, with respect to the provisions of Schedule X, wide power has been given to the Speaker which is heavily criticized. As per the provision the Chairman or the Speaker of the House is given wide and absolute power in deciding the cases pertaining to disqualification of members on the ground of defection. The question arises whether the Speaker shall be absolutely impartial while making such a decision since at the time of making the decision he is still the member of the party which nominated him for the said post therefore there are high chances that he might be lured into making a partial decision. Therefore the anti-defection

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49INDIA CONST. art 14.
49INDIA CONST. art 19.

iv. The fourth criticism that the law faced was in terms of demolishing the idea of parliamentary democracy. The Constitution and principles of democracy mandates accountability to the electorate but the anti-defection law has made legislators accountable only to the party leadership since they do not possess the calibre to disobey the party leadership in order to represent the voice of the electorate. The ruling party can easily compel a member to vote in a particular irrespective of his own choice on the basis of tenth schedule since members need to save themselves from disqualification.

To uphold the true spirit of democracy, a member should be free to vote as he wishes to especially on important public matters and not be compelled to follow the directions given by the party.

v. Yet another anomaly in the law was that as per Paragraph 7, the court would have no jurisdiction in respect of any matter connected with disqualification of a member of a House thereby restricting the power of judiciary provided under the Constitution. Judicial review is a basic feature of the Constitution and no amendment to the Constitution can violate the basic structure. This particular rule barring jurisdiction of Courts has been challenged multiple times and in cases like Ravi S Naik v. Union of India, it was held that the rules relating to anti-defection laws are merely procedural in nature and any violation of these, being a procedural irregularity, was immune from judicial scrutiny. This law of providing that the court would have no jurisdiction and that the Speaker would be the final judge in the matter was heavily criticised for violating the basic feature of judicial review but in 1991 Finally Supreme Court declared paragraph 7 unconstitutional and also stated that the speaker’s decision would be subject to judicial review.

Lastly another flaw in the anti-defection law pertains to the phrase ‘voluntarily giving up’. As per Rule 2(1)(a) of the Tenth Schedule a member of the House is disqualified from the party if he voluntarily gives up his membership of the political party but the term voluntarily gives up his membership seems vague to infer a particular meaning and the Schedule has not clarified the same. To further come to a solution for this, two judgments by the Supreme Court can be relied upon, namely, Ravi Naik v. Union of India and G. Vishwanathan v. Hon’ble Speaker, Tamil Nadu Legislative Assembly where it was held that in order to constitute ‘voluntary giving up of membership’, no formal resignation was necessary and that an implied or express giving up as inferred from the conduct of the member will suffice the basic structure. As per the conduct of the situation, the member should be free to vote as he wishes to especially on important public matters and not be compelled to follow the directions given by the party.

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56G. Vishwanathan v. Hon’ble Speaker, Tamil Nadu Legislative Assembly, 1996 2 SCC 353.

the opposite party to form a Government would by itself amount to an act of voluntarily giving up membership of the party of which he is an elected member. These cases brought some reduction in the Speakers power to disqualify members indulging in activities contrary to the party’s interest yet there are instances where the Speaker has misused the power and has interpreted the phrase ‘voluntarily given up membership’ in such a way as to curb even mild forms of dissent and a very evident example of this would be the disqualification of eleven members of Legislative Assembly of Karnataka in 2010 by the Speaker.

**DECISION IN THE KIHOTA HOLLOHON JUDGEMENT**

Many of the criticisms mentioned above have been discussed in a very important landmark judgement related to anti-defection law in India i.e. KihotaHollohon v. Zachillu 58 where the constitutional validity of the Tenth Schedule was challenged. Most of the provisions though were upheld by the Supreme Court and the major holding of the Court included:

i. The validity of Paragraph 2 of the Tenth Schedule which recognizes abstaining from voting or voting against any direction issued by the political party without prior permission as a ground for disqualification was upheld by the Supreme Court. Contrary to the contentions it was held that Paragraph 2 does not suffer from vice of subverting democratic rights of members of Parliament and members of Legislative Assemblies and moreover anti-defection laws were necessary to uphold the most basic of fundamental features of the Constitution like Democracy and hence restrictions could be placed on fundamental freedoms of speech and expression in this regard. The Court however made it clear that it was only in matters pertaining to confidence or no confidence motion and matters integral to party’s policy that a legislator is bound to follow the direction issued by the party.

ii. Second important decision in this case was with respect to the provisions of Paragraph 7 of the Tenth Schedule which had provided that the court would have no jurisdiction in the matter and that the Speaker would be the final judge. The Court held that the paragraph seeks to change the operation and effect of Articles 136, 226 and 227 of the Constitution which gives the High Courts and Supreme Court jurisdiction in such cases. Further any such provision is required to be ratified by state legislatures as per Article 368(2) and since this paragraph had not been ratified, it was held to be invalid.

iii. Thirdly the question arose as to whether paragraph 6 of the Tenth Schedule granting finality to the decision of the Speaker/ Chairman is valid. The Supreme Court held that to 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 but judicial review should not cover any stage prior to the making of a decision by the Speaker. The majority in the present case held that the Speaker or Chairman under Paragraph 6(1) of the Tenth Schedule is a Tribunal and that the finality clause does not oust the jurisdiction of the courts under Arts. 136, 226 and 227 but only limits it.

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Therefore the majority judgement, headed by Justice Venkatachaliah propounded that the very nature of the Speaker’s office should make it inappropriate to question the impartiality of the Speaker. Therefore the constitutionality of the Anti-Defection Law has been upheld by the Hon’ble Supreme Court in a 3:2 decision in the landmark KihotaHollohon judgment. Even though various issues related to the law were discussed in this case, there are still issues that remain unresolved which will be dealt with in the subsequent paragraphs.

CRITICAL ANALYSIS

The Anti-Defection law was introduced in India with the motive to check the practice of parliamentarians abandoning their original parties from which they were elected and also using it as a weapon for the toppling and creation of governments. Ironically, the law that was brought to reaffirm India’s democratic ideals itself turned out to be the one creating profound anti-democratic ramifications in the Indian polity.

Beginning with Paragraph 2 (1) (a) where one of the grounds of defection mentioned is ‘voluntary giving up membership of such political party’, it was held that the term 'voluntarily given up membership' is not synonymous with the tendering of formal resignation by the member. It is a wider term and inference can be drawn by conduct and actions of the members. A critical analysis of this provision clearly demonstrates how the anti-defection law is being misused even though that is not the objective of the legislation. Many a times this term is interpreted in such a way as to curb even mild forms of dissent. Moreover there is lack of clarity about the status of a legislator who has been expelled by the political party he belongs to since there is no explicit mention about this in the Tenth Schedule. The Supreme Court in its judgement in the case of G. Vishwanathan v. Honourable Speaker, Tamil Nadu Legislative Assembly held that after expulsion from a party if a legislator joins another party, that shall amount to voluntary giving up of membership and that again created an issue. For example the Speaker expels a member and declares him as an unattached member, then onwards the party does not recognise him as a member but still the legislator cannot join another party since for the purposes of the Tenth Schedule he is still a member and if he joins another party, he shall be disqualified thereby diminishing his individual identity. Further coming to the provision stated in Paragraph 2 (1) (b) of the law, it clearly mandates a parliamentarian must vote in the manner that has been directed by the political party thereby curtail their power to even have a contrary opinion even if they see merit in it. As per this law, a parliamentarian is not permitted to express his dissent in the House which is very evidently against the country’s democratic ideals. If a parliamentarian is already ordered to vote in a particular manner, how is he ever going to have the incentive to start a debate about the position contrary to the one decided by the party.

59 Supra, note 19.
61 Supra, note 16.
62 Supra, note 17.
The Parliament is the embodiment of the consciousness of the nation and therefore it is essential that everything is conducted fairly inside, not by directing people to vote in a certain manner. Such a practice as per the law is clearly curtailing the aim of democracy by ignoring the fact that members belonging to the same political party may obviously have different opinions on a matter therefore allowing them to express their dissent is needed. A party can endorse its principles but not by unfairly taking away the freedom of dissent and voting among members by subjecting them to the anti-defection law. While the Kihoto Hollohon judgment did impose restrictions on powers of the party to issue Whips, there are certain ambiguities. While the Supreme Court has held that whips can be issued only pertaining to matters which are an integral part of the party's policies, there is no definition or explanation as to what matters are integral. This provision clearly affects the culture of healthy debate and discussion that ideally should exist in a parliament. In such a situation, light needs to be thrown on the model adopted by U.S.A and U.K. as per which dissent and defection are viewed as an internal matter of the party and not a matter that should warrant legal intervention by the State. Therefore, it can be concluded that as far as Paragraph 2 of the Anti-Defection law prevailing in our country is concerned it is very evidently diminishing the individuality of the legislators and promoting the idea of leadership in political parties where the terms shall be dictated and the legislator is bound to follow it.

Next aspect of the law needs thorough analysis is with respect to the office of the Speaker in the context of the Tenth Schedule. Major issue of the anti-defection law is whether the Speaker acts arbitrarily. The Speaker or the Chairman decides whether a member of a house is subject to disqualification on the grounds of defection. In our opinion, since the presiding officers are drawn from political parties, such an authority should be vested in the Chief Election Commissioner or some other independent authority constituted for the same. It is disconcerting to have a law that gives leverage to the Speaker or the Chairman of the respective house to act in a partisan manner or without any proper appreciation. It is rational to conclude that due to the Speaker’s loyalty to the ruling party by virtue of his appointment and continuance in office based on its support, it would be unrealistic to expect the Speaker to not have certain party considerations in mind while taking a decision in matters of defections and disqualifications. Moreover another aspect of this is maybe in certain cases, the Speaker lacks the legal knowledge and expertise to adjudicate upon such essential matters. Another issue is the lack of uniformity in the decisions of


64 Supra, note 19.


Speakers in the different States which has led to great confusion in the political set-up as similar situations have been treated differently by different speakers. This has led to a great deal of uncertainty prevailing about what the law actually provides.

Further, critically analysing the anti-defection law it needs to be mentioned that the phrase ‘voluntarily giving up’ is not explained in the Schedule. The Tenth Schedule does not clarify what really ‘voluntarily giving up’ means for example, does it only cover resignation of the member from the party or does it have a wider meaning than that. The issue arose in various cases before the Supreme Court and ultimately conclusions can be drawn from them which are that the phrase has a wider connotation and can also be inferred from the conduct of the members⁶⁷ and that on being expelled from the party, the member, though considered ‘unattached’, still remains the member of the old party for the purpose of the Tenth Schedule. However, if the expelled member joins another political party after expulsion, he is considered to have voluntarily given up the membership of his old political party.⁶⁸ Though on the part of the Tenth Schedule the words ‘voluntarily giving up membership of a political party’ is somewhat vague which can be misused by the Speaker and therefore requires comprehensive revision.

The passing of the Anti-Defection law was a tremendous effort made to curb political deflections and thereby bringing the focus onto government stability. It has definitely achieved some of its planned results but due to various criticisms and loopholes it is unable to succeed in the best way that it should. The defects in the law assist corrupt politicians and other such persons to take advantage of it and use it for their own personal benefit thereby not letting the problem of government instability evade fully. To achieve the fundamental of democracy in its truest sense, certain amendments must be made to the law for it to be in consonance with current facts and circumstances.

RECOMMENDATIONS BY DIFFERENT BODIES
Various committees were formed and many criticisms have been addressed to amend or and remove lacunae in the law and therefore the paper shall further discuss the recommendations by various bodies on reforming the Anti-Defection law.⁶⁹

Dinesh Goswami Committee
The Dinesh Goswami Committee on Electoral Reforms, appointed by the V.P. Singh Government in 1990 recommended that the disqualification provisions should be limited to cases where

➢ A member voluntarily gives up the membership of his political party.
➢ A member abstains from voting, or votes contrary to the party whip in a motion of vote of confidence or motion of no-confidence.

⁶⁷ Supra, note 16.
⁶⁸ Supra, note 17.
Further the Committee suggested that the issue of disqualification should be decided by the President/Governor on the advice of the Election Commission.

**Halim Committee**

At the Conference of Presiding Officers held in 1998, there were detailed deliberations on the need to review the Tenth Schedule to the Constitution and thereafter a Committee of Presiding Officers was constituted under the Chairmanship of Shri Hashim Abdul Halim, Hon’ble Speaker of the West Bengal Legislative Assembly. 70 This Committee explored the possibility wherein the Speaker/Chairman shall not be involved and the power shall be given to a judicial body to decided cases. Various suggestions by the Committee were namely:

- The words ‘voluntary giving up membership of a political party’ be comprehensively defined.
- Restrictions like prohibition on joining another party or holding offices in the government be imposed on expelled members.
- The term political party should be defined clearly.

**Law Commission (170th Report, 1999)**

The Law Commission of India in its 170th report on ‘Reform of Electoral Laws’ (1999) had given various suggestions and recommendations for the amendment of the Anti-Defection Law which were:

- Provisions which exempt splits and mergers from disqualification to be deleted.
- Pre-poll electoral fronts should be treated as political parties under anti-defection law.
- Political parties should limit issuance of whips to instances only when the government is in danger.

**Constitution Review Commission (2002)**

The National Commission to Review the Working of the Constitution headed by Justice Venkatachalaiah among other things suggested in its report of 2002 that:

- Provisions to be made in the tenth schedule that any person who defects must resign and seek fresh mandate.
- Vote cast by a defector to overthrow the government would amount to be invalid.
- Defectors should be debarred from holding any office of profit during the ongoing term.
- Power to decide question regarding the disqualification of membership should vest with the Election Commission instead of the Speaker or the Chairman.

Lastly the **Election Commission** provided with the suggestion that Decisions under the Tenth Schedule should be made by the President/ Governor on the binding advice of the Election Commission.

These were the recommendations and suggestions given by various bodies to improve the Anti-Defection Law by removing the flaws that the bodies felt needed to be removed. Further, the paper seeks to include various proposals which is detailed further below. These suggestive measures can be implemented after being...

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subject to scrutiny as it is aimed to eradicate the loopholes that exist in the law currently.

PROPOSALS
The introduction of the Tenth Schedule in the Indian Constitution was aimed at curbing political defections therefore it is about time that the law is reformed and hence we put forth a few proposals to rid the law of its anomalies.

1) Firstly, the decision making power which vests in the presiding officers i.e. the Speaker or Chairman should be conferred on some other independent body since it is extremely important to have a body which can take impartial decisions without having its party needs in mind unlike the Speaker. It should not be forgotten that in our country, the Speaker does not resign from the political party after being elected to the post thereby there still can be existence of a certain degree of partisan behaviour which ends up being a big loophole in the law.

2) Secondly, as mentioned before in the above paragraphs the distinction that is brought about and exemption given in case of disqualification on the basis of number of defections is not rational and hence should be amended. The law seems to be ignoring the possibility of a situation where two thirds of the party might merge due to the lure of office hence exempting them from disqualification simply because they are more in number is illogical. Therefore the extended proposal is that this provision be amended in such a way to make exceptions on the basis of a valid reason and not just on the number of defectors, that way this particular flaw shall be removed.

3) Further in continuation of the above proposal, another thing that could be reformed is the unnecessary distinction between an independent member and a nominated member. No purpose is really being solved by allowing a nominated member to join any party within a month of his nomination whereas an independent member shall stand disqualified if he joins any political after his election.

4) Next important issue that needs to be addressed is to reform the law in such a way as to help the members to retain their individual viewpoint on certain issues. The law in a certain manner imposing unreasonable restriction on dissent, debate and freedom to vote among the members thereby taking away their identity as legislators. Therefore it shall be reasonable to restrict the voting rights related to matters that form a core to the party legislation but on other matters, legislators should be given some leverage to take a stand.

5) The phrase ‘voluntarily giving up membership’ constitutes a major portion of the Tenth Schedule but is extremely vague due to which many a times Speaker can misuse it by wrongly interpreting it. Therefore this term should be comprehensively defined.

Therefore these proposals are just an aim to make these Anti-Defection Laws efficient and serve the purpose – to truly stand for its aim to curb the menace of defection.

CONCLUSION
The Anti-Defection Legislation has been hailed as a momentous step taken towards cleansing the evil of defection among political parties. It was enacted to put a check on the Members of the Parliament and to ensure the maintenance of loyalty among them to their respective party. We, in this article, have attempted to critically analyse the law and conclude whether it really has been fully successful in promoting parliamentary discipline and decorum and also in preventing unethical tactics from being used by politicians. Further we have through analysis of the law examined the scope for some needed improvement. There is no doubt that the step the government has taken in banning defection is indeed bold and commendable but due to several serious lacunae in the law it is unable to deliver its promises of absolutely curbing defection. Summarising what has been explained in detail in the previous paragraphs, the law fails to provide sufficient incentive for an MP or MLA to examine an issue in depth since he shall be disqualified if his vote is contrary to the party’s direction which is going against the idea of democracy wherein law-making should be an inclusive process. It is important that this practice of emergence of leadership of political parties as extra constitutional authorities dictating terms to a legislator is eradicated. Further, we have focused on the need to appoint an independent body like the Election Commission to take decisions with respect to disqualification instead of the Speaker to ensure that the law is not being tampered due to the partisan behaviour of speakers when it comes to interpreting and applying the law. The law should further be refined to make ambiguous and vague phrases like ‘voluntarily giving up membership’ clearer and also amending unnecessary provisions stating that mergers would not amount to disqualification due to the number of people involved. It is about time that the law is reformed so as to fulfil its intention to curb defections because the truth is that political defections continue to be common even today. For example in 2016 itself, the Arunachal Pradesh CM, PemaKhandu, along with forty three MLAs defected from the Congress Party to join People’s Party of Arunachal. The disappointing fact is that similar instances of defections have also occurred in Goa, Uttarakhand, Andhra Pradesh, Manipur, Nagaland and Telangana in recent years.  

Concluding, in our opinion the questions of defections has now haunted the Indian polity for over three decades and hence serious effort must be made to refine the present anti-defection law which actually is a great tool to curb this evil practice but due to some of its loopholes, as mentioned above, it has not been able to achieve the best it can.

TRAFFICKING IN CHILDREN AND THEIR PLIGHTS

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Abstract
“Childhood should be carefree playing in the sun; not living a nightmare in the darkness of soul”

Childhood is like spring season, the way flowers blossom, so does a child. The more we take care of them, the more nurtured they are. But what if this is taken away from the children and they are exposed to various exploitations. Their childhood is hampered and exposed to all inhumane practices. One such is child trafficking. This is the most aggravated form of crime against children which has become more prevalent in the world. This is one of the global issues which calls for our attention. Child trafficking is the action or practice of illegally procuring and relocating children, typically for the purposes of forced labour or sexual exploitation.

Child trafficking has become a serious National and International concern. India has witnessed high rates of child trafficking over last few decades. Child trafficking has taken many forms like child labour, kidnapping and abduction for ransom or sexual exploitation. Even in this era of globalisation, this practice has not been curtailed. Having numerous laws and various policies by the international organisations on prevention of trafficking of children is just a stepping stone, the real victory will be when we properly implement them for the betterment of these children prone to such exploitation.

This article aims to give an insight into child trafficking not only in national aspect but also global scenario. The reason why trafficking is still a part of our society and how intensely it has affected innocent children. Also, it aims at giving a concrete view on the legal provisions on child trafficking along with certain non-legal measure. It is always said that prevention is better than cure, walking on this proverb, this article mainly focuses on steps to be taken to prevent such a massacre and give a secured childhood to these children.

Introduction
Children are the world’s most valuable resource and the best hope for the future. Trafficking is most commonly found among women and children. This practice has been in the roots of the society for decades now. Giving a global nature to Trafficking, it is difficult to estimate the numerical data of children trafficked each year. Both National and International crisis have led to illegal transportation of children since 1960s. Also Child Trafficking is a serious violation of human rights and affects them both physically and mentally. This is one of the most lucrative criminal trades which is ranked next to arms and drugs smuggling undertaken by highly organised criminals. Mostly, boys are trafficked for labour in mines, industries, construction work etc., and girls are trafficked for domestic works, forced prostitution, sexual abuse, etc.
After vast development of technology in the field of medicine, children are also trafficked for their organ. It has been estimated in the second meeting of the WHO that 5-10% of organ transplants are done through trafficking. According to an NHRC report on trafficking, it was found that 60% of the people trafficked are minors. Among the total prostitutes in India, 20% of them are children. The worst form of child labour classifies trafficking among “forms of slavery or practices similar to slavery”. Where children lack stable homes and financial security, their risk of being enslaved is high. The rates of trafficking are usually high in areas where there are low job opportunities, poor education and economic backgrounds. The children without birth registration or identity document face the high risk of being trafficked. The trafficked victims are usually exposed to physical or sexual abuse, dangerous work environment and denied education. The government of India has taken several steps and also framed various Acts to abolish child trafficking and to prevent them from nasty criminals. Any person involved in this Act will be imprisoned for years. Despite these enactments, this dreadful act is still present in the society.

**Status of India in Trafficking**

India is a third world country and few things which characterise third world countries are poverty, unemployment, low economic growth, social disparity, economic inequality, illiteracy and etc. Traffickers use these types of disadvantages as their lead. Fake promises such as providing money, work and etc. were given by the traffickers to the poor families for trafficking the women and children. The girl children were used for prostitution and even for club dancing.

According to national crime records bureau, in 2014, 76% of women and girl children were trafficked for CSE. These traffickers in India sell those victims in exchange of money and force them to work as the prostitutes. A leading journalist’s survey clears that in India 80% of the children are trafficked for making money out of their physical body. Indian government estimates that girls make up the majority of children in sex trafficking.

**Child Sexual Exploitation (CSE)**

This is a form of sexual abuse which involves penetrative assaults or non-penetrative actions. Child sexual exploitation is not a fault on the side of victim and every child has the right to be safe and to be protected from harm. Sexual exploitation may take place in the necessary of “exchange”. Here exchange means the consideration for the abuse. The consideration may also be tangible such as drugs or intangible. Children who are all within the age group of 12-15 are mostly involved in sexual abuse but in some demanded areas even children with age of 8 years were also found to be sexually.

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73 ncrb.gov.in/statepublications/2016/pdf. Pg186-206
74 ILO Convention no.182(1999) on WFCL
exploited. Equally children with age of 16 and above are also in high risk of exploitation.

Female children are highly endangered for sexual exploitation than male children. Female child who are all in lower grade in a society are easily attracted by the fake promises made by the trafficker and becomes a sex slaves or used for commercial sex purpose. Trafficked girls are classified based on certain parameters. It is often based on the following hierarchy of ‘demand factors’:

1. Physical appearance
2. Age (younger age are more demand)
3. Region (girls from certain region are more demand in certain brothels)
4. Complexion (fair skinned girls are preferred)
5. Submissiveness (readiness to surrender to all kinds of permissive and exploitation)

The cost per trafficked person varies from place to place and it is purely depends on demand.

The Public at Large v. State of Maharashtra and Others\(^\text{76}\), the petition arose due to suo motto notice taken by the court on a newspaper article which indicated that the minor girls were illegally confined and forced to be sex workers. The court passed directions to frame schemes to release them from abuse and to implement such schemes in a proper manner. By this scheme 487 minors were rescued by the police. The court also appointed a committee to rehabilitation of the rescued girls.

Methods used by the Traffickers (Modus Operandi)

The traffickers adopt various methods and fake promises to traffic women and children. Usually, the ingenuity of the trafficker, along with victim’s vulnerability determines the modus operandi that is used. There are various methods used for trafficking children in India, they are:

1. Offering them jobs as domestic servants,
2. Promising jobs in film industry,
3. Promising jobs in factories,
4. Offering money,
5. Luring them with pleasure tips,
6. Making false promises of marriage,
7. Befriending by giving them goodies,
8. Offering to take them on pilgrimages,
9. Making other kinds of false promises and

Their low status and poor economic conditions make them become a victim to this trafficking. The more vulnerable the victim, the easiest is for the traffickers to lure them.

Also, sex tourism in Goa has become a topic of discussion across the country after the Freddy Peats case\(^\text{77}\). He was considered as a respected man who provided shelter for homeless children. But in reality, he was luring young boys and girls into prostitution. Nearly 2300 photographs of nude children, in some cases with Peats were found in this case. The modus operandi of Peats was

\(^76\) AIR 1997 4 BOM. CP 171

\(^77\) State V. Shri Freddie Peats and Others, Sessions Case No. 24/1992, Criminal Appeal No. 4/1996.
varied, devious and ingenious. Children were kept under control not only by coercion but by deceit. They were brainwashed to accept sexual activities as natural. They often gained the children’s silence by portraying the abuse as education or as a game or with threats or violence.

**Radha Bai Vs.Union Territory of Pondicherry** 78, the petitioner’s protests against the Home Minister of Pondicherry alleging that he was misusing the protective home for immoral purposes landed her in deep trouble. The Commissioner suggested the closing down of such homes immediately. Two decades later she got relief from the Supreme Court. In this case the protective home was used as modus operandi by the trafficker.

### Causes for Child Trafficking

Child trafficking being a severe crime, dates back to the times where wars were relevant and had a grave impact on the lives of the people.

1. Wars in Asia, Africa, Eastern Europe, the Middle East and South America had caused many disasters, which resulted in many orphans and orphanages. The orphanages were overwhelming and most of orphan children were made to live and roam on the roads. Thus, they had easily become prey for the traffickers as well as for sex tourists who invaded South Asia for the sole purpose of sexually abusing these minors.

2. Illiteracy: Rural people don’t have enough knowledge about the traffickers. Most of the parents are drug addicts and their children are made to work for the family at a very young age. Some of these kids are easily attracted by the traffickers to leave the poor area and sold to slavery. Some places children are even made to work recklessly for 16 hours a day as slaves.

3. Socio-cultural factors: In some cases, socio-cultural and religious factors have an impact on child trafficking: where religious figure make use of their position to traffic girls for prostitution 79. In many villages in West Bengal, it has been reported that the traffickers act as groom without dowry to get access to the victims 80.

4. Globalisation: The elimination for the demand of visas at the borders has made it easy for these criminals to transport the children across international borders, especially among the states that were parties to the treaty. This illegal are exploited by the traffickers to traffic women and children into exploitative situations, including prostitution and labour 81.

### Reasons for Trafficking

Child trafficking is a covert and growing issue throughout the world. Children are trafficked for various reasons. These are given in detail below:

- Involuntary domestic servitude: This is one of the most vulnerable kinds where children are manipulated that they will get excellent wages to work as a maid in the middle-class house but the fact is that they are abused and underpaid and sometimes even prone to sexual exploitation 82.

Girls from rural India are trafficked because their parents being

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78 (1995) 4 SCC 141

79 Save the children, cited at Rebecca Everly, Prevention and Combating the Trafficking of Girls in India using Legal Empowerment Strategies, June 2010–March 2011


81 S.K.ROY, Child trafficking in India: relatives and realisations.

82 “major forms of trafficking in persons”

www.supremoamicus.org

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from agricultural background are unable to meet the expenses of the family, therefore, forced to work to support their family. The procurement of child domestic workers is commercial and highly exploitative and is exposed to horrendous working conditions. They were not allowed to have any communication with their families and even they were not provided hygienic place for sleep and nutritious food.

In Mirza Sikundar Bukhut case a Hindu girl was kidnapped and sold to Mohammedan where she was subjected to domestic violence. He was held liable for child trafficking.

- Bonded labourers: Children are force to work as bonded labourers usually at brick Randi and stone quarries to pay off their family debts. They are forced to work and have no ways to escape from such exploitation. Some of them are even abused physically, sexually and mentally. Most of them are transported from rural areas for employment in industries and construction where they are compelled to work in hazardous places for little or no pay in return and at the end they are treated as slaves.

- Performing in circus: The newest form of child trafficking can be seen in circus where children are promised attractive salaries for working in circus and also lead a glamorous life. But at the end of the day, they only get disappointment. Girls are even exposed to sexual assaults by men working in the circus. The parents themselves give their consent for sending their children to work in the circus, but because of lack of communication between the two they aren’t able to know about the hardship of their children. (haq 2001)

- Camel jockeying: In a research by SLARTC, KOLKATA it was identified that very young boys are trafficked to serve as camel jockeys. They are tied to the backs of camels so that they don’t move or run away during the race. They are not given proper nutrition so that they are light on the camel’s back. They are badly hurt if they fall down during the race and trampled to death by other camels during the race. This type of trafficking is mostly seen in Bangladesh, India and Middle East.

- Illegal activities: Children are often trafficked for certain illegal activities such as begging and organ trade. This is the most vulnerable form and is prohibited by the law itself.

1. Begging: A large number of children are trafficked for begging. Most commonly are those children who are differently abled so that they can get more money by virtue of their disability. The most common reasons for begging are poverty and physical disability. Various researches have concluded that these children are exposed to drugs for purpose of begging. Some parents who are unable to earn enough money to take care of these children also rent them to be used for such illegal purposes on a daily basis. Apart from these, some children who are fit and made physically challenged by either pouring acid on their face or have their limb forcibly amputated so that they make more money.

- Organ donation: Organ trade is also common, where traffickers force the children to give up their organs for money. The donors are mostly poor people and they

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83 (1871) 3 NWP 146
84 www.ungift.org, retrieved last on 10-05-18
85 Socio-legal research training centre in Kolkata
are categorised by their blood group and a false affidavit is filed by the lawyers on their behalf. The World Health Organisation viewed this illegal sale of organs as a violation of human rights and dignity and enunciated a guideline principle and stated that “the human body and parts cannot be subject to commercialisation” .

Before the Organ Transplantation Act, 1994, there were no legislations in India restricting the sale or organs. This Act made it mandatory to have a proper permission from the respected authorities which will be given approval only after fulfilment of certain medical conditions.

- Adoption: Trafficking for adoption is another serious issue. The main need for adoption arises when the parents or guardian of those children are unable to maintain them or when the child is abandoned to live on streets. The traffickers appoint agents who will go across the rural area and procure babies. They then sell them for money to foreign adoptive parents at higher rates.

In Laxmikant Pandey V. Union of India\textsuperscript{86}, the Supreme Court gave guidelines for intercountry adoption and made it mandatory. It also looked into the complaints filed against these social organisations regarding adoption and opined that demanding large sum of money for adoption is a part and parcel of child trafficking.

In light of these guidelines, the Ministry of Social Justice and Empowerment set up CARA which regulates the in-country and inter-country adoption practices and ensures that these guidelines are properly adhered. However, it is important to have a proper legislation regarding adoption procedure so that the rights of these children are not affected in any way and any issues related to this is properly heard upon and justice is rendered.

- Marriage: The traffickers will appoint middlemen who will induce the parents to give their young girls for marriage in return of heavy payment and bright future of their children. The parents believe them and give their consent for marriage. Later, these girls are forced to marry and are even subject to illegal practices such as slavery, forced sex and also at times prostitution. The life of that girl is made reckless and she has to suffer bodily injuries.

**Enactments to abolish Trafficking**

- International Framework on Law Related to Trafficking:
  The International Law lays down the standards that have been agreed upon by all countries. By ratifying an international law or convention, a country agrees to implement the same. There are several international conventions that regulate child trafficking. Some of them are

  - International Convention for Suppression of Traffic in Women and Children 1921: this treaty prohibits the enticing of a woman or a girl for immoral purposes to be carried out in other country.

  - Convention on the Rights of the Child, 1989: In this convention article 11 requires the state parties to take measures to avoid illicit transfer and non-return of children abroad. Under article 34 and 35, the state should take steps to prevent the children from abuse, sale, trafficking and sexual exploitation.


\textsuperscript{86} [1984] 2 SCR 795
Pornography 2002: This was raised to protect children from all sorts of sexual exploitation and abuse.

- The ILO Convention on the Worst forms of Child Labour 1999: Article 3 of this convention states that the worst form of child labour as slavery, sales and trafficking of children, debt bondage and servitude, and forced or compulsory labour, etc.

- SAARC Convention on Regional Arrangement for Promotion of Child Welfare 2002: This created awareness among SAARC countries about the rights, duties and responsibilities of children and to develop the full potential of South Asian child.

National Framework of Laws Related to Trafficking in India:

Constitutional Provisions:

Article 21 of the Constitution of India provides right to life and liberty for all human beings to live with dignity. Article 23 of the Constitution of India guarantees right against exploitation; prohibits traffic in human beings and forced labour and makes them punishable under law. The Article 24 of the Constitution of India prohibits the employment of children under age 14 in factories, mines or other hazardous employment.

Indian Penal Code, 1860:

- Section 366A - procuration of a minor girl (below 18 years of age) from one part of the country to another is punishable.
- Section 366B – importation of a girl below 21 years of age is punishable.
- Section 374 – provides punishment for compelling any person to labour against his will.

- Section 375 of IPC, sexual intercourse with the girl under 16 years of age, even with her consent, is an offence. There exists a rivalry between this act and POSCO act, which states that even with consent any sexual intercourse with the girl who is regarded as minor i.e. below 18 years is an offence hence IPC should be amended in par with POSCO. There is a strong suggestion among the legal reformers that the punishment should be more crucial so that child trafficking can be minimized.


State of Kerala v. Rajayyan\(^87\) in this case it was held that inducing a girl under eighteen years to go from any place or to do an act is punishable under section 366A of the IPC, 1860.

Immoral Traffic (Prevention) Act, (ITPA) 1956\(^88\) exclusively deals with trafficking. Its main objective is to inhibit/abolish traffic in women and girls for the purpose of prostitution as an organized means of living. The various offences which have been specified in this Act are:

- punishment for keeping a brothel or allowing premises to be used as a brothel (S.3)
- punishment for living on the earnings of prostitution (S. 4)
- procuring, inducing or taking persons for the sake of prostitution (S. 5)

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\(^87\) 1996 cr l r 145 (ker)

\(^88\) renamed as such by drastic amendments to the suppression of immoral traffic in women and girls act, 1956 (sita)
• detaining a person in premises where prostitution is carried on (S. 6)
• prostitution in or the vicinity of public places (S. 7)
• seducing or soliciting for the purpose of prostitution (S. 8)
• Seduction of a person in custody (S. 9).

Child Labour (Prohibition and Regulation) Act, 1986 prohibits employment of children in specific occupations set forth in Part A of the schedule of the Act. The Act lays down the condition of work of the children. As per the Act, no child shall work for more than three hours before he or she has had an interval of rest for at least one hour.

Juvenile Justice (Care and Protection of Children) Act, 2000 consolidates and amends the law relating to juveniles in conflict with law and to children in need of care and protection. The law is especially relevant to children who are vulnerable and are therefore likely to be induced into trafficking. The focus of the Act is to provide for proper care, protection and treatment by catering to the child’s development needs and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interests of children.

The Goa children’s Act, 2003 is the only Indian statute which gives a legal definition of trafficking in section 2(z), this act has imposed certain terms to prevent the children from abuse. The hotel owner and the manager should ensure the safety of the children. Photo studios should periodically report the police that they have not taken obscene photographs of children.

Role of Judiciary in Child Trafficking
The Judiciary has interpreted the aforesaid laws, in following landmark cases:

In Vishal Jeet v. Union of India Supreme Court issued directions to the state Government to introduce rehabilitate homes for children who are found on the streets begging and also the minor girls forced into 'flesh trade' to protective homes.

In Gaurav Jain v. Union of India, directions were given to Government by Supreme Court to rehabilitate children and child prostitutes after conducting in depth study of matter. Furthermore juvenile homes should be used for rehabilitating child prostitutes.

Budhadev Karmaskar v. State of West Bengal, In this case the Supreme Court stated that the Central and the State Governments through Social Welfare Boards should prepare schemes for rehabilitation all over the country for physically and sexually abused women.

Hori Lal Vs Commissioner of Police, Delhi & Ors Respondents The Court in its order read out the following guidelines for effective search of the Kidnapped minor girls, which are to be followed by the Investigation Officer in all the States.

89 enacted in consonance with the convention on the rights of the child (crc)
Geeta Kancha Tamang vs State of Maharashtra\textsuperscript{94} While denying the release of a women trafficker, on mercy grounds, who had served 14 months, the Court has to consider for such a heinous crime is that trafficking in persons is prohibited under Article 23 of the Constitution of India. It is, therefore, the Fundamental Right of every Indian citizen not to be trafficked. Such act constitutes the grossest violence of the Human Rights of the victim child

\textbf{NGO’s works to eradicate Child Trafficking}

In order to prevent and combat child trafficking, a considerable number of programs and policies have been developed and implemented by different governmental and non-governmental organisations at the international, regional and national levels. Although welfare is Government’s task, it is also undertaken by non-governmental organizations within limited funds and space.\textsuperscript{95}

Some of them are:

\textbf{PLAN India} is a child-centred development organization that aims to promote child rights and improve the quality of life of vulnerable children. Plan works in 13 States in India and has directly impacted lives of over a million children and their families since 1979. The organisation’s child centred community developed interventions focus on child protection and child participation, children in difficult circumstances, education, HIV/AIDS awareness, health, early childhood care and development etc.

\textbf{Shakti Vahini} in Delhi ensures that the trafficking cases are investigated properly and exploitation happening from source, transit and destination are linked. Since 2010, Shakti Vahini has intervened in 1270 cases and rescued 1300 victims. It has also been part of 462 court proceedings and trial and has achieved conviction in 26 cases till date. Shakti Vahini has been involved in various Public Interest Litigations on issues connecting to human trafficking and victim protection.

\textsuperscript{94} criminal appeal no. 858 of 2009
\textsuperscript{95} Apeksha Kumari, role of non-government organizations in confronting trafficking in India, 14 American international journal of research in humanities, arts and social sciences 198- 200 (2014).

Some NGO’s have taken the initiative to file Public Interest Litigation in the court to punish the violators and to protect the victims of trafficking. The procedure involves investigations, identification of traffickers and other offenders, in human trafficking, arrest and detention, interrogation, prosecution, conviction of offender.

**Bachpan Bachao Andolan v. Union of India**

A Writ Petition was filed by the Bachpan Bachao Andolan on child labour and exploitation that prevailed in circuses. Hon’ble Court gave directions to the Central Government to have constant monitoring of circuses and also to ensure the children are not subjected to any kind of exploitations and if any reports received immediate action to be taken to protect the interest of children.

**Prerana v. State of Maharashtra**

The Bombay High Court has given certain directions to the State Government of Maharashtra for the welfare of the children of the commercial sex workers. This petition sought directions to be given to the State Government in respect of Kasturaba Sadan, a rescue home established by the State Government of Maharashtra for such victims. In this case the High Court of Bombay issued certain directions for the proper implementation of the related Acts, keeping in view the rights of the trafficked persons. The court order addressed several issues regarding child rights, viz. the role of advocate and NGOs and child friendly procedures in dealing with rescued persons and also brought out clear guidelines for compliance by all the authorities concerned.

### Suggestive measures

Trafficking of children causes countless distresses, and it violates the right to life, dignity, security, privacy, health education, legal remedies and etc. It is always better to take preventive measures to reduce trafficking of children. Few preventive measures that can be implemented to reduce the child trafficking are:

- **Prosecution and protection** is one of the best methods of preventing the trafficking. Prosecution includes identification of these traffickers and make them give compensation to the victims for their illegal activities.

- **Relief and after care programmes** can also help reducing the impact of trafficking on the victims. These programmes must mainly focus on creating awareness on the rights of the children. They must be educated about their vulnerability towards these crimes. Proper knowledge and skill based training programmes must be conducted in an effective manner.

- It is important to have rescue homes for the children who are prone to trafficking. Once rescued, they should be sent to these rescue homes where they are given proper care and protection. There is an alarming need for a large number of rescue homes.

- Sometimes, the brothel owners and pimps or traffickers may come into the appearance of the victim’s parents or relatives. They take away them from the rescue home only for re-trafficking. Therefore, **proper identification of parents/relatives must be made mandatory**

- **Merging the anti-trafficking component with other programmes** such as human rights commission, unifem, institute of social science.

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97 (2015) see 988
98 2003(2) mah.l.j.105
department of home, criminal justice, social justice, labour, women and children development will have a tremendous effect and impact on social and economic empowerment on vulnerable persons.

- **The media** has the large and powerful role to play in the prevention of trafficking. They must explain the effects of the trafficking to the general public and create awareness about child trafficking and sexual exploitation. “……..Creating legal awareness is one of the most important functions for any social action programme because without social awareness it is not possible to promote the real social activism” says Justice P.N. Bhagwati.

- It is also important that the legislatures frame proper guidelines related to the child trafficking and help these victims get justice for the consequences they had faced.

### Conclusion

The problem of child trafficking cannot be handled in closed room. This issue has to be brought into the light and be addressed at the earliest possible. This problem can only be stopped if the people behind these traffickers too are arrested, and for that the police and the public have to become much more vigilant. It is a duty casted upon the Administration and Judiciary to make and implement guidelines to put an end to child trafficking.

The saddest part is that these trafficked children are not only deprived of their rights to education and saving from exploitation and abuse, but also, they are also deprived of their right to health and to choose their life opportunities. Also, children in the sex industry may become serious source of dangerous diseases as they are directly exposed to sexually transmitted infections, including HIV/AIDS. This is an essential issue which has to be brought into lime-light

The Government has the resources and authority to implement the law, while community-based organizations have the grass-roots level contacts and trust necessary to facilitate this implementation. Moreover, Non-Governmental Groups can act as a watchdog on government programs, keeping vigil for corruption, waste, and apathy. Neither standing alone is sufficient. Child trafficking is a vast, pernicious, and long-standing social ill, and the tenacity of that must be attacked with similar tenacity; anything less than total commitment is certain to fail.

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RIGHT TO EDUCATION ACT, 2010: IS THIS ACT MAKING “SCHOOLING” NECESSARY INSTEAD OF “EDUCATION”?

By Deepika Vijaywargia
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“What is really needed to make democracy function is not knowledge of facts, but right education”
-Mahatma Gandhi

Abstract
India is one of the fastest developing nations of the world. There is a rapid increase in almost all the sectors from infrastructure to automobile, from industries to agriculture. But behind these entire development one sector which is struggling with its pace is that of education. The need for education in India was felt quite early and it is still showing continuous growth. One such factor which can be easily said behind this continuous growth is the Right of Children to Free and Compulsory Education Act or Right to Education Act (RTE), an Indian legislation enacted by the Parliament on 4 August 2009. From the time this act has came into effect, the first change which strikes most is that of enrollment. The enrollment percentage in rural area has increased to 96%.

RTE is considered to be one of the major successes toward education in India and these enrollment numbers are speaking about the truth. But one question which is brutally ignored behind this success is enrollment enough? What about the quality? Is it going parallel with quantity? And finally, is policies are regulated and mastered properly?

Introduction
Education is a human right with immense power to transform. Education opens up a vast world of opportunities and ideas to the educated person. It is also of great instrumental value in the process of economic growth and development. Education plays a critical role in the process of lowering the fertility and mortality rates.

Primary schooling is associated with better health outcomes. There is a strong correlation between literacy and life expectancy. The returns of education are large, as education empowers and empowerment affects larger social process.

In spite of this millions of young people around the world are denied their Right to Education. The State of the World’s Children, 1999, pointed out that 130 million children in the developing countries are denied educational rights and almost two thirds of them are girls. Denying girl their rights to equality of education is denial of all other human rights which minimizes the chances of successive generations (particularly of their daughters) to develop their fullest potential.

The framers of the Indian Constitution were aware of the importance of education, so they imposed a duty on the State under

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99 The State of World Children 1999, UNICEF
100 M. Swaminathan and V. Rawal, Primary Education for All, Development Report, 200 at p. 68

www.supremoamicus.org
Article 45 as one of the Directive Principle of the State Policy to provide Free and Compulsory Education to all children until they attain the age of fourteen years, within ten years from the commencement of the Constitution. The object of the Article was to abolish the illiteracy from the country.

It was expected that the elected Government of the country would implement this directive. But unfortunately even after lapse of sixty years from the commencement of the Constitution, no effective step has been taken and 40% of the population of the country is still illiterate.

At the time of making of the Constitution, the framers were apprehensive that view of financial condition of the State it is not feasible to make education a fundamental right under Part III of the Constitution and kept it as one of the directive principles in Part IV of the Constitution.

The Hon’ble Supreme Court in its historic Unnikrishnan’s judgment in 1993 directed the Government that all children up to fourteen years of age have fundamental right to education. The Court in this case, came to the conclusion that fundamental right to life under article 21 of the Constitution should be read in harmonious construction with the directive principles of state policy under Article 45 to provide free and compulsory education to all children up to fourteen years of age including those below six years of age.

In the wake of this decision a demand was being raised from all corners to make education fundamental right. Consequently, the Government enacted the Constitutional 86th Amendment Act, 2002 making education a fundamental right under Article 21A of the Constitution.

Though this Amendment has been passed, but the enforcement of this fundamental right is a challenging task, as the population of the children (between the ages six to fourteen) in this country is in corners. Making education compulsory as fundamental right will not serve the purpose unless there are sufficient schools and infrastructure.

The Government does not have money at present to run its own schools, so the education is on the verge of privatization. Majority of higher secondary schools are run by private bodies making education costly and far from the reach of the poor. Once education is a fundamental right the government is obliged to impart it, otherwise citizens will go to the courts for the enforcement of their rights.

The crucial role of universal elementary education for strengthening the social fabric of democracy through the provision of equal opportunities to all has been accepted since the inception of our Republic. Over the years there have been significant, spatial and numerical expansion of elementary schools in the country, yet the goal of universal elementary education continue to elude us. The number of children, particularly children from disadvantaged groups and weaker sections, who drop out of the school before completing elementary education, remains very large.

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102 Added by the 86th Constitutional Amendment Act, 2002
Moreover the quality of learning achievement is not always entirely satisfactory even in the case of children who complete elementary education.

While the constitutional provisions contain a broadly idealistic expression of concession for the children, the legislative provisions are expected to take it the legislation relating to children is useful so as to ascertain how and whether these legislations complement constitutional provisions are expected to take it further towards machinery for its application in practice. Therefore, a review of the legislation relating to children is useful so as to ascertain how and whether these legislations complement constitutional provisions for safe guarding the interest of children.

Article 21-A\textsuperscript{103} of the Constitution provides for free and compulsory education to all the children in the age group of six to fourteen years as Fundamental Right in such manner as the state may, by law, determine. Consequently, the \textit{Right of Children to Free and Compulsory Education Bill, 2008} was purposed to be enacted which seeks to provide:

A. That every children has a Right to be provided full time elementary education of satisfactory equitable equality in a formal school which satisfies certain essential norms and standards.

B. \textit{Compulsory Education} cast an obligation on the appropriate Government to provide and ensure admission, attendance and completion of elementary education.

C. \textit{Free Education}, which means that no child (other than a child who has been admitted by his or her parents to a school which is not supported by the government), shall be liable to pay any kind of fees, charges or expenses which may prevent him or her from pursuing and completing elementary education.

D. The duties and responsibilities of the Government, local authorities, parents, school and teachers in providing free and compulsory education.

E. A system for protection of the Rights of children and decentralized grievance redressal mechanism.

This Legislation is anchored in a belief that the values of equality, social justice, democracy and the creation of a \textit{just} and \textit{humane} society can be achieved only through the provisions of inclusive elementary education to all. To provide free and compulsory education is not merely the responsibility of school run or supported by the appropriate governments but also of school which are not dependent on government funds. To achieve these objectives the \textit{Right of Children to Free and Compulsory Education Act} has been passed in the year 2009\textsuperscript{104} and has been implemented since 1\textsuperscript{st} April, 2010.

What happens when a country of the size of India has over 3 million populations living on the streets? Or one out of every six girl child does not live to see her 15\textsuperscript{th} birthday? What happens when despite having a national policy for compulsory primary education, only 50\% of children have access to education? Then, the statement “children are the future of the nation” stops making

\textsuperscript{103} Added by the 86\textsuperscript{th} Constitutional Amendment Act, 2002.

\textsuperscript{104} Act no. 35 of 2009.
sense. It sounds like an ominous prophecy. For how can we explain that even after 60 years of independence half of India’s children are illiterate, despite identifying primary education as a key thrust area and possessing one of the world’s largest network of schools.

In order to curb the above mentioned problems and in answer to the questions above Government of India came up with Right of Children to Free and Compulsory Education (RTE) Act, 2009 and the same was inserted in Article 21-A of the Constitution of India by the Eighty Sixth Amendment Act.

After the enforcement of the Act the figures for enrollment into schools touched a whopping 96% but the question lies that whether the quality of education is going hand in hand with the astonishing figure of the enrollments? Apart from the above issue, this paper attempts to analyze certain core issues such as was the whole act interpreted and implemented wrongly, whether the act is implemented in an irresponsible manner?

Predecessor to Right to Education Act: A Historical Narrative

Mid-Day Meals
The program of providing mid-day meal to primary school children in India (National Programme of Nutritional Support to Primary Education) was launched on the 15th of August 1995. Under this program cooked mid-day meals were to be provided in all government and government-aided schools within two years.

The aim of the program was to improve enrolment and attendance and to take care of nutritional needs of children in grades 1-5.105 The state governments in the interim were allowed to distribute non-cooked grains instead of cooked meals. Until 2001, however, only the states of Kerala, Gujrat, Tamil Nadu, Madhya Pradesh, Chattisgarh, Orissa, Karnataka and Delhi were providing cooked meals under the scheme, while the remaining states and Union Territories continued to provide food grains (wheat or rice).

In 2001, the Supreme Court of India converted the mid-day meal scheme into a legal entitlement where in the state governments were liable to provide nutritious cooked meals for all children in government and government-aided schools. There are differences across states in the budgetary allocations to mid-day meals schemes and the infrastructure that is set up in schools for its provision. This is reflected in the quality of mid-day meals provided (Dreze and Goyal, 2003).

However, most observers are in agreement that the mid-day meal scheme is an important step forward in improving both the education and health outcomes of children in India and greater effort and funds should be channeled in improving its quality and implementation.

105 According to the Global Feeding Report of the United Nations World Food Programme, “School feeding programmes often double enrollments within a year and can produce a 40 percent improvement in academic performance in just two years. Children who take part in such programmes stay in school longer and the expense is minimal.”
Right To Education Act: A Brief Overview

The Right of Children to Free and Compulsory Education (RTE) Act, 2009 provides free and compulsory education of all children in the age group of six to fourteen years as a Fundamental Right in such a manner as the State may, by law, determine. The Right of Children to Free and Compulsory Education (RTE) Act, 2009, which represents the consequential legislation envisaged under Article 21-A, means that every child has a right to full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards.

The title of the RTE Act incorporates the words ‘free and compulsory’. ‘Free education’ means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education.

‘Compulsory education’ casts an obligation on the appropriate Government and local authorities to provide and ensure admission, attendance and completion of elementary education by all children in the 6-14 age groups. With this, India has moved forward to a rights based framework that casts a legal obligation on the Central and State Governments to implement this fundamental child right as enshrined in the Article 21A of the Constitution, in accordance with the provisions of the RTE Act.

There are 5 main components that the Act puts forth:

- In India, every child is entitled to free and compulsory full-time elementary education (first to eighth grade) as facilitated by the Right of Children to Free and Compulsory Education Act. This means elementary education of satisfactory and equitable quality in a formal school run with certain essential standards.
- Parents of children covered under RTE are not liable to pay for school fees, uniforms, textbooks, mid-day meals, transportation, etc. until the elementary education is complete.
- If a child has not managed to secure admission in a school according to age, it will be Government’s responsibility to get the child admitted in an age-appropriate class. Schools will have to organize training sessions to allow such a child to catch up with others.
- No child shall be held back (failed) or expelled until the completion of elementary education.
- Not following the RTE rules can invite a penalty of Rs 25000.

While the RTE is a ground breaking piece of legislation, the first in the world that puts the responsibility of ensuring student enrollment, attendance and completion of elementary education on the Government, recent surveys by the State Commission for Protection of Child Rights and UNICEF show that the state of education has not improved much since 2009, when the act was first proposed.

The RTE Act was amended in 2012 wherein the following sub sections 4 and 5 were inserted to Section 1 of the Act. These sub
sections are:
“(4) Subject to the provisions of articles 29 and 30 of the Constitution, the provisions of this Act shall apply to conferment of right on children to free and compulsory education.
(5) Nothing contained in this Act shall apply to Madrasas, Vedic Pathsalas and educational institutions primarily imparting religious instruction.”

Section 2 of the Act was also amended and clause (ee) was added to it which says:
(ee) “child with disability” includes –
(A) a child with "disability" as defined in clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995;
(B) a child, being a person with disability as defined in clause (j) of section 2 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999;
(C) a child with "severe disability" as defined in clause (o) of section 2 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

Section 22 was also amended by the 2012 Amendment Act which says:

Section 22: School Development Plan: (1) Every School Management Committee, except the School Management Committee in respect of a school established and administered by minority, whether based on religion or language and an aided school as defined in sub-clause (ii) of clause (n) of section 2, constituted under sub-section (1) of section 21, shall prepare a School Development Plan, in such manner as may be prescribed.

The School Development Plan so prepared under sub-section (1) shall be the basis for the plans and grants to be made by the appropriate Government or local authority, as the case may be.

Section 25 was also amended which seeks to provide for maintenance of pupil teacher ratio, by the appropriate government and local authority. An apparent contradiction between this provision, which requires that the pupil teacher ratio shall be maintained within a period of six months, vis-à-vis the provision under section 19 mandating that the norms and standards prescribed in the Schedule should be met within three years, is proposed to be corrected through the Amendment Bill introduced in the Parliament.

Section 17 prohibits any child being subjected to physical punishment or mental harassment.

Article 39 (f) of the Constitution of India states: Art 39 (f): ‘The state shall ensure that children are given opportunities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment’. There is explicit use of the word ‘dignity’ in Article 39(f). It is not conceivable for dignity and punishment to co-exist.

Further, the National Policy on Education\textsuperscript{106} also prohibits corporal punishment. It states:

Corporal punishment will be firmly excluded from the education system.

India is a signatory to the United Nations Convention on Child Rights (UNCRC). Article 19 of the UNCRC states: State parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, legal guardians or any other person who has the care of the child.

Thus, the provisions in the RTE Act banning corporal punishment and mental harassment are in consonance with the spirit of Article 39 (f) of the Constitution, the National Policy on Education, and the UNCRC.

As per section 31 of the Act the National Commission for Protection of Child Rights and State Commission for Protection of Child Rights are supposed to:

(i) Examine and review the safeguards for rights provided by or under this Act and recommend measures for their effective implementation;
(ii) Inquire into complaints relating to child’s right to free and compulsory education;
(iii) Take necessary steps as provided under section 15 and 24 of the Commissions for Protection of Child Rights Act. Under section 32 (3) and (4) of the RTE Act, the State Commission for Protection of Child Rights are the appellate authority to receive appeals from the aggrieved persons who would prefer such appeals when their grievances relating to children’s right to education are not redressed by the designated local authorities under section 32 (2).

Children are subject to corporal punishment in schools; institutions meant for care and protection of children such as hostels, orphanages, ashram shalas and juvenile homes; and even in the family setting. A study ‘Child Abuse in India- 2007’, by the Ministry of Women and Child Development, Government of India, found that 69% of children reported having been physically abused. Of these 54.68% were boys.

Incident of having been abused in their family environment have been reported by 52.91% of boys and 47.09% of girls. Of the children who were abused in family situations, 88.6% were abused by their parents. Every two out of three school children reported facing corporal punishment. In juvenile justice system, 70.21% of children in conflict with the law and 52.86% of children in need of care and protection reported having been physically abused.

India after Right to Education Act: Changes, Achievements and Issues

This Act is an essential step towards improving each child’s accessibility to secondary and higher education. The Act also contains specific provisions for disadvantaged groups, such as child labourers, migrant children, children with special needs, or those who have a disadvantage owing to social, cultural, economical, geographical, linguistic, gender or any such factor.

With the implementation of this Act, it is
also expected that issues of school dropout, out-of-school children, and quality of education and availability of trained teachers would be addressed in the short to medium term plans. The enforcement of the Right to Education Act brings the country closer to achieving the objectives and mission of the Millennium Development Goals (MDGs) and Education for All (EFA) and hence is a historic step taken by the Government of India.

Well on the achievement side, it can be said that this act has really grown both length and breadth and children from underprivileged/worse section of society are getting access to school. Parents and guardians are slowly and steadily getting aware about the importance of education and showing and a good response toward this act.

After the implementation of this act enrollment in rural areas has reached to 96% and this act has been contributing in national literacy rate of India as well. On the other side it is opening various opportunities for these students and developing them both intellectually and personally.

But as it is the case with all the other acts, this act also comes with some issues, issues which need serious answer. Some of the major issues are:

**Age Group in RTE:** RTE talks about the age group which starts from the age 6. However, in India the elementary education starts with the age of 2 and half years of age. The schools take the kids in pre-nursery if they are three years of age. A child who has an early schooling since the age of 3 will be far ahead from the child who enters the school at the age of 6. Therefore, the act does not take care of the age below six. The age taken cannot be justified and right. The act should be reviewed again and the age should be revised in this regard.

**Challenge of Hiring Qualified Teachers:** Good and qualified teachers for considered being the backbone of education, in their absence the act cannot achieve the goals. It is a fact government schools are going to be one of the hardest tasks to be achieved in implementing the act. The teachers are that, about one fourth of the teachers of government school remains on leave in India at any given point of time and most of them are not able to do full justice to their professions due to numerous reasons. The Act makes it evident that school drop outs and others kids who are unable to get education, would be brought back into the education stream again, it demands hiring almost double the number of teachers. The teachers of primary schools agreed that there are hundreds of students in one class and there is a huge gap between the training imparted to teachers and what they practice on ground.

**Enforcement of 25% Quota for Weaker Sections:** The act gives a clause of reservation of 25% of seats for weaker sections by private unaided schools turns out to be a boon or a bane. By this clause the government itself accepts that the government schools are not capable of giving good quality education. Meanwhile, confront is to define weaker sections. The malpractices can creep in through this mechanism.
A well monitored mechanism needs to be set up to ensure its fair implementation of the clause. Also, it is tough task to bring together children from varying economic and social backgrounds on the same platform. It would indeed be challenging for the teachers to maintain equilibrium and create an environment for them to blend together.

**Challenge to Bring Child Laborers to Schools:** RTE has become a fundamental right of each and every child, therefore, the children who are out of schools and are child laborers should be brought back to schools. There are more than 12 million children in India who are engaged in child labor according to official figures.

The Act brings India in the same league as USA and 130 nations which have the concern for right to education. Therefore to be up to mark with this nations India has to work hard for this child labor issue and providing education.

**The Regional Balance in Opening New Schools should be maintained:** The government schools should be opened where they are needed very much. An imbalance can be seen in the rural and urban sector of the school. The government primary schools in some areas are in very pitiable conditions. The government can take care of this regional imbalance while opening or giving recognition to these schools.

The government can instruct private sector to come forward to open the schools in the remote rural areas where the schools are far. It will solve the purpose of imparting quality education in the far furlong areas as well. The schools should be only there where they are needed i.e. remote rural areas to vanish the regional imbalance in imparting the education.

**ANNUAL STATUS OF EDUCATION REPORT (ASER):A MAJOR CONCERN**

Facilitated by Pratham, ASER is the largest household survey undertaken in India by people outside the government. It annually measures the enrollment as well as the reading and arithmetic levels of children in the age group of 6-14 years.

ASER has become an important input in the educational policies of both the Central and State governments. The findings of the survey have been referred to in the approach paper to the 11th Planning Commission and several state governments use the findings to define their educational programs each year. Since the last 4 years the report has been released by the Deputy Chairman of the Planning Commission, Shri Montek Singh Ahluwalia.

According to the Annual Status of Education Report (ASER), the RTE has improved the facilities; brought more kids to the school and increased number of toilets but has failed to provide them with right or quality education. This year’s report has exposed the dismal status of schooling and basic learning in rural India. While school enrolment numbers have gone up (96.5% of all children in the 6-14 age group go to school) and school infrastructure has improved, attendance (in government schools) and the overall ability of children to read and do simple mathematical exercises
have dipped in India’s rural classrooms. The survey also revealed that most children in primary schools today are at least three grades behind from where they should have been now and the situation appears worsening. For example, while half of the Class 5 children in government schools were able to read Class 2 texts in 2010, the number has gone down to 41.7% in 2012.

Similarly, in 2012, around 50% of the Class-5 students were able to do a two digit subtraction as against 71% in 2010. In fact, barring Andhra Pradesh, Karnataka and Kerala, every state registered a drop in arithmetic learning levels. Only 30 per cent of class 3 students could read a class 1 textbook in 2012, down from 50 per cent in 2008.

The number of children in government schools who can correctly recognize numbers up to 100 has dropped to 50 per cent from 70 per cent over the last four years, with the real downward turn distinctly visible after 2010, the year RTE came into force.

Generally poor training and status of the primary school teachers, decline in classroom teaching and scrapping of exams and assessments are major factors for the decline in the quality of education. In the absence of the traditional annual examination (students cannot be detained in the same class up to class VIII) the student’s poor learning cannot be detected until class IX.

The ASER report also claims that primary school outcomes have deteriorated since the RTE Act came into force in 2010. It is also found that children in private schools seem to be doing better academically than their counterparts in government schools. The study also showed that students from government schools across states tend to go for private tuition classes more than their counterparts in private schools, underlining again the absence of quality education in government schools.

Although some of the infrastructural parameters under the RTE Act have improved, it’s far from where it should be. For instance, 27% of all schools visited had no drinking water facility in 2012, proportion of schools with useable toilets is only 56.5% and mid-day-meal was served in 87% of the schools. The desired student-teacher ratio is missing in nearly 60% of the schools across India.

On the healthy side, quality has been found to improve whenever the community as a whole has been involved and village representatives have a say in teacher recruitment, monitoring and accountability. Hence, involvement is the key to the issue of quality.

Poor quality of government run schools is encouraging migration to private schools where enrollment has risen from 18.7% in 2006 to 28.3% in 2012. If the trend continues, then by 2018, India may have 50% children in private schools.

It means they have to pay for their own education even in primary level. In fact, more than 40 percent of the children in Jammu and Kashmir, Punjab, Haryana, Rajasthan, Uttar Pradesh, Goa and Meghalaya were already enrolled in private schools.
schools. In Kerala and Manipur, the figure was even more than 60 percent.

The irony is that most of the government schools not only have better infrastructure but better paid teachers compared to the many small private schools. Private schools have proved to be better than government schools because of higher level of commitment of teachers, though government school teachers are more competent generally but indifferent to teaching.

About a quarter of elementary school children in rural areas take private tuitions. The report also said that tuition-going students were much clearer with their arithmetic concepts. Whether enrolled in government school or private school, children receiving this addition support have better learning outcomes than those who do not. It also said that in 2012, of all the children enrolled in standard I to VIII, close to 45 per cent were going to private schools or taking to private tuitions.

For overall improvement in the quality of education, the qualities of teacher training, infrastructure, teaching resources and community involvement in ensuring teacher and school accountability must go hand in hand.

In Chhattisgarh and Madhya Pradesh, adivasi children need special attention: both their enrollment and dropout rates are rather high. Naxal violence is another factor that causes internal migration and lower school enrollments. In Rajasthan, dropout rate of girls in the age group 11-14 years is a cause for concern.

Two Major Trends

The ASER report reveals two major findings which are not very flattering for the right to education movement in India.

A. Poor quality of education

In 2008, only about 50 percent of Standard 3 students could read a Standard 1 text, but by 2012, it declined to 30 percent – a fall of 16 percent. About 50 percent of the Std 3 kids cannot even correctly recognize digits up to 100, where as they are supposed to learn two digit subtraction. In 2008, about 70 percent of the kids could do this.

Not only that the country is unable to improve the learning skills of half its primary school children in the last four years, it has fallen to alarming lows. Similar deterioration in standards of education was also noted among Std 5 students.

The report further notes that the decline is cumulative, which means that the “learning decline” gets accumulated because of neglect over the years. The poor quality of education from Std 1 pulls down their rate of learning progressively so that by the time they are in Std 5, their level of learning is not even comparable to that of Std 2. The private schools are “relatively unaffected” but their low standards remain low. They have also shown a “downturn” in maths beyond number recognition.

The poor quality of education and rate of decline are however not uniform across India. Some states are low in quality, but are staying where they are (Karnataka, Tamil Nadu and Andhra Pradesh) while some have higher levels of education, which are neither improving nor deteriorating (Himachal Pradesh, Kerala and Punjab). The decline is
more noticeable since 2010, when the RTE came into effect, indicating targets of blanket coverage compromising quality and standards.

B. Privatization
The report notes that the private sector is making huge inroads into education in rural India. Before 2020, private schools will be the majority service provider. Private schools have problem admitting children from poor parents, but not when somehow parents can arrange for fees.

Quoting DISE (District Information System of Education) data, the report says that Kerala, Tamil Nadu, Puducherry and Goa have more than 60% of private enrollment in primary schools. Andhra, Maharashtra and Karnataka are at 40 percent, while UP is at 50%. Ironically, the highest private sector enrollment is in Kerala, where successive governments claim commitment to welfare policies, particularly on education and health. Besides private schools, parents also spend considerable amount of money on private tuitions, making quality education more inaccessible to people without money.

STATISTICS IN INDIA (compilation of other Reports published in and outside India)

Public Expenditure on Education
In 2001-2002, India spent about 4% of its GDP on education (all levels). This is lower than the targeted percentage of 6% of GDP, though historically public expenditure on education as a percentage of GDP has been rising. The following table shows government expenditure on education (all levels) as a ratio of expenditure on all sectors as well as percentage of GDP.

<table>
<thead>
<tr>
<th>Year</th>
<th>Government Expenditure on education (in million rupees)</th>
<th>Expenditure on Education as % (of all government expenditure)</th>
<th>Expenditure on education as % of GDP</th>
</tr>
</thead>
<tbody>
<tr>
<td>1951-52</td>
<td>4.46</td>
<td>7.92</td>
<td>0.64</td>
</tr>
<tr>
<td>1961-62</td>
<td>26630</td>
<td>11.70</td>
<td>1.52</td>
</tr>
<tr>
<td>1971-72</td>
<td>110.107</td>
<td>9.53</td>
<td>2.33</td>
</tr>
<tr>
<td>1981-82</td>
<td>443.529</td>
<td>13.17</td>
<td>2.92</td>
</tr>
<tr>
<td>1991-92</td>
<td>2239.369</td>
<td>13.14</td>
<td>3.8</td>
</tr>
<tr>
<td>2000-01</td>
<td>-</td>
<td>-</td>
<td>46.3</td>
</tr>
<tr>
<td>2001-02</td>
<td>8417.946</td>
<td>13.17</td>
<td>4.02</td>
</tr>
</tbody>
</table>

In 1990-1991, expenditure on elementary education as a percentage of GDP was only 1.78% reflecting the greater emphasis given to secondary and tertiary education. In 1994-1995, this percentage actually declined to 1.65% and then increased to 2.02% in 2001-2002 (Ministry of Education, GOI).

As a proportion of government expenditure on all levels of education, elementary education accounts for around 50%, up from 46.3% in 1990-91. Elementary education is financed almost completely by the government – central, state and local – and government funds account for 99% of all recurring expenditure in elementary education.

**Net Enrolment Ratio Trend**

As per Section 8(a) (i & ii) of the Act, it is the duty of the State Government to provide free elementary education; and ensure compulsory admission, attendance and completion of elementary education by every child of the age of six to fourteen years. The Net Enrolment Ratio (NER) for the country is tabulated below.

**Table 2: Net Enrolment Ratio during 2012-16 (figures in per cent)**

<table>
<thead>
<tr>
<th>Year</th>
<th>Primary (Class I – V)</th>
<th>Upper Primary (Class VI &amp; VII)</th>
<th>Secondary (Class VIII – X)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012-13</td>
<td>96.09</td>
<td>73.78</td>
<td>47.92</td>
</tr>
<tr>
<td>2013-14</td>
<td>90.41</td>
<td>72.54</td>
<td>46.86</td>
</tr>
<tr>
<td>2014-15</td>
<td>87.41</td>
<td>72.48</td>
<td>48.46</td>
</tr>
<tr>
<td>2015-16</td>
<td>87.30</td>
<td>74.74</td>
<td>51.26</td>
</tr>
</tbody>
</table>

Above table indicates that NER for primary classes was in the decreasing trend during 2012-13 to 2015-16.

**Attendance in classes**

However, school attendance has been rising for both girls and boys at the elementary school level in both rural and urban areas. Fewer girls attend school in rural areas compared to their urban counterparts, and also compared to boys in rural areas. The proportion of girls attending schools, however, has increased from 59% to 70% between the years under comparison.

**Table 3: School Attendance, age 6-14 years during 2012-16 (figures in per cent)**

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109 ibid
While participation of girls in education has seen an increase over time at all levels of education, it continues to lag behind that of boys. The percentage of girls’ enrolment to total enrolment at the primary school level between 1950-51 and 2000-2001 is provided. Even in 2001-2002, girls’ enrolment remains below 50% of total enrolment at the primary school level. This is true of girls’ enrolment at all levels of education, though they have been increasing at levels beyond the primary as well.

**Poor retention rate in Government Management schools**

As per Section 8(f) and 9(e) of the Act, the Appropriate Government/Local Authority shall ensure and monitor admission, attendance and completion of elementary education by every child. The retention rates at All Management.

Schools and Government Management Schools for the years 2014-15 and 2015-16 is given below:

**Table 4: Retention Ratio during 2014-16**

<table>
<thead>
<tr>
<th>Year</th>
<th>Primary Government</th>
<th>Upper Primary Government</th>
<th>Private &amp; Others</th>
<th>Primary Government</th>
<th>Upper Primary Government</th>
<th>Privat &amp; Others</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012-13</td>
<td>9.39</td>
<td>11.81</td>
<td>NA</td>
<td>110</td>
<td>NA</td>
<td>111</td>
</tr>
<tr>
<td>2013-14</td>
<td>4.86</td>
<td>4.39</td>
<td>19.60</td>
<td>4.72</td>
<td>5.45</td>
<td></td>
</tr>
<tr>
<td>2014-15</td>
<td>7.82</td>
<td>13.66</td>
<td>NA</td>
<td>2.60</td>
<td>NA</td>
<td></td>
</tr>
<tr>
<td>2015-16</td>
<td>5.10</td>
<td>11.73</td>
<td>NA</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The above table indicates that the retention rate at Government management schools was poor in comparison to that in all management schools.

**Dropouts**

Analysis of UDISE data of dropout pertaining to a period of four years (2012-13 to 2015-16) is tabulated below:

**Table 5: Dropout Rate during 2012-16**

<table>
<thead>
<tr>
<th>Year</th>
<th>Primary</th>
<th>Upper Primary</th>
<th>Management Retention Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015-16</td>
<td>84.21</td>
<td>70.70</td>
<td>77.59</td>
</tr>
<tr>
<td>2014-15</td>
<td>83.74</td>
<td>67.38</td>
<td>73.75</td>
</tr>
</tbody>
</table>

---

\(^{110}\) ibid

\(^{111}\) Id note 1

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U-DISE data further revealed highest dropout rate for the year 2015-16 in respect of Government Management schools in the primary segment was in Assam where the dropout rate was 18.52 per cent and in upper primary segment in Maharashtra where the dropout rate was 35.34 per cent.

**Pupil Teacher Ratio**

Section 25 of Act states that within three years from the date of commencement of this Act, the appropriate government and the local authority shall ensure that the Pupil Teacher Ratio (PTR) as specified in the Schedule is maintained in each school.

Reverse trend in teacher classroom ratio

In terms of Section 19 and Schedule to the Act, in a school, there should be at least one classroom for every teacher and an office-cum-store-cum Head teacher’s room. Data under ‘School Report Card’ during the last four years revealed that number of schools having teachers in excess of classrooms has increased from 8,94,329 in 2012-13 to 9,58,820 in 2015-16 as depicted in the table below:

**Table 7: Teacher Classroom Ratio**

<table>
<thead>
<tr>
<th>Year</th>
<th>Total number of Primary/Upper Primary schools</th>
<th>No. of schools having teachers in excess of classrooms in a school</th>
<th>Percentage (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012-13</td>
<td>14,31,703</td>
<td>8,94,329</td>
<td>62.47</td>
</tr>
<tr>
<td>2013-14</td>
<td>14,48,712</td>
<td>10,17,496</td>
<td>70.23</td>
</tr>
<tr>
<td>2014-15</td>
<td>14,45,807</td>
<td>9,83,359</td>
<td>68.01</td>
</tr>
<tr>
<td>2015-16</td>
<td>14,49,078</td>
<td>9,58,820</td>
<td>66.17</td>
</tr>
</tbody>
</table>

As per Schedule (u/s 19 & 25/ Part II) of Act, norms for pupil teacher ratio in primary as well as in upper primary schools was as follows:

**Table 6: Norms for teachers under RTE**

<table>
<thead>
<tr>
<th>Class</th>
<th>No. of students</th>
<th>No. of teachers required</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Primary (I to V)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Up to 60 student</td>
<td>60</td>
<td>Two teachers</td>
</tr>
<tr>
<td>61-90 student</td>
<td></td>
<td>Three teachers</td>
</tr>
<tr>
<td>91-120 student</td>
<td></td>
<td>Four teachers</td>
</tr>
<tr>
<td>121-200 student</td>
<td>200</td>
<td>Five teachers+ one Head teacher</td>
</tr>
<tr>
<td>Above student</td>
<td>200</td>
<td>Per 40 student one teacher plus Head teacher</td>
</tr>
<tr>
<td><strong>Upper Primary (VI to VIII)</strong></td>
<td>35</td>
<td>One teacher</td>
</tr>
<tr>
<td>Per student</td>
<td></td>
<td>One full time Head teacher</td>
</tr>
<tr>
<td></td>
<td></td>
<td>One teacher each for Science &amp; Mathematics,</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Social Studies, and Language</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Part time instructor for Art Education, Health</td>
</tr>
<tr>
<td></td>
<td></td>
<td>&amp; Physical Education and Work Education</td>
</tr>
</tbody>
</table>

From the table, it is seen that 62.47 per cent schools in 2012-13 had to accommodate more than one teacher in a class and this increased to 66.17 per cent schools in 2015-16 which warranted addition of classrooms in existing schools to comply to the norms prescribed under the Act.

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**Schools having Electricity**

Provisions under Section 8 and 9 of the Act stipulate that school buildings should be electrified. Analysis of ‘School Report Card’ data for the four years period is tabulated below.

**Table 8: Schools having Electricity**

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Year</th>
<th>Total no. of Government Management Schools</th>
<th>No of schools having Electricity</th>
<th>Per cent of Govt. Management Schools having Electricity</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>2012-13</td>
<td>10,62,147</td>
<td>5,36,431</td>
<td>50.50</td>
</tr>
<tr>
<td>2.</td>
<td>2013-14</td>
<td>10,89,892</td>
<td>5,35,910</td>
<td>49.17</td>
</tr>
<tr>
<td>3.</td>
<td>2014-15</td>
<td>10,78,021</td>
<td>5,87,653</td>
<td>54.51</td>
</tr>
<tr>
<td>4.</td>
<td>2015-16</td>
<td>10,75,036</td>
<td>6,23,152</td>
<td>57.97</td>
</tr>
</tbody>
</table>

Though the status of electrification has marginally improved, only 57.97 *per cent* of the Government Management Schools were electrified.

Quantity-wise there has been a large increase in the spread of education in India, especially at the primary school level. There is close to universal access to a primary school within one kilometer of the place of residence for most children. In terms of quality of education provided, the system underperforms critically. In terms of learning outcomes, even the graduates of the primary school system lack basic functional literacy and numeracy skills. Weak teacher motivations, their apathy towards teaching and high teacher truancy plague the educational system.

**Conclusion**

Article 21A inserted through the 86th Constitutional Amendment Act 2002, has limited the fundamental right to education for children between six to fourteen years only. It has not recognized the importance of the Jomtien Conference 1990 which acknowledges the expansion of early childhood care and development activities as an integral part of the objective of Education for All.

Globally recognition exists that the early years are the most critical years for lifelong development. This recognition comes from various quarters including evidence from brain research that neurological and biological pathway that affects health, learning, and behavior throughout life are set in the early years.

Dreze and Sen (2002) note that there may have actually been an increase in educational inequality in recent years.

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112 Id note 1

113 The Conference was held in Jomtien, Thailand, 5-9 March, 1990. Delegates from 155 countries, as well as representatives from some 150 organizations agreed at the World Conference on Education for All, to universalize primary education and massively reduce illiteracy before the end of the decade.

especially if we take the quality of education into account, due to expansion of private schools which is accessible only to children from privileged backgrounds and decline in the quality of schooling provided by the public school system.

Various researches have revealed that neglect during the early years can often result in irreversible reduction in the full development of the brains potential. In short research all over the world have recognized early childhood care and development programming especially in the context of deprivation leading to improvement in child health, cognitive ability and performance at school.

The Right to Education Act commits this major error of depriving its young sixteen core population, the right to nutrition, health and early childhood education. The Child Right Convention 1989 to which India is a signatory, will be violated by not including the children between the ages of three to six years in the Act. The Act is also furthering gender discrimination, since it is always the girl who is left to take care of the younger siblings, thus it is she who is deprived of right to education.

The provision of the Act which provides that the children with severe or profound disability, who can’t be provided elementary education in a neighborhood school, shall have the right to education in an appropriate alternative environment as may be prescribed, is also against the principles of inclusion and does not put the onus on the education system to meet individual need of children.

The Act is also silent on the need to enable children with disability to attend school. In the Act, disability has the same meaning as assigned by the Person With Disability Act, 1996, which does not include such other disabilities, as defined by National Trust Act, 1999 such as autism and cerebral palsy. Though the provisions of the Act prohibit any person from preventing a child from participating in elementary education, but it does not take into consideration the issue of child labour. The Act refers to Child Labor (Prohibition and Regulation) Act, 1986 and emphasizes that no person shall employ or otherwise engage a child in a manner that renders his a working child. The Act also ignores that a large number of children are employed in agriculture and domestic work and looks after siblings.

The other shortcomings of the Right to Education Act includes that the Act does not promote a common school system and legitimizes inequality through multi layered system. In Chapter II Section 6 reads as, it will be the responsibility of the State to provide free and compulsory education in a neighborhood school within a period of three years from the commencement of the Act.

The Act also continues to propagate discrimination against Government school children as their teachers are deployed for census, elections and disaster relief duties. This is a complete abrogation of children particularly in times of disaster, when they are in urgent need of normalization. Moreover, the shutting down of schools during emergencies and disaster is a strong co relate to trafficking and missing children.

115 Section 24 (f) of the Right to Education Act, 2012
The standard of primary education has a direct relationship with the development of a nation and the quality of life of its citizens. The Annual Status of Education Report (ASER) has shown that though schooling is available for each and every child of this nation, but education or quality education is still a dream for many. There have been various changes but still quality aspect of education is still in a pathetic situation. Thus from the above facts and data, it is quite clear that this act, which has the potential to bring a revolutionary change in the field of education, is not implemented in a proper manner. It is only enrollment number which is showing growth but quality of education is still on the down side.

Therefore, in the concluding remarks it is wished to state that passing an act is not sufficient. The need of hour is to implement and monitor the act properly. The consistent monitoring and intention of the political will is a must to make it successful. According to the UNESCO’s Education for All Global Monitoring Report 2010, about 135 countries has constitutional provisions for free and non–discriminatory education for all. The much awaited Right to Education (RTE) Act which has been passed by the parliament of India should play an important role in achieving universal elementary education in India. The success and failure of RTE would largely depend on consistent political attention. Budgetary allocation of funds should be sufficient in this respect. The youth and civil society in India should come forward and spread the usefulness of education to illiterate parents who are unable to appreciate the relevance of education in curbing the social evils. Social inequalities and monopolization by any group should not be permitted at any cost. Education which is free of cost up to a certain age must be accessible to all. The right to education is a fundamental right and UNESCO aims at education for all by 2015. India along with other countries of the world should also put sincere efforts to make this goal a real success.

The quantity and quality of education provided should be such that all children of school going age must be in school, remain in school till they complete the school cycle and when they leave school have mastered the three R’s firmly. While the quantity of education has increased substantially in India, the state of the quality of education provided and hence the quality of literacy in the ‘literate’ population is worrisomely low. India cannot allow itself complacency in the field of education due to better numbers alone. Average statistics hide the unevenness of achievements; moreover higher achievements quantitatively by no means imply adequacy of quality. In fact, quality of education in India is the most problematic aspect of its education system today.
POLITICAL INTERVENTION IN THE JUDICIAL SYSTEM

By Dixita
From Banasthali Vidhyapith, Jammalal Bajaj Institute of Legal studies Rajasthan

Abstract- when political system and judiciary in India somewhere gets mixed than the weaker or unstable one get dominated by the other. Political system in India is embodied under democracy in which government and opposition prevailed. On the other hand where judiciary talks about justice. All three legislature, executive and judiciary are the organs of government. All the three organs have their own function and distinct works to perform. But many times in India it was being seen that legislature and judiciary intervene in each other works or having tussle between them. Not only that appointment of judges in Supreme Court done by president and at times when in need president too need judge's advice related to a legal matter. Thus in almost each and every phase in one way or the other, judiciary and legislature intervene with each other works or functions. This paper in the Continuance talks about judicial system and political system in India. How both of it works. What are their major functions to perform and in what ways they intervene. Not only that, it aims to provide hierarchy of judicial system in India. Further this paper highlights the four phase till now in a sense how political system and judicial system exist and in what ways tussle prevailed between both of them.

Judicial system and political system prevailed -

- Meaning , Work and functions - their difference
- Hierachial judicial system
1. Meaning, work and functions - their differences

According to renowned political scientists, Gabriel Almond and James Coleman (1960), ‘Political system is that system of interactions to be found in all independent societies which performs the functions of integration and adaptation by means of legitimate physical compulsion.’

The Concise Oxford Dictionary of Sociology (1994) defines it as, ‘a political system in any persistent pattern of human relationship that involves (to a significant extent) power, rule and authority.’

In the words of Robert Dahl, “Whether he likes it or not, virtually no one is completely beyond the reach of some kind of political system.”

In simple sense the meaning of political system is such which can not be define in static term. It is that interaction between human relationships which involve leaders meant to say power, able to handle the work meant to say authority and sometimes take decision in rigid manner so to rule in a systematic and proper manner. All these is to be done with the view to integrate people of a country and to change in accordance with time. Due to change in time, in nature, in mentality of the people, etc the nature and meaning of politycal system changes, As instance, at the time of 1930’s the main aim of political system or Congress is to build integrity so to get independence. But now-
a-days the aim of political system is to build a developed nation from developing one.

Work and function of political system
Almond and Coleman (1960) have described the following three main functions of a political system:
1. To maintain integration of society by determining norms.
2. To adapt and change elements of social, economic, religious systems necessary for achieving collective (political) goals.
3. To protect the integrity of the political system from outside threats.

They have grouped these functions into two categories:
1. Input functions—political socialization, interest articulation, interest aggregation, and political communication; and
2. Output functions—rule making, rule application and rule adjudication.

However, its function categorised into two form i.e., primary and secondary one.

Primary function are those functions which mainly integrate people either religiously, ethically, diversity in unity so to achieve desired goal. Every system has it desired goal to achieve for which political system use certain resources.

Secondary functions are those functions which includes all those work which help in smoothing of a system and all such system are interdependence as in one system any change came into force the other will automatically get affected and changed and thus controlled when such change get stable. Political system also maintain the values, Norms, culture, historical background from one generation to other.

Meaning of judicial system in India - The judicial system in India has been a significant importance and is one of the organ of government. And the judicial system in India built with a view to fulfill the requirements of citizen of country."The system of law courts that administer justice and constitute the judicial branch of government"

The term judicial system connotes the meaning as such a system which work in stipulated manner and in a proper do to achieve its goal i.e., to provide justice. Unlike political system it is somewhat static in nature. Its aim doesn't hindered or changed according to time. Unlike political system neither it influences nor it influenced.

The main and foremost aim of judicial system in India is to provide justice to everyone irrespective of caste, creed, sex, place of birth, religion, etc. And to provide with effectiveness the structure of judicial system in India are as follows:-

Supreme Court which is known as apex court of India.
High court which is retained in every state
District court which is lower than that of high court and Supreme Court.

Work and function of Indian judiciary - there are certain function and work of Indian judiciary that has been performed by the same and provide justice in different manner:-

- Prevention of violation of law.
- Judicial review is it's one of the most important function.
- Judiciary is independent.
• Protect individual rights, public at large.
• Sometimes Supreme Court works as a advisory body in legal matters to president
• Supreme Court as a guardian of constitution.
• Punish those who commit any offence.
• Directly or indirectly protect society from such person who could be danger for society.
• Supreme Court many time answered constitutional questions.
• Supreme Court at times frame new laws.
• High court which is highest authority in a state, has a supervisory role.
• Judicial system in India performs in a systematic and proper manner. The way to perform is stipulated and can not perform in any way it likes.

Hierarchical structure of Indian judiciary -
the term hierarchy ensures systematic way of

Hierarchy of courts

The working of courts in India, as the highest or Apex court in India is SC, than HC and subordinates came into play. First the case will fall under the jurisdiction of District court than its appeal in High court and Supreme Court except in Art 32 and 226 of constitution of India.

Unlike political system, judiciary in India has been since years a systematic and stipulated procedure that has to be followed. Hierarchy is the result of inability of one boss or office to supervise it effectively a very large number of subordinates. And through this system hierarchy the work becomes manageable.

Lantham - Hierarchy is an ordered structure of inferior and superior being in an ascending scale. Authority is the capacity to make decisions that are accepted by a subordinate as to guide his behaviour.

<table>
<thead>
<tr>
<th>Political system</th>
<th>Judiciary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Meaning</td>
<td>In the words of Robert Dahl, “Whether he likes it or not, virtually no one is completely beyond the reach of some kind of political system.”</td>
</tr>
<tr>
<td>Nature</td>
<td>Dynamic</td>
</tr>
<tr>
<td>Aim</td>
<td>Integrity</td>
</tr>
<tr>
<td>Works</td>
<td>To maintain values, norms, culture, belief, etc</td>
</tr>
<tr>
<td>Hierarchy</td>
<td>No systematic hierarchy found</td>
</tr>
<tr>
<td>Powers</td>
<td>No specific or stipulated power</td>
</tr>
<tr>
<td>Systematic working</td>
<td>Lacking somewhere</td>
</tr>
</tbody>
</table>
Phase
Four phase
Till the death of Nehru ji 1964- The bench started with the 1950 judgment by the Supreme Court in the case of Romesh Thapar vs state of Madras, where the court stated that freedom of speech lay at the foundation of all democratic organisations. Thapar had moved the court after his magazine Cross Roads was banned by the Madras state government for reportedly publishing views critical or defamatory of the Congress. This case was heard with Brij Bhushan vs State of Delhi that related to a ban on another magazine, Organiser. The full court ruled that the imposition of pre-censorship on a journal is a restriction on the liberty of the press, which is an essential part of the right to freedom of speech and expression under Article 19 (1)(a). It said the freedom of speech and expression is one of the most valuable rights guaranteed to a citizen by the Constitution and should be jealously guarded by the courts. The verdict added that free political discussion is essential for the proper functioning of a democratic government.6

After the First Amendment (which was brought about in response to cases such as Romesh Thapar vs State of Madras and Brij Bhushan vs State of Delhi), the modified Article 19(2) now read:7 “(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.”7

This amendment not only widened the scope of art, 19(2) but also by adding the word "public order" and "incitement to ab offence" which clearly shows that it had been done with a view to get around the decision of Supreme Court which struck down the ban.

In Sankari Prasad Vs union of India, It was challenged that Amendment (in this case an amendment to Article 31A and 31B) that take away fundamental right of the citizens is not allowed by article 13. It was argued that “State” includes parliament and “Law” includes Constitutional Amendments. It was held that ‘Law’ in Article 13 is ordinary law made under the legislative powers. And therefore, the parliament has power to amend the constitution.8

At the time of government of Nehru ji, the decision laid down by judiciary were with a view that not even judiciary tried to challenge their stands as he is charismatic leader and at the same time legislature was so strong that judiciary by up and down, Right and left try to balance it and not given a judgment that would be against the policy and decision of it.

1964-1981 (Emergency period) - there was also the period when the government and the ruling party had many differences with the judiciary. Three constitutional issues had emerged. Can the parliament abridge fundamental right? The Supreme Court said it can not. Secondly, can the parliament curtail the right to property by making an amendment? Again the court died that parliament can not amend the constitution in
such a manner that right are curtailed. Thirdly the parliament amended the constitution saying that it can abridge Fundamental rights for giving effect to Directive Principles. But the Supreme Court rejected the provision also. This led to crisis as far as the relations between the government and the judiciary were concerned. In keshavananda bhari case, the court have a decision that there are some basic features of the constitution and the parliament can not amend these features. Such are basic structure of constitution and parliament can not amend it. Immediately after the Supreme court's decision in 1973 in keshavananda case, the vacancy arose for the post of Chief Justice of India. It had been a practice to appoint the senior-most judge of the Supreme Court as the Chief Justice. But in 1973, the government set aside the seniority of three judges and appoint justice A N. Ray as the Chief Justice of India. The appointment became politically controversial because all the three judges who were superseded had given rulings against the stand of the government. This, constitutional interpretations and political ideologies were getting mixed up rapidly. Thus, the aforesaid picture of judiciary and government clearly shows the intervention of political in judiciary and not only that whenever government being weak judiciary strengthen it's scope and amplitude and vice versa.

In case of Sankara Prasad vs union of India, these controversy has came at the first time before the SC that Constitutional amendment is a law or not? The SC has decided that the constitutional amendment is not a law under clause 3 of Art13. In the second time these controversy came before the court in case of Sajjan singh Vs State if Rajasthan, the SC has decided again that the constitutional amendment is not a law.

But in case if IC golaknath Vs State of Punjab given the judgment deviant from 2 previous cases and decide the constitutional amendment is a law under a13(3). The judgment of the SC had created the roaring controversy. By this way the parliament power to amend the constitution has become confined and cabinet.  

Being affected by this judgment parliament made 24th and 25th Amendment and added clause (4) in Art 13. By this clause it has been expressly stayed that the constitutional amendment is not a law under art13(3). By the decision of keshavananda case it has fully settled or established that 24th Amendment is valid and constitutional Amendment is not falling within the definition of law.

In case of Maneka Gandhi Vs union of India J P. N. Bhagwati again quite "A14 strikes at arbitrariness in state action and ensures fairness and equality if treatment". Thus the law made must be just, fair and reasonable in the due process of law. Thus, whenever there is political intervention in judiciary either amendment took place if the government at the time would enough strong to tackle or the historical judgment took place. Till the emergency in many cases, Amendments, political intervention in judiciary has been observed time to time which hinders the work of independent of judiciary. Such cases are Ramesh thapar case, sankalchamd case, Sajjan singh case, sankalchamd paper case, express newspaper case, IC golaknath
case, Inre berubarian case, Ak gopalan case, Maneka Gandhi case, and many more. All such cases are examples where the constitutionality questioned of one article or the other and leads to optical intervention in judiciary.

1984-2012 balanced judiciary and political intervention - In the case of Landmark Development authority Vs MKG, the SC held that if loss or injury is caused to citizen by arbitrary action of state employ than the state is liable to pay compensation. In the landmark case Vishakha Vs state of Rajasthan, the SC laid down the guidelines of working women I'm place of their work. It was observed that Art 14, 19 and 21 together constitute gender equality, which includes protection from sexual harassment and right to work with dignity. In the year of 2013 the parliament has enacted the prevention of sexual Harassment work Act 2013 where the guidelines of Vishakha was realised.

In National Anthem case bujoy Manuel Vs state of Kerala, the SC held that no person can compel to sing National Anthem if he has genuine conscious objection based on his religious faith. In the landmark judgement in Union of India v Association for democratic reform, the SC recognise the right of voters to know about previous detail of candidate contesting election. Olga Tells Vs Bombay Municipal Corporation it was held that right to life includes right to livelihood. Gian kaur Vs state of Punjab, in this case the SC review the judgment of Ratnam's case Sec 309 is not unconstitutional. Right to life is natural termination embodied in art21 but suicide is an unnatural termination of extinction of life and therefore is incompatible and inconsistent. In Aruna Shaubhag case, SC for the first time recognise the difference between Active bad passive euthenasia. Thus, in all aforesaid cases there was no tussle between judiciary and government observed. It's true that there are many leading cases between this period but not strikes by political intervention as such.

2013 to til now both government and judiciary are enough strong to give amendments and leading cases- Nirbhaya case as nd 2013 Criminal Law (Amendment) Act 2013 - This case leads to various Amendments in criminal law, Indian Evidence Act, Crpc. And for the first time SC announced death penalty to the accused guilty of rape. And through this act the following amendments took place to stronger the punishment related to sexual offences. Altogether this amendment also leads some of the fgender biased sections in IPC. Both judiciary and government worked together so hard and make the justice possible. Many times it has been seen that due to political intervention in judiciary, hinders the work but this time both work together and proved that if both work together and mingled with each other than crimes in such a populous country can be decreased to the extent. Not only that the belief that government has a feature of "red tapism" proved to be wrong by passing the bill and assent by president within approximately 3 months. These shows that when both judiciary and government worked together everything is possible.

Facts of the case
The gang rape in Delhi took place on the night of 16th December 2012. The victim, a 23 year old physiotherapy intern took a ride home in a private bus that night, with her friend. There were six other people on the bus, including the driver.

The victim and her friend were beaten up when they raised their suspicions as to route of the bus to the destination. The woman was later raped by all the men while the bus was moving and her friend was beaten unconscious.[iv] After the beatings and rape, both the victims were thrown out of the moving bus by their perpetrators and left on the side of the road, partially clothed. Later, a PCR van arrived at the scene after receiving a call from a passerby. The victims were taken to the Safdarjung Hospital in Delhi for treatment.

Medical investigation of the woman suggested she was penetrated by a blunt object, probably a rod-like object that had caused extensive damage to the internal organs of the victim. Two blood stained metal rods were retrieved from the bus on police inspection, which the medical staff later confirmed to be the object used for penetration that had caused serious injuries to the victim’s uterus, genitals and the abdomen.

Within a day of the commission crime, arrests were made by the Delhi police in the case and all the six accused including a juvenile were arrested19

After such a case, rebellion by public, candle March and the hard work of government, judiciary, justice Verna committee led this possible.

**National legal service Vs Authority of India**, In a landmark judgment the Supreme Court in April, 2014 recognised transgender persons as a third gender and ordered the government to treat them as minorities and extend reservations in jobs, education and other amenities20

**Yakub Abdul Razak Menon Vs state of Maharashtra**, Yakub Abdul Razak Memon was convicted and sentenced to execution by hanging in March 2015 for his involvement in the 1993 Bombay serial blasts. His conviction sparked a nationwide debate on capital punishment in India.21

**Supreme Court Advocates on Record Association Vs Union of India** both houses of Union Legislature passed much awaited National Judicial Appointments Commission Bill, the Supreme Court struck down the NJAC Act by 4:1. Justices J S Khehar, MB Lokur, Kurian Joseph and Adarsh Kumar Goel declared the 99th Amendment and NJAC Act unconstitutional while lone minority, Justice Chelameswar upheld it. The judgement rendered by five judges runs over 1000 pages.22

**Vikram singh Vs union of India**, the Supreme Court of India dismissed an appeal by a death row convict, and held that Section 364A awarding death penalty as a possible punishment, for kidnapping any person threatening to cause death in order to compel Government or any other person, to pay ransom, is not unconstitutional. Three Judge Bench of Justices T.S. Thakur, R.K. Agrawal and Adarsh Kumar Goel examined the background of the Section 364A and held that it was enacted for the safety and security of the citizens and the unity, sovereignty and integrity of the country23
Right to privacy a fundamental right - K. S. Puttuswamy and anr. Vsu ion of India and ors.

Triple talaq to be held unconstitutional - sharaya bano Vs Union of India

Right to die (living will, passive euthenasia) recognised - NGO common cause case

Thus, whenever both government and judiciary are enough strong than cases like nirbhaya, transgender people get justice and right respectively. And if judiciary and government both work together and gives country such a tremendous amendments and leading cases than the day will not so far from us when India would known for the least commission crime at global level. Political intervention in judiciary many times regarded as deteriorated for country but when both perform their respective function and don't intervene in each others work than tussle won't arise. And everyone get justice.

**Conclusion** - From cases to amendments, philosophy to politics it has been observed and analyze that political intervention in a country, many times being seen and due that general public, country suffered a lot which not at all good for a country. But it also been observed that whenever both perform their functions well than the day will close to us when India know for least crime country.

Earlier days till 1982 tussle between government and judiciary and political intervention in judiciary clearly shown by cases and amendments. Afterwards when situation gets balanced the time came when both work together and perform their functions which resulted in many leading judgments, Amendments and justice to people.

For a country free from crimes it is incumbent for judiciary and government to perform their own function instead of intervention in each others work. In a democratic country like India it is true that judiciary and government can not work separately as whole but both should work together that could be possible and hope that the situation when tussle was arose at the time 1973 when J. A. N. Ray become CJI won't arise again.

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INDIAN JUDICIARY AND ITS ROLE IN PROTECTING ENVIRONMENT: CURRENT DRIFTS AND ANALYSIS

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ABSTRACT

The judiciary plays an imperative and crucial role in bringing reprieve and respite to the sufferings and ebony of the people from every harm that takes a toll on their health, be it physical or mental. It is the judiciary only which by implementing various and assorted legislations made for the protection of environment provide various reprieves to the already frazzled and disheartened people. The main intention of this paper is to identify the current and existing scenario of judiciary in achieving the objective of environment protection in India and whether it has been able to fulfil the objectives as have been enshrined in our constitution or not. This paper will commence with the gist and sum and substance of environmental law and further will go on analysing the judicial remedies available for environmental protection with some remarkable and phenomenal principles and doctrine propounded by proficient and efficient Indian judiciary. It will further deal with the constitutional aspects and the new trends in judicial approach in environmental protection. This will help in comprehending the role of judiciary in environment protection and will also help in providing a clear and unambiguous policy along with the different ways of combating it.

INTRODUCTION

Environment consisting of water, air, soil, etc. is considered as the life line of this planet and it is the environment only which makes life and other humanely activities possible. The concept of conserving and sustaining the environment is not the norm of the present day society and has been present since antediluvian civilizations. Various texts highlights that it is the dharma of each and every human being to play an immanent part in preserving the environment. But humans are constantly annihilating and routing it with their inhuman activities. Therefore an exigent need arises for conserving the environment or else there will come a time when there would be nothing left to protect. So, in order to bring change to this picture, the role of Indian judiciary has been increasing drastically for the implementation of measures to control anti-environmental activities. Although Judiciary has played a pivotal and significant role in protecting and shielding the environment, yet, until and unless we the people from the core of our hearts realize the importance of environmental protection and how significant it is for our sustainability nothing much can be achieved.

MEANING OF ENVIRONMENT

Keywords:- Environment, Environment Protection, Judicial Role.

The greatest threat to our environment is the belief that someone else will save it”.
- Robert Swan

www.supremoamicus.org
The word “environment” relates to surroundings. It includes virtually everything. It can be can defined as anything which may be treated as covering the physical surroundings that are common to all of us, including air, space, land, water, plants and wildlife.116

According to the Webster Dictionary, it is defined as the “Aggregate of all the external condition and influences affecting the life and development of an organism.”117

Section 2(a) of The Environment (Protection) Act, 1986 defines environment as “environment includes water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property”

Thus, after analysing all the above definitions, the basic idea that can be concluded is that environment means the surroundings in which we live and is essential for our lives.

SOME IMPORTANT DOCTRINES

1. DOCTRINE OF ABSOLUTE LIABILITY118

The doctrine of Absolute Liability provides that when an industry inherently indulges in some activities which pose a serious peril or hazard to the environment and any damage arises from that activities, than it will make the industry liable to pay compensation and damages to the aggrieved parties and further will not be allowed to cite any defences for their irresponsible actions.

This doctrine was introduced to make the enterprises more responsible and ethical towards their employees and environment as this doctrine will ensure that stringent measures are been taken by the enterprises towards the safety of employees as well as environment so as to prevent both of them from any mishap.

M.C.Mehta vs. Union of India119:-

A writ petition was filed under Article 32 of the Indian constitution against an industry’s activities. The judges in this case keeping in mind the facts of the case refused to follow the Strict Liability Principle set by the English Laws and came up with a new Doctrine of Absolute Liability as they felt that new norms and principles need to be laid down in order to deal with highly industrialized economy.

Bhopal Gas Tragedy / Union Carbide Corporation v. Union of India 120 :-

The court upheld the Doctrine of Absolute liability in the infamous case of Bhopal Gas tragedy in which due to the leakage of methyl-iso-cyanide(MIC) poisonous gas from the Union Carbide Company in Bhopal, Madhya Pradesh led to a major disaster and due to this three thousand people lost their lives. This case also led to the enactment of the Bhopal Gas Disaster (Processing of Claims) Act, 1985 by the Government.

120AIR (1991) 4 SCC 548.
2. POLLUTER PAYS PRINCIPLES

“If anyone intentionally spoils the water of another ... let him not only pay damages, but purify the stream or cistern which contains the water...” – Plato

Polluter Pays Principle has become a popular location in recent times. The slogan for this principle provides that “if you make a mess, it’s your duty to clean it up”. This principle as explained by the Supreme Court means that any person/industry causing damage to the environment have the absolute liability of not only compensating the victim but also to pay cost of repairing the damages so caused to the environment by their irresponsible activities.\(^{121}\)

The Polluter Pays” principle has been held to be a sound principle by this Court in Indian Council for Enviro - Legal Action v. Union of India\(^{122}\).

The Court observed, ”We are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country”. The Court ruled that "Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on".

Research Foundation for Science(18) v Union of India\(^{123}\);

In this case the Supreme Court explained that the concept of “Polluter Pays Principle” imposes a responsibility on individuals and industries to take care of all the compensation and costs regarding the damages that have been caused by their activities.

3. PRECAUTIONARY PRINCIPLE

The precautionary Principle is an ideal principle for ensuring a healthy and a safe environment. Its main purpose is to ensure that if any activity or a substance poses a risk to the environment than the same should be prevented from occurring rather than managing it after the fact. In common language it means “better safe than sorry”. This principle provides prevention of harm should be done when it is within our ability to do so, even when all the evidence are not in. In short, this principle provides for taking protective action before there is complete scientific proof of a risk; that is, action should not be delayed because full scientific information is lacking.

The Supreme Court of India, in Vellore Citizens Welfare Forum v Union of India\(^{124}\), referred to Brundtland report and other international documents in addition to Article 21, 48A, 51A(g) of the Constitution of India and also developed the following three concepts for the Precautionary Principle:

1. Environmental measures must anticipate, prevent and attack the causes of environmental degradation
2. Lack of scientific certainty should not be used as a reason for postponing measures

\(^{121}\) Supra Note to 3.
\(^{123}\)(2005) 13 SCC 186.
\(^{124}\)(1995) 5 SCC 647 at 658.
3. Onus of proof is on the actor to show that his action is benign.

4. PUBLIC TRUST DOCTRINE
This Doctrine was developed by ancient Roman Empire and basically rests on the concept that certain resources like air, sea, waters and forests play an integral role in the lives of many people and it would not be justified if these resources become a subject matter of some one’s private ownership. This doctrine basically imposes responsibility on the state to ensure that all these resources are subjected to public use only and any private action over these resources are duly and lawfully handled. Public trust doctrine serves two purposes: it mandates affirmative state action for effective management of resources and empowers citizens to question ineffective management of natural resources. The doctrine was first mentioned in M.C. Mehta v Kamal Nath & Ors. where the Indian Supreme Court suo moto acted on the basis of a newspaper report and applied public trust with regard to the protection and preservation of natural resources. The Supreme Court in M.C. Mehta stated that State is the trustee of all the natural resources meant for public use and enjoyment and it is under a legal duty to protect it from any private action as public at large should be the beneficiary of natural resources.

5. DOCTRINE OF SUSTAINABLE DEVELOPMENT
"Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:
- the concept of needs, in particular the essential needs of the world's poor, to which overriding priority should be given; and
- The idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs."

In Rural Litigation and Entitlement Kendra Dehradun vs. State of Uttar Pradesh, which is also known as Doon valley case, dispute arose over mining in the hilly areas. The Supreme Court after much investigation, ordered the stopping of mining work and held that:
"This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affection of air, water and environment."

COMMON LAW AND STATUTORY REMEDIES
The liability of the polluter under the tort is one of the major and oldest legal remedies to
abate the pollution. The most important tortuous liabilities are under the following heads:-

- Nuisance
- Trespass
- Negligence
- Strict Liability

1. Nuisance means anything which annoys, hurts, or that which is offensive. It can take various forms like obnoxious smells, noise, fumes, air or water pollution due to discharge of harmful effluents which interferes with the right of the person to which he is entitled to. It is of two types:-

   a- Private
   b- Public

PRIVATE NUISANCE

Private Nuisance is committed when a person while using or enjoying his property or anything over which he has control, causes damage to the usage, enjoyment and interference of another person’s private use of property. Thus, it can be defined as when an act of one person results in interference of another person’s health, comfort and convenience.

Thus the elements of private nuisance are:-
1. unreasonable or unlawful interference;
2. such interference is with the use or enjoyment of land, or some right over, or in connection with the land; and
3. damage.

PUBLIC NUISANCE

Section 268 of the Indian Penal Code, defines it as “an act or illegal omission which causes any common injury, danger or annoyance, to the people in general who dwell, or occupy property, in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.”

When an act of any person/authority results in affecting a large amount of public and their rights which they were otherwise entitled to enjoy commits the tort of public nuisance. Thus if any act interferes with the health, safety, comfort or convenience of the general public or which tend to degrade public morals are considered as public nuisance.

In Ram Raj Singh v. Babulal, the plaintiff complained regarding the dust which used to enter in his consultation room from the defendant’s brick grinding machine, which used to affect him as well as his patients. The Court in this case stated that dust is a public menace and if due to the activities of defendant damage is being caused to plaintiff’s rights, than he is entitled to benefit under this tort.

In Free Legal Aid Cell v. Government of NCT of Delhi, in this notable judgment, the court referred to the timely challenges of Noise Pollution during festivals and marriages due to which physical and mental health of people are affected. The court opined “the effect of noise on health has not yet received full

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131AIR 1982 All. 285.
132AIR 2001 Delhi 455.
attention of our judiciary, which it deserves. Pollution being wrongful contamination of the environment which causes material injury to the right of an individual, noise can well be regarded as pollutant because it contaminates environment causes nuisance and affects the health of a person and would therefore, offends Art. 21 if it exceeds a reasonable limits”.

2- TRESPASS
Trespass means when someone intentionally or negligently interferes with the personal or proprietary rights of another person without any lawful excuse. In order to prove this tort there is no necessity of showing any damages as this tort is actionable per se. There are two requirements relating to this tort i.e. there must be intentional or negligent interference with the personal or proprietary right and secondly such interference must be direct rather than consequential.133

3- NEGLIGENCE
Negligence may also be used as a cause of action to address environmental harm. To plead negligence, the person bringing the action (“the plaintiff”) must be able to prove that:134

1) The defendant owed the plaintiff a “duty of care”;
2) the defendant breached this duty; and
3) this breach of duty caused damage to the plaintiff.

People owe a duty of care to those people who are so closely and directly affected by their activities that if they have any lose ends in their actions, the same would result in damages to the other person. But, the defendants do not have to be able to foresee every type of damages. A defendant will only breach a duty of care if they do not carry out their activities in accordance with the necessary standard of care.

In Mukesh Textiles Mills v SubramanyaSastri135 the court applied common law action for negligence to prevent activity causing environment pollution. In this case the appellant had a sugar factory and also used to store molasses, when one day molasses stored in the vessel got emptied in the water and damaged the paddy crops of the respondent. The court held that the appellant was liable as there was duty to take reasonable care in matter of maintenance and he could have reasonably foresee the damages which was likely to be caused.

4- STRICT LIABILITY
The rule regarding strict liability was enunciated in Rylands v. Fletcher136 by Blackburn J. that any person who for his own purpose or benefit brings on his land something dangerous which if escaped is likely to cause mischief to other person must keep that at its peril and if it escapes and causes damages to other person than the person who brought that dangerous thing will be held liable for the payment of all the damages. The doctrine of strict liability has considerable utility in environmental pollution cases especially cases dealing with the harm caused by the leakage of hazardous substances.

However, there are certain exceptions to this rule:-
• Act of God i.e. Vis Major

133 Supra Note to 12 pg. 24(ed.2017).
134 Ibid, pg. 25.
135 AIR 1987 Kant. 87.
136 UKHL 1, (1868) LR 3 HL 330.
The common law remedies against the environmental pollution are available under the law of torts. A plaintiff in the tort action may sue for damages or seek an injunction or both.

CONSTITUTIONAL PROVISIONS AND ENVIRONMENT PROTECTION

Environment was hailed in the medieval India but till 1976 there were no major laws for the protection of the environment. It was the Stockholm conference in 1972 that played a vital role in the amendment of the constitution and to the development of protection laws for environment such as Water (Prevention and control of pollution) Act, 1974 and Air (Prevention and control of pollution) Act, 1981.  

To protect and improve the environment is a constitutional mandate. It is the commitment for a country wedded to the ideas of a welfare State. Protection of environment is explicitly been provided under the provision of Directive Principles and Fundamental Duties in Indian Constitution and any absence in the constitution regarding the environment protection is abridged by judicial activism.

FUNDAMENTAL RIGHTS

Article 21 of the Constitution of India guarantees all persons a fundamental right to “life and liberty” 139. Article 21 guarantees fundamental right to life. Right to environment, free of danger of disease and infection is inherent in it. Right to healthy environment is important attribute of right to live with human dignity. The right to live in a healthy environment as part of Article 21 of the Constitution was first recognized in the case of Rural Litigation and Entitlement Kendra, Dehradun vs. State of U.P. It is the first case of this kind in India, involving issues relating to environment and ecological balance in which Supreme Court directed to stop the excavation (illegal mining) under the Environment (Protection) Act, 1986.

In M.C. Mehta vs. Union of India 141 the Supreme Court stated that Right to live in a pollution free environment is an integral part under Article 21 of the Indian Constitution.

In T. Damodar Rao v S.O Municipal Corporation, Hyderabad 142 The court held that “the slow poisoning by the polluted atmosphere caused by environment pollution and spoliation should also be regarded as


138 AdvRudra, Environmental Laws and Constitutional Provisions In India, Legal Services

139 Article 21 provides “No person shall be deprived of his life or personal liberty except according to a procedure established by law”.
140 AIR1988 SC 2187 (Popularly known as Dehradun Quarrying Case).
141 AIR 1987 SC 1086(Oleum Gas Leakage Case).
142 AIR 1987 A.P. 171.
amounting to violation of article 21 of the Constitution”.

Article 19

Article 19 (1) (g) of the Indian constitution confers fundamental right on every citizen to practice any profession or to carry on any occupation, trade or business. This is subject to reasonable restrictions. A citizen cannot carry on business activity, if it results in health hazards to the society or general public. The Supreme Court, while deciding the matter relating to carrying on trade of liquor in Cooverjee B. Bharucha v Excise commissioner, Ajmer observed that if there is clash between environmental protection and right to freedom of trade and occupation, the courts have to balance environmental interests with the fundamental rights to carry on any occupations.

Excessive noise creates pollution in the society. The constitution of India under Article 19 (1) (a) read with Article 21 of the constitution assures right to decent environment and right to live peacefully. In PA Jacob v The Superintendent of Police Kottayam, the Kerala High Court held that freedom of speech under article 19 (1)(a) does not include freedom to use loud speakers or sound amplifiers.

ARTICLE 47 & 48-A (DIRECTIVE PRINCIPLES)

144 (1954, SC 220).
145 AIR 1993 Ker 1.

Article 47 states that it is the “Duty of the State to raise the level of nutrition and the standard of living and to improve public health”. This Directive Principle imposes a responsibility on the state that they should continuously work towards raising the level of nutrition and standard of living of its people and particularly should indulge in activities which results in the prohibition of substances which pose a serious threat to the health of its people i.e. drugs and intoxicating drinks.

A global conference on environment shook the country’s consciousness for the protection of the environment in the seventies and prompted the Indian Government to enact the 42nd Amendment (1976) to the Constitution. The said amendment added Art. 48A to the Directive Principles of State Policy. It Declares:- “The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country”.

In T. Damodar Rao v S.O. Municipal Corporation, Hyderabad the court in this case stated that in view of Articles 48-A and 51-A(g) protection of environment is not the sole duty of citizens. In order to reap better results both government and citizens need to work hand in hand against this common menace.

In M.C Mehta v Union Of India, the court observed that articles 39(e), 47 and 48-A of the Indian Constitution casts a duty on the state that they have to take steps which helps in improving the health of people, improving the environment and taking steps which helps in reducing their ill-effects.

146 AIR 1987 A.P 171.
147 (2002) 4 S.C.C. 356
FUNDAMENTAL DUTIES

The Constitution (Forty-Second Amendment) added a new part IV-A dealing with “Fundamental Duties” in the Constitution of India. The concept of fundamental duties was added in the constitution by the recommendations of the Swarn Singh committee bringing the Constitution of India in line with Article 29(1) of the Universal Declaration of human rights.\(^{148}\)

Article 51-A(g) provides “to protect and improve the natural environment including forest, lakes, rivers and wildlife, and to have compassion for living creatures”.

In *L.K Koolwal v State of Rajasthan*\(^{149}\), a writ petition was filed under Article 226 of the Constitution which stated that the municipality have failed in discharging their functions of sanitation. The court by allowing the petition explained the true scope of Article 51-A in the following terms: “We can all call Article 51-A ordinarily as the duty of the citizens, but it truly enforces right on the citizens, that they have the right to move to the court if they see that the state is not performing their functions with sincerity”. a simple writ petition by citizens of Jaipur compelled the municipal authorities to provide adequate sanitation. The court observes that when every citizen owes a constitutional duty to protect the environment (Art.51A), the citizen must be also entitled to enlist the court’s aid in enforcing that duty against recalcitrant State agencies. The Court gave the administration six month to clean up the entire city, and dismissed the plea of lack of funds and staff. *Goa Foundation v State of Goa*\(^{150}\). In this case the question that arose before the court was whether a society registered under the law also has the fundamental duty under Article 51-A(g) to protect and improve the environment, which was answered in affirmation by the court.

In *Sitaram Chhaparia v State of Bihar*\(^{151}\) The Patna High Court held that protecting the environment is a fundamental duty under Article 51-A(g) and accordingly the respondents were directed to wind up their industry emitting carbon dioxide and other obnoxious gases.

STATUTORY REMEDIES

Apart from the tortious remedies for environment protection, there also exist statutory remedies which can be availed of by the citizens for environment protection and statutory remedies includes the following:-

1. **INDIAN PENAL CODE**

Indian Penal Code, 1860 makes various acts affecting environment as offences, CHAPTER XIV of the Indian Penal Code containing sections 268 to 294-A deals with the offences affecting public health, safety, convenience, decency and morals. The sole object of Chapter XIV is to safeguard the public health, safety, and convenience by making those acts punishable which makes the environment polluted and makes people’s life miserable.

\(^{148}\) Article 29(1) of the Universal Declaration of human rights provides: Everyone has duties to the community in which alone the free and full development of his personality is possible.”

\(^{149}\) AIR 1988 Raj. 2

\(^{150}\) AIR 2001 Bom. 318 at 319.

\(^{151}\) AIR 2002 Pat. 134.
2- CRIMINAL PROCEDURE CODE, 1973

Like IPC, CrPC can also be brought into use for protecting and conserving the environment from almost all kinds of pollution. Chapter X part B containing sections 133-143 and Part C having section 144 provides the most effective and speedy remedy for preventing and controlling pollution.

In Raghunandan vs. Emperor the Allahabad High Court upheld the magistrate’s order forbidding the factory owner from operating his factory engines from 9 pm to 5 am on the ground that the noise emanated from the factory is ‘injurious to the physical comfort of the community. The Court held nuisance of such a nature would undoubtedly be injurious to the physical comfort and those living in the neighbourhood of the factory and the matter attracts action under Section.133 of Cr. P.C.

3- ENVIRONMENT (PROTECTION) ACT, 1986 AIR (PREVENTION AND CONTROL OF POLLUTION) ACT, 1981 AND WATER (PREVENTION AND CONTROL OF POLLUTION) ACT, 1974

Under the Public Liability Insurance Act, claims upto Rs.25,000/- may be filed before the district collector, with the jurisdiction for awarding larger amounts vesting in the National Tribunal constituted under the Environmental Tribunal Act, 1995. Until the enactment of the Environment (Protection) Act of 1986, the power to prosecute belonged exclusively to the Government under the existing laws. Citizens had no direct statutory remedy against a polluter.

But after the enactment of Environment (Protection) Act, 1986 under Section 19 of the E.P. Act a citizen may prosecute an offender by a complaint to a magistrate of course prior to complaining he must give the government 60 days notice of his or her intention to complain.

Similar provisions are available allowing citizens participation in the enforcement of pollution laws, in the Section 43 of the Air Act 1981 and in Section 49 of the Water Act as amended in the year 1988.

4- CIVIL PROCEDURE CODE,1908

The Civil Procedure Code has Section 91, under which the Advocate General, or with the leave of the Court, two or more persons, can institute a suit, whether or not special damage caused to such persons. A suit may be filed in the case of public nuisance affecting or likely to affect the public. The remedy may be either a declaration or injunction or any other relief according to the facts of the case.

WRITS AND ENVIRONMENT PROTECTION

One of the most innovative part of our constitution is the Right to enforce our fundamental rights by directly moving to High Court and Supreme Court. Writ

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152 Supra Note to 12, pg. 31.
153 AIR 1931 All 433

Aishwarya Upadhyay, Remedies for Environmental Protection: Civil, Criminal & Constitutional, Young Arena Litigators (Jan. 23, 2017).
jurisdiction is conferred under Article 32 for Supreme Court and Article 226 for High Courts. The only difference between the two sections is that one can go to Supreme Court only to enforce fundamental rights whereas in High Courts, one can move for the enforcement of Fundamental Rights as well as for any other purpose. Since environmental rights are also an integral part of Fundamental Rights, so most of the writ petitions filed in the courts are related to environment cases only. Generally, the writs of Mandamus, Certiorari and Prohibition are used in environmental matters. For instance, a Mandamus (a writ to command action by a public authority when an authority is vested with power and wrongfully refuses to exercise it) would lie against a municipality that fails to construct sewers and drains, clean street and clear garbage likewise, a state pollution control board may be compelled to take action against an industry discharging pollutants beyond the permissible level.\(^{155}\)

**IMPORTANCE OF PIL (PUBLIC INTEREST LITIGATION)**

In order to provide protection to the environment the judiciary opened the door for general public also to do the same. Thus, by allowing PIL the court fulfilled the objective of public spirited individuals for environment protection and shaded the inhibitions against refusing strangers to present the petitions. PIL is considered as an ideal weapon that is used by the Indian Judiciary in the protection, improvement and development of environment.

PIL has proved to be a great weapon in the hands of higher courts for protection of environment & our judiciary has certainly utilized this weapon of PIL in best possible manner.

In the case of *M.C Mehta v Union Of India*,\(^{156}\) the court held that all the industries that are operating in the Taj Trapezium Zone must change their fuel to natural gas or should stop using coal as a fuel within the stipulated time or else their functioning will be stopped permanently. The Shifting Industries were promised incentives from the provisions of Agra Master Plan and also the incentive normally extended to the new industrial units.

In the case of *T.N Godavarman v Union Of India*,\(^ {157}\) the court acted on the PIL filed by a public spirited person and held an injunction on the lease of forest land for non-forest activities and asked the government to provide funds for the protection of forest lands.

**NATIONAL GREEN TRIBUNAL**

The National Green Tribunal Bill passed by both the Houses of Parliament received the nod of the President on 2 June 2010 and came into force on 18 October 2010. The National Green Tribunal will have jurisdiction over all the civil cases where substantial question in the case is related to environment.

Objectives of the National Green Tribunal are\(^ {158}\):

1- To provide for effective and expeditious disposal of cases relating to environmental protection;
2- To provide for conservation of forests and other natural resources.

\(^{155}\) Supra Note to 12, pg 80.

\(^{156}\) (2008) 1 SCC 407.(TAJ MAHAL CASE).


\(^{158}\) Supra Note to 12 pg. 374.
including enforcement of any legal right relating to environment.

3. To provide for relief and compensation for damages to person.

In the case of Sanjay Kumar v Union Of India\(^{159}\), the NGT directed the Delhi government to demolish all permanent and temporary illegal structures built by ASA RAMJI BAPU for the protection of forest area and also directed the trust to dismantle the sewage pipe emanating the sewage from ashram to that area.

In the case of Asim Sarode and Others v Maharashtra Pollution Control Board and Others\(^{160}\), the NGT was of the opinion that there was an urgent need to regulate the used tyre disposal to avoid the environment problems, on the principles of sustainable development and precautionary principle.

In the case of Goodwill Plastic Industries &Anr. V Union Territory of Chandigarh &Ors.\(^{161}\), the constitutionality, legality and correctness for the use, manufacture, storage, sale was challenged. The NGT by applying the doctrine of pith and substance upheld the constitutionality validity of the impugned notification.

**CONCLUSION**

Environment plays a very focal and crucial role in the life of all living beings on this orb. It is the very part and parcel of one’s life. Playing with it means playing with the lives of all living beings on this earth. Pollution, land disturbance, landfills, constructions, deforestation are some of the cases which have played a significant role in disturbing and upsetting environment. Presently, it is not being realized that what kind of wretched and devastating effects it can have on the life of everyone living on this planet. It could have a distressing and shattering effects, to name a few, health hazards which could be fatal and lethal, global warming, depletion of ozone layer resulting in various and assorted skin diseases including cancer etc., deforestation resulting in various harrowing and horrendous effects etc. Thus, it is evident that environment does play an immanent and innate role in the life of humans and annihilating it just in the name of development, progress and growth will bring humans more close to their doomsday. Realizing the importance of environment protection, judiciary has come forward and have given certain landmark and momentous decisions. Now, it is our turn to come forward and play our part, so that everyone on this earth can live with dignity and poise. Actions taken by courts, tribunals will have no effect unless earnestness and candour to really protect the environment rises from one’s own consciousness and perception. Additionally, environment protection study should be imparted to each and every person on the earth, so that they should be familiar and acquainted with the effects and repercussions of environment degradation. If we really need to bring some colour to this picture, than we should consider environment protection as our very own accountability or else there would be nothing left to take responsibility for.

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\(^{159}\) Original Application No. 306 of 2013( Order dated 10\(^{th}\) November 2014, Principal Bench, New Delhi).


\(^{161}\) 2013 All (1) NGT Reporter (Delhi) 486.
CHALLENGES AND PROPOSALS FOR MEASURES FOR VICTIMS OF CRIMINALISATION OF POLITICS IN INDIA

In the process of prevention of victimisation and the protection of victims, there are many challenges faced in India which are being tackled through some positive measures. Some of the challenges include:

• No Separate Law for Crime Victims Yet

But continuous efforts are going on to enact a national law for victims. The ISV’s Victim Bill is a model draft Bill.

• Corruption in the Indian Criminal Justice System

Corruption by public officials erodes the entire health of the society and victimizes people in all sections of the population. Many steps to reduce the level of corruption and accumulation of illegal wealth have been taken by the Government. Declaration of assets and wealth by judges of the higher judiciary and ministers of the government is a recently introduced example.

• Empowerment of Women to Prevent Victimization of Women

Serious efforts to change the traditional submissive and victimized role of women have been taken up by NGOs and the Government. One attempt is the consistent struggle and active efforts by women’s organizations to get more political power for women in the form of representation in the Parliament, state legislatures and local bodies through a 33% reservation of seats for women in these bodies.162 Women have already succeeded in getting representation in local self-government but the struggle continues to get reservations for women in Parliament and state legislatures. Many concessions, special privileges and tax rebates are provided for female students to encourage them in higher education and employment, and to encourage senior women citizens in economic self-reliance. The Cradle Baby scheme of the Tamil Nadu State Government is a step towards protecting female babies and preventing female infanticide.

• Empowerment of Children

Making primary education a fundamental right under the Constitution is a leaping step to empower children as education is the tool for development. The implementation of this right will have a bearing on other kinds of victimization such as child labour. Strengthening the Noon Meal scheme in the schools for the children in Tamil Nadu and the introduction of this scheme in other states will attract more children from the disadvantaged sections of the society to schools to pursue study.

• Legislature being a convenient shield

Surprisingly, the current law goes overboard in offering protection to those convicted of criminal offences. Section 8(4) of the Representation of People Act, 1951163 allows a Member of Parliament (MP) or a Member of a State Legislature (MLA or MLC) to retain his or her seat in the House even when convicted, if he or she appeals against the conviction. The Supreme Court is currently in the process of hearing two Public Interest Litigations (PILs) that challenge this section on the ground of violating the right to equality.

162 AJAY K MEHRA, PARTY SYSTEM IN INDIA, Pg 75 (2011)

163 Representation of People Act, 1951, No 8(4), Acts of Parliament, 1951 (India)
under the Constitution of India. While the Representation of People Act, 1951\textsuperscript{164} debars candidates convicted of serious offences from contesting elections for six years after their release from prison, Section 8 (4) of the same Act makes an exception for sitting legislators. This grants an unfair advantage by allowing convicted legislators to contest elections, while at the same time denying the right to those who are convicted but do not hold office. The Major challenge is

- Implementation
  Transparency and honesty among the politicians who make policies and the commitment of government officials who are charged with the responsibility for implementation are the big challenge. Whereas the situation of victims has not been satisfactory in India, developed countries, including the United Kingdom, have gone far ahead to render victim justice, but the expectations and aspirations of victims remain high even in those countries which do not match the accomplishments made elsewhere. Justice: The Way Ahead", in 2001, found that “many victims felt that the rights of the accused of a crime take precedence over theirs in criminal proceedings”. During the long proceedings of investigation and trial, victims are not kept informed or provided with a sense of security. Very often, victims are expected to appear in courts for cases, which are adjourned even without their notice, or they are subjected to unnecessarily stressful courtroom experiences. The agencies meant to help victims do not always understand and respond effectively to their needs.

- Proposals
There is an urgent need to break the criminal-political nexus. Unless some decisive action is taken soon, the public will lose all faith in politics, politicians and democracy itself. This will do irreparable damage to our republic. It is recognised that Private Members’ Bills haven’t been passed by our Parliament in decades. Nevertheless, they serve as useful tools to build awareness, gather public support and pressurise the government.

- 3 Private Member’s Bills
Three Private Members’ Bills in the Lok Sabha that aim to attack the roots of this problem. The first Bill proposes to amend the Representation of People Act, 1951\textsuperscript{165} to remove the exception that allows MPs & MLAs/MLCs to continue in the Legislature even after conviction. The second would set up Fast Track Courts for speedy trials (within 90 days) of criminal cases against all elected representatives. This would expedite criminal cases against all MPs, MLAs/MLCs and elected members of Panchayats and Municipalities established under the State Panchayati Raj Legislations. The third would amend the Code of Criminal Procedure to empower independent and effective prosecutors. To ensure that proceedings don’t suffer due to ineffective or biased prosecution, third Bill proposes to increase accountability and transparency in the appointment of prosecutors so as to shield them from political interference. Though the current Code of Criminal Procedure calls for ‘consultation’ with the judiciary for all

\textsuperscript{164} Id

\textsuperscript{165} Id 22
appointments to the post of public prosecutor, the requirement has been diluted through amendments in many states. Often, special public prosecutors are appointed at the whims and fancies of the government, without adequate reasoning, to suit special interests.

**RECOMMENDATION OF COMMITTEES AND COMMISSIONS ON JUSTICE TO VICTIMS OF CRIMINALISATION OF POLITICS IN INDIA**

During the last decade, there has been significant change in the thinking of the judiciary about the human rights of victims. The concern of the courts and the judicial commissions and committees about the need to have a law on victim compensation or a comprehensive law on victim justice has been reflected in their judgments and reports.

1. **The Law Commission of India, 1996**
   The Law Commission, in its report in 1996, stated that, “The State should accept the principle of providing assistance to victims out of its own funds, (i) in cases of acquittals; or (ii) where the offender is not traceable, but the victim is identified; and (iii) also in cases when the offence is proved” (Law Commission of India Report, 1996).

2. **The Justice Malimath Committee on Reforms of Criminal Justice System (Government of India, 2003)**
   The Justice V. S. Malimath Committee has made many recommendations of far-reaching significance to improve the position of victims of crime in the CJS, including the victim’s right to participate in cases and to adequate compensation. Some of the significant recommendations include:
   - The victim, and if he is dead, his or her legal representative, shall have the right to be impleaded as a party in every criminal proceeding where the offence is punishable with seven years’ imprisonment or more;
   - In select cases, with the permission of the court, an approved voluntary organization shall also have the right to implead in court proceedings;
   - The victim has a right to be represented by an advocate and the same shall be provided at the cost of the State if the victim cannot afford a lawyer;
   - The victim’s right to participate in criminal trial shall include the right: to produce evidence; to ask questions of the witnesses; to be informed of the status of investigation and to move the court to issue directions for further investigation; to be heard on issues relating to bail and withdrawal of prosecution; and to advance arguments after the submission of the prosecutor’s arguments;
   - The right to prefer an appeal against any adverse order of acquittal of the accused, convicting for a lesser offence, imposing inadequate sentence, or granting inadequate compensation;
   - Legal services to victims may be extended to include psychiatric and medical help, interim compensation, and protection against secondary victimization;
   - Victim compensation is a State obligation in all serious crimes. This is to be organized in separate legislation by Parliament. The draft bill on the subject submitted to Government in 1995 by the Indian Society of Victimology provides a tentative framework for consideration;
• The Victim Compensation Law will provide for the creation of a Victim Compensation Fund to be administered possibly by the Legal Services Authority. (Government of India, 2003). 166

3. The National Commission to Review the Working of the Constitution The Commission to review the working of the Constitution (Government of India, 2002) has advocated a victim-orientation to criminal justice administration, with greater respect and consideration towards victims and their rights in the investigative and prosecution processes, provision for greater choices to victims in trial and disposition of the accused, and a scheme of reparation/compensation particularly for victims of violent crimes.

RECENT LAWS TO CARE FOR AND PROTECT VARIOUS CATEGORIES OF VICTIMS OF CRIMINALISATION OF POLITICS IN INDIA
There are also significant developments in the form of new laws to promote the cause of victims and to mitigate the sufferings of potential victims of vulnerable sections of the population such as women, children and elders. The recent enactments passed by the Parliament have a significant bearing on preventing victimization and giving relief to victims:

A. The Protection of Women from Domestic Violence Act, 2005 167

“The Protection of Women from Domestic Violence Act, 2005” is a major achievement of the women’s movement towards protection of domestic violence victims after a struggle of 16 years. This Act aims to provide for more effective protection of the rights of women guaranteed under the Constitution. The definition of domestic violence is wide enough to include physical, sexual, verbal and emotional abuse. The unique feature of the Act is that it prohibits denying the victim “continued access to resources or facilities which the aggrieved person (victim) is entitled to use or enjoy by virtue of the domestic relationship, including access to the shared household”. A police officer, protection officer or a magistrate who has received a complaint of domestic violence has a mandatory duty to inform the victim either right to obtain a protection order or an order of monetary relief, a custody order, a residence order, a compensation order or more than one such order and the availability of the services of service providers, protection officers, and the right to free legal services under this Act. A violation of the protection order by the respondent is an offence which can result in imprisonment for one year or a fine up to Rs.20,000 or both. If the protection officer refuses to discharge his duties, he shall be punished with imprisonment for one year or with a fine of 20,000 rupees or with both.

B. The Maintenance and Welfare of Parents and Senior Citizens Act, 2007168

This is also an innovative law aiming to protect elders and prevent elder abuse and victimization, which is a growing problem in many countries, including India. Under

166 SHEFALI ROY, SOCIETY AND POLITICS IN INDIA UNDERSTANDING POLITICAL SOCIOLOGY, Pg 117-221 (2nd ed 2014)
this law, an obligation is created of the children or adult legal heirs to maintain their parents, or senior citizens above the age of 60 years who are unable to maintain themselves out of their own earnings, to enable them to lead a normal life. If children or legal heirs neglect or refuse to maintain the senior citizen, the Tribunal can pass an order asking the children or legal heirs to make a monthly allowance for their maintenance.

C. Prevention of Child Abuse and Victim Protection

Empowering the child is the road to prevention from abuse and victimization. To empower the child, education is the tool. Therefore, primary education for children has been made a fundamental right as per the decision of the Supreme Court of India in Unnikrishnan’s Case \(^{169}\) (1993). Article 21-A of the Constitution states that “The State shall provide free and compulsory education to all children of the age 6-14 years in such manner as the State may by law determine”. The proposal also will have a positive impact on eradication of child labour. The spread of elementary education through constitutional measures would have a good impact on other social indicators like population growth, health and women’s development as well as enhancement of productivity of the economy and reduction in unemployment.

1. The National Commission for Protection of Child Rights (NCPCR) This Commission was set up in March 2007 and its mandate is to ensure that all Laws, Policies, Programmes, and Administrative Mechanisms are in consonance with the Child Rights perspective as enshrined in the Constitution of India and also the UN Convention on the Rights of the Child (see at Government of India, 2009). India ratified the United Nations Convention on the Rights of the Child in 1992 and this Act was passed as one of the necessary steps to protect the rights of children in the country. After inquiry, the National Commission can recommend initiation of proceedings for prosecution or any other action it may deem fit.

D. Prevention of Caste-Based Victimization and Protection for Victims: The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 \(^{170}\) This is an act to prevent atrocities against the members of the Scheduled Castes and Scheduled Tribes. Under this Act, compensation to victims is mandatory, besides several other reliefs depending on the type of atrocity. The victims are entitled to receive monetary compensation ranging from Rs. 25,000 to 200,000 depending on the gravity of the offence.

CONCLUSION

Criminalization of politics in India is an extremely serious problem, which has already reached dangerous levels. This evil of Criminalization of Politics calls for special attention of the people because the subject revolves around the vested interests of politicians of all hues as such the people can never hope that the politicians would take any initiative to rectify this evil. The prevailing trend is spreading like cancer. It is nullifying all the constitutional safeguards

\(^{169}\)Unni Krishnan, J.P. &Ors. V State of Andhra Pradesh, AIR 217 1993 SCC (1) 645 (India)

of democracy; that is, it is spoiling bureaucracy by making it partial; it thwarts press; and even threatens judiciary; and thus is destroying the foundation of democracy. So the people should wake up at once and force the political parties to mend their ways. The political parties do not pay attention to inculcate noble political values and principles of citizenship in the people. They do not promote patriotism and commitment to nation-building. They do not want to unite the people of nation by stressing the importance of harmonious living. On the contrary, they perpetuate the differences among the people and make full use of those differences for creating conflicts among them. The British followed the policy of ‘divide and rule’; after India became independent, our politicians have become past masters of the art of creating groups and inciting them against one another. They want to fish in the troubled waters and when the water is placid, they trouble it to achieve their selfish ends. The corner-stone of democracy is objective discussion of the public issues by the people. The representatives of the people are expected to encourage such discussions, generate valuable ideas and take decisions in the larger interests of the people. But even the democratic forums like legislative assemblies and Parliament are not used for sincere discussions.

Thus it could be concluded that the criminalization of politics pose a threat to the very democratic foundation of our country. And the disappointing reality is that no political party is taking measures towards the reduction or elimination of criminal members in their parties as they eventually prove to be beneficial for them. But for the democratic principles to sustain and prove beneficial for the masses there is a pressing necessity for de-criminalisation of politics in the country.
RESERVATION IN PROMOTION FOR SC/ST EMPLOYEES: AN ANALYSIS

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ABSTRACT
A decent standard of living is the basic objective of every person. A good employment can boost the purchasing power, i.e., can provide families with wherewithal. According to Indian notion, this can only be achieved if a person is well settled in a Government job. According to Marc Galanter, “Government employment in India is widely considered a guarantor of security and advancement and prestige.”

The Indian society has bequeathed upon the future generations also the approach of the discriminatory structure based on caste system. This ritual based disparity between the ‘haves’ and the ‘haves not’ the ‘majority’ and the ‘minority’ has led to a socio-economic divide. The framers of the Constitution thought of filling this gap with the policy of Reservation at the entry level in employment so that all the communities are adequately represented in the Government services. Since then, the reservation policy in India has attracted the attention of almost every political party.

However, Reservation in promotions has been a much debated issue since the very inception of the Reservation Policy in India. This research paper aims to analyse the Indian jurisprudence on Reservation in promotions. It also intends to study the idea of the constitution makers behind Reservations and its utility in the present scenario and also suggests the way forward.

INTRODUCTION
According to the Preamble to the Indian Constitution, Equality is the key to Justice-social, economic and political. Hence, inequality would mean discrimination, denial of our basic rights and fretfulness. According to Andre Bateille, “It cannot be denied that in the traditional system inequalities were closely related to the inequalities of caste. The caste system contributed to the persistence of these inequalities by providing the values and norms which were appropriate to the agrarian hierarchy.”

In India also the socio-economic disparity is the result of the ritual based caste system we inherited from our forefathers. To compensate that degradation and disadvantage, the Government adopted a policy which comprises of various special provisions for the depressed. This policy is what we know today as the Reservation Policy.

According to Dr. Anuradha Chadha, “Reservation denotes a set quota of public service positions for recognized minorities and includes reservation of seats in educational institutes.” Hence, reservation to some extent means preferential treatment to the oppressed class.
However, while providing benefits of the policy of reservation, a stable equilibrium is needed to keep between justice towards the Backward Classes, equity for the forwards as well as efficiency for the entire system.¹⁷⁵ Keeping in mind the history, the framers of the Constitution felt essential to make special provisions for the disadvantaged classes in subjects of Public employment. Unless they are adequately represented, administration cannot work effectively keeping the welfare of every citizen a priority. The goal of making India an egalitarian society or Swaraj can only be accomplished if the down trodden people also have an equal say in the governmental process. Hence, Article 16(4) was included in the Constitution which states that “Nothing in this article shall prevent the state from making any provision for the reservation of appointments or posts in favour of any Backward Class of citizens which in the opinion of the state, is not adequately represented in the services under the state.”

Article 16(4) is not an exception to Article 16 rather; it was enacted to supplement Article 16 in attaining the bigger objective of equality. Hence, Article 16(4) is an enabling provision and so, citizens have no right to claim reservations under it. Schedules Castes and Scheduled Tribes are no where expressly mentioned under Article 16(4), hence, are entitled to be treated as ‘Backward Class’.¹⁷⁶

¹⁷⁵ Supra note 3.

A GLANCE AT THE CONSTITUENT ASSEMBLY DEBATES

Dr. B.R. Ambedkar, in the Constituent Assembly debated pleaded that the reservations for Scheduled Castes and Scheduled Tribes should be allowed for 40 years and after that no further extension would be given. But the short sighted Constituent Assembly rejected this proposal and pleaded that reservation would continue for 10 years only. Along with this statement, they also added a clause for extension of this period if deemed necessary. So many years have passes and there seems no chance of reservation coming to an end. The SC’s and ST’s have become so empowered and assertive now that they are demanding reservations in promotion as well.

The concept of Reservation is very old. The Legislative Assembly was aware about the implications of Reservation policy. In a casteless society, caste based reservation came with Separatist tendencies. It would mean certain degree of exclusion. It would promote enmity rather than brotherhood. It was also argued that reservation is not the ideal way of benefitting people as it would not promote true representation.

Sardar Vallabhbhai Patel said, “What brought about the abolition of slavery? Was it safeguards granted to it by anyone? No, it was the awakened conscience of the various countries.”¹⁷⁷ He means to say that with due course of time, things change, people change and thus, democracies change. So, Social Justice would be a part of such change and

thus political intervention is not required. Eventually, the mindset of people would change and Indian Society will refrain from accepting reservations.

Mahavir Tyagi also pleaded that, “the term Scheduled Castes is a fiction…there are some castes who are depressed, some castes who are poor, some who are untouchables…How is Dr. B.R. Ambedkar a member of Scheduled Castes? Is he illiterate? Is he untouchable? Is he lacking in anything?... I do not believe in the minorities on community basis, but minorities must exist on economic basis…It was not the Scheduled Castes that needed special provisions but ‘cobblers, washermen, and similar classes’ along with farmers who did not enjoy this very urban provision.”

Dr. P.S. Deshmukh also said, “there are millions of people in our country whose obstacles are in no way different from those of Scheduled castes; and I wish to leave room for such people.”

Hence, the main objective of Reservations was to overcome the economic problems irrespective of social status. But to our despair, no such distinction was made while drafting these articles. Hence, till now this social evil persists. So, it can be concluded that inequalities can’t be solved with political interference. A good standard of living, good education, health facilities for all would do more benefit than the Reservation policy.

It is rightly said by Amartya Sen that “Providing Backward Castes with Functional Capabilities brings about a more sustainable approach to real progress and equality.”

Backward classes were not defined anywhere in the Constitution. H.N. Kunzru said that, “the word ‘Backward’ is not defined anywhere in the Constitution. Whether any class is backward or not should not be left to the law courts to decide. It is our duty to define the term.”

T.T. Krishnamachari considering this term as ambiguous said that, “it does not apply to a backward caste…It says class. Is it a class which is based on grounds of economic status or on grounds of literacy or on grounds of birth?”

Once an applicant approached Krishna Menon and urged to recommend him for a certain job because he belonged to backward class. Menon answered, “Well, if you yourself think of yourself as backward, why should you expect me to recommend a backward fellow?”

Thus, reservation policy was a political interference so as to bring about equality in the 10 years as decided. But the aim wasn’t achieved and hence, today reservation id deepening is roots by penetrating in every aspect of Government services.

It is ironical that a casteless, secular Governmental machinery is appointing

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178 Ibid.
179 Ibid.
180 Ibid.
181 “Constituent Assembly Debates on Reservation Based on Castes”. INDIA AGAINST RESERVATION, jacindia.co.in/blog/2017/12/29/constituent
182 Ibid.
employees on the basis of caste which was never the aim of Constituent Assembly and our forefathers.

**ARTICLE 16(4)(a)**
Till 1993, the Scheduled Castes and Scheduled Tribes were enjoying the benefit of reservation in promotions. But in the Mandal Commission case\(^\text{184}\), the Supreme Court curbed the powers under Article 16(4) and confined the provision of reservations only in the stage of initial appointment and not in promotions as that was hampering the efficiency.

But this was not acceptable to the Government and hence Clause 4A was inserted in Article 16 through the Constitution (77\(^{th}\) Amendment) Act, 1995 extending reservation in employment to promotions as well. Thus, this amendment gave negating effect to Indra Sawhney judgment.

Relevant parts of Art. 16(4A) read as follows-

\[
\text{"The state can] make any provision for reservation in matters of promotion to any class or classes of posts.... In favour of the Scheduled Castes or Scheduled Tribes."}
\]

In case of Ajit Singh Januja v. State of Punjab\(^\text{185}\), catch up rule was declared by the court as per which consequential seniority in higher posts would not be affected by reservation in promotions.\(^\text{186}\)

To negate the effect, Government enacted the Constitution (85\(^{th}\) Amendment) Act, 2001 which read as-

\[
\text{"In article 16 of the Constitution, in clause (4A), for the words “in matters of promotion to any class”, the words “in matters of promotion, with consequential seniority, to any class” shall be substituted."}
\]

The Government also inserted clause (4B) to Article 16 by the Constitution (81\(^{st}\) Amendment) Act, 2000 making the carry forward rule not subject to 50% limit in contravention to the Indra Sawhney judgment.

**M. Nagaraj Judgment: An Analysis**
The constitutionality of Articles 16(4A) and 16(4B) was challenged in 2007 before a Constitution Bench in the case of M. Nagaraj v. Union of India\(^\text{187}\) claiming them as discriminatory and illegal and hence, violative of the Basic Structure of the Constitution.

The Supreme Court upheld these amendments and observed:

\[
\text{"...the boundaries of the width of the power, namely, the ceiling limit of 50%( the numerical benchmark), the principles of creamy layer, the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are not obliterated by the impugned amendments. At the appropriate time, we have to consider the law as enacted by various States providing for reservation if challenged. At that time we have to see whether limitations on the exercise of power are violated. The State is}
\]

\(^\text{184}\) Indra Sawhney v. Union of India, AIR 1993 SC 477.
\(^\text{185}\) AIR 1996 SC 1189
\(^\text{187}\) AIR 2006 SCC 212
free to exercise its discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post(s) keeping in mind the overall administrative efficiency. It is made clear that even if the state has reasons to make reservation, as stated above, if the impugned law violates any of the above substantive limits on the width of the power the same would be liable to be set aside.”

The Court also observed:
“Equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors; it will depend on the facts and circumstances of each case. These are the limitations on the mode of exercise of power by the state. None of these limitations have been removed by the impugned amendments. If the concerned state fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14.”

Therefore, the above amendments were upheld by the court concluding that-

1) The operation of Roaster System ensures equality and justice,
2) Subject to backwardness, inadequacy of representation and administrative efficiency
3) A post cannot be carried forward for more than 3 years.

This judgment gave the power of judicial review to the courts over individual promotions. This did not please the Government and hence, it tried to invalidate the Nagaraj judgment in order to limit the judicial review of reservation in promotion policies. The bill has lapsed. Reservation in Promotions is not Ex Debito Justitiae and thus it needs to be supported by empirical data.

RESERVATION IN PROMOTIONS: A CRITIQUE

The M. Nagaraj judgment was challenged by many who felt aggrieved. The premise was that people appointed through reservation would not be able to compete with the rest of the people for promotion and thus arises the need for reservation in promotions.

This would make Reservations at multiple levels. But reservation is not a Poverty alleviation program. It is a retrograde step with the tendency to expand. Today one class will get reservation; tomorrow the other classes would demand the same.

Though the court has allowed to carry on reservations in promotions for the SC and ST category employees in “accordance with law”, the Government needs to examine the interpretation of the same. Entry level reservation is essential but reservation in promotion is cautional and can impair efficiency.

The matter was referred to the Constitution Bench of the Supreme Court because it needs the interpretation of three decisions of Constitution Bench-

1) Indra Sawhney v. Union of India
2) EV Chinnaiah v. State of AP
3) M Nagaraj v. Union of India

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188 Ibid.

189 Choudhary, Sujit, et al.
Also the basic contention is that the Nagaraj judgment by constitution bench does not rely upon the EV Chinnaiah judgment specifically on SC/ST act. The irony here is that Justice KG Balakrishnan, 1st Dalit Chief Justice of the country was present in the constitution bench while deciding the M Nagaraj case. He did not dissent with the three conditions laid in the M Nagaraj judgment.

In the leading judgment of American jurisprudence Brown v. Board of Education\textsuperscript{190} which related to an argument with respect to segregation and de segregation of racial classes- black and white, a question was put before lawyers fighting for de segregation that why do u have to worry about segregation aspect at all. Both the communities are different and thus, both can take their decisions on their own without interfering in each others decision making process. The argument which prevailed in the SC was that ability to take decision with respect to each other is an integral aspect of the right to equality.

The system that prevails in the US is preferential system not reservation. Efficiency is not compromised. In US, the Blacks are always in minority. But in India, the Backward Castes, Scheduled Castes and Scheduled Tribes in almost every constituency, when combined, form a majority.

So they are the people who rule the country and take decisions by virtue of their superior numbers in the electoral process. In the Parliament around 125 MP’s are from SC/ST category. OBC’s are almost 275. If taken as whole more than 2/3rd of the parliament is from reserved class which is thus, the main deciding factor for the future of this country.

Even after 70 years of independence, the SC/ST are suffering because no affirmative action is taken in the right direction. More reservation is not a solution to remove discrimination. More pro-active action needs to be done by providing them with good education, basic amenities and making them capable of competing. The purpose of promotion would be served better if all the candidates are selected in their own merit and then promoted rather than promoted as an affirmative action.

Reservation at each and every level would by no means strengthen the administrative structure as it would be a compromise with the quality of services delivered. Article 335 of the Constitution mentions that reservation should not impact the efficiency in services. Efficiency is the benchmark of good quality services and hence progressive steps should be taken to promote it.

Caste is not a matter of identity, it is an administrative policy and hence, the State should engage with it empirically.

\textsuperscript{190} 347 US 483 (1954)
HAS THE DIGITAL WORLD COME OF AGE, WITHOUT A LEGAL FRAMEWORK?

By Gayatri Dabir & Aishwarya Ganesan
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THE INFORMATION AGE:
With nearly 450 million Internet users and a growth rate of 7-8%, India is well on the path to becoming a digital economy, which has a large market for global players. The internet has removed geographical boundaries to a number of activities and hence has made electronic transactions a necessary part of our everyday lives. It has given birth to entirely new markets: those dealing in the collection, organisation, and processing of personal information and other related data, whether directly or indirectly. With electronic transactions on the rise, there is also an increase in data processing activities in both, public and private sector and cybercrime activities like data theft, hacking, identity theft to name a few. Data protection has therefore become an issue which needs urgent attention. India is still at a nascent stage when it comes to data protection regulations, as compared to other jurisdictions like the European Union. The European Union gave effect to the provisions of the General Data Protection Regulation (hereinafter referred to as “EU GDPR”) from May 25, 2018.

As of 2018, In India, data protection and all the matters relating to the storage, collection, disclosure and transfer of such data in the electronic form is covered under Information Technology Act, 2000 (hereinafter referred to as “IT Act”) and the rules framed under the same. With respect to personal data, the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (hereinafter referred to as “SPDI Rules”), lay down procedures and measures to be undertaken by all those entities which deal with sensitive personal information. But with the efforts being put to digitise the economy, increase in the activities over the internet and right to privacy being recognised as a constitutional right, the existing data protection framework seems to be insufficient to address all the issues surrounding data protection.

Therefore in order to further strengthen the regulations surrounding data protection and privacy, a Committee of Experts under the chairmanship of Justice, Shri B. N. Srikrishna was formed to daft a Data Protection Bill. The Committee accordingly on November 27, 2017 released White Paper of The Committee of Experts on a Data Protection Framework for India (hereinafter referred to as “White Paper”). The draft after a number of delays is now set to be submitted to the Government. The draft will later be introduced in the Parliament, subject to the Government’s agreement on the same.

This article firstly tries to put forward a judicial approach of the Indian courts

191 Arushi Chopra, Number of Internet users in India could cross 450 million by June: report, LiveMint (2 March 2017), http://www.livemint.com/Industry/QWzIOYEsfQknXhC3HuyVI/Number-of-Internet-usersin-India-could-cross-450-million-by.html

192 See Justice K.S. Puttaswamy (Retd.) vs. Union of India & Ors. 2017 (10) SCALE 1.
towards privacy. Secondly, it covers comparative approach between the EU GDPR, the IT Act and Rules and the White Paper and then concerns that may arise with these rough and non-demarcated lines of privacy.

**JUDICIAL RESPONSES TO PRIVACY CONCERNS IN INDIA**

“Privacy is not something I’m merely entitled to, it’s an absolute prerequisite”

- Marlon Brando

Debates about this extremely complex subject took their pilot opening with the phrase ‘the right to be left alone’ coined by Cooley and adopted by Warren and Brandeis in a shaping and decisive Harvard Law Review article which has been held as providing the basis for the origin and development of the law in this area. Right to privacy is an integral part of right to life, a cherished constitutional value and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner.” The fundamental rights, enshrined in Part III of the Constitution, are inherent and cannot be extinguished by any constitutional or statutory provision. Any law that therefore abrogates or abridges such rights would be violative of the basic structure doctrine. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account in determining whether or not it destroys the basic structure. The Hon’ble Supreme Court has added to the already wide ambit of Art.21, and to imply certain rights there from, has looked to perceive and interpret Art.21 along with international charters on human rights. In PUCL v UOI, the court has derived and deduced the right to privacy from Art.21 by construing it in conformity with Art.12 of UDHR, 1948 and Art.17 of ICCPR, 1966. This kind of judicial approach has been observed in a number of cases.

International instruments have therefore assisted jurisprudence and offer important interpretative tools to Art.21 and the right to privacy. *Informational privacy is a facet of*

198 See PUCL v UOI AIR 1997 SC 568
199 See Art.12 of UDHR, 1948.
201 Universal Declaration of Human Rights, on 10 December 1948, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights.

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193 American Motion picture and stage actor, 1924-2004.
194 Cooley, Torts, 2ndEdn., 1888.
196 See Ram Jethmalani and Ors. vs. Union of India (UOI) and Ors., 2011(4)ALLMR(SC)815.
the right to privacy\textsuperscript{204}, rightly said by the Hon’ble Supreme Court in Justice K.S. Puttaswamy, laying the foundation to a future with a digitally secure India.

**COMPARATIVE APPROACH**

A brief comparison of the two existing legislations and one proposed regulatory framework for data protection could be summarised as under:

- **Application:**
  Several jurisdictions have deliberated on the applicability of the data protection law differently. The EU GDPR only applies to ‘natural persons’ whereas the IT Act covers natural as well as body corporate under its ambit. The White Paper seeks to cover only natural persons under the framework.

- **Processing:**
  Data protection laws across the globe have tried to keep the definition of ‘processing’ as broad as possible to ensure that there is always room to incorporate new operations in the existing definition with changing times. Under the EU GDPR any operation performed on personal data, manually or electronically constitutes processing. The White Paper identifies three main operations of processing, namely, collection, use and disclosure of data but this is not exhaustive. Processing would include electronic as well as manual processing.

- **Consent:**
  Informational privacy can be broadly understood as the individual’s ability to exercise control over the manner in which her information may be collected and used\textsuperscript{205} hence consent becomes an integral part of the same.\textsuperscript{206}

  Article 6 of the EU GDPR talks about the requirement of consent. For such consent to be valid, the consent must be freely given, specific, informed and unambiguous for processing of personal data. When the data is sensitive, the Regulation requires an explicit consent. Similar to the aforementioned, Rule 5 of the SPDI Rules mandates the requirement of consent in written form for sensitive information. Keeping the importance of consent in mind, the White Paper also makes the requirement of consent a mandatory one; for collection and use of personal data.

  The EU GDPR and White Paper also cover child’s consent. Any child who is below the age of 16 and 18 respectively, would require parent’s consent for data processing.

- **Purpose Specification Principle:**
  Purpose Specification is an essential first step in applying data protection laws and designing safeguards for the collection, use and disclosure of personal data.\textsuperscript{207}

  Article 29 of the EU GDPR mandates the data controller to collect data for specified, explicit and legitimate purposes, and once the data is collected, it must not be processed further in a manner that is

\textsuperscript{204} See Justice K.S. Puttaswamy (Retd.) vs. Union of India & Ors. 2017 (10) SCALE 1.

\textsuperscript{205} Adam Moore, Toward Informational Privacy Rights’, 44 San Diego Law Review 809 (2007)


incompatible with the original purpose. Rule 5 of the SPDI Rules, 2011 also states that data can only be collected for a lawful and specific propose. The White Paper suggests some standards and guidelines to be enacted to govern the data controller’s actions and that individuals should be able to retain the control of data provided by them.

- **Cross Border Data Flow:**
  With disappearing geographical borders due to technological advancements and increase in cross border transactions on the Internet, it becomes important for data protection laws to cover such transactions. All three frameworks mandate for an adequacy test (the IT Act doesn’t specifically use the term) i.e. the access to personal data to not be permitted in other countries unless the countries are deemed to have an adequate level of data protection. Furthermore, the White Paper suggests for an additional comparable level of protection test. It also suggests for an establishment of Authority that will actively monitor developments of this law around the world.

- **Individual Participation:**
  Processing of personal data must be transparent to, and capable of being influenced by, the data subject and hence to ensure the adherence to the same, it becomes important for individual participation.
  The EU GDPR grants an individual the right to access his personal data including the right to confirm the processing of such data. He can also seek rectification of his data, subject to certain conditions. Furthermore, he has the right to object processing of his data on certain grounds and the right to request data controllers to erase any data from the system. The IT Act lacks any such provision. The White Paper, just like the EU GDPR seeks to provide an individual with the right to confirm access and rectify his personal data once it has been collected by a party. The Paper also recognises the right of an individual to controllers to erase any data from the system, better known as the right to be forgotten.\(^\text{209}\)

- **Penalties:**
  Civil Penalties act as a sanction as well as act as deterrence for those who violate the obligations under data protection law. Under the EU GDPR, an administrative fine can be imposed up to EUR 20,000,000 or up to four percent of the total turnover of the preceding financial year, whichever is higher. The IT Act under Section 43 A provides for compensation on failure of data protection by body corporate involving a fine not exceeding five crore rupees. The Act also provides for a residuary penalty under Section 45. As per the White Paper, there has to be a Data Protection Authority established that shall have the power to impose civil penalties on the defaulting parties.

**WHERE DOES OUR CONCERN BEGIN?**
In light of the judicial pronouncements that have been laid down, it is clear that it is the right of every citizen to obtain information from a public authority.\(^\text{210}\) Information has been further defined to constitute, “any material in any form, including records,”

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\(^{209}\) Sri Vasunathan vs. The Registrar General, 2017 SCC OnLine Kar 424

\(^{210}\) See § 3, Right to Information Act, Act No. 22 of2005.

www.supremoamicus.org

102
documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.”

While the terms ‘data material to be held in any electronic form’ has been mentioned within the section, it is not an easy task to differentiate information or segregate it into sensitive, personal information or just information considering that there is no law in place for the same purpose. As the objective of “White Paper” is clearly stated, as to ensure growth of the digital economy while keeping personal data of citizens secure and protected; it keeps in mind and refers to the obiter of this Hon’ble court in Justice K.S. Puttuswamy v. UOI, which states “Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state factors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state.” With this growing realisation the government, felt it was instrumental to have a legal framework for data protection, to facilitate India’s digital growth. The courts have however opined and realised that, “Formulation of data protection was a complex exercise which needs to be undertaken by State after a careful balancing of privacy concerns and legitimate State interests, including public benefit arising from scientific and historical research based on data collected and processed.”

While the Supreme Court of India has recognised a general right to privacy, no general right relating to personal data protection has been developed to date. Although the IT Act attempts to address the issue of protecting privacy rights, it fails to meet the objective as it only protects privacy rights from government action. In fact, SPDI Rules only apply to bodies corporate or persons treated in India.

The Calcutt Committee used as its working definition:

*The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information.*

Furthermore, it is also submitted that in today’s era a lot of information that could be considered ‘personal’ has been expended out

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211 See § 2(1)(f), Id.
212 See Justice K.S. Puttuswamy v. Union of India, 2017 (6) MLJ 267.
213 Id., at ¶481.
214 The judgement rendered by this hon’ble court in the *Puttuswamy* case was only recognizing a constitutional right to privacy and did not provide clarity to what information falls under this.
by the very person the information could stand to bring harm to. This has led to a problem in ascertaining what all comes under the ambit of personal information and therefore strict adherence cannot be made to any of the definitions under the Indian law. A similar line of thought rendered by this Hon’ble court in the case of State of Uttar Pradesh v. Raj Narain\(^2\)\(^1\), wherein on the matter of informational privacy the court stated that "In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. Their right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary when secrecy is claimed for transactions which can at any rate have no repercussion on public security";\(^2\)\(^1\)\(^8\) The Supreme Court of Pennsylvania has expressly stated that once an individual's information becomes a matter of public record, the right to privacy with respect to that information ceases.\(^2\)\(^1\)\(^9\) Further with a similar holding, the courts in the case of R. Rajgopal v. State of Tamil Nadu\(^2\)\(^2\)\(^0\) stated, "Every citizen has a right to safeguard the privacy of his own. However, in the case of a matter being part of public records, the right to privacy cannot be claimed."\(^2\)\(^2\)\(^1\) It is submitted that reference should be made to the opinion made by S. A. Bobde, J., in the case of Justice K.S Puttuswamy v. UOI\(^2\)\(^2\)\(^2\) wherein he states the importance of a case to case decision making when it involved such a premature right.\(^2\)\(^2\)\(^3\) § 6A of the IT Act prescribes that the government may for the efficient delivery of services to the public through electronic means authorise, by order, any service provider, which includes agency that has been granted permission to offer services in accordance with the policy governing that area.

Rule 3(3) Information Technology (Electronic Service Delivery) Rules, 2011 prescribes that the appropriate Government may determine the (sic) of encrypting sensitive electronic records requiring confidentiality while they are electronically signed, which thereby proves that if the government felt the necessity it could have issued protection on the information that the Service providers are to maintain its confidentiality.

After adverting to the evolution of the doctrine of privacy in the US from a right


\(^{218}\) Id., p.27, ¶1.


\(^{220}\) See Rajgopal v. State of Tamil Nadu, 1995 AIR 264.

\(^{221}\) Id., ¶26.

\(^{222}\) Supra No. 3.

\(^{223}\) According to S.A. Bobde J., “No legal right could be absolute and every right has limitations. Such aspect of the matter was conceded at the bar. Therefore, even a fundamental right to privacy has limitations. The limitations are to be identified on case to case basis depending upon the nature of the privacy interest claimed ... Thus, it is critical that such standard be adopted with some clarity as to when and in what types of privacy claims it is to be used. Only in privacy claims which deserve the strictest scrutiny is the standard of compelling state interest to be used.”
associated with property \(^{224}\) to a right associated with the individual \(^{225}\), Chief Justice Lahoti \(^{226}\) referred to the penumbras created by the Bill of Rights resulting in a zone of privacy \(^{227}\) leading up eventually to a “reasonable expectation of privacy” \(^{228}\) Post *Maneka Gandhi v. Union of India*, \(^{229}\) the Supreme Court expanded the phrase “personal liberty” in its interpretation of A.21 to the widest amplitude. \(^{230}\)

The word "personal" means appertaining to the person; belonging to an individual; limited to the person \(^{231}\) and would be information, in any form, that pertains to an individual. \(^{232}\)

Therefore information is in relationship to a public activity and will not be an intrusion on privacy. \(^{233}\)

Hence, with the advancements in digital age and with the emergence of big data analytics, the need to protect privacy has only increased. The right to privacy is an inalienable fundamental right of all natural persons indispensable to the preservation of human dignity, personal autonomy and the exercise of constitutional liberties. \(^{234}\) It is therefore the need of the hour to put in place an effective regime to safeguard the crucial fundamental right to privacy of all natural persons and their personal data. An establishment of a data protection law and a Privacy Commission to look after the matters related to privacy like from surveillance of natural persons and interception of communications, etc. to name a few and for matters connected therewith and incidental thereto is the first step that our country now needs to take.

\(^{224}\) See Boyd v. United States, 116 US 616 (1886).
\(^{225}\) See Olmstead v. United States, 277 US 438 (1928).
\(^{226}\) See District Registrar and Collector, Hyderabad v Canara Bank (2005) 1 SCC 496.
\(^{228}\) See Katz v United States, 389 US 347 (1967).
\(^{229}\) Hereinafter referred to as the ‘Maneka Gandhi case’.
\(^{230}\) See Pathumma and Ors. v. State of Kerala and Ors. AIR 1978 SC 771.
\(^{231}\) BLACK'S LAW DICTIONARY, 567 (4th ed. 2011).
\(^{233}\) See Rakesh Kumar Gupta vs. The Public Information Officers MANU/CI/0087/2009.
\(^{234}\) See Justice K.S. Puttuswamy v. Union of India, 2017 (6) MLJ 267
DIGITAL REVOLUTION: LEGAL METHODOLOGY ON COMPUTERS AND INTERNET

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ABSTRACT
It is necessary to explore the links between law and technological development, the different paces of changes in each other and resulting gaps between them. It is necessary to examine the structural effects of information technology on the legal rules that aim to regulate this area. As we know, law has followed significant changes in the mind and culture. The range of emerging technologies has changed the society. The technology has progressed to such an extent that it has had a considerable impact on both society and politics. In the past few decades there has been a revolution in computing and communications and all indications are that technological progress and the use of information technology will continue at a rapid pace. We need to understand the ethical considerations of technological innovations. It is necessary to understand the impacts of information technology and E-Commerce, E-Contracting, Electronic Money, Electronic Signatures, Electronic Evidence and Cyber Crimes. The timely necessity to understand the emerging issues on internet need to be carefully analysed. With the emergence of technology, the concept of Online Dispute Resolution has gained light. Not only these areas of technology, but the area of Law and Medicine needs to be carefully studied. Therefore high-potential, high-risks emerging technologies present a social and regulatory quandary. The development and governance of such technologies are inevitably and dynamically intertwined. A technology cannot advance without freedom of research and development, but too much freedom can lead to a technological calamity that will become difficult to overcome. If we analyse the concepts historically, we learn that advancement in technology has posed challenges before the society, for example, ‘digital divide.’ Therefore we need to understand the different Legislations of different countries and learn how much are they effective to overcome the challenges posed.

Keywords: Cyber Crimes, Electronic Commerce, Law and Medicine, Law and Technology, Online Dispute Resolution

INTRODUCTION

Is an innovation and technology related theory that describes radical transformation of society through technological development. Richta defines technology as “a material entity created by the application of mental and physical effort to nature in order to achieve some value” evolves in three stages. These are tools, machine and automation. The evolution of technology can be divided into two trends that is Development and Theoretical Implications.

- Development:
The pre-technological period, in which all other animal species remain today aside from some avian and primate species was a

235See A View of the Distant Past, the Present and the Far Future, Masefield Books, 1993
The non-rational period of the early prehistoric man. The emergence of technology, made possible by the development of the rational faculty, paved the way for the first stage: the tool. The tool provides a mechanical advantage in accomplishing a physical task, such as an arrow, plough or hammer that arguments physical labour to more efficiently achieve his objective. Later animal-powered tools such as the plow and the horse, increased the productivity of food production about tenfold over the technology over the technology of the hunter-gathers. The second technological stage was the creation of the machine. A machine (a powered machine to be more precise) is a tool that substitutes the element of human physical effort and requires only to control the function. Machines became widespread with the industrial revolution, through windmills, a type of machine, are much older. Examples of these are cars, trains, computers and lights. Machines allow humans to tremendously exceed the limitations of their bodies. Putting a machine on the farm, a tractor has increased the food productivity at least tenfold over the technology of the plow and the horse. The third and the final stage of technological evolution is the automation. The automation is a machine that removes the element of human control with an automatic algorithm. Examples of machines that exhibit this characteristic are digital watches, automatic telephone, switches, pacemakers and computer programs. It is critical to understand that the three stages outline the introduction of the fundamental types of technology and so all three continue to be widely used today. A spear, a plow, a pen, a knife, a glove and an optical microscope are all examples of tools.

- Theoretical Implications:
The process of technological evolution culminates with the ability to achieve all the material values technologically possible and desirable by mental effort.

An economic implication of the above idea is that intellectual labour will become increasingly more important relative to physical labour. Contracts and agreements around information will become increasingly more common at the marketplace. Expansion and creation of new kinds of institutes that works with information such as universities, book stores, patent trading companies etc. are considered an indication that a civilization is in technological evolution.

This highlights the importance underlining the debate over intellectual property conjunction with decentralized distribution systems such as today’s internet. Where the price of information distribution is going towards zero with ever more efficient tools to distribute information is being invented. Growing amounts of information being distributed to an increasingly larger customer base as times goes by. With growing disintermediation in said markets and growing concerns over the protection of intellectual property rights, it is not clear what form of markets for information will take the evolution of the information age.

The Social Impact of Technology
There is no doubt that technological change brings about social change. The Industrial Revolution aw many people displaced from their land, to find work in crowded city factories. Serfdom was abolished and population shifted from villages to the cities.
Strong family ties, self-sufficiency and the right to occupy land were replaced with uncertain tenancy of land, dependency on trade and a weakening of the family unit. Economically, goods and money abounded and trade flourished. The merchant class profited from the wealth that was generated on the backs of the displaced population in urban workers. Children were sent to work in factories, in order for families to make enough money to live. The peasant class worked long hard hours in poor conditions with no security. The industrial revolution led to the alienation of the working class and although many union battles have since led to the adoption of better working conditions, the effects of industrial revolution remain. The family unit is even more vulnerable today with soaring divorce rates, high rates of teenage suicide, most of society are either heavily mortgaged to banks or paying high rents and no-one can be self-sufficient in a world governed by free trade.

Advances in technology, is generally not equitably shared within society. People with money have more opportunity to acquire technology, which enables them to acquire more wealth. It is also important to remember that war has been and will continue to be the driving force for technology and innovation. Power and wealth are intrinsically tied together. Technology leads to a greater socio economic division. Labourers are viewed as commodities and expendable. Technology leads to alienation because it can create jobs that require no specialist knowledge. Till date, since the industrial revolution we have seen technology used to the detriment of society. The right to occupy land has become a privilege that must be worked for and earned and now the battle is on to control all the world’s food and textiles through genetically modified seeds and animals. The insidious part of genetically modified is that, there is no recall once it is released into the environment. The weed plants that will grow ten times faster than normal weed plants will destroy river systems, as their unfair genetically modified crops that are dependent on pesticides will contaminate organic, heritage seeds that have sustained people for thousands of years. Seeds will no longer be able to be harvested and re-planted but the farmer will have to buy new seed every year from genetically modified seed makers. This fight is more important that the fight over open source because it involves the right of people everywhere to have clean, safe food that has not been genetically altered. It is essential to mention that genetically modified is a tax on everyone because a patent will be on every seed and seeds are made to be sterile the following year. This is something to become angry about. The greedy corporations and individuals that want control over our food, water and land, do not care about the irreversible damage to the environment, people and animals they cause.

We have the right to eat tomatoes that are free of fish DNA, meat and milk that is free of human DNA, pigs that haven’t been grown to harvest anthrax antibodies. They will never be able to prove the safety of Genetically Modified food and no long terms studies have been done. Nor will genetically solve the problem of soil erosion and polluted of rivers from artificial fertilizers and pesticides. Only a return to
responsible organic and biodynamic farming practices will solve these problems.\textsuperscript{236} The internet in its current form was developed as a free exchange of information, unregulated by any one government or owned by one person or company. In this raw form it was the playground of hackers and computer geeks, who challenged the status quo. It brings about a new era, the technological revolution. The free flow of information, has brought about technological advances at an unprecedented rate and has made many rich and brought companies who failed to adapt to a standstill.

How will the technological revolution impact on our society? If the industrial revolution is anything to go by, there will be winners and losers to technological revolution.

E-Commerce will affect the middle man and allow direct trade with consumers. Efficiency brings about lower prices for the consumer, but it is more accurate to argue that efficiency brings about greater wealth for shareholders, directors and owners. The intrinsic weave of social interactions of trade, can be disentangled and made into a horizontal supply chain. E-Commerce will create efficiencies that effectively remove the need for a long supply chain but at the expense of social relationships.

The effect of E-Commerce and the internet will impact on every society on the earth. Already, the barriers of trade between individuals in different countries are non-existent. Company contact details are searchable through powerful search engines and trade can commerce between two individuals who would otherwise never have met. The internet dissolves national boundaries and the consequences for cities that have developed as center of administration and trade will be disastrous, if they do not embrace the technological advances in communication and trade that the internet brings. While at the same time, free trade means fierce competition without the protection of award wages. People are reduced to consumers and suppliers.

Resisting the tide of technological change is impossible. Of course it is possible to do business without a website or email or mobile phone of a fax machine. People have been doing business well before any of these gadgets were invented. But business today is about competition and technology is about leverage. Technology can lead to alienation if it is not widely dispersed in society. The industrial age saw the concentration of technology in the hands of the rich and powerful, allowing them to dominate and subdue the population into harsh working conditions and the social impact of the internet and computers is only just beginning will it challenge the status quo or will it lead to greater population control? Already technology like digital T.V. is being pushed in the guise of better quality but the benefits to those who own the systems is that they will be able to track what you watch, when you watch it, whether or not you switch off an ad. Knowledge is power and with access to tapping phone lines, reading e-mails, reading your credit cards statements, knowing by GPS where you are by tracking your mobile phone, it can be scary world, if all that knowledge and power were to be used to oppress and control.

\textsuperscript{236} See http://www.cqs.com/50harm.htm and See http://www.seedsavers.net
On the upside, technology has made the developed world a richer place to the detriment of the environment. Technology has gone too far and there are more people counting beans than growing them.

Impact of Technology on Government
The legal system is dependent on local jurisdictions under common law. Historically, one has to remember that before the age of the internet, airplanes and telephones, the vast majority of business was done locally. Technology has rapidly changed the way people do business but people and governments have not adapted to change to that same pace especially in India.

What are the implications?
If we buy a product from a local supplier in your state and it turns out that the item is faulty, we can go back to the supplier to work out repair or replacement and if they don’t help us, then complaint can be made in Consumer Dispute Redressal Commission. However if we buy a product outside jurisdiction, claim can be filed in another state, where the supplier is located.

We have a world which is governed by local laws and yet the businesses and individuals are now actively trading outside their local area. Governments are trying to make laws about content on the internet but have no jurisdiction to enforce those laws. This has created havens in small developing countries, that are happy to accept companies that want to run online gambling websites that may be outlawed in their jurisdiction or companies that wish to reduce their tax liabilities by opening up bank accounts in developing countries.

We see arising now a homogenizing of local laws on the issues like ‘SPAM’ and even sending an international letter from anywhere in the world involves the completion of almost identical forms. Governments are making agreements, in an attempt to be relevant in a world where people are able to trade more freely and where digital communication has enabled businesses to work, almost without physical boundaries.

THE EVOLUTION OF CYBER SPACE
INTERNET USAGE AND PENETRATION IN INDIA:
In India, the internet usage and population penetration statistics has been on the rise continually over the last decade. Data available on internet projects that whereas in India in 1998 there were only 1,400,000 users of internet and internet penetration was 0.1% only, in 2010 internet users grew ten crore and internet penetration reached 8.5%.237

SIGNIFICANCE OF INFORMATION TECHNOLOGY
The role of information technology in today’s e-world is remarkable. It has extended efficiency, cost-effectiveness and accelerated productivity at individual as well as the business or governmental level. Internet has truly become an internal facet of our lives. People communicate within their social circles through blogs and social networking sites such as Facebook, Orkut, and Twitter and also transact business across borders with much ease and speed through the use of internet. The information technology age has strengthened our law enforcement systems and led to

237See www.internetworldstats.com
It is a web network service that enables virtual sharing of software, resources for storage and processing, or retrieval of data as a utility service. It is similar to electricity to electricity supply wherein end user does not know the origin and travel path of electricity supplied to a user.

NO GEPGRAPHICAL DIVIDE:
It is also amazing to see how internet has blurred the time and geographical divide. While operating a computer station we are connected to cyberspace and are able to seamlessly transact business across different jurisdictions on touch of screen. Moving a step further, in ‘cloud computing’ a user may request for a service on the internet and receive these from any server in any part of the world without knowing its exact geo location akin to supply of electricity by a service provider. Substantial data is uploaded, downloaded, stored, streamed and retrieved through internet which may comprise of confidential and proprietary data or information of social, economic or political nature. This has led to a debate in protecting privacy and data in the cloud computing age and adoption of security parameters to benefit from the new technology.

DRAWBACKS OF INFORMATION TECHNOLOGY:
While there are many advantages of information technology, there is also a flip side. The growing proliferation of e-crimes in cyberspace such as cyber warfare, cyber terrorism, hacking, data thefts, invasion of privacy, phishing attacks, intellectual property infringements and identity thefts and other computer related frauds. The e-crimes often pose serious threats to national security, cause danger to life and property and may cause economic loss to entities and individuals apart from threat to one’s privacy and freedom in cyberspace. There are growing instances of behavioural advertising, corporate espionage, data mining, employee surveillance and illegal use of web bugs and cookies which is also an affront to the right of privacy of individuals.

THE DIGITAL DIVIDE:
In many countries like India despite growing internet and mobile usage, there is still a digital divide that poses a clear challenge. The affordability, availability of technology, literacy and ready access to computers and mobile internet phones are important factors that decide penetration levels of Information Communication Technology (ICT). The Government of India has adopted several ICT and e- governance schemes in the country, including initiatives to spread internet connectivity among the masses. This initiative of the Government has been termed as ‘Digital India.’

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238 2010 (10) SCC 280
239 It is a web network service that enables virtual sharing of software, resources for storage and processing, or retrieval of data as a utility service. It is similar to electricity to electricity supply wherein end user does not know the origin and travel path of electricity supplied to a user.

240 Digital India is the flagship Programme of the Government of India to digitally empower its people and India’s economy. Its vision is three fold namely creation of digital infrastructure, governance and services on demand and digital empowerment of
ORIGIN OF CYBERSPACE
The cyberspace means the virtual world created by mankind using computers and networking through which they interact and exchange information using multiple languages or communication protocols that are created by humans so that one computer can talk to another computer. Our internet is the same virtual space with no physical boundaries and powered with technological dynamism and speed. The expression ‘Cyber Law’ covers all case law and statutes, statutory regulations, codes, legal principles that state and its authorities legislate to govern acts of persons and entities while they perform acts on the internet or in connection with internet. The expression includes law that governs those entities that provide or facilitate the internet access or entities that use cyberspace for displaying information or e-commerce and entities that manufacture that sell hardware and software.

GROWTH OF INFORMATION TECHNOLOGY
MEANING AND SCOPE OF INFORMATION TECHNOLOGY
The ‘information technology’ can be defined as computers and computer networks, internet infrastructure and topography, software, websites and internet based communication technologies and its in-depth scientific knowledge that is used to upload, access, search, process, share, transmit, post, update information including textual and multimedia based images or other information. The term ‘information technology’ includes hardware, databases, programs and other internet related equipment used for storage, processing and transmission of information across computer networks.

LEGAL ISSUES IN CYBERSPACE
Cyberspace is unlike the traditional offline world that has over a period of time developed settled legal principles that govern people’s actions and rights over their property. The cyberspace is comparatively a fairly recent invention and jurisprudence in cyber law is still at a nascent stage is gradually evolving. While certain laws applicable in a conventional offline are being adapted to an online world. There are other different Legal Issues in Cyberspace.241

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241 Legal Issues in Cyberspace are:
- Applying existing Laws or making new laws?
  The issue presents an unending debate between creation of a specific law that would govern one’s actions over the internet as a distinct from the offline world or simply adapting offline laws to the new virtual cyberspace. The dynamics of information technology requires special treatment due to its unique and inherent matrix and far reaching implications. Information technology Law requires special law to be developed.
- Contractual and Non-Contractual issues
  Many interesting and intriguing questions surface when one attempts to apply territory specific laws to acts or omissions committed over internet.
While internet law regulation is being developed and few cases have been developed and few cases have been decided with regard to internet yet there are many complicated legal issues that will have to be resolved with the passage of time.

- **Legal Recognition to E- contracts and E-Signatures**
  The approach of the courts in most jurisdictions is to apply principles of formation of contracts and applicability of jurisdiction to the e-world as these principles apply in a conventional setting. There is a general consensus that electronic signatures and electronic documents are legally valid and stand on an equal footing to handwritten signatures or paper-based documents. The United Nations Commission on International Trade Law working group on Electronic Commission framed the model law on electronic commerce in 1996. The Model Law emphasizes on the principles of ‘Functional Equivalence.’ India in the year 2000 enacted its first law of information technology based on fundamental principles elucidated in UNCITRAL Model Law of E-commerce.

- **Privacy and Data Protection**
  Apart from contractual matters, several non-contractual issues arise under Tort Law which are often intertwined with jurisdictional issues. Other legal issues which confront us on the Internet include concerns over freedom of speech on the Internet and privacy and data protection issues. Several countries have already introduced comprehensive laws to deal with UK Data Protection Act in 1998. In European Union (EU), the Data Protection Directive was passed in 1995 whereby EU laid strict guidelines on data collected from persons and its authorized use and related matters.
  In addition, intellectual property infringements are rampant on the Internet due to the ease with which trademarks and copyrighted materials can be copied and distributed in cyberspace.

- **Freedom of Speech**
  The other non-contractual matters involve issues of protecting freedom of speech and privacy in the cyberspace. This may assume different dimensions and effects including posting of obscene information, defamation, hate speech and acts which threaten national security and public order. Protection of privacy and data is of vital significance in the online world. However, a

**JURISDICTION IN BORDERLESS CYBERSPACE**

Unlike the conventional world, territorial borders do not exist in the virtual world. The cyberspace is one single space devoid of national boundaries. We need to understand the key principles to determine jurisdiction in cross-border online disputes between them. We need to understand the key aspects of internet law such as e-contracting, e-commerce, taxation amongst other legal aspects. We need to learn the meaning of jurisdiction.242

**THREE PRE-REQUISITES OF JURISDICTION**

For a judgement to be valid and enforceable, three prerequisites need to be satisfied, namely, (1) the jurisdiction to prescribe243, delicate balancing of interests of both government and individuals is required for both national and public interest.

242 Jurisdiction’ means the power or authority of a court to adjudge a case. In case court lacks jurisdiction, its judgement has no force in law.

Jurisdiction is mainly categorized into three types namely (1) subject matter jurisdiction, (2) personal jurisdiction, (3) pecuniary jurisdiction. All the three are required to be satisfied if a judgement delivered by a court is to have validity and enforceability. The term ‘subject matter jurisdiction’ means power of the court to hear and decide specific cases that can be categorized in a subject matter domain. The forum where a legal dispute is or a claim is filed, ought to have an authority to decide a matter pertaining to specific subject matter or domain. ‘Personal Jurisdiction’ is the authority of a court to hear and decide a case against a particular set of persons. ‘Pecuniary Jurisdiction’ refers to jurisdiction of a court based the amount of claim which is made in a proceeding.

243 Jurisdiction to Prescribe- It means that the laws and regulations of country apply to a particular category of persons. The jurisdiction to prescribe is the power of a state and its privilege to apply its laws to persons, their activities or belongings or interests,
(2) the jurisdiction to adjudicate\textsuperscript{244} and (3) the jurisdiction to enforce.\textsuperscript{245} According to status of persons and their interpersonal relationships and business entitlements in that state. In USA the Restatement of Foreign Relations law of the United Nations, 1987, explains when a country has jurisdiction to prescribe law, i.e. it will have jurisdiction to prescribe law with respect to:

- Conduct that wholly or in substantial part, takes place within its territory,
- The status of person or interests in things present or interests in things present within its territory,
- Conduct outside its territory that has or is intended to have specific substantial effect within its territory,
- The activities, interest, status, or relations of its nationals outside as well as within its territory,
- Certain conduct outside its territory by persons who are not its nationals outside as well as within its territory
- Certain conduct outside its territory by persons who are not its nationals that is directed against the security of the country or against a limited class of other national interests.

These principles are popularly known as territorial principles, nationality principles, the effect principles and the protective principles respectively.

\textsuperscript{244}Jurisdiction to adjudicate- It means that a forum of adjudication has the power to decide a dispute concerning a person or a thing. To fulfil the jurisdiction to adjudicate, a country must have the jurisdiction to prescribe the law that it seeks to apply to decide the subject dispute. According to the precedents involving issue of determining jurisdiction over a non-resident defendant, a number of factors are considered by courts to decide if they hold jurisdiction to adjudicate the matter. The need of reasonableness is always a threshold requirement. It is pertinent to note that if it is reasonable it does not necessarily imply that the forum state has also the jurisdiction to prescribe. In many cases there may be jurisdiction to prescribe, for instance in India, The Information Technology Act, 2000 (IT Act, 2000), Section 1(2) read with Section 75 wherein the act states that it applies to any offence or contravention committed outside India by any person apart from its application to the whole of India. According to Section 75 of IT Act, 2000, the Act applies to any international law, a country’s power to exercise jurisdiction over non-residents that may conduct business or have other interests in their country is largely limited. In many cases a non-residents that may transact online business and solicit business in a forum state where he does not reside. Many countries have evolved principles that apply in similar situations to determine jurisdiction involving cross border online activity.

JURISDICTIONAL THEORIES IN JURISDICTION TO PRESCRIBE

Whether a state has \textit{jurisdiction to prescribe} is based on different theories. These are (1) Subjective Territoriality\textsuperscript{246}, (2) Objective Territoriality\textsuperscript{247}, (3) Nationality\textsuperscript{248},

\textsuperscript{245}Jurisdiction to Enforce- it means a state’s power to direct a person to mandate compliance of its rules and regulations by various means including administrative or police action or judicial or non-judicial action. The jurisdiction to enforce will apply only if a state has the jurisdiction to prescribe. Very rarely a state may allow another state’s law enforcement team to enforce their own state’s laws within the jurisdiction of another state without due written consent of the state.

\textsuperscript{246}The subjective territoriality means that if a particular act or conduct is committed within the boundaries of the regulating state then such state shall be entitled to lay down law that would govern such act or conduct.

\textsuperscript{247}The objective territoriality finds its application where the act in question takes place in another territory. However, the effect of the activity, direct or indirect is substantially felt within the forum state. Commonly known as the “effects jurisdiction”, this principle has emerged into a widely accepted test to determine jurisdiction in cyberspace.

\textsuperscript{248}The principle of nationality applies where the alleged offender is a national of the state, the laws of
(5) Protective Principles and (6) Universal Interest Jurisdiction.

INDIAN LAWS TO DETERMINE PERSONAL JURISDICTION

- Selection of Forum by Choice:
  The parties to contract are free to decide the forum where they agree to decide their disputes. In case where there is conflict of jurisdiction, the choice of jurisdiction shall be made by the plaintiff based on convenience unless a law excludes such option of access or it would amount to abuse of process of court or against public policy. ‘Public Policy’ means not merely policy of a government but also includes matter which is for public interest and public good.

- The Code of Civil Procedure, 1908:
  Under the IT Act, 2000 there are no separate criminal courts to decide cybercrime matters and such cases are heard by criminal courts established to hear general criminal matters. In civil cases wherein compensation is claimed for any contraventions as provided in the IT Act, 2000, the Adjudicating Authority is empowered to grant compensation by virtue of Section 46 of the IT Act, 2000. Such cases involve, for instance where someone unauthorised deletes data of another person, introduces virus, or copies or extracts certain data amongst other acts mentioned in Section 43 which have been violated by his acts. The forum state assumes jurisdiction based on nationality principles.

of the said act. For seeking injunction orders, for instance in Trademark infringement matters, courts where plaintiff resides, or personally works for gain determines jurisdiction (Section 134 of Trademark Act, 1999) while Section 20 CPC also allows case to be filed where part of cause of action arises or where defendant carries on business. There are other relevant provisions of Civil Procedure Code.

E-CONTRACTING

The formation of contract in cyberspace has intrigued legislators and academicians of several countries. The tradition rules of formation of contracts in the offline world are more or less settled. However, on the internet, the same principles may not find equal application.

FORMING AN E-CONTRACT THROUGH WEBSITE:

Whenever a company has an e-commerce based website it enters into contracts through various advertisements posted on their website which constitutes an ‘invitation to treat.’ While surfing on the internet, we often come across websites which are shopping sites, auction websites where several products are being advertised for sale originating from several manufactures. There are also manufactures who have dedicated websites consisting of advertisements, brochures and catalogues of various goods they manufacture. Each case has to be analysed on the basis of facts and

249 The protective principle finds application where a country takes necessary action in a foreign state to secure its national integrity or interest.

250 This jurisdiction is assumed by any state to prosecute an offender for acts which are known universally by International Law to be a heinous crime, i.e. hijacking, genocide, child pornography.

251 Relevant provisions of CPC - The Code of Civil Procedure, 1908 prescribes pecuniary jurisdiction limiting the powers of the court to hear matters up to a particular pecuniary limit under Section 6. As per Section 16 of CPC, the jurisdiction in a case is also determined on the criteria of where the subject matter is situated.
circumstances. Nevertheless, the words used for the advertisements and the intended purpose of website form material consideration for the analysis. On the e-commerce websites a user is asked to register where he fills in his personal particulars and contract information. Basically, in-contract websites there are three types of contracts. These are Clickwrap, Browsewrap and Shrinkwrap contracts.

CLICKWRAP AGREEMENTS:
In the case of a ‘Clickwrap Agreements’ the terms and conditions are mentioned on a website to which a user indicates his acceptance by clicking on the ‘I agree’ button on the screen. Sometimes in the place of ‘I agree’ button similar connotations indicating acceptance of user may be used. The clickwrap agreements are often used in downloading software and contain provisions to protect the intellectual property contained therein by restraining the licensee from selling the copy of his software. It also contains provisions that disallow any decompiling of the program for any purpose.

Browsewrap Agreements:
In a ‘Browsewrap Agreements’, the terms are a part of the website content but, does not require to specifically grant his assent and mere browsing of website may constitute a user’s consent. Generally, in all e-commerce websites the terms and conditions are prominently displayed on the website and at the earliest opportunity the attention of a user is drawn to read the same.

Shrinkwrap Agreement:
Shrinkwrap Agreements have met with some criticisms by the courts and a court may not enforce a contract if it is of the view that such a contract is ‘unconscionable at the time it was made.’

VALIDITY OF SHRINKWRAP, BROWSEWRAP AND CLICKWRAP AGREEMENTS:
Article 11 of the UNCITRAL Model Law on Electronic Commerce (1996) grants recognition to the validity and enforceability of Clickwrap Licenses. Similarly, under Section 10A of the Indian Information Technology Act, 2000 confers legal recognition to electronically formed contracts. Since there are no cases under all these three agreements, such contracts will be held valid and enforceable as long as contracts satisfy basic ingredients of formation and are not tainted with undue influence under Section 16 and opposed to public policy under Section 23 of the Indian Contract Act, 1872.

REQUIREMENT OF WRITING IN E-CONTRACTS:

An agreement formed with a customer wherein some terms of agreement are packed inside the package of a product such as software. Generally in the case of Shrinkwrap Agreements, if the product’s sale and purchase terms are not acceptable to a user after he opens the package, the product can be returned within specified time window.
In most jurisdictions, for a contract to be valid and enforceable, it is required to be in writing. A written contract grants reasonable certainty of its existence and is clearer as regards the terms agreed between parties. According to Model Law, whenever any information is required in writing, such requirement is satisfied by an electronic message if the information in data message is accessible and usable for a subsequent reference.

**POSTAL RULE IN ONLINE CONTRACTS:**

Under the conventional common law principles of contract law, a legally binding contract is formed when an offer is given its assent in the manner required by the terms of the offer. According to Common Law principles, an acceptance communicated through post is complete when the letter is posted or by telegram when it is handed. This is known as ‘postal rule.’ As per the ‘postal rule’ a contract is formed when a written acceptance has been posted.

**UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATION IN INTERNATIONAL CONTRACTS, 2005**

The Convention was adopted by the General Assembly on 23rd November 2005 and deals with increasing ‘legal certainty and commercial predictability’ where electronic communications are used in relation to international contracts. It lays down guidelines for determining a party’s location on the internet, the time and place of dispatch and receipt of electronic messages, e-contracting through automated systems and parameters for functional equivalence between electronic records and paper based documents.

**EUROPEAN UNION LEGISLATION ON E-CONTRACTS**


**INDIAN APPROACH TO E-CONTRACTS**

The Information Technology Act, 2000 is enacted based on the UNCITRAL Model Law of e-Commerce. The IT Act, 2000 grants legal recognition to electronic records and states that the requirement in ‘writing or type written or printed form’ will be considered as fulfilled if the information is made available in an electronic form and accessible for use for a subsequent reference. There are many relevant provisions under IT Act, 2000.

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256 Relevant provisions are:
- Section11 of the IT Act, 2000 provides that an electronic record is attributed to the originator if it was sent by the originator himself or a person duly authorized by the originator or by an information system programmed by the originator to send the message automatically.
- Section 12 of the IT Act, 2000 elucidates Section 12 of the IT Act, 2000 elucidates that when the originator has not specified that an acknowledgement of receipt is required in a particular format or method, an acknowledgement can be given through any communication by the addressee ‘automated or otherwise’ or by the conduct of the addressee that reasonably indicates to the sender of a message that the electronic record has been received.
ELECTRONIC COMMERCE
Use of computers and Information Technology to transact business by and between entities and individuals is termed as electronic commerce. Now a days, markets have been transformed to online shopping malls where Business to Consumer (B2C) and Business to Business (B2B) transactions materialize using payment gateways and online contracts. The accessibility and ease of using Information and Communication Technology (ICT) propelled internet based payment systems including net banking and mobile payments that has been a key factor in the growth of E-Commerce.

ADVANTAGES OF E-COMMERCE:
E-Commerce has many advantages. Because internet is accessible, user friendly, cost effective and effective means of transacting business, its advantages have increased.

RESTRICTED ACTIVITIES IN E-COMMERCE:
Another issue that arises in the context of e-commerce is that different jurisdictions have different laws to regulate online activity. For instance, in India, any online gambling website is banned and any online money transfer services require permission from Reserve Bank of India to operate its business in India. In European Union (EU), online shops selling drugs is a regulated activity and in Germany online pharmacy is permitted. Many countries like India either prohibit or restrict websites selling Narcotic Drugs, hazardous chemicals, explosives, firearms, live animals, alcohol, gambling and pornography on the internet and even otherwise.

LINKING, FRAMING AND METATAGGING IN E-COMMERCE:
Another aspect of e-commerce is active advertising through linking and vast amount of information can be easily processed and transmitted across borders at one-tenth cost.

- For a consumer it is far easier to conduct research on a topic, assess and analyse, an offer of goods and services online. For a consumer, e-commerce is a boon offering myriad choices of products and services across diverse markets and quick access to consumer reviews on consumer websites and blogs enabling easy comparison and decision making more convenient.

Section 13 of IT Act, 2000 regarding time and place of dispatch and receipt of electronic record, the dispatch of electronic record occurs ‘when it enters a computer resource outside the control of the originator.

Advantages of E-Commerce:
- Electronic commerce has revolutionized the methods of undertaking business in almost all the sectors of activity including education sector where most courses are now offered online through distance education.
- The global nature of cyberspace and with the ease of communication both traders and individuals benefit from cross border business opportunities are available online. A consumer has wide range of options to choose from and large amount of updated information at his disposal to arrive at a decision while purchasing goods and services online.
- Now, the domestic industry is able to procure raw materials from across borders. For instance, it is commonly known that in the tyre industry and chemical sector Indian importers sign e-contracts with Chinese suppliers to order raw materials.
- US entities have started to outsource office functions back into India. With this, significant cost reduction in the BPO, KPO, LPO sectors as
framing. In most jurisdictions courts have relied on national laws to decide any dispute that may arise involving linking and framing within their national frontiers. The general understanding is that a person who links to a website does not endorse its content. This principle is usually incorporated in its terms of use policy, privacy policy and disclaimers mentioned on the website. In the case of metatagging, keywords may infringe Trade Mark Law and constitute an unfair trade practice.

UNCITRAL MODEL LAW ON E-COMMERCE:
United Nations Commission on International Trade Law (UNICTRAL) adopted the Model Law on E-commerce in the year 1996. The Model Law aims to facilitate electronic commerce by overcoming legal hurdles in international trade through internet. The Model Law has been adopted as guiding text for enactment of India’s IT Act, 2000 incorporating specific provisions on e-contracting and e-commerce. Model Law is explained through a guide of enactment. The Guide to Enactment explains that the Model Law adopts a functional ‘equivalent approach’ and declares that the paper based contracts are as legally valid as electronic documents. Model Law studies basic functions of paper based documents and provides adequate criteria for electronic records, which when adopted, will grant the same legal recognition to an electronic record as granted to a paper based document.

INDIA’S APPROACH TO E-COMMERCE:
The Indian IT Act, 2000 is based on the Model Law on Electronic Commerce adopted by United Nations Commission on International Trade Law. There are various provisions in IT Act, 2000 to facilitate e-commerce.

ELECTRONIC SIGNATURES
With the introduction of internet and computing has introduced a dynamic change in the manner of forming contracts using ‘bits and bytes’ instead of ink and paper. The conventional ‘ink and paper’ model had its advantages that it can be proved easily, it has its own disadvantages that exchange of written documents will take more time and cost. At the same time there may be some authenticity in online transactions, problems like unauthorised interception, identity thefts, cheating by personation and anonymity in cyberspace. It is also easy to tamper electronic documents without easy detection. To combat these challenges, use

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259 On the internet framing takes place when a website uses its own frame but takes a reader to the content of another website which displaying the content of another in its own frame to create a false impression that the content belongs to the website of that frames. It is a form of copyright infringement.

260 It means the use of keywords which are trademarks of the competitor used as hidden key words.

261 Provisions to facilitate e-commerce are:
- Section 3 of IT Act, 2000 deals with authentication of electronic records.
- Section 4 of IT Act, 2000 grants legal recognition to electronic records.
- Section 10A of IT Act, 2000 provides that contracts which are formed by electronic means shall not be unenforceable only on the ground that such electronic means were used to form the contract.
- Section 17 to Section 39 create the legal framework and infrastructure to support an efficient e-commerce regime.
SIGNIFICANCE OF ELECTRONIC SIGNATURES
E-commerce activity is now largely facilitated by the use of electronic signatures in online transactions. It is now common practice to use digital signatures to sign and file documents to incorporate company in India with the Registrar of companies. In some government offices in India, a digital sign on an electronic digipad is used for authentication and identification. The risk of anonymity, identity theft, criminal impersonation, consumption of time and cost and logistic problems are some of the reasons why electronic signatures are important to secure internet transactions.

MODES OF ELECTRONIC SIGNATURES:
The most important mode of electronic signature is PKI. There are many other important modes of electronic signatures.

UNICTRAL MODEL LAW ON ELECTRONIC SIGNATURES, 2001:
The Model Law of Electronic Signatures adopts a technological neutral approach and does not approve or specify any particular form of electronic signature for authentication purposes. The Model Law also explains the ‘rules of conduct’ to indicate the obligations of the signer, the recipient and the role of a Trusted Third Party (means certifying authorities that grant electronic signatures to a person). See Article 2 (1) of Model Law of Electronic Signatures defines an ‘electronic signature’ as data in electronic form affixed to a data message that identifies and verifies the signer with consent to the content in such data message. The Model Law envisages three functions of electronic signatures namely, asymmetric cryptography is preferred over symmetric cryptography. Electronic signatures can be used for other methods of verification such as use of biometric device involving handwritten signatures where a signer signs manually using a unique pen like device on a digipad or directly on a computer screen. This signature will be converted and stored in electronic form on a computer and attach to a data message for authentication. Other methods of electronic signatures include retina scanning, iris patterns, fingerprinting that records an individual’s specific print or quality and measurement as identity proof of authentication. Furthermore, personal identification number (PIN) such as internet password or I-pin or password authentication, for example through input of alphanumeric digits is used to access one’s e-mail account or clicking the ‘OK’ or ‘I Agree’ button to enter into an e-contract.

https://www.unictral.org/pdf/english/texts/elecsig-e.pdf

See Article 2 (1) of Model Law of Electronic Signatures

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120
creation and reliance on an electronic signature and certification by a certifying authority. More than three entities could be involved when an electronic signature is affixed. Sometimes two of its functions could be fulfilled by a single party in case where the relying party also plays the role of certifying authority.

INDIA’S APPROACH TO ELECTRONIC SIGNATURES UNDER INFORMATION TECHNOLOGY ACT, 2000:
The IT Act, 2000 is enshrined with the provisions for electronic signatures. Cryptography:
Cryptography

Symmetric Cryptography

Asymmetric Cryptography

Encryption is achieved by using cryptographic algorithms to convert a plain message into an encrypted form.

Public Key and Private Key:
In digital signature technology, the private key compliments its corresponding public key. The public key is used by the recipient of a message to verify digital signatures and the private key is required to be kept confidential by the signers. The private key can be stored on a smart card or to be contained in a PIN or in biometric device. While public key is made accessible to the public and usually published on a Public Authority’s website, the private key is kept secret. The keys are based on mathematical algorithms and often use the prime numbers which are multiplied together to produce a hash number. It is impossible to derive a private key if a public key is known to individual. This feature ensures high security, authentication and integrity and ensuring non-repudiation of data messages.

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266 Provisions for Electronic Signatures under IT Act, 2000 are:
- Section 3A defines requirements of electronic signature.
- Section 3A explains ingredients of electronic signatures.
- Section 3A sub-clause 2 provides that the signature should exclusively linked to the signer and no other person and the ‘Signature Creation Data’ or ‘Authentication Data’, at the time of signing should be under exclusive control of the signatory or authenticator, any tampering of electronic signature or any change in information after being electronically signed should be detectable.
- Section 16 provides for security procedures and practices that are used to create ‘secure electronic signatures’ which bear a favourable presumption in law of its authenticity under evidence law.

267 The digital signatures are based on encryption and decryption mechanism that ensure integrity and confidentiality of information that two parties may exchange on the internet. It is known to have its origins around 2000 B.C. In Egypt Hieroglyphics used cryptography to write on the tombs of their ancestral rulers.

268 It involves a unique single secret key for both encrypting and decrypting a message.
THE PROCESS OF CREATING DIGITAL SIGNATURE:
When the content is to be transmitted as a data message is selected by a sender, a ‘Hash Function’ in the signer’s software calculates a mathematical algorithm based hash result. This hash result will alter if a minor change is made to the data message. The signer’s software converts the hash result into a digital signature by using private key of the signer. The digital signature is unique to the data message signed and the private key which is used for signing the data message. The digital signature attaches to the data message and is transmitted along with the message. There is a verification process of digital signature and should meet two conditions.

ELECTRONIC MONEY
E-Money means prepaid money that is stored in an electronic format and used to pay for goods and services online. It includes prepaid online accounts, e-wallets, and bitcoins, amongst other e-payment methods.

ADVANTAGES AND DISADVANTAGES OF E-MONEY:
E-money has various advantages apart from low cost. Besides this there are many other disadvantages of E-money.

DIFFERENT FORMS OF E-MONEY:
The payment of cash online involves different types of payment systems,

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271It is a mathematical process based on algorithms which is used to create and verify a digital signature. The use of ‘Hash Function’ compresses a data message into a ‘message digest’ of the message which is shown in the form of a hash result much smaller than the original message. In case there is any change or alteration in the message, a different hash result will be created whenever the same ‘Hash Function’ is utilized.

272The two conditions are:

- The signer’s private key was used to sign the message. This will be confirmed if the signer’s public key was used to verify the signature as the public key will verify the digital signature which was created with the signer’s private key.
- The message was unaltered. This will be the case if the hash result calculated by the verifier matches with the hash result derived from digital signature when verifying the message.

273Advantages of e-money:
- The reduced overhead costs and processing delays are its prime benefits.
- Electronic money can be transferred across without much convenience. It also brings transparency in payment transactions and payment systems like CC Avenue and PayTM. These systems grant certainty in the receipt of money.
- Digital money renders accounting of money and its storage fairly easy to manage. Use of Trust Seal and Secure Socket Layer, cryptography and authorized payment gateway such as CC Avenue offers great security to online transactions. These factors have stimulated increase in the e-commerce activity.
- Use of smart cards or e-money is not considered appropriate for high value transactions and credit cards and debit cards play a significant role in high-value transactions as these have been fairly more secure payment methods.

274Disadvantages of e-money:
- A rise in plastic money frauds due to skimming or cloning has led to introduction of new chip based encrypted cards that also bear magnetic strip to offer added security protection.
- Bitcoin is a form of electronic money where transactions are verified by network nodes or computers and recorded in a public distributed ledger called a block chain. It lacks centralised repository and is decentralised system. It is misused by criminals, particularly for darknet markets wherein their identity is camouflaged of spoofed by software and technical tools to commit crimes have caught the attention of law enforcement.

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122
including ‘virtual money’, ‘the electronic wallet’ and ‘the virtual wallet.’ Centralised systems such as PayTM, BHIM, web money sell electronic money to users through their centralized e-money infrastructure. Examples of decentralised electronic money are Monero which is an open source crypto currency which is secure and decentralized and Bitcoin and Ripple monetary systems which is a real time gross settlement system, currency exchange and remittance network by ripple. The third category of e-money is offline anonymous system and an example of the same is Digicash that does not trace one’s identity. Electronic wallets utilize the Smart Card Technology which enables it to store the information about the card holders funds which are transferred from his account.

Similarly, E-Cheque is an analogous model of payment to the traditional cheque in the offline world. In this for example a customer sends payment to the merchant. The merchant presents e-cheque to the issuing organisation to receive payment. The details of the cheque are transferred electronically through electronic interbank compensation system and the fund is transferred similar to the processing of paper cheque.

PROTECTING PRIVACY AND DATA ON INTERNET
The right to ‘privacy’ can be defined as the right of a person to enjoy his own presence by himself and decide his boundaries of physical, mental and emotional interactions with other persons.

THREAT TO PRIVACY ON INTERNET:
The internet is a unique medium of exchange of information that contains vast information comprising of data which is stored and uploaded or downloaded. As more and more internet users surf the internet and post their personal information online, has led to scams of personal data. The virtual world has left no information private. Data thefts, corporate espionage, identity thefts and other crimes including defamation; kidnapping and murder have become a common phenomenon.

REQUIREMENTS OF PRIVACY POLICY AND TERMS OF USE OF A WEBSITE:
On internet sensitive personal information is gathered by credit rating agencies, payment gateway, employers, income tax department, service providers and by individuals. Any information that is posted on the website is no more private. For privacy policy, a user is often asked to provide personal information in order to register or create a new account to avail services from a website. This is done in order to check whether the person registering is fake or not.

INDIAN LEGAL FRAMEWORK FOR DATA PROTECTION AND PRIVACY:
Privacy protects different aspects of private interest including private interest protecting information that protects disclosure or misuse of sensitive personal information and ‘autonomy interest’ which includes discretion to make personal decisions and conduct activities in seclusion. Article 21 of the Constitution of India includes the provision of ‘Right to Privacy.’

PRIVACY PROTECTION UNDER INFORMATION TECHNOLOGY ACT, 2000:
The Information Technology Act, 2000 is enshrined with many provisions for the protection of privacy on internet.275

CYBER CRIMES
MEANING AND AMBIT OF CYBER CRIME
In many ‘Cyber Crimes’ 276, the conventional crimes are committed through the use of internet or computer such as online defamation, cheating by personation, black mailing, fraud and criminal intimidation. Cybercrimes include crimes which are committed through use of computers or where a computer or computer network is the target of the crime. This category includes destruction of records, data theft and system hijacking amongst other crimes.

DIFFERENT KINDS OF CYBER CRIME:
Financial frauds are prevalent in the cyberspace due to technical loopholes and anonymity that exists in cyberspace. The following categories of cybercrimes are committed to make financial gains.

1. PHISHING
Phishing 277 is conducted through fax messages or other forms of instant communications like text messaging service. It is also termed as carding and spoofing. There are ‘Hybrids of Phishing.’ 278 Most Phishing attacks involve addressing the members without the original name and simply mentioning ‘Dear Valued Customer’, it may contain deceptive links which lead a victim to a fake website that may use a deceptively similar website address as an authentic service provides. Special training workshops are being provided by service providers and other law enforcement

275Privacy provisions under IT Act, 2000 are:
- Section 66E explains about violation of privacy.
- Section 67 provides punishment for publishing or transmitting obscene material in electronic form.
- Section 67A provides for punishment for publishing or transmitting of material containing sexually explicit act, etc. in electronic form.
- Section 67B provides for punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form.
- Section 69 confers power to issue directions for interception or monitoring or decryption of any information through any computer resource.
- Section 69A prescribes power to issue directions for blocking for public access of any information through any computer resource.
- Section 69 B empowers the central government to authorise to monitor and collect traffic data or information through any computer resource for cyber security.
- Section 72 prohibits disclosure of information received by a person in his official capacity. This section imposes penalty for breach of confidentiality and privacy.

276A criminal act committed by making computer as a method or means of a crime to cause damage to persons and property is a cybercrime. When persons conspire to spread terror attacks, it amounts to cyber terrorism, if a person threatens to wage war over internet through writing against government, it is cyber war.

277The term is derived from the word ‘fishing.’ It is a form of financial crime or e-crime where a cyber-criminal disguises his true identity and sends out spam which appears like an authentic message, for instance a communication from a bank to authenticate one’s net banking user name and password. These are fake messages that are sent to defraud the gullible netizens whose sensitive information such as credit card details may be stolen through phishing attack carried out by e-mail, such as credit card details, passwords from the users on the pretext of seeking authentication of a company’s record.
278When phishing is conducted through mobile via SMS, it is termed as ‘smishing’ and if by telecalling, it is known as ‘Vishing.’
agencies to spread awareness among the customers to detect phishing e-mails and encourage use of special software and spam filters to safeguard customers.

2. SKIMMING
Skimming\textsuperscript{279} is another form of cybercrime. It is necessary to take precautions against skimming.\textsuperscript{280}

3. SPOOFING
Spoofing\textsuperscript{281} is a crime where a person on the internet disguises his identity. Sections 66D and Section 66E of Information Technology Act, 2000 prescribes punishments for identity thefts and cheating by personation with a maximum term of three years of imprisonment and fine up to one lakh rupees.

4. Cyber stalking
Cyber stalking\textsuperscript{282} is a criminal offence in most jurisdictions including India. It is coupled with criminal intimidation, blackmail or extortion and puts the victim to threat to life or property and causes emotional harassment to the victim.

5. CYBERSQUATTING
Cybersquatting\textsuperscript{283} in India domain names have been conferred with the same protection as it is given to a trademark. A cyber squatter is liable to be restrained from using domain name in any manner and is required to transfer the domain name to the rightful owner, pay damages for trademark infringement apart from rendering account of profits.

6. CYBER TERRORISM
Cyber terrorism\textsuperscript{284} the attacks may cause physical or virtual violence which cause direct damage to nation’s people and property or results in riots. The acts of cyber terrorism include damage to the protected critical computer systems that contain sensitive information of national interest, plane hijacking and crashes, automated bomb explosions and damage to any public utility services which are managed by the use of computer systems.

7. HATE SPEECH
Under ‘Hate Speech’\textsuperscript{285}, section 66A of IT Act, 2000 has been struck unconstitutional

\textsuperscript{279}It is a form of cybercrime or fraud where person steals the credit card number of a person by use of a copying machine called ‘skimmer’ when a credit card is swiped into a skimmer by a criminal secretly without detection by rightful owner such as a petrol station for example, it reads all magnetic data contained therein that can be used to clone the cards to commit unauthorized credit card transactions.

\textsuperscript{280}Banks have adopted firewalls to protect their computer servers and data. Sophisticated software is used to conduct electronic banking and use of digital signatures for authentication process in order to maintain confidentiality and privacy of personal information.

\textsuperscript{281}It means concealment on an electronic network such as internet protocol, spoofing using technical software such as Hide IP or identity spoofing through impersonation or webpage spoofing by creating by creating a deceptively similar webpage. Spoofing attacks can be curtailed by the use of firewalls that check and verify the origin and recipient of electronic message.

\textsuperscript{282}The use of internet and its services such as blog, e-mail or chat services to harass, intimate, defame and stalk a person, threatening or causing mental agony or injury to a person.

\textsuperscript{283}It is used to denote an illegal act whereby a person intentionally books a domain name deceptively similar to the trademarks of its rightful owner and later offers the owner the domain name for purchase at a hefty amount.

\textsuperscript{284}It means use of computers, computer networks, internet by criminals such as terrorists to spread error and crime that threatens the integrity, sovereignty, defence systems and public safety of a nation.

\textsuperscript{285}It means writing posts on the internet which are aimed at defaming, intimidating or inciting violence or riots written against an individual or a specific group of individuals with a bias towards gender, religion, nationality, disability, sect, creed, region, social or political views, class, profession or physical
by the Supreme Court of India in the case of ‘Shreya Singhal v. Union of India.’

CYBER CRIMES UNDER INFORMATION TECHNOLOGY ACT, 2000:
The Indian Information Act, 2000 is enshrined with provisions related to cybercrimes.

 attributes. It includes any oral communications apart from written matter on the internet.

Provisions for cybercrimes under IT Act, 2000:

- Section 43 of the IT Act, 2000 provides penalty and compensation for damage to computer, computer system etc.
- Section 66 deals with computer related offences.
- Section 67 provides for punishment for publishing or transmitting obscene material in electronic form.
- Section 67A imposes punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form.
- Section 67B provides for punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form.
- Section 67C relates to preservation and retention of information by intermediaries.
- Section 68 provides for power to give directions.
- Section 69 provides power to issue directions for interception or monitoring or decryption of any information through computer resource.
- Section 69A provides for power to issue directions for blocking for public access of any information through any computer resource.
- Section 69B deals with the power to authorise to monitor and collect traffic data or information through any computer resource for cyber security.
- Section 70 provides for protected system.

ELECTRONIC EVIDENCE

Besides this, section 88A, section 85A, section 85B and section 85C of Indian Evidence Act, 1872 are relevant provisions.

EMERGING NEW ISSUES ON INTERNET
These include ‘Behavioral Advertising,’ ‘Blogging’ , ‘Cloud’

- Section 70A deals with National Nodal Agency.
- Section 70B provides that the Central Government by the notification in the official gazette for Indian Computer Emergency Response Team to serve as national agency for incident response.
- Section 71 provides for penalty for compensation.
- Section 72 provides penalty for breach of confidentiality and privacy.
- Section 72A punishment for disclosure of information in breach of lawful contract.
- Section 73 imposes penalty for publishing [Electronic Signature] Certificate false in certain particulars.
- Section 74 provides for publication for fraudulent purpose.

Provisions for electronic evidence under IT Act, 2000 are:

- Section 4 explains legal recognition of electronic records.
- Section 5 explains legal recognition to electronic signatures.
- Section 7 provides for retention of electronic records.
- Section 7A provides for audit of documents in electronic form.

It means marketing or advertising practices and technologies adopted by E-Commerce entities on the internet based on behavioural patterns, browsing preferences, search queries of internet users who visit their websites.

It is a web page maintained by a person who is the administrator and creator of the blog who regularly
CONCEPT OF ONLINE DISPUTE RESOLUTION

Online Dispute Resolution can serve as an efficient means of dispute resolution in cyberspace. It is a common belief that ODR may initially succeed in resolving small claims related disputes as opposed to the high stake matters a parties invariably prefer to enter into arbitration and present oral arguments in physical hearings in high stake cases. For ODR system to prove more practicable and feasible than litigation to a party, it needs to offer greater accessibility to technology, infrastructure, affordability and convenience of use, flexibility, transparency apart from adequate security, impartiality, expertise and legal enforcement mechanisms. Therefore, propagation of ODR practices will involve spreading awareness, public-private partnership, IT training and education, developing an internationally accepted body of core principles and substantive and procedural law for ODR practices.

AUTHORS VIEW POINTS

According to me I have completed the task of conceptual analyses in the best possible way I could. The digital revolution has ushered a new millennium of increase in the use of computers and internet. With these there is a need for legislative framework. I have written the paper in such a way so that I am able to explain what technology can do for the mankind and what is the legal framework to protect the mankind. One thing we should all keep in mind is that with the pace in technology, ethical considerations should be kept in mind. This means the use of technology should be for the benefit of the people and not to exploit them. Analyses of legal methodology on computers and internet has been an invigorating experience of mine.

CONCLUSION

Technology has allowed man to move from manual labour of the fields to cities and machines. It has led to urbanisation and people have migrated to cities improved services and job opportunities. With the invention of computers till now the activity on the system has increased to an utmost extent. The law on computers and internet is based on UNCITRAL Model Law. This means, the states of the world have enacted legislation in accordance to it. But still, in developed countries the use of technology is much more than developing and under-developed ones. The crimes in the developed countries are also high. Therefore, developed countries should take stringent steps to control crimes on internet and this will automatically help developed and under-developed countries to overcome the challenges.

posts its views on any topic that forms subject matter on the blog.

291 It is a web network service that enables virtual sharing of software, resources for storage and processing or retrieval of data as a utility service.

292 It is a twelve digit unique number which the Unique Identification Authority of India. Issues to all residents in India. The UID card bears the identification number that is stored in a centralized database and linked to biometrical information of a person such as fingerprint of all ten fingers and iris of each individual.
RIGHT TO DIE WITH DIGNITY: A LEGAL RIGHT?

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ABSTRACT

Supreme Court of India on 9th March 2018 legalise Passive Euthanasia. The decision was made as a part of the verdict in a case involving Aruna Ramchandra Shaunbaug v/s Union of India. This is the landmark judgement which legalises Passive Euthanasia in India. It comes under Article 21 Right to Life – "as if a person is terminally ill he can die by his choice: Right to die with dignity. If a person is living a life of indignity due to the medical condition, if a person is in a situation of unbearable suffering, if a person is in a persistent vegetative state then he or she should not be subjected to artificial means of prolonging life. To legalise passive euthanasia, the main motto of Supreme Court is to help the people by providing them euthanasia who really need it. After all, a person's last wish should be honoured. Supreme Court's decision to legalise passive euthanasia in the country is a very courageous one and we should all respect that.

Keywords: - Passive Euthanasia, Verdict, Terminally, Indignity, Persistence Vegetative State (p.v.s.), Prolonging.

CHAPTER-1
INTRODUCTION

“Death is our friend, the best of our friends; it delivers us from agony. I do not want to die of a reaping paralysis of my faculties – a defeated man”.

- Mahatma Gandhi

In 5th century BC Ancient Greeks and Romans tend to support mercy killing which means good death. These people were the first who introduced the phenomenon of mercy killing. In Ancient Greek and Rome, there were pagan physicians who frequently performed abortion, foeticide, and Active and Passive mercy killing respectively. Although not every physician render the same activity it was believed that they have to take an oath which prohibited them to give a deadly drug to someone not even if asked for; Pagan Physician called them Hippocrates293. The word 'Euthanasia' was first used in the 17th century by Francis Bacon in a medical context in which he was referring to an easy, painless, happy death in which it was the responsibility of the physicians to soothe the suffering of the patients294.

In India, the term right to die should be granted and it must be a part of Right to life first came in front of Supreme Court in the year 1994 in which the constitutional validity of Indian Penal Code (IPC Section 293 Euthanasia. procon, Historical Timeline, (14/6/18,9: 50 AM), https://euthanasia.procon.org/view.timeline.php?time lineID=000022
294 Ibid

www.supremoamicus.org 128
the able to contribute to the society; every individual wants to live a good life and hopes to die with dignity. If a person is living a life of indignity due to the medical condition, if a person is in a situation of unbearable suffering, if a person is terminally ill or is in a persistent vegetative state then he or she should not be subjected to artificial means of prolonging life.

CHAPTER 3
FACETS OF EUTHANASIA
Euthanasia is of two types Active Euthanasia and Passive Euthanasia. In Active Euthanasia the person is neither in a vegetative condition nor is he/she suffering from any non-curing disease, in this situation a person simply wants to end his/her life just because they don’t want to live. Active Euthanasia is illegal in India. There was an issue which comes forward in Maharashtra a couple, Iravati Lavate, 79, and her husband Narayan, 86, fear that they will fall terminally ill and will not be able to ‘contribute to society’. Iravati Lavate, 79, a retired school principal, and her husband Narayan, 86, a former government employee, have no major health problems. However, they have the major fear of falling terminally ill and believe that they will no longer be able to contribute to the society; this fear pushes them to write a letter to president seeking permission for doctor-assisted death. The couple does not have any children. When a journalist of Hindustan Times visited them to their house Iravati said, “From the starting year of our marriage I and my husband has decided that we don’t want any kinds so we don’t have any. Now, at this stage of our age, we don’t want others to be liable for our condition later.”

CHAPTER 2
THE LAST RIGHT: MEANING
The term Euthanasia is derived from Greek word EU means good and thantos means death respectively. It simply means withdrawing medical treatment with the deliberate intention of causing the death of a person who is suffering from a non-curing disease. Every individual wants to live a good life and hopes to die with dignity. If a person is terminally ill or is in a persistent vegetative state then he or she should not be subjected to artificial means of prolonging life.

309) was challenged. The Supreme Court declared Section 309 of IPC is unconstitutional under Article 21- Right to Life.

Supreme Court of India on 9th March 2018 legalise Passive Euthanasia. The decision was made as a part of the verdict in a case involving Aruna Ramchandra Shaunbaug v/s Union of India. A writ petition was filed by Pinki Virani (Journalist) under Supreme Court under Article 32 on the behalf of Aruna Shanbaug. Aruna was a nurse in King Edward Memorial Hospital, Parel Mumbai. She spends 42 years in a vegetative state; on the evening of 27th November 1973, she was brutally raped by her colleague a ward boy name Sohanlal Valmiki, choked with a dog chain. It was ostensible that Aruna Ramchandra Shanbaug was in a persistent vegetative state (p.v.s) and basically a dead person and has no state of awareness, and her brain is virtually dead. She can neither see, nor hear anything nor can she express, herself or communicate, in any manner whatsoever. This is the landmark judgement which legalises Passive Euthanasia in India. It comes under Article 21 Right to Life – "as if a person is terminally ill he can die by his choice: Right to die with dignity".

Narayan, 86, a former government employee, have no major health problems. However, they have the major fear of falling terminally ill and believe that they will no longer be able to contribute to the society; this fear pushes them to write a letter to president seeking permission for doctor-assisted death. The couple does not have any children. When a journalist of Hindustan Times visited them to their house Iravati said, “From the starting year of our marriage I and my husband has decided that we don’t want any kinds so we don’t have any. Now, at this stage of our age, we don’t want others to be liable for our condition later.”

295 Indian Kanoon, Aruna Shaunbaug v/s Union of India & Ors, (14/6/18, 11:42 AM), https://indiankanoon.org/doc/235821/
court rejected their plea and does not grant them to commit active euthanasia, even though it's where they don't have any right to end by artificial means (active euthanasia) which the Supreme Court of India has stated illegal.

Active Euthanasia entails the use of a lethal substance to kill a person whereas in Passive Euthanasia the person is almost dead only his mind is working, they cannot even move their body by themselves. It is a condition which is similar to coma in which a person is in a state of unconsciousness or lack of sensation; he has become unable to respond. Passive Euthanasia is must in some cases. It demands by the near and dear ones of the patient to withdraw them from life support system not because they want to kill them but because they cannot see them in such a miserable condition where the patient is dying every day in front of their eyes. The patients went through the pain every single day the pain which is unbearable for the family member of a person for whom the Passive Euthanasia is demanded. Supreme Court bench says Passive Euthanasia is permissible in India. The court said human beings have the right to die with dignity to contest a living will, family members or friends can go to the court; the court can set up a medical board to decide if Passive Euthanasia is needed or not.

CHAPTER-4
PORTRAYAL OF JUDICIARY
The Supreme Court legalises Passive Euthanasia in a legal verdict and given the people of India the Right of a "Living Will" withdrawing life support system if the person is living in a persistent vegetative condition for a long period of time.

The Judiciary alone was seemed to involve in this issue. Constitutionally, it should have been in the domain of legislature to construct a law providing for such remedies and then executive to implement it. The legislature and Executive show no proclivity towards this issue, then the people have only one option to move towards court and Judiciary- the pioneer didn't disappoint them. The Supreme Court held that Passive Euthanasia can be granted; the court will set up a medical board to decide if Passive Euthanasia is needed. Supreme Court will take the responsibility for all the pros and cons of Passive Euthanasia until any legislation is passed by the Parliament.

People need to understand the difference between the two situations – Active & Passive Euthanasia:-

- First is where a doctor is administering a lethal dosage of medication to end the life of a patient.
- Secondly where a doctor withholds or withdraws a treatment from the patient because of the futility of such treatment.

The later is permissible but the former is not\(^296\).

The judicial system of India played a heroic role in legalising the Passive Euthanasia whereas the other two organs of government don't take any step in the matter related to Euthanasia.

CHAPTER-5


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CONCEPT OF LIVING WILL
A living will is a document prescribing a person’s wishes regarding the medical treatment the person would want if he was unable to share his wishes with the health care provider, also known as Advanced Medical Directive (A.M.D).297

Process:-
When a person is in a Persistent vegetative state (p.v.s.) he is unable to communicate, if he has written any advanced medical directive that must be carrying by his/her relatives. The A.M.D should be hand over to the doctor. Hospital Doctor will call a board of 5 specialists having the experience of 20 in different – different fields they are: Cardiology, Physician, Neurology, Nephrology and Psychiatry. If the board agrees with the A.M.D. then they will inform to Jurisdiction Collector about the case. The Jurisdiction Collector will set up the same board of specialist but this time they do not form hospital staff. When these, two boards agree then a certificate will pass to the doctor allowing him to perform passive euthanasia on the patient.

Guidelines by Supreme Court:-
- The living will be given by a person who is mentally stable, who is of the age of majority and he must be in a position to understand the consequences of the document.
- It must be voluntarily executed and without any coercion after having full knowledge or information.
- It shall be writing which has to be written in front of magistrate clearly stating as to when medical treatment can be withdrawn.

CHAPTER-6
LEGISLATIVE STAND
The government’s latest stand represents forward movement in the quest for a legislative framework to deal with the question whether the patients who are terminally ill and possibly beyond the scope of medical revival can be allowed to die with dignity.298

International Scenario-
The first country to legalise Euthanasia is Switzerland in the year 1942 after that Australia became the second country to legalise it in 1996, Netherland 2001, Belgium 2002, and Luxemburg 2009 respectively. The term “Euthanasia” is very controversial from the time when it was first discovered till now.

Switzerland
Passive Euthanasia is not illegal in Switzerland and can have the involvement of common persons or non-physicians. According to a report hundreds of Europeans have travelled to Zurich to end their life as they want to die with dignity. In 1998 an organisation was set up in country ‘Dignitas’ to help people who are suffering from terminal illness. They are provided with a lethal dose of barbiturates which they have to take by themselves. But Dignitas were forced to move, according to one report a person chooses to die in his car. According to Swiss law, a person can be prosecuted only if helping someone commits


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suicide out of self-interested motivation and the ‘Dignitas’299, staffs work as volunteers300.

Australia-
In Australia Euthanasia was legalised by Terminally Ill Act, 1995 in Australia’s Northern Territory on July 1996. It consists of about 1/6th of the total landmass of Australia. This service of providing euthanasia to people is promoted by Marshall Perron and several Right to life organisation opposes it. It is permitted for Passive Euthanasia under doctor’s prescription. After that similar bills were introduced in different states of Australia.

The first person on whom it is tested was Bob Dents 22 Sept. 1996. He was diagnosed with cancer in 1991 and converted to Buddhism shortly as his religion does not allow him to commit Euthanasia of any type. He writes a letter in which he confessed that he doesn't want to live anymore & his religion allows him that he can end his life so Euthanasia should be granted to him.

After his death, on his birth anniversary, 200 people marched through the streets of Sydney demanding Right to die laws. There was a patient Christian Rossiter, 49 years old who is also suffering from terminal illness, in August 2009 The Supreme Court of Western Australia give him a choice whether he wants to continue his medical treatment or to end his life; he chooses to end his life. Thus, The Court of Australia gives a right to patients who are suffering from terminal illness and their parents that what type of medical treatment they would like to choose is up to them. It can, however, be concluded that Passive Euthanasia is illegal in Australia.

Luxemburg-
The first reading of Luxemburg's Parliament was 30 out of 59 votes in favour which passed a bill legalising passive euthanasia. 20th February 2008 Parliament of Luxemburg legalise passive euthanasia, Luxemburg became the third European country after the Netherlands and Belgium, to Legalise Euthanasia this was clear after the second reading of the bill which was passed on 19th March 2009.

People of Luxemburg now have the right to end their life after receiving the approval of two doctors and a panel of experts. The above law was passed by 26 out of 30 votes301.

**Indian scenario:-**
The issue of legalisation of Euthanasia in India is very old. It can be better understood with a view of Reflection from cultural and historical heritage. It was believed that death is certain it is also mentioned in Bhagavad Geeta-

"Jatasyu hi Dhruvo mrityur dhruvain janma mrityasya cha Tasmad apariharyerthe an tam shochitum areas"

-Death is certain for one who has been born and rebirth is inevitable for one who has died. Therefore you should not lament over the Inevitable302.

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299 “Dignitas “meaning- It is a Swiss non-profit organisation which provides assisted suicide to members who are suffering from terminal illness.
300 Shodh Ganga, Euthanasia: Global and India Perspective,(15/6/18, 11:46 AM),shodhganga.inflibnet.ac.in>bitstream

301 Supra7
302 The Bhagavad Geeta, Commentary by Sri A.C. Bhaktivedanta Swami,(24/6/18, 21:48 PM),
http://www.bhagavad-geeta.us
India is a country which remained under the rule of customs some of them appear autocrat and unjustified today. Indian culture seems to create an equivocal attitude towards Euthanasia and suicide, on the one hand ending life by artificial means was believed to be the highest sin. But on the other hand mercy killing or suicidal activities which defence social welfare and values were highly promoted. There were several customs in India such as Sati, Jauhar, Saka by performing these rituals men and women can kill themselves, they perform these rituals either in pressure of society for example self-immolation of a widowed women (A widow has to end her life by the date of his husband’s death) or simply they just want to end their life. Sati was believed as the most important custom of Hinduism, women were bound to perform these customs.

There were some people who do not believe in such type of rituals and consider them as, a sin for the society. Among them, there was Raja Ram Mohan Rai who with the help of Lord William Bantick, the then Governor General of British East India Company abolished "Sati Pratha" in 1928. Even in Recent times, people believe in such customs, there was a case of Rajasthan's Sikar district where a woman performed Sati, she burned herself on the burning pyre of her husband. Many local people have supported her and said it is the duty of everyone to uphold Hindu tradition as long as one can.

Jauhar and Saka involve the voluntary death of men and women of the Rajput families, they do so to avoid capture, disdour by their enemies, it was considered as a mass suicide. There are several stories in Puranas and Vedas in which both men and women voluntarily accept death.

In the 21st century, the post-independent Indian society has made glorious achievements in the field of socio-economic development, the medical and health facilities have also made a great progress. Deadly diseases like polio, malaria etc. were largely controlled by vaccinations. Due to increase in medical facilities, the life expectancy has also increased accordingly. Life Support System and medical facilities to extend the life of a person such type of medical provisions were adopted by India even if the person is mentally dead.

**State of Maharashtra V. Maruti Shripati Dubal**

Bombay High Court held that "Every person should have the freedom to incline of his life as and when he desires and his last wish should be honoured. The above decision of Bombay High Court was overruled by Supreme Court of India in the *P. Rathinam V. Union of India* ... Where the Supreme Court held that ‘No person can enjoy his life to the extent which results in hurting him. Supreme Court rejected the plea of Euthanasia (mercy killing) and stated that no person should be granted Euthanasia on any grounds. In *Gian Kaur V. State of Punjab* ... A bench of five judges of Supreme Court overruled the P. Rathinam case and held that “Article 21 of the Constitution –Right to Life does not mean Right to die, it only means an exercise of such right up to the end of natural life. The Supreme Court also held that the Court

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304 [AIR 1844,1994 SCC (3) 394]
305 [AIR 1996 SCC (2) 648]
Article 21 does not include right to curtail the natural lifespan. The court further stated that Euthanasia is not only a legal issue but it is also a social and moral issue and every person who is in a persistent vegetative state for a long period of time demands it.

Recently, however, the Supreme Court of India on 8th March 2018 in its historic judgement **Aruna Ramchandra Shanbaug V. Union of India**\(^{306}\) legalise Passive Euthanasia which means a person can end his life with dignity with the withdrawal of life support system if he is in a persistent vegetative state or suffering from a not curing disease and whom doctors have lost hope of reviving even when the best medical facilities are being provided. The Court further stated that Active Euthanasia is still illegal in India and no person has the right to end his life by taking any kind of lethal substance it should be considered a crime under the law.

The above landmark judgement was given by Justice Gyan Sudha Mishra and Justice Markandey Katju in a PIL filed by Pinki Virani (journalist) in 2011 as a next friend of Aruna Shanbaug a nurse in a K.E.M. hospital Mumbai. On 27th of November 1973 Aruna was attacked and sexually assaulted by a ward boy Sohan Lal Valmiki, he tried to rape her but finding that she was menstruating he sodomized her. When she was 25 years old. Sohan Lal chocked her with a dog chain due to which blood and oxygen supply to her mind get cut off this leads her in a condition of vegetative state & paralysis. On the next day on 28th of November 1973 in the morning a cleaner finds her lying on the floor, she was all over in an unconscious condition. Since then she layed on the bed for 37 years. Sohan Lal Valmiki was charged with attempt of murder and robbery of Aruna’s earrings. The court granted Sohan Lal seven years of jail and Aruna was struggling with her life. Valmiki walked free after just 7 years of punishment but his savage victim has been incarcerated her body for past 37 years, the longest patient to ever stay in a hospital. She was 25 then and now she is 63, she has spent all these years brain dead, unable to speak, hear or see. There is no hope for her ever reviving, her bone fingers are brittle, her teeth have a decade, and the mashed food was given to her to keep her alive.

Pinki Virani moved to the court and seeking that force-feeding to Aruna should be stopped, the court rejected her plea as she is neither her skin nor her caretaker but appreciated Virani for her efforts. Supreme Court ruled that Aruna Shanbaug should live, according to court Euthanasia should not be granted to Shanbaug and accepted the prayer of K.E.M. Hospital staff as they want her to die with natural death, they agreed that they will take care of Shanbaug in all possible manner.

Aruna Shanbaug died on 18 May 2015 in K.E.M. hospital due to pneumonia. She receives no justice from the system, no legal justice, no medical justice. She gave India the gift Passive Euthanasia.

The Supreme Court has laid down certain provisions which should be followed in the case of Passive Euthanasia. They are:-

➢ When there is no possibility that the patient is ever reviving or come out of this stage. If there has been no change in the

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\(^{306}\) WP NO. 115 of 2009
condition of the patient at least for a few years.

- On the plea of Patients relative, caretaker, friends, doctors or staff High Court can pass an order to withdraw the patient from life support system.

- A bench of two judges must be constituted by the Chief Justice of High Court if such type of petition is filed.

- The bench communicates with the panel of three doctors i.e. a neurologist, psychiatrist and physician before granting the permission for Passive Euthanasia.

- After giving the copy of doctors panel to the family the High court should hear them.

- The High Court would issue notice a notice to parties concerned and then give its judgement\(^3\)07.

The court appreciated Pinki Virani who filed this petition, the court holds her in high esteem and the staff of K.E.M. Hospital; Mumbai for their dedication in taking care, of Aruna for so many long years they have shown what real humanity is every Indian should be proud of them.

The Court stated that Active Euthanasia is not legal in India and no person can end his life by taking the dose of lethal substance and the court further stated that the judgement of the judiciary is final until the parliament passes any law regarding Euthanasia.

### CHAPTER-7

**IS EUTHANASIA EQUIVALENT TO SUICIDE?**

The act in which a person intentionally causes one’s own death is called suicide; it is sometimes a way for people to escape from pain or suffering. We can say that active euthanasia is somewhat similar to suicide. In Active Euthanasia the person is neither in a vegetative condition nor he/she suffering from any non-curable disease, in this situation a person simply wants to end his/her life just because they don’t want to live. The Supreme Court of India on 9th March 2018 legalise Passive Euthanasia. The decision was made as a part of the verdict in the case involving Aruna Ramchandra Shaunbaug v/s Union of India.

The court further stated that active euthanasia is illegal in India & it comes under criminal activity.

Legalising Passive euthanasia is also the biggest challenge for a country like India. The judicial system of India has played the important role because no other organ of government never take this issue seriously, the only judiciary is responsible for all the pros and cons of this until & unless the parliament has passed any bill. People in our country need to understand the difference between Active and Passive Euthanasia, only then after they will get to know the difference between suicide and euthanasia.

One of the biggest myths about legalising passive euthanasia is that it will lead to pressure on the old, disabled and infirm to end their lives. It’s a fear among people we should not take it lightly, although it also has absolutely no basis. Death is not easy for those who are in a permanent vegetative state (p.v.s.) for a long period of time. For them, death is usually slow, painful and undignified. And by refusing people the

\(^3\)07 Amit Anand Choudhary, SC Guidelines on passive euthanasia, Times of India, (25/6/18, 6:59 PM), HTTP://timesofindia.indiatimes.com>
right to end their own life; we are increasing that pain and indignity to a horrifying extent. Suicide is far different from passive euthanasia; usually, people do it when they get depressed, tired of their life, they have to understand one thing suicide is not a solution to solve their problem. People who are against passive euthanasia argue that legalising euthanasia is somewhat related to the promotion of suicide directly or indirectly but this is not true. In Gian Kaur v/s State of Punjab\(^{308}\) the Supreme court held that Right to die does not include in the right to life under Article 21 and further stated that Right to live with human dignity cannot be constructed include within its ambit the right to terminate natural life by artificial means. Attempt to Suicide is an offence under Article 309 of Indian Penal Code. In a society where we place the high value on freedom and individual choice, why don't we allow people to choose the time and manner of their death? By legalising passive euthanasia in country, judiciary is helping only those who are struggling for their lives for a period of time in a vegetative state. Do we have to understand two facts very clearly first whose life is it? If a person doesn't want to live anymore or want to die with dignity why can't he just finish his life, so Euthanasia must be granted when there is a need for it. People who believe in Law of God argued that let the maker take away the life he created, their point is that euthanasia is legalised in country sure to be misused. People need to understand life is precious. People who are against euthanasia believe that we should live our life till the last breath.

\(^{308}\) Supra 3

**CHAPTER-8**

**CONCLUSION**

Euthanasia is a choice of personal matter law should not have any say in it. Every individual has the right to live with dignity then why can’t he just die with dignity. Euthanasia is a painful decision for a terminally ill patient’s family to take, it’s not because they don’t want to end the patient’s life but because they want to see him die with dignity. Again the same question arises whose life is it? Supreme Court of India on 9\(^{\text{th}}\) March 2018 legalise Passive Euthanasia. The decision was made as a part of the Merdicit in the case involving Aruna Ramchandra Shaunbaug v/s Union of India. Behind the legalising of passive euthanasia main motto of Supreme Court is that to help the people by providing them euthanasia who really need it. After all, a person's last wish should be honoured. Supreme Court's decision to legalise passive euthanasia in the country, is a very courageous one and we should all respect that.

The time had come to permit passive euthanasia in other words people who are in a permanent vegetative state (p.v.s.) have the option for their family that they should be allowed a life with dignity.

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NEED OF REFORMS IN LEGAL EDUCATION IN INDIA: GLOBALISATION AND JUDICIAL OUTLOOK

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ABSTRACT
This Article analyzes various evolutionary stages of legal education and profession in India. The thesis of this article is that though legal education in India is fundamentally strong and is potentially capable of guiding its destiny, but it is required to cope up with contemporary challenges arising from technology, globalization and evolving social values. At present the demand is to introduce internationally prominent subjects like Intellectual Property, Corporate Law, Human Rights, Alternative Dispute Resolution, Media Laws, Sports Law, and International Business Transactions. This article also argues that mere improving the quality of course contents will not improve the quality of legal education unless delivery system is also improved. It focuses on recommendations given by various committees viz., Committee on Governance of Universities, 1969, Bar Council India Trust 1974, National Convention of Legal Education, 1981, UGC Curriculum Development Report, 2001 etc. and highlights importance of Bar Council of India and Supreme Court to lay down the foundation of legal education in India. As Indian society is facing severely institutionalized problems relating to the administration of justice, the law schools in India should engage themselves in the task of conducting and supporting various research projects in law and related fields. This article further emphasis upon the importance of legal education and research in institutions for developing and establishing justice and rule of law, and focusing on this aspect along with the essence of legal education system and morals of our nation a step is taken to make the readers aware of the intricacies involved herein.

Keywords; Legal Education, Globalization, Institutional Framework, Clinical Education, Legal Research.

INTRODUCTION
"If you spiritualise the practice of law, it is not to make your profession subservient to the interests of your pursuit, as is unfortunately too often the case at present, but to your profession for the service of your country. There are instances of ancient lawyers in all countries who led a life of self-sacrifice, who devoted their brilliant legal talents entirely to the service of this country. It is not necessary for lawyers to be philosopher, secluded judges, mediating saints or devoted musicians, but they have to be active citizens in launching wars against poverty, disease, hunger, illiteracy, discrimination and a host of other evils,"
-M.K. Gandhi

The nobility of legal profession has its essence in its roots of Legal education as it is a science, which imparts to students knowledge of certain principles and provisions of law to enable them to enter
Legal Education is a broad and comprehensive concept. It includes not merely the profession which is practiced in courts, but also covers law teaching, law research, administration in different branches where law plays a prominent role and, in fact, commercial and industrial employments and all other activities which postulate and require the use of legal knowledge and skills. Consequently, the responsibility on the Legal Education and Legal Profession is very heavy, as lawyers are meant to preserve the society and act as ‘healers’ and have to contribute not only to their purse, but also to the administration of justice. Therefore, the legal education requires promoting congenial ethical environment and skills which may help in the effective administration of justice.

Law in action has given birth to the concept of justice and justice is the highest thing desired by men on earth. Undoubtedly, a sound system of the administration of justice should possess three ingredients, viz: well-planned body of laws based on wise concepts of social justice; a judicial hierarchy comprised of the Bench and the Bar, learned the law and inspired by high principles of professional conduct and existence of suitable generation to ensure fair trial. The existence of suitable generation, securing all the facets of legal profession and its ethics, is paramount and essential for the administration of justice. Learned C.L. Anand has rightly stated that the advocates share with the judges the responsibility for maintaining order and justice in the community. It is generally said that ‘law is what law does’. And, what law does is to a large extent structured and influenced by the activities of the legal profession.

**EVOLUTION OF LEGAL EDUCATION IN INDIA**

The Legal system in India is the natural outcome of its deep roots in Ancient Indian traditions. But, the legal profession as it exists today was created and developed during the British Period. The Legal Practitioners Act, 1879; India Bar Committee,1923; India Bar Councils Act,1926 have played a vital role in enforcing and consolidating the law relating to legal practitioners. But it was in 1950 that with the attainment of independence, and the consequent responsibility of developing a Constitutional Republic Government, the need was felt to evolve a stable and effective legal system. However, the beginning of reforming legal education was made with the 14th Report of Law Commission of India, 1958 that made exhaustive recommendations with regard to the

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315 Dr. KailashRai, Legal Ethics-Accountability for lawyers and Bench-bar Relation,14 (11th ed.,2013)
316 C.L. Anand, General Principles of Legal Ethics, 43 (1st ed.,1965)
317 Ibid., p.31
318 Prof. N.R. MadhavaMenon’sReflections on Legal and Judicial Education, 8(Dr. G. Mohan Gopal, 1st ed., 2009)
319 Ibid., at 102

www.supremoamicus.org 138
syllabus, teaching methodology and examination system etc. Subsequently, with the enactment of the Advocates Act, 1961, early reforms in the legal education started acquiring an authentic shape. The Act sought to integrate legal education across the country under a uniform standard to be monitored by the various State and Central Bar Councils.

RECOMMENDATIONS BY DIFFERENT COMMITTEES
Legal education in India has taken its true essence not only from enacted statutes but also from various recommendations by different committees. The Committee on Governance of Universities, 1969 was appointed by the University Grants Commission under the chairmanship of Dr. P.B. Gajendra Gadakar, which suggested following recommendations to achieve excellence in legal education:

1. The Universities must come out of the "ivory tower", not only because the intellectual should have a commitment to social problems and the cause of humanism and justice, but also knowledge should be related to social purposes, and research should contribute materially to the transformation of society.

2. In view of the rapid advances in various fields of knowledge, it is imperative that the prevailing system of education and methods of instruction should be critically reviewed from time to time.

3. To improve the quality of instruction as well as to impart it a social relevance, there should be a greater contact between higher education and the problem of life and society.

4. In the interests of higher education the number of colleges in a university should not be too large; also that as far as possible at least one university should be a City University. And further, as far as possible postgraduate education should be limited to university departments, if extended to colleges, it should be on a very carefully planned and selective basis (to ensure adequate standards).

Apart from these recommendations, efforts made through All India Seminar on Legal Education, 1972; role of Bar Council India Trust, 1974; recommendation made by Seminar on Legal Education, Bombay, 1977; National Convention on Legal Education, 1979; National Convention of Legal Education, 1981, Hyderabad etc. were truly the systematic efforts to bring excellence in the legal education in India. Further, UGC Curriculum Development Report, 2001 has contributed immense help by recommending numerous suggestions for renewing and updating the curriculum in legal schools.

OBJECT AND SCOPE OF LEGAL EDUCATION
Legal education is a sine-qua-non for the development of rule of law and a sustainable socio-democratic order. It is essentially a multi-disciplined as well as a multi-purpose education which can develop the human resources and idealism needed to strengthen the legal system. Legal education aims to answer different theoretical and practical questions related to legal profession viz.; how the concept of "law" emerged and how it

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developed?; What will be its future requirements?; what are the various role of judiciary, executive and legislature to strengthen legal profession?; what are the substantial and procedure laws? etc.

As per the recommendations made by National Knowledge Commission, 2008, the vision of legal education is to provide and safeguard justice-oriented education, paramount to the realization of values enshrined in the Constitution of India. In keeping with this vision, legal education must aim at preparing legal professionals who will play decisive leadership roles, not only as advocates practicing in courts, but also as academics, legislators, judges, policymakers, public officials, civil society activists as well as legal counsel in the private sector, maintaining the highest standards of professional ethics and a spirit of public service. The Commission has further suggested that legal education should also prepare professionals equipped to meet the new challenges and dimensions of internationalization, where the nature and organization of law and legal practice are undergoing a paradigm shift.

IMPORTANCE OF PROFESSIONAL ETHICS IN LEGAL EDUCATION

Lawyers constitute a potential force to protect the rights and interests of individuals in society\textsuperscript{321} which has its source from the Constitution of India. Therefore, it is instructive to make an assessment of the formal code of ethics, which the Indian Legal Profession has adopted to realize the high moral principles laid down by the Indian Constitution.\textsuperscript{322} Since the duty of a lawyer is to assist the Court in the administration of justice, the practice of law has a public utility flavor and, therefore, he must strictly and scrupulously abide by the code of conduct making it the noble profession and not indulge in any activity which may tend to lower the image of the profession in society.\textsuperscript{323} To maintain the honour, dignity and prestige of the law profession, there are certain kinds of ethical code which are required to be followed by lawyers while maintaining their relation with the society. Unfortunately, there are plethora of cases\textsuperscript{324} delineating ‘Professional misconduct’ on the part of lawyers directly suggesting failure of law schools in inculcating legal ethics among students and indicating degradation of the legal education system. The main ethical responsibility of law schools, of course, is neither to students nor to the profession, it is to the citizens who depend upon law, and therefore derivatively upon lawyers, to provide a fair, coherent, and efficient framework within which to live their lives.\textsuperscript{325}

Hence, law school’s failure to study and teach about the profession is an

\begin{itemize}
\item \textsuperscript{321}Dr. V.N. Paranjape, Legal Education Research Methodology, 61 (1\textsuperscript{st} ed., 2011)
\item \textsuperscript{322}Prof. N.R. MadhavaMenon’s Reflections on Legal and Judicial Education, 9 (Dr. G. Mohan Gopal, 1\textsuperscript{st} ed., 2009)
\item \textsuperscript{323}India Council of Legal Aid and Advice v. Bar Council of India & Anr., (1995) 1 SCC 732
\end{itemize}

www.supremoamicus.org

140
Unfortuitously, the range of professional misconduct and misbehavior is not only confined to legal practitioners but has extended to judges also. Succinctly, it is necessary to extend value education in the agenda of higher education to moral and ethical practices in individual and collective behavior.

Therefore, the legal education must aim at preparing legal professionals who will play decisive leadership role, not only as advocate practicing in courts but also as academicians, legislators, judges, judicial officers, policy maker, public officials, civil society activists as well as legal counsels in the private sector, in order to maintain the highest standard of professional ethics.

PRESENT LEGAL EDUCATION SYSTEM AND INTERNATIONAL CHALLENGES

Today, Legal Education in India is at the cross-road of its destiny. Legal Education in a sense has become mass education rather than a specialized training. On the flip side, the emergence of new economy—globalization, privatization and deregulation have thrown up new challenges to legal system. Presently, there are revolutionary changes in information, communication and transportation technologies which require corresponding changes in the legal system. The advent of economic liberalization and globalization under the World Trade Organization has brought new challenges to the system of delivery of legal services. In addition to this, cyber-crimes are growing fast into a menace. Globally, crimes like Cyber Defamation, Data Dilding, Identity Theft, Salami Attack, Social engineering etc. have emerged as a great threat to Cyber Laws. Moreover, rapid advances in science and technology has posed considerable challenges in delineating the contours of the “Right to Privacy”. Therefore, it is expeditious to impart quality legal education as well as global legal education with the help of proper advancements in information technology and telecommunication for our law students.

Also, it is pertinent to point out that the Law Commission of India, XIV (1) Report 35 notes that India legal Education had failed to promote the growth of juristic thought. Our Legal Education system has disappointedly failed to produce internationally known expounders of jurisprudence and legal studies. The amazing fact is that we have so many able practitioners and well qualified judges, rather than there is a scarcity of gifted legal scholars and researchers. The changes in Legal Education and Legal Profession have been long over-due. There have been voices sometimes sharp and sometimes subdued for such changes. However, SAARCLAW has strived to meet these changes by suggesting certain proposition in the field of law reforms, enforcements and justice.

326 S. Gupta, History of Legal Education, 3(1) ed., 2006
327 In re: Justice C.S. Karnan, Suo Moto Contempt Petition (C) No. 1/2017 (Supreme Court, 09/05/2017)
329 State of Maharashtra vs Manubhai Pragaji Vashi & Ors, 1995 SCC (5) 730
administration from time to time at international level. Hence, the need for effective and well-established legal education is absolutely necessary to meet the emerging requirements of present scenario and to tackle the ever-growing challenges. The Legal education should be able to meet the eves growing demands of the society and should be thoroughly equipped to cater to the complexities of different situations.\(^{330}\) Also, in the globalized world, the role of lawyers has evolved from being traditionally a legal advisor to that of active business advisor and negotiator. This evolution has challenged the entire legal education system and now the reform has become an urgent need.

**ROLE OF BAR COUNCIL OF INDIA IN LEGAL EDUCATION**

The Bar Council of India has indeed played a very important role in the development of Legal Education in India as it is a pioneer for structuring the Legal Education system in India as it exists today. Bar Council of India has been conferred extensive power for promotion and improvement of the Legal Profession. As the Apex Professional Body \(^{331}\), the Bar Council of India is concerned with the standards of the Legal Profession and the equipment of those who seek entry into that Profession.\(^{332}\) **Section-49** **sub-section (1) clause (d)** of the Advocates Act, 1961 provides that the Bar Council of India may make rules for discharging its functions under this Act, and, in particular, such rules may prescribe the standards of legal education to be observed by Universities in India and the inspection of universities for that purpose. **Section-7 sub-section(e)** of the Advocate Act, 1961 elucidates that the functions of Bar Council of India shall be to promote and safeguard law reform. Further, under **Section- 7 sub-section (h)** of the Advocate Act, 1961, the Bar Council of India is empowered, amongst others, “to promote legal education and to lay down standards of such education” in consultation with the Universities in India imparting such education and the State Bar Councils. It is under the aegis of these sections that the Bar Council of India Rules (1975), Bar Council of India Training Rule (1998) and Bar Council of India Rules on Legal Education (2008) has been enacted. The Study of these rules reveals that the Council is quite conscious to make up law study practical oriented and effective to enable the students to find answers to the legal squabbles that they encounter in their fast-changing problem-oriented society.

These powers provided to the Bar Council of India have been enlarged and elongated by necessary implications from time to time to meet the necessary requirements of the legal system. The Bar Councils have been created at the state level as well as the central level not only to protect the rights, interests, and privileges of its members but also to protect the litigating public by ensuring that high and noble traditions are maintained so that the purity and dignity of the profession are not jeopardized.\(^{333}\)

\(^{330}\) State of Maharashtra v. Manubhai Pragaji Vashi & Ors., 1995 SCC (5) 730

\(^{331}\) Sec-4, Advocates Act, 1961

\(^{332}\) Bar Council of India v. Board of Management, Dayanand College of Law and Ors. (2007) 2 SCC 202

\(^{333}\) India Council of Legal Aid and Advice v. Bar Council of India & Anr. (1995) 1 SCC 732
ROLE OF UNIVERSITY GRANT COMMISSION IN LEGAL EDUCATION

The University Grants Commission Act, 1956 is an Act of Parliament which states that it shall be the general duty of the commission to take, in consultation with the universities or other bodies concerned, all such steps as it may think fit for promotion and coordination of university education and for the determination and maintenance of standards of teaching, examination and research in university and under section 12(d) the UGC may recommend to any university, the measures necessary for the improvement of the university education and advice the university upon the action to be taken for the purpose of implementing such recommendations. The UGC is also possessed of statutory powers to co-ordinate standards of higher education including law. In addition, each university has its own autonomy in matters which vitally affect the improvement of legal education, for example, size of enrolment, the nature of examination system, policies concerning affiliation of the college, the nature of planning for the development of law, provision of law libraries etc.

Referring to the role of the UGC, the Supreme Court said in Osmania University Teachers’ case the UGC has therefore greater role to play in shaping the academic life of the country. It shall not falter or fail in its duty to maintain a high standard in the universities.

LEGAL EDUCATION IN INDIA: JUDICIAL OUTLOOK

The legal system and education in India have always remained under the scrutiny of the Apex Court. The Supreme Court of India in its landmark judgment such as Deepak Sibal v Punjab Univeristy, has held that the study of law should be encouraged as far as possible without any unreasonable intervention. Further, in Bar Council of India v Aparna Basu Mallick the apex court held that if the acquisition of a degree in law is essential for being qualified to be admitted on a state roll, it is obvious that the Bar Council of India must have the authority to prescribe the standards of legal education to be observed by universities in the country. Conditions of standard laid down by the Bar Council of India as to attendance in the law classes, lectures, tutorials, moot courts, etc. must be fulfilled before enrolment as an advocate.

With reference to part-time legal education by an employee and thereafter availing an opportunity for enrolling himself as an advocate the Supreme Court of India in Dr. Haniraj L. Chulani v Bar Council of Maharashtra, observed that the Fundamental Purpose of Education is the same at all times and all places. It is to transfigure the human personality into a pattern of perfection through a systematic process, the development of the body, the environment of the mind, the sublimation of the emotions and the illumination of the spirit. Education is a preparation for a living and for life here and hereafter. Lastly, the court observed that part-time legal education of an employee is — “For a living and for

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334 Meenu Paul, "Legal Profession - One of the Objectives of Legal Education and the Role of Bar Councils in Legal Education in India in 21st Century", 312-313.
335 AIR 1987 SC 203.
336 AIR 1989 SC 493
337 1994 AIR 1334
338 AIR 1996 SC 1708
life, here and hereafter”, and thus its denial is quite unjustified.

In Vandana Kandari v. University of Delhi, the Delhi High Court quoted the remark of eminent jurist Nani Palkhivala that lawyers “education is a process extending over a whole career. It starts with the academic stage, extends through training in courts and continues through a mix of self-education and learning from peers for long as a person is involved in legal work. The stress is on the importance of the capacity to learn, which must be developed at the earliest possible stage i.e., the law school.” Thus, it is this vital capacity, which marks the distinction between getting a degree and having an education.

The Hon’ble Supreme Court has rightly observed in State of Maharashtra vs Manubhai Pragaji Vashi & Ors, The explosion in population, the vast changes brought about by scientific, technological and other developments and the all-round enlarged field of human activity reflected in modern society, and the consequent increase in litigation in courts and other forums demand that the service of competent persons with expertise in law is required in many stages and at different forums or levels and should be made available. The legal education should be able to meet the ever growing demands of the society and should be thoroughly equipped to cater to the complexities of the different situations. Specialisation in different branches of the law is necessary. The requirement is of such a great dimension, that sizeable or vast number of dedicated persons should be properly trained in different branches of law, every year by providing or rendering competent and proper legal education. This is possible only if adequate number of law colleges with proper infrastructure including expertise law teachers and staff are established to deal with the situation in an appropriate manner.”

SIGNIFICANCE AND NEED OF RESEARCH IN LEGAL PROFESSION

Law is a dynamic discipline and it is essential that laws, principles and their interpretations develop with time and confront the challenges posed by social, economic and political transformations in the country. The law schools in India need to establish a sound institutional foundation on the basis of which the intellectual and scholarly abilities of its legal scholars can be actively promoted. Thus, the role of law schools is overarching in forgoing these understandings as it has been aptly said: “Law is what the lawyers are, and the law and lawyers are what the law schools make them”.

Research can contribute significantly towards improvement in teaching and, more importantly, addressing numerous challenges relating to law and justice. Research in law should pave way for developing greater clarity in the law and its interpretation. But ignorance to promote researchers in law and absence of due emphasis on research and publications in existing law schools have led to the degradation in the intellectual intensity of

339170 (2010) DLT
3401995 SCC (5) 730

www.supremoamicus.org
144
environment of the legal education system. Therefore, Law schools in India need to go on a long way in developing an institutional culture that promotes and encourages research that has the capacity to foster many positive changes in society at large.\textsuperscript{342} And thereby help India get transformed from being only a consumer of available legal knowledge to being a leading producer in the world of new legal knowledge and ideas. Law schools or legal institutions are required to cultivate greater opportunities for students as well as faculty to undertake original and extensive research on contemporary issues relating to law and justice. A proper research culture enabling scholars to identify issues that serve as an impediment to the efficient and effective administration of justice is necessary to promote. This is possible through a comprehensive examination of the legal framework and justice delivery mechanisms in India.

The emerging concept of lawyering and legal education would necessarily demand from learners and practitioners to know not only the local legal normative regimes but also to acquire knowledge of different system with comparative perspectives and this is all possible with a strong and extensive research mechanism in law schools.

**CONCLUSION AND SUGGESTIONS**

Legal education in the country is required to undergo for a complete transformation so that the Legal Education and Profession can translate the ideals enshrined in the Indian Constitution into reality and thereby achieve Justice—Social, Economic and Political. Any negligence towards reform in the legal profession can cause hardship and be detrimental to the general public who will be deprived of standard legal assistance.

Standard of Legal Education is a yardstick to measure the Rule of Law which is the foundation of modern democracy\textsuperscript{343}. The status of the legal profession is directly linked with the legal education process. It is high time that the law students understand that there is no royal road to education and education teaches only those in attendance. In our Country, admittedly, a social duty is cast upon the Legal Profession to show the people beacon light by their conduct and actions. Therefore in all professional functions, an advocate should be diligent and should conform to the requirements of the law by which an advocate plays a vital role in the preservation of society and the justice system.\textsuperscript{345}

Relying upon the Report of Knowledge commission (2008), one can conclude that the vision of Legal education is to provide justice-oriented education essential to the realization of the values enshrined in the Constitution of India. In keeping with this vision, the legal education must endeavor to prepare legal professionals who will play influential leadership roles in various fields of the Legal Profession. Legal education should also prepare professionals equipped to meet the new challenges and dimensions

\textsuperscript{342} Swati Deva, Law and inequalities 298 ( 1st ed. 2010)

\textsuperscript{343} VandanaKandari v. University of Delhi 170 (2010) DLT

\textsuperscript{344} R.D. Saxena v. Balram Prasad Sharma, (2000) 7 SCC 264

\textsuperscript{345} O.P. Sharma v. High Court of Punjab, AIR 2012 SC 2101
of internationalization where the nature and organization of law and legal practice are undergoing a paradigm shift. Therefore, the Objective of the Legal education should be to cultivate and develop skills required by the person acting as a lawyer, judge or researcher.

Accordingly, it is suggested that Legal education in India should adhere to ever-growing demands of the society in order to cater to the complexities of the different situations. However, no educational scheme particularly in our present context can be perfect or can last for all times. The process has to continue by trial and error. The task of reform should therefore encompass changes not only of curricular and pedagogic arrangements but also the regulatory structures, the pattern of recruitment, funding and management of law teaching Institution. Hence, the situation demands consideration of alternative strategies at appropriate levels.

Moreover, the next phase of reform in legal education will have to think of the world of Globalization and the role that law will be playing in it and plan a programme of action which can enable the legal system to fulfill the unfinished tasks in the constitutional agenda of Justice, Social, Political and Economic. At last, it can be stated that legal education in India is solid in its fundamentals and is potentially capable of guiding its destiny if it can cope with contemporary challenges arising from technology, globalization, and erosion of values.

With the purpose to confer upon present legal education system the ability to meet changing demands of legal profession both at domestic as well as international level, there are some suggestions as hereinaftermentioned-

1. As recommended by the Law Commission of India\textsuperscript{346}, the regulatory mechanism of Bar Council of India and the University Grants Commission in the area of legal education should be harmonized. In addition to the prescriptions from regulatory bodies, the universities and also the educational institutions should be given the required amount of freedom in the selection of teaching methodologies and syllabus suited to the local needs as well as international needs.

Legal education should impart conventional and indigenous skills on negotiation, conciliation, mediation and arbitration as alternative strategies of dispute settlement.

3. Clinical legal education\textsuperscript{347} should be introduced to make education socially relevant, intellectually challenging and professionally competent. Clinical work enables the law student to learn by doing himself the practice of law including the techniques of interviewing, collection of facts, critical decision-making, preparation of legal documents, appreciation of evidence, examination and cross-examination of witnesses in real life situation etc. Consequently, it helps students to develop the perceptions, attitudes and skills as perceptual, instrumental and operational aspects of the

\textsuperscript{346} 184\textsuperscript{th} Law Commission Report, 2002 available at lawcommissionofindia.nic.in/reports/184threport-PartI.pdf, last seen on 14/04/2018

\textsuperscript{347} Report of Bar Council India Trust, 1974
lawyering process and the legal system are all present in clinical work.  

4. Law teaching must be interwoven with related contemporary issues including international and comparative law perspectives. The curriculum and syllabi must be based in a multidisciplinary body of social science and scientific knowledge. Further, the end semester examination should be problem-oriented, combining theoretical and problem-oriented approaches rather than merely test memory.

5. Mere improving the quality of course contents will not improve the quality of legal education unless delivery system is also improved. Therefore, a series of conferences and workshops on teaching techniques must be organized as regular feature the efforts should be made by U.G.C. as well as Bar Council of India and State Bar Councils.

6. Universities and other Controlling Authorities shall endeavor to promote research and analysis among law students. It is important that, whatever subjects may be offered, the students should acquire the powers of clear thinking, accurate analysis, and cogent expression.

7. As there are revolutionary changes in information, communication and transportation technologies, many highly specialized areas of law like intellectual property, corporate law, human rights, alternative dispute resolution, media laws, sports law, international business transactions, are desideratum to introduce in legal schools.

8. Philosophical studies should be promoted to logically cultivate the principles of jurisprudence and juristic thoughts among students.

9. A comparative study of different countries on legal education system must be provided in law schools to groom the law students into specialists in varied foreign legal systems and use their services for a variety of purposes.

In the light of the changed scenario in the last fifty years, the needs of globalization after 1991, and the gaps and deficiencies in the existing system as referred to above which have to be filed up, it is clear that present legal education mechanism is required to be enhanced to meet the new challenges both domestically and internationally. It is, therefore, necessary to constitute and establish a new mechanism with a vision both of social and international goals, to deal with all aspects of legal education. Further, there is a need for original and path-breaking legal research to create new legal knowledge and ideas that will help meet these challenges in a manner responsive to the needs of the country and the ideals and goals of our Constitution.

To sum up, our legal education system needs a lot of improvement and reformation over its traditional methods in order to meet the needs and demands of the present day society. It is pre-eminently a time for deep.

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349 Recommendation by National Knowledge Commission 2008 available at https://nationalknowledgecommission.wordpress.com /2008/11/, last seen on 14/04/2018
350 Sec-7(1) , (h) and Sec.-6(1)(e), The Advocates Act, 1961
351 Report of University Education Commission (1949), Vol-I, Ch. VII
national introspection where we must be self-critical enough to meet the truth face to face and let not the soul of law get sacrificed which is continuously striving to achieve a better status and be held in high regard with due respect and civility among its aspirants and the player of the entire legal field.

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CONCEPT OF NATURAL JUSTICE AND DISCRETIONARY POWER OF SUPREME COURT JUDGES

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ABSTRACT

“The universal and absolute law is that natural justice which cannot be written down, but which appeals to the heart of all.”
-Victor Cousin

‘Nemo iudex in causa sua’ is indispensible in the field of law. India being a democratic country protects the socio-economic justice. The concept natural justice helps to prevent the miscarriage of justice. Supreme Court judges and their judgments ranks first, it is majorly seen that the most cases pending before SC are of national importance. The discretionary power which is imposed on the judges should be safeguarded and not misused. In present era, it is a need for transparency in work. This paper deals with SC judges in particular; the SC judges should invoke the natural justice and should not abuse their discretionary power while delivering judgments. Arbitrariness leads to violation of the concept of Rule of law, where it says about the supremacy of law, equality before law and predominance of legal spirit. Hence this paper strives to explain that there is a need for transparency in allocation of work for SC Judges along with concept of natural justice and the discretionary power of SC Judges at large.

Keywords: Natural justice, Supreme Court, judges, discretionary power, transparency.

INTRODUCTION:

“A lack of transparency results in distrust and a deep sense of insecurity”
-Dalai Lama.

Rationale and aim of the study:

India being a democratic country, not only looks into the welfare of the people but also ensures the socio-economic justice, which could be expressly seen through the preamble of Indian constitution. This impliedly brings out the concept of “Natural Justice”. Violating the principle of Natural justice also violates Article.14 of Indian constitution. Being a concept of administrative law, is neither fixed nor prescribed in any code. Natural Justice being a public law, it should be a weapon to secure justice to the people. Its major object is not only to secure justice but also prevent miscarriage of justice. Judiciary being a distinct and most important organ of the government seeks to protect justice and it is given in the hands of judges. Supreme Court judges and their judgments ranks first, it is majorly seen that the most cases pending before SC are of national importance. It is clearly known fact that the judges have discretionary power while upholding judgments, which could be also termed as “Judicial discretion”. The discretionary

353 14. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth (constitution of India, 1949).
power of the judges was recognized through the doctrine of *Separation of power* as judicial independence. Sometimes, courts may abuse its discretionary power, which results in hindering the concept of *Rule of Law*. The contemporary issue that is popping out is about the allocation of work for the Supreme Court judges. As the world develops, as people literacy rate increases, they start questioning; some encourage some discourage certain judgments. In today’s era, it is a need for transparency in work. Hence this paper strives to explain that there is a need for transparency in allocation of work for SC judges along with concept of natural justice and the discretionary power of SC judges.

**Term “Discretionary power”:**

- **Black’s Law dictionary**: Discretionary power is a term that is given to the power to do or not to do a thing.

- **General definition**: Discretionary means it’s up to you to decide.

- **Chief Justice Coke**: Discretion is a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colorable glosses and pretences, and not to do according to their wills and private affections and opinions.

  - **Oxford definition**: It is the freedom to decide what should be done in a particular situation.

**NATURAL JUSTICE- AN OVERVIEW:**

According to Justice Megarry, “Justice that is simple and elementary, as distinct from justice that is complex, sophisticates and technical”. Natural justice is a close relationship between the common law and moral principles and it has an impressive ancestry, it is also known as substantial justice. The rules of natural justice have been cherished through ages. It applies reasonableness, good faith, justice, equity and good conscience to control the public authorities’ activities. Hence, the principle of natural justice must be considered while delivering judgments. *Wade* states that, “the presumption is, Natural justice will always apply, however silent about it the statue may be”. Article 14 and 21 embodies the principle of natural justice for the fair proceedings. Two major principles must be considered when it comes to natural justice, one is “*nemo debet esse judex in propria causa*” and the other one is ‘*Audi alteram partem***.

1. **Nemo debet esse judex in propria causa**: It means, no one can be a judge of his own cause, or no man can act as both at the one and the same time or it should be without bias.
2. **Audi alteram partem**: This means, hear from both side, or no man should be condemned unheard, or

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355 Lectures on administrative law by C.K.Takwani.
356 SC- Supreme Court (hereafter would be referred as SC).
358 http://www.vocabulary.com
359 www.lawyersclubindia.com
360 http://en.oxforddictionaries.com
361 Article 14 & 21 of Indian constitution.
362 Lectures on administrative law, by C.K.Takwani.
there must be fairness on the side of deciding authority.\textsuperscript{363} The major concept here is, the judge should be free from bias and he himself cannot be a judge of his own cause. The judge especially SC should be free from bias and they should not interfere their personal issues and involve it in the decision making.

**Does natural justice provides modus operandi to arbitrariness vis-à-vis work allocation for Supreme Court judges and their discretionary power?**

Discretionary power shall be based on fairness while delivering decisions. This is exclusively provided for the judges in India when we look towards the SC judges, they should use this power more delicately and carefully while providing judgments. Under separation of powers, the concept of judicial independence was introduced, which in turn brought the concept of judicial discretion. The Natural justice should be in such a manner, that it should prevent arbitrariness. Since this paper deals with SC judges in particular, the SC judges should invoke the natural justice and should not abuse their discretionary power while deciding cases. Arbitrariness leads to violation of the concept of Rule of law, where it says about the supremacy of law, equality before law and predominance of legal spirit. On 12th January 2018, the SC Judges, held a press conference in order to register their differences with CJI \textsuperscript{364} in court administrative matters. One of the issues is “master of the roster”. It was said that, CJI has the discretionary power to allocate cases to the benches. It was an immediate step taken after the medical college corruption case, involving the conspiracy to bribe. It was also contended that, the allocation of cases was done by means of preference and without any rational basis for such assignment.\textsuperscript{365}

The people in the country has the right to information, people should be aware of what is happening in the judiciary, hence there is a need for transparency in order to prevent the miscarriage of justice, but this could be attained only by incorporating the Natural justice principle in it.

**EXIGENCY OF TRANSPARENCY IN WORK ALLOCATION FOR SC JUDGES FOR IT UNPRECEDENTED MOVE:**

Article.142 deals about the Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.\textsuperscript{366}

The purpose of this article is that, SC should not depend on the executive for the enforcement of orders, if it depends, and then there would a violation of independence of judiciary which is the basic structure of the constitution. In *Prem Chand Garg v. Excise Commr., U.P.*, Allahabad held that, "An order which


\textsuperscript{364} Chief Justice of India.

\textsuperscript{365} www.livelaw.in

\textsuperscript{366} Constitution of India, 1949.
this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory. Sometimes leads to arbitrariness and the discretion power being an inherent power of SC Judges, are to be protected and abuse of such discretion power would lead to arbitrariness and sometimes leads to ultra vires. Such arbitrariness could be found only when the legal system is transparent in nature.

The recent press conference, which was headed by Justice Jasti Chelameswar, M.B.Lokur, Ranjan Gogoi, kurian Joseph. They wrote a letter to CJI, one of the issues that were raised was about the assignment of matters. The letter also contained that, “not recognition of any superior authority, legal or factual of the chief justice over his colleagues”.

Complete justice should be according to rule of law which is a basic feature of the Constitution vide Kesavananda Bharati v. State of Kerala.

Section.151- Saving of inherent powers of court, “Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”. In the very recent verdict of K.K. Velusamy v. N. Palanisamy, the Hon'ble Supreme Court upheld that Section. 151 of the Code recognizes the discretionary power inherited by every court as a necessary corollary for rendering justice in accordance with law, to do what is ‘right’ and undo what is ‘wrong’.

Hence the power which is given to the court and the discretionary power being an inherited power of SC Judges are to be protected and abuse of such discretionary power would lead to arbitrariness and arbitrariness could be found only when the legal system is transparent in nature.

It also held that, the SC in the case, State of U.P v. Pyaksh chand & others argue that Hon'ble Chief Justice being the master of roster can even transfer part heard cases from one Bench to another Bench. They also referred to the judgment of Hon'ble Apex Court rendered in the case of Divine Retreat Centre Vs. State of Kerala and others argued that the constitution of Benches and allocation of work to Judges/Benches is the sole prerogative of Hon'ble Chief Justice and the Judges cannot pick and choose any case pending in High Court and assigned the same to themselves for disposal without appropriate orders of Hon'ble Chief Justice.

The press conference letter incorporated the case of R.P.Luthra v. Union of India, where, Justice lalit had issued a notice to the centre for the delay in finalizing the memorandum of procedure for appointment of judges on SC & HC, any issue with regard to the memorandum of procedure should be discussed by the Chief judges’

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368 The code of civil procedure, 1908.
conference and by full court and should be dealt with by none other than the constitutional bench and they also cited \textit{Supreme Court advocate on record association and Anr v. union of India}\footnote{373} case, and said that, there was no occasion for the bench to make any observation with regard to finalization of memorandum of procedure.\footnote{374}

From this press conference, we can find that, there is a need for transparency in work allocation of SC judges and work allocation in SC should be maintained properly and the allocation shall be based on hierarchy and without arbitrariness in order to minimize the pending cases. One could say that the discretionary power is abused for the personal sake then this could lead to arbitrariness and it can be prevented only through the mode of transparency, when transparency prevails in work places, an individual would fear to take any action against Justice and in return the Natural Justice could be upheld and protected.

\textbf{CONCLUSION:}  
Salmond says, “\textit{matter of right and judicial discretion are not the subject of evidence and demonstration, but of argument and are submitted to the reason and conscience of the court- in determining the questions of Judicial discretion it seeks to discover the right or Justice of the matter}”. The essence of discretionary power can be tasted only for providing moral judgments, with certain restrictions and limitation keeping in mind. When the court uses the \textit{Wednesbury principle of reasonableness} to check whether the discretion results in arbitrariness or not, it should also check within itself at first. The citizen of the country has the right to know information; it can be obtained through right to information Act, 2005 in order to increase the level of transparency. Transparency in courts helps in appointment of judges, will reduce the pending cases as the judges or judiciary have to give valid reasons, it would help for recruitment of posts, bribery, corruption would reduce in judiciary etc., but these could be achieved only when the Judges use their discretionary power under limit, by keeping in mind the concept of Natural justice. Since, Supreme Court judges ranks the highest, they should play a significant role in such a way, to protect the Natural justice. This could be obtained only when the Judiciary attains transparency. Work allocation in SC should be maintained properly and the allocation shall be based on hierarchy and without arbitrariness in order to minimize the pending cases. Hence, this paper had tried to learn and explore the need for transparency in judiciary in particular to the allocation of work for SC judges.

\textbf{SUGGESTIONS:}  
The allocation of work for the Supreme Court judges can be maintained by means of forming a committee, headed by Chief Judges of India. By creating such committee, the complications or issues regarding the allocation of work can be reduced.

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RECENT DEVELOPMENTS OF ADMIRALITY LAW IN INDIA

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Abstract:
In India admiralty law has been undeveloped for years, following the legislations enacted during British rule, the current developments in technology and globalisation, exposing India to more sea trade caused law makers to enact a recent legislation with regard to admiralty issues. While analysing the previous legislations, the drawbacks and the provisions which lacked clarity, the grounds which needed to be addressed are seen answered by this legislation. Though some of the major problem are given direction to there are still some provisions in the new legislation which give scope to judicial interpretation and some questions regarding the same do arise. Here we will understand the previous and current legislations while analysing some of the possible questions and problems that could arise with regard to the same.

Keywords:
Admiralty, Legislations, Maritime lien, Maritime claim

Introduction:
It is seen that in today’s world that trade and commerce has developed, there are different ways of trade from air route or even sea route. For a long time the seas have been not just a way of travel but also a way of business for many. It was noticed that through time several sea routes have become an attraction to traders as their demand and business have grown in places outside their place of domicile. Though there was an increase of business and profit as a result of this, there was also a risk that had to be taken. The possible problems that could occur on international waters and civil wrongs that could be committed on international waters were of a concern to international businessmen. And hence laws concerning sea trade were to be enacted in order to protect the traders and their goods. It is seen that different countries there were different laws regarding the sea and so there were certain international conventions that are guiding principles which are used by domestic law making bodies in making legislation with regard to the same.

It was then admiralty law or maritime law which is the law that is used to govern matters of vessels on the high seas. This law finds its way to any country which has a coastline, seeing that a lot of countries use sea trade as a way of economic gain and development for the country. Eventually with the development of admiralty law it was considered specifically as to what type of matters a particular could consider with relation to wrongs committed on the high seas. Though there is separate jurisdiction for civil and criminal matters what types of wrongs would be considered and till what extent can a particular court derive its jurisdiction. It was seen in India that these questions did arise as well, though there was no proper legislation addressing such issues for years the courts had used its preceding judgements, legislations which were enacted before independence and international
conventions to guide their decisions. Yet now there is a particular legislation with regard to admiralty law which clears most of the problems and questions which had previously risen. Also there are certain new guidelines as to how certain matters are to be taken care of and also the jurisdiction of the high courts with regard to admiralty matters.

Understanding Admiralty law:
Before looking into the history and development of admiralty law it is important to understand the reason as to why admiralty law has to have a different interpretation. To begin the admiralty law is a connection between domestic law and international law mainly seen as the way domestic laws are binding on international vessels. The treatment of international vessels and the treatment of such goods on international waters are very important for both the businessmen and the country in which the said goods are going to. Though the domestic countries can make their own laws and the vessels entering the said country is binding of such, many times in the internationally accepted principles that shape these domestic laws. The international law concerned here is private international law, the relationship between international private parties. It is seen that a lot of things are taken into consideration when enacting legislation with regard to maritime matters, mainly that of jurisdictions. Jurisdiction is mainly considered, sometimes difficult to determine because there are no proper territorial borders on the sea and so most of the time it is considered that the territory is within certain nautical into the ocean floor or when the said vessel is docked in a particular port. With regard to India, the development of its legislations are important in understanding admiralty jurisdictions and the reasons for such changes made.

Historical Development of Admiralty law:
In India, a country which has a huge coastline gives opportunity for traders and businessmen to export and import good through such international water bodies. It is also observed that through such business practices that certain disputes do arise regarding the same. In the due course of business it is seen that events such as breach of contract, negligence and so on, do occur. And when such incidents arise on international waters it is considered that in order to solve such matters countries can take jurisdiction over the same. Also in cases where the particular vessel has been docked in the territory where the cause of action arises, and the owner of the vessel has no place of domicile in the country or if the vessel is not registered under the domestic legislation.

Admiralty law is the domestic law which governs foreign vessels in domestic territory and private international law, which governs the relationship between private international parties. Admiralty law gives the domestic counties the right to decide certain disputes that has taken place within a particular area from the coastline of the country. It governs aspects of commercial aspects, navigation and so on. It is seen that there are some international guidelines with regard to admiralty law to govern the counties which have coastlines. Though these conventions and not binding they are guiding principles for domestic states to make domestic laws while taking into consideration international standards. Such
matter are to be looked into and dealt with properly, seeing its relationship between domestic and international law.

The history of admiralty law can be traced to the Rhodes Island where the Rhodes sea law was seen, this was considered to be the first proper law with regard to sea matters which was found in 900 BC. It was this law which set out the basic treatment of traders and ship on the high seas, back then laws like goods must be thrown overboard as a safety measures and protection of another’s property, compensation and so on. It was then seen in the Mediterranean countries that such law were accepted as a result of the growth if sea trade. With the development of international sea routes, countries were forced to change their laws and enact certain legislations with regard to sea laws as a result of increase in trade and commerce. These laws were hence to protect the trader and the vessel and to ensure proper treatment of the same.

Historical development of Admiralty law in India:
The Indian admiralty law was influenced by England finding its history, first seen by Edward III that looked into laws regarding the sea, mainly with regard to piracy and civil matters were settled. It was through time that the growth of commercial activities on the sea and the expansion of the British Empire acquiring several coastland regions, the need for proper legislations was seen.

Though there were important legislations enacted in England it was only after the year 1862 that such legislations were considered when dealing with maritime matters in India, these were the Admiralty Court Act, 1840 and Admiralty Court Act, 1861. Yet it was seen that India needed a separate legislation when dealing its own admiralty matters and hence the Colonial Courts of Admiralty Act, 1890 and the Colonial Courts of Admiralty Act (India), 1891 was enacted by the British government in India to regulate the maritime affairs of the county.

It was under this legislation that gave the admiralty jurisdiction to three of the courts in India i.e. the Bombay, Madras and Calcutta high courts that had been given unlimited civil jurisdiction under Section 2 of this legislation. Also the previous legislation of 1860 was considered when interpreting the court’s jurisdiction i.e. Section 35 which gives the court the jurisdiction to try matters by proceeding in rem or in personam. Also under the Letter Patent Act, which provided certain provisions with regard to admiralty jurisdiction of the three High Courts i.e. Bombay, Calcutta and Madras. It was seen under this legislation that there was no proper guidelines with regard to several matters in maritime law, it was through time and courts interpretation of maritime matters that there was clarity with regard to certain matters in maritime law. It was seen by the courts that several international conventions

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376 Historical survey of maritime laws in India and Iraq http://shodhganga.inflibnet.ac.in/bitstream/10603/73384/14_chapter%206.pdf
should be taken into consideration when dealing with maritime matters.

Before looking at the international statutes it is seen under several India statutes and several judgments, how Indian maritime law is seen and interpreted. The previous legislations are still in force after the enactment of the constitution according to Article 372, which says that British statutes would still be in force even after the enactment of the Constitution. It was also seen that there were certain terms such as vessel that was not defined anywhere and hence it was later defined under the Merchant shipping Act, 1958. Also with the division of India into different states after independence, several other high courts which had a coastline had now have jurisdiction over admiralty matters according to the State Recognition Act. It was also seen that criminal jurisdiction on the high seas was considered to be 20 nautical into the ocean from the coastline under the Indian Penal Code (IPC), 1860. There were several cases where the Indian courts have interpreted the nature and scope of admiralty jurisdiction in India. It is seen under the case of Interaccess Marine Bunkering Ltd v. K.M. Alluddin, v. Ramasubramanian J of the Madras High Court that international principles are to be considered when dealing with maritime matters. It was seen in Liverpool & London S.P. & I Asson. v M.V. Sea Success I & Anr that the Geneva Convention on Arrest of Ships, 1999 was applicable to India. This is one such case where international conventions were considered s guiding principles to Indian admiralty law. Some of the other conventions were the United Nations 1982, Convention on High Seas, 1958 and so on. Then there was a landmark judgement Elisabeth v Harwan Investment & Trading Pvt Ltd which talked about the admiralty jurisdiction. It was found in this case that the High court did not have a separate admiralty jurisdiction but in ordinary jurisdiction it included admiralty jurisdiction and so the jurisdiction could also be seen under the Indian Constitution under Article 226. The above mentioned cases are some of the few cases which guided the courts in making decisions with regard to admiralty law and its jurisdiction.

It was only in the year 1994, the 151st Law Commission Report, it was recommended that all High Courts be given admiralty jurisdiction as an extension of principle of jurisdiction from the civil courts. It was seen that the old laws with regard to maritime matters were outdated and there were some matters which required clarity. And so it was the Ministry of Shipping that drafted a bill based on the recommendations of the law commission report and had included matters which had seemed relevant to maritime matters. This also included clarifying the proper jurisdictions of the Indian courts on maritime matters.

**Recent developments in admiralty law:**

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377 The Indian Constitution, 1950, Article 372
378 Indian Penal Code, 1860, §4
381 M.V. Elisabeth And Ors v Harwan Investment And Trading 1993 AIR 1014
The current legislation which was enacted in 2017, 24 years after the Law Commission Report has a huge scope is defining the jurisdiction and rights of the courts in maritime matters. The Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017\(^{382}\) (henceforth referred to as the Act) was enacted in order to bring clarity to maritime matters and also to bring maritime matters under a single legislation. The legislations looks into several matters and also gives proper powers to several high courts, proper procedure for appeals, arrest of ships and so on. It is seen that under Section 17 of the Act that this legislation repeals all the previous legislations including the Admiralty Court Act, 1840, the Admiralty Court Act, 1861, the Colonial Courts Admiralty Act, 1890, the Colonial Courts Admiralty (India) Act, 1891 and several provisions of the Letters Patent Act, 1865. It is seen here that with the repealing of these legislations that the Act would now be covering matters with regard to all the previous legislations. It is also seen here that the term vessel is defined under this legislation giving proper scope and meaning to the types of ships that can come under this particular Act.

Firstly the matter of jurisdiction is addressed under this legislation, it states that admiralty jurisdiction can only be exercised by the High Courts and the same can be exercised by the any High court by notification of the Central Government. This includes the territorial jurisdictions of the high courts, any vessel that has docked within its territory and so on. It is seen that there are no particular High Courts that deal with such matters unlike the previous legislations, the High Courts that are notified by the central government to deal with the admiralty matters. The reasons for only the High Courts are given such matter is because such matters are considered to be resolved only by experts and so the same is not given to the district court. The procedure of the Civil Procedure Code, 1908 shall be followed when dealing with matters which are in so far inconsistent or contrary to the provisions in this legislation according to section 12, also there would be certain experts in these matters who would be appointed by the central government to deal with such matters. The appeal which is specifically given under this legislation is from a single bench in the high court shall be referred to a divisional bench of the high court. Also on application to the Supreme Court under Section 15 of the Act by either of the party, a matter can be transferred from one High Court to another for the said matter to be heard.

The legislation also gives in detail the matters which would come under admiralty jurisdiction and the courts. It is seen when it comes to the arrest of a vessel, it is now possible under this Act regardless of the owner’s place of residence and domicile. It is seen that maritime matters regarding the dispute of ownership of a vessel, mortgage of a vessel, damages arising with regard to the vessel, the cargo it carries, loss with regard to personal life, claims made either against the vessel or the owner with relation to insurance of either the goods or the crew, damages the vessel could cause or has caused to the environment and so on. These

\(^{382}\)Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017
are some of the main maritime matters that come under the jurisdiction of the high court. Also any other matter which is found like outstanding accounts with regard to a particular case, the same can be settled by the High Court. It was seen that before this legislation that any tort or civil wrong would come under admiralty matters and now the same is specifically given under Section 4 of the Act, it is also seen that some of these matters provided under Section 4 and several of its subsections, these proceedings are taken in personam while a few others in rem.

When it comes to the matter of arresting of ships it was seen that India had followed the principles of the Geneva Convention on Arrest of Ships\textsuperscript{383} for years. According to this ships could have only been arrested in cases of any maritime claim. It is seen under Section 5 of this Act, it lays down the grounds for arrest of vessels within its territory as a security to maritime claims. The vessels that are under constructions and which are inland vessels could not be arrested unless there is a notification regarding the same by the central government. It is hence seen that the grounds for arrest of a particular vessel has changed giving both under what claims can the vessel be arrested and even the associate ships and vessels can be arrested as well. Also this legislation does not include warships and any vessel that is used for non-commercial purposes.

There are proceedings in rem (seen under Section 5 of the Act) and in personam (seen under section 6 of the Act) that can be initiated under the Act, it is seen that the proceedings in rem are mainly against a particular vessel and the Act provides for several conditions with regard to the arrest of the same. The in personam proceedings that are seen have a lot more conditions that the proceedings in rem, mainly because when concerning people and at time foreign citizens, it is dependent on them as to which court to approach for justice. It is seen that only two conditions where the Indian High Courts can consider such cases, where the cause of action arose wholly or partly in India and if the person carries on business or works full gain in India. It is observed that only if the claimant has brought the said claim before another court of another country the same would not be entertained, hence according to the provisions of the Act, any claim which is brought by the plaintiff against the defendant can be entertained before the Indian Courts on certain terms.

It is observed that according to this new legislation that maritime lien and maritime claims would be looked into based on certain priorities. The maritime lien is said to be the procession or arrest of a vessel and possible sale of the same in case of unpaid debts. It is seen that these liens continue even after as change in ownership and after a certain time the same can be seized and arrested (seen under Section 9 of the Act). Also it is seen that if any maritime lien arises out of leakage of hazardous substance into waters and so on, the vessels cannot be arrest as a result for claim regarding the same. These are the major changes that are seen in the Act and also the proper guideline

\textsuperscript{383}Geneava Convention on Arrest of Ships, held by the United Nations/International Maritime Organization, 1999
with regard to maritime claims, the admiralty jurisdiction and the proper claims that can be addressed under this legislation. It is also seen that several questions with regard to what all can constituted a civil wrong (in the previous legislations), the different types of maritime claims and the power of the High Courts with regard to different matters and their priorities on different matters that approach the courts.

**Analysis of the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, 2017:**

It was seen that after a long time India has finally made a legislation with regard to admiralty law and answered several questions that the courts were burdened with for years. We that see that according to this detailed legislation that several things from the different types of maritime claims to the arrest of vessels are explained. This legislation almost gives the proper guidelines as to how the court has to act in different circumstances. Though we can see a drastic improvement in admiralty laws through this Act there are still some questions that do arise and might require the court’s interpretation. Above the main features of the Act is given and with the explanation of certain sections, it is seen that a great variety of claims and maritime matters are not just dealt with but also officially recognised under this legislation.

To begin its best to look at the jurisdiction, though the problem of jurisdiction is now clear with regard to the previous legislation, there is still some questions with regard to the jurisdiction of the Supreme Court. Though the High Courts of particular states are given the jurisdiction by notification of the central government, the appeal of such matters do not lie in the supreme court but from a single division bench in the High Court the matters goes to appeal to a divisional bench in the High Court. Here the transfer of cases is seen to lie with the Supreme Court, but from one High Court to another on the condition that the same matter, both the parties were given a chance of being heard. It is seen that the Supreme Court does not act as a court of appeal under this legislation, but instead the Supreme Court directs the matters from one court to another. Though the Supreme Court does not look into these matters directly, it is clearly seen that they too have an important part when determining maritime matters and so the assertion as to which court should deal with a particular matter, in case of transfer lies with them. Also stating that there need to be several experts in the respective High Court when dealing with such matters in order to provide proper judgements regarding the same. As it was previously discussed that maritime matters are not to be dealt with by just anyone as it deals with more than just domestic law. Hence it is seen that these sections do provide for such thinkers when it comes to dealing with admiralty matters, and the possible reasons for the Supreme Court to ensure the matters are resolved by the High Court’s itself.

The next point would be in relation to the arrest of vessels by the High Courts, it was seen that the Geneva Convention on Arrest of Ships, 1999 has shaped most of the grounds of ships. It is seen that mainly for reasons of maritime claim and maritime lien that the arrest is permitted with certain exceptions. Yet the main question here would arise with regard to Section 5(2) of
this Act. Here the provisions states that even the other vessels can also be arrested in certain cases, mainly with regard to maritime claim. It is understood here that arrest of ships or vessels are done in order to provide security for certain claims, but here this provision states that not only that one particular vessel can be arrested but any associate vessels can also be arrested and sometime these associate vessels can be arrested instead of the other vessel. Though some reasons for the same can be seen like the sale of a particular ship or schedules voyage of the same, in such cases the arrest of a associate vessel can be done or even in cases where the vessel would not provide adequate security for a particular claim. In this legislation these particular reasons for arrest of associate vessels are not provided nor are the grounds for the same provided. And so the grounds for which an associate vessel can be arrested either with or in place of a particular vessel is to be interpreted by the Courts in upcoming cases. This is one of the provisions that require a certain amount of interpretation leaving a wide scope and use of the same.

The next provision that will be looked into is the list of priorities that are seen under Section 9 and 10 of the Act. Section 9 talks about the priorities with regard to maritime lien, here it is seen that the first priority is given to claim of wages and other sums that are due followed by the claim of loss of life or personal injury with a direct connection to a particular vessel. It is seen that the claims over wages are to be given inter se priority over the claims of loss of life and personal injury. It is seen that the claims which are a result of accidents which result in the particular employee in need to treatment, where compensation can pay for the same. It is of the opinion that such cases be dealt with first and as fast as possible in order to repay the said outstanding medical payment due. Though it is understood that outstanding wages and amounts are the rights of the workers and the same has to be paid on time in accordance with certain legislations, the importance of dealing with the loss of life or personal injury, putting an employee in a procession where there is difficulty for him to earn, such cases should be dealt with quickly and effectively. It is seen that the priorities with regard to maritime claims start with maritime lien, mortgages and then all the other claims. The principle used here would be equal priority given for claims falling under a certain category and the claims in case of salvaging would be dealt with in order in which the time the claims were made. These are how the priorities of maritime claim and maritime lien is ranked according to this legislation.

Conclusion:
It is seen that with the development of maritime law in India a bill which was drafted and now passed has a lot of answers to answers questions seen in previous legislations. Not just answering previous legislation questions but also giving clarity as to what all can constitute maritime matter. We also see the proper jurisdiction, powers of the High Court in certain cases and the power of the Central Government when it comes to making new rules extending the jurisdiction of a particular High Court and so on. It is also seen that with the addition of certain provisions that certain new questions arise which the court would be given a scope of interpreting the same. This legislation has
taken the admiralty law in India to a new step repealing all the previous legislation which came into force before independence. Though the courts have found ways of interpreting maritime law, international conventions that acted as guiding principles for the same. These cases and also international conventions did have its place in sharpening the current legislation and though there are still some unanswered questions and scope for interpretation in the same, this legislation has made a lot of maritime law clear, specifying its scope, jurisdiction and so on.
EXPERT OPINION AND FINGERPRINT EVIDENCE

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OVERVIEW AND SCOPE OF RESEARCH

Expert testimony is relevant under Section 45 of the Indian Evidence Act, 1872 (hereinafter referred to as “Evidence Act”) and where the Court has to form an opinion upon a point as to foreign law, or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or questions as to identity of handwriting, or finger impressions are relevant facts.\textsuperscript{384}

The present research project will involve an analysis of the Expert Evidence in relation to fingerprints as evidence and we will analyse various facets of the use of fingerprints as evidence against the accused party. The present analysis includes its conflict with the fundamental rights, the proof of fingerprints expert’s data and opinion, the probative value of the fingerprint evidence and fingerprints in relation to foundation of police identification. Before proceeding with the analysis in depth, we will briefly give an overview of the research in this introductory chapter.

Firstly, the evidence of finger print expert falls under the category of expert evidence under Section 45 of the Evidence Act. In this perspective, in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in words that he is skilled and has adequate knowledge of the subject. However, an expert is not a witness of fact and his evidence is of advisory character.

The duty of an expert witness is to furnish the judge with necessary scientific criteria for testing the accuracy of the conclusions so as to enable the judge to form his independent judgment by the application of the criteria to the facts proved by the evidence of the case. The law of evidence is designed by Sir James Stephen to ensure that the Court considers only that evidence which will enable to reach a reliable conclusion.\textsuperscript{385} Accordingly, the first and foremost requirement for an expert evidence to be admissible is that it is necessary to hear the expert evidence and there is a need to hear an expert opinion where an medical issue is to be settled. Further, other requirements for admissibility of expert evidence are:

a. That the expert must be within a recognised field of expertise.

b. That the evidence must be based on reliable principles, and
c. That the expert must be qualified in that discipline\textsuperscript{386}

\textsuperscript{384} I Jethmalani et. al, The Law of Evidence 663 (2nd ed. 2016).

\textsuperscript{385} Id. at 671.

\textsuperscript{386} Alan Merry et. al, Medicine and the Law 178 (Cambridge Univ. Press 2001).
The evidence given by a Finger Print expert need not necessarily be corroborated, however the Court must satisfy itself as to the value of the evidence of the expert in the same way as it must satisfy itself of the value of the other evidence. While appreciating the evidence tendered by the expert, the Court will also consider the credibility of the expert. For instance in Krishna Mohan, this question pertaining to the credibility of the fingerprint expert arose. The Court observed that the expert was duly qualified and therefore his opinion could not be discarded.

If the fingerprint evidence is obtained in a suspicious manner and if some doubt persists as regards the nature of the evidence, the accused cannot be convicted since the condition precedent of credibility of the evidence is vitiated and therefore the nature are quality of evidence and the manner in which the evidence is obtained becomes essential.

The authors state that it is a well settled principle that the evidence of a finger print expert is not substantive evidence but it can certainly be used to corroborate items of substantive evidence. In Musheer, the accused who were hired criminals shot dead the deceased at point blank range and his body fell half inside and half outside the car. However, there was no evidence to show that he had any reason to touch the car and that too with the ring finger. Accordingly, the evidence of fingerprints on the car ceased to have any evidence.

In this introductory overview of the fingerprint evidence, the authors will proceed to analyse a significant question i.e. whether the taking of fingerprints of the accused violates the fundamental rights of the accused under Article 20 (3).

### Chapter 1: Fingerprints and Fundamental Rights

The principal issue with regard to obtaining fingerprints is whether the same infringes the fundamental rights of the accused party under Article 20 (3) of the Constitution of India and whether it compels an accused to be a witness against himself. Section 73 of the Evidence Act empowers a Court to direct any person including an accused present in court to allow his finger impressions to be taken. However, notwithstanding Section 73, several arguments were raised before the Courts that there can be no law which authorises a Court to ask the accused to do something which may have a tendency to incriminate him and

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389 Id.
392 Id.
393 RAO ET. AL, EXPERT EVIDENCE 1297 (4th ed. 2010).
394 The Indian Evidence Act, 1872, § 73, No. 1, Acts of Parliament, 1872 (India).
further it was also submitted that such a practice is inconsistent with the principle of
a fair trial.

Therefore, before examining the evidentiary value of an expert as to fingerprint evidence,
the very obtaining of the fingerprints has to be justified and tested on Constitutional
Principles. This issue arose as early as 1952 when the Travancore- Cochin High Court
observed that “the prohibition of compelling a man in criminal court to be a witness
against himself is the use of physical or moral compulsion to extort communications
from him, not an exclusion of his body as evidence when it may be material”.395

Thereafter, after this decision, various High Courts including the Punjab, Calcutta,
Mysore and Rajasthan High Courts also held that the taking of thumb or finger
impressions if an accused does not violate Article 20 (3) of the Constitution and cannot
be held to be valid within the salubrious principles of Constitutional Law. In view of
this uncertainty, the burden was on the Supreme Court to authoritatively settle this
issue. Accordingly, an 11 Judge Bench authoritatively laid down the controversy
and settled the position of law which holds good presently and held that taking of
thumb, finger and foot impressions is not hit by Article 20 (3) and is justified.396
Therefore, the taking of thumb impressions and fingerprints is justified. Having settled
the obtaining of fingerprints, the authors will now analyse the probative value of
fingerprint evidence.

## Chapter II: Probative Value of Finger Print Evidence

The Probative Value of the Fingerprint Expert’s evidence must have same value as
the opinion of any other expert such as medical officer.397 In each case, the evidence
is only a guide to the Court to direct its attention to judge of its value. The Court is
at liberty to use its own discretion and come to a conclusion either in affirmance or
dissent from the view taken by the expert. However, in addition to this, every case
must depend on its own circumstances.398

While submitting his report involving the fingerprints evidence, the fingerprint expert
must state the particular marks used by him as the basis of his inference and he will have
to state as to whether the marks were distinct and numerous enough to afford an infallible
inference.399 Based on this report, the Court of Law has to direct its attention mainly to
two aspects based on which the probative value can be ascertained i.e.: -

a. The Question of Similarity between the fingerprints found on the spot where the
incident occurred and the fingerprints of the accused. This aspect is purely a
question of fact and there is nothing contained to deter the Court from
considering this evidence as relevant.

395 State v. Parameswaran, AIR 1952 TC 482.
397 Public Prosecutor v. Virammal, AIR 1923 Mad 178.
398 Id.
399 RAO, Supra note 10 at 1316.
b. The Question as to whether it is possible to find the thumb impressions of two individuals corresponding to one another and is similar. This issue is well settled and it is difficult to find resemblances between prints of two individuals.\(^{400}\)

Upon determination of the two aforesaid questions, a Court is not bound to accept the opinion of the fingerprint expert without itself being satisfied as to the reasons which led to the opinion of the expert and the Court will have to apply its own mind and eyes to the evidence and to the impressions and verify the results submitted to it by experts.

However, in a situation where the Court examines the fingerprint evidence carefully and satisfies itself that there could be no mistake, bearing in mind that the expert has opined that the two fingerprints match, the Court can convict an accused on the basis of this evidence. \(^{401}\) This test was applied in Ayyapan \(^{402}\) where the expert had given evidence that the thumb impressions found on the various accounts and vouchers do not pertain to any of the fingers of the alleged borrowers and were definitely the impressions of the accused. However, his statement before the Magistrate about the identity of the disputed impressions with the undisputed fingerprints of the accused gave no reasons for such an opinion and his conclusion was never justified. In this case, the expert merely filed a list of common characteristics and stated no reasons. Yet, the Court appreciated the evidence and the accused was convicted. When the matter went in appeal to the High Court, the High Court observed that the lower Court had failed in its duty and accordingly, the accused was acquitted. \(^{403}\) Therefore, the conclusion from this case is that the expert opinion must contain sufficient reasons justifying each and every view for the Court to appreciate as evidence.

As far as the question of corroboration was concerned, the law was unsettled and uncertain in the earlier days. In 1923, the Madras High Court held that the evidence of the fingerprint expert need not necessarily be corroborated and it can be appreciated without corroboration. \(^{404}\) However, this approach was subsequently overruled by a subsequent decision in 1936. \(^{405}\) Here, the Court observed that corroboration is required in order to appreciate the evidence of a fingerprint expert. Therefore, one thing is very clear and the law has been settled down i.e. this evidence of an fingerprint expert is not of substantive evidence and such evidence can only be used to corroborate some items of substantive evidence which are otherwise on record. \(^{406}\)

Therefore, the authors conclude that a Court is not bound to accept the evidence of an expert and only after corroboration the Court may consider appreciate evidence. Further, upon corroboration, the Court must satisfy itself that the finger impressions of the accused and those found on the articles at the scene of crime are identical. If required,

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\(^{400}\) JETHMALANI, *Supra* note 1 at 664.


\(^{402}\) Ayyapan v. State of Kerala, 2005 CrLJ 57 (Ker).

\(^{403}\) Id.

\(^{404}\) Public Prosecutor v. Virammal, AIR 1923 Mad 178.

\(^{405}\) Fakir Mahomed Ramzan v. Emperor, AIR 1936 Bom 151.

the Court should summon the expert in Court and ask the expert to justify his findings. Since the burden of proof vests on the prosecution, unless the Court is satisfied that the expert opinion is correct, the Court will most likely release the accused. Further, a thorough and scholarly report on fingerprint inquiry of 14 December 2011 in the United Kingdom cautioned against any complacency in placing reliance on the science of fingerprints. It was recommended that:

a. Fingerprint evidence should be recognized as opinion evidence, not fact, and those involved in the Criminal Justice System need to assess it as such on its merits.

b. Fingerprint comparison continues to serve as a valuable source of evidence but its practice can be improved, at the same time it has to recognised that it is not realistic to expect a zero error rate and therefore the reliability of fingerprint evidence depends on a proper appreciation by fingerprint examiners, and the legal community, of the limitations of the discipline and in particular the subjective nature of the judgments that underlie a fingerprint opinion and the many variable factors of relevance to it.

c. Examiners should discontinue reporting conclusions on identification or exclusion with a claim to 100% certainty or on any other basis suggesting that fingerprint evidence is infallible.\textsuperscript{407}

Accordingly, notwithstanding the fact that fingerprint evidence has a high probability of being accurate and certain, and that it will consequently lead to the attainment of justice as an end, the chances of an error cannot be understated and therefore, the Courts should be careful whenever the prosecution relies its case solely on fingerprint evidence without any corroboration. The authors agree with the opinion of the settled law laid down by the Supreme Court and hence state that corroboration by other witnesses or through other evidence is essential for admissibility of fingerprint evidence.

Now, the authors will analyse the science of fingerprints and its connection with the Evidence Act.

\textbf{CHAPTER III: THE SCIENCE OF FINGERPRINTS AND THE EVIDENCE ACT}

The Actual Founder of the present system of identification by fingerprints is Sir Francis Galton. He extensively proved the individuality and permanence of such prints and also devised a scheme of classification which enabled a particular print to be at once selected from however large a collection. Thereafter, this system of Fingerprints was further simplified and improved by Sir Edward Henry of the Scotland Yard, London.

The Science of Fingerprints depends upon the fact that the terminal phalanx of the finger is covered with ridges which form definite curved patterns and that these are absolutely individual and are unchanged by time.\textsuperscript{408} The ridges are said to be arranged with an infinite variety of details and from the cradle to the grave their arrangements and patterns never change. The ridges on the fingers and thumbs with the details of their

\textsuperscript{407} V Nageswara Rao, \textit{The Indian Evidence Act} 460 (2nd ed. 2015).

\textsuperscript{408} RAO, \textit{Supra} note 10 at 1314.
arrangements are never wholly repeated in the case of fingers of any other person. Therefore, the fingerprints afford a more conclusive test of identity than any other bodily feature.

Where two prints resemble one another even in minute details and contain no point of disagreement, an irresistible conclusion arises that they belong to the same person. Therefore, in this background Sir James Stephen made evidence tendered by an expert as to fingerprints admissible. The fundamental principles of fingerprints were also recognised by the Kerala High Court as:

a. A fingerprint is an individual characteristic; no two fingers have yet been found to possess identical ridge characteristics.
b. A fingerprint will remain unchanged during an individual’s life time.
c. Fingerprints have general ridge patterns that permit them to be systematically classified.  

Further, this aspect regarding uniformity of fingerprints is also statistically supported. Experts have opined that the chances of a single finger’s marks showing the same pattern as another’s are as to about 64 Millions. Further, between birth and death of a person, there is absolutely no change in 699 out of 700 numerous characteristics of the markings of the same person such as can be impressed by him whenever it is desirable to do so.

Nigel Morland opined that out of the hundreds and thousands of prints taken in Great Britain alone, there has never been a duplicate of the same.  

Further, Balthazard’s simple formula on points of resemblance fingerprints shows that to find two points of resemblance in two fingerprints, 16 would have to be examined. Enlarging on this, for eight points of resemblance, 65, 536 prints would have to be examined, for 12 points of resemblance, 16, 777, 216 and for 16 points of resemblance 17,179, 869, 184 prints would have to be examined. Accordingly, the fingerprints found at the site of a crime become relevant and it is a rare situation that the fingerprints of two individuals are same.

There was an entirely irresponsible belief among some criminals that alterations can be made by injections of a certain drug into the fingerpads. However, this belief was exposed when despite this act of ‘expert’ criminals to get away scot free, they were exposed by the experts. American Criminal John Dillinger had his fingers treated by surgery when he underwent extensive plastic operations to avoid detection. However, the fingerprints were intact in pattern and did not affect the identification in any form. This adds more reason for the appreciation of fingerprint evidence and it has been conclusively proven that the marks will stay the same even after prolonged duration.

The fingerprint evidence is infallible and its certainty is arraigned by methods basically simple and direct. In this regard, the only difficulty in the system is associated with the keeping of records and the routine of tracing them. The difficulty is inherent in any system in which the keeping of a large

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410 Id.
411 RAO, Supra note 10 at 1314.
amount of data is necessary. Lastly, unlike certain other sciences, fingerprints do not dispute one another in open Court, since fingerprints is not a debatable object like a forged signature, nor does it contain the differences which might exist in the photographs of the same person taken at different circumstances and at different ages.

The Science of identifying thumb impressions is an exact science and does not admit any mistake or doubt. Moreover, the identification of finger impressions with the aid of a magnifying glass is not difficult, particularly when the photographs of the latent and patent impressions are pasted side by side. However, the Courts of Law cannot play the role of a fingerprint expert, but must depend on the clear evidence of the expert which is furnished.

Therefore, in this light the authors opine that the science of fingerprints in inextricably linked with the method of obtaining evidence and which is why Stephen made fingerprint evidence admissible under the contours of the Evidence Act. In the present day, police maintain fingerprint records of all criminals and due to technological improvement; this science has received a greater importance.

Suggested Impact of the Aadhar Scheme, 2016

In India, due to the scheme of Aadhar, the biometric information including fingerprint impressions of all people enrolled under Aadhar exist with the Government. If the police find fingerprints on the crime scene, they ideally should be allowed to be checked with the Aadhar Database. This will not only lead to a speedier investigation but will also lead to greater chances of the guilty party being arrested and convicted for his unlawful acts. However, the Aadhar Act, 2016 prohibits sharing of the biometric information with any person or institution. This prohibition is subject to the exception i.e. the order of a court or an order made in the interest of national security by an officer not below the rank of Joint Secretary to the Government of India.

Therefore, the possibility of sharing relevant information with the permission of the Court or with the order of the Joint Secretary in high profile cases in the very least if not all cases must be examined. If this sharing is successful, this benefits of this linking are widespread and a major tool to achieve fair and speedy investigation against the accused. However, this will have to be tested on the contours of the recent judgment of the Apex Court on privacy.

Notwithstanding the test of privacy, the authors opine that the greater benefits of the linking of fingerprints found at the Crime Scene which correspond to the rule of law must prevail over so called individual privacy. Accordingly, the authors opine and recommend that the Police and the prosecution may choose to match the fingerprints with the records of Aadhar if the suspect cannot be detected either by

414 Id at § 33.
415 Justice K.S. Puttaswamy & Ors. v. Union of India & Ors., 2017 (10) SCALE 1.
requesting the Court or through the order of the Government of India.

**CONCLUSION AND RECOMMENDATIONS**

Identification by fingerprints is one of the oldest methods but the science has become more sophisticated with the use of the technology developed in biometrics. Apart from the usual physical examination of fingerprints, optical, ultrasound and computer aided- comparisons have come into vogue that has enhanced the reliability of fingerprint evidence immensely. In India, 88.2 % of its population which somewhere translates into 1.12 billion Indians have been covered under the Aadhar scheme which also involves recording of fingerprint evidence.

The authors opine and recommend that the police and the investigative authorities should place greater reliance on the fingerprints and link them with the database of Aadhar. This linking will not only lead to speedier investigation, but it will also lead to higher probability of accuracy. Moreover, the issue becomes further significant since the very scheme of Aadhar and its Constitutionality is currently pending before the Supreme Court. Without pre-empting as to which way the decision shall go, the authors believe that the linking of Aadhar will become more significant only if there is corroborative evidence tendered by the prosecution in the course of the trial. In absence of any corroborative evidence, there is a likely chance of an innocent person being harshly subjected to penalty for an offence in which there was no such involvement. Therefore, corroboration to prove fingerprint evidence is must.

The Authors also opine that the experts who draft the fingerprint report to be submitted to the Court must ensure punctilious adherence to the requirements necessitated and must include them in the report accordingly. This also includes a clear statement as to the likelihood of the fingerprints being that of the accused in addition to a mere analysis on the comparison of the two fingerprints found. The accused should not be allowed to get away scot-free merely due to lacunae on the part of the expert and it is this very reason that experts need to be extremely careful while preparing their report.

Lastly, in light of the recent judgment on privacy, the Constitutionality of fingerprint evidence is likely to be raised before the Supreme Court. If the same is struck down on the test of privacy, it will be a great setback to the law enforcement agencies. In the event that it survives the test of privacy, it will be largely beneficial in investigation. At this point of time we can only wait and watch.
REVISITING THE L. CHANDRA KUMAR JUDGMENT AND DETERMINING THE CONSTITUTIONALITY OF ARTICLE 323

By Kaustubh Hardikar
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INTRODUCTION

The legislature in order to reduce the burden with regard to service litigation before the Supreme court of India and of the High courts, were looking for a separate mechanism. The reason for the same being that, there were lot of pending cases with regard to service litigation and that they had to be redressed as quickly as possible.

Therefore in 1958 the Law commission recommended for the establishment of the tribunal that shall consists members from the legal as well as from the administrative fraternity. In 1975 the Swarn Singh committee, In 1969 the Administrative Reform Commission and lastly in the case of K.K Dutta v Union of India in 1980 recommended that they should be a necessary establishment of tribunals in order to reduce the burden from avalanche of writ petition and appeals in service matters in the courts.

The legislature/parliament because of the recommendations amended the constitution for the 42nd time in 1976, in order to insert Article 323-A and 323B, These articles dealt with setting up of tribunals and these articles were enshrined in part XIV-A of the constitution and was termed as ‘Tribunals’, After which there were many kind of appeals filled in front of the supreme court and of the high court where the constitutionality of article 323 was questioned upon. Therefore on the 18th of March of 1997 the Supreme Court of India in its 7-judge bench finally decided on the constitutionality of article 323 of the constitution of India in the case of L. Chandra Kumar v Union of India.

This paper is divided into two parts, the first part deals with the summary of the case and the second part deals with the critical analysis of the case.

PART I

This case came in front of the court due to a lot special leave petitions, civil appeals and writ petitions challenging the constitutional validity of Article 323-A and sub clause (d) of clause (3) of Article 323-B of the constitution of India. Therefore the Supreme Court in all together grouped all these matter into one case for the purpose of adjudication upon them.

One more question that was to be answered in this case was the question of ‘whether the High Courts can be substituted and be discharged with regard to their power of judicial review, by the tribunals which were constituted under part XIV of the constitution of India 1950’.

416 K.K Dutta v Union of India, AIR 1980 SCR (3) 811

417 L. Chandra Kumar v Union of India, AIR 1997 S.C. 1125
The seven-judge bench of the Supreme Court held in this case that High Court’s power to judicial review or rather to say the supervisory jurisdiction of the High Court under article 226 is part of the “inviolable basic structure of the constitution”. This is also true with regard to the supreme courts power to judicial review under article 32.

The court further held that each and every decision of the tribunals, which were constituted under article 323A and 323B, would be under the scrutiny of the High courts writ jurisdiction. The court on article 323 held that, clause 2(d) of article 323A and clause 3(d) of article 323B are against the basic essence of the constitutions; therefore they are to be termed as unconstitutional because these provisions essentially ousts the power of judicial review of high court under 226 and the supreme court under 32\(^{418}\), thus it was held that the courts supervisory power cannot be curtailed by any statutory provision, or constitutional provision added to the constitution after KesavanandaBharti in 1972.

Adding upon this the supreme court also held that judicial review is part of the basic feature of the constitution which means that if any amendment is made to the constitution which oust the judicial review power of the courts it shall be declared as unconstitutional and finally held that judicial review cannot be abrogated by the creation of tribunal under 323A and 323B “Any institutional mechanism or authority in negation of judicial review is destructive of the basic structure”\(^{420}\).

**PART II**

**CASE ANALYSIS**

The supreme court holding was not quite pragmatic in this very case, Here the Supreme Court was much more concerned about reinstating the High court and the Supreme court’s power of judicial review under article 226 and 32, which per se were ousted by the S.P. Sampath Kumar judgment \(^{421}\), and not on strengthening the Droit Administratif principle in India, which was the original intention of the legislators through the 42nd amendment act.

The most important thing to be understood by this case was that the supreme court did not delve into finding an effective remedy for proper functioning of the tribunal and rather it just held that any judgment rendered by the tribunal will be under constant scrutiny of the high court through article 226 and supreme court under 32 and this was held irrespective of the fact that the huge backlog of cases in the high court, still persists.

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\(^{418}\) M.P Jain and S.N Jain, Principle of Administrative law (8th edition, 2016), Vol 2, Chapter XXXIV, Pg2257-2258

\(^{419}\) KesavanandaBharti v State of Kerala,(1974) 1 SCC (JI) 3

\(^{420}\) M.P Jain and S.N Jain, Principle of Administrative law (8th edition, 2016), Vol 2, Chapter XXXIV, Pg2257-2258

\(^{421}\) S.P. Sampath Kumar v Union of India, AIR 1987 SC 2292

(The court in this case held that the idea underlying Article 323A and 323B was that the tribunals established under thereunder will practically have the same status as the high court, as appeals from these tribunals could go to the Supreme Court under Article 136).
Is the High court’s power to judicial review is as inviolable as that of the Supreme Court?

The whole case of L. Chandra Kumar runs on the basic assumption by the courts that article 226 which grants the high court the power to judicial review forms an essential and inviolable part of the basic structure doctrine which evolved from the KeshvanadaBharti case, but in my opinion the Power of the high court to judicial review exercised under 226/227 is not as absolute or inviolable as that of the power of the Supreme court under Article 32 due to the fact that Article 32(4) as mentioned below:

“The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution”

This provision of the article essentially talks about the absoluteness and consolidates Supreme Court’s power to judicial review and a similar provision as to that of Article 32(4) is absent in Article 226 of the constitution.

Therefore in my opinion the judgment in S. P. Sampath Kumar’s case where the Supreme court held that the establishment of the tribunal, is a mere substitute to the high court and is not supplement to it, is actually in good understanding or rather to say in tune with the basic essence of the constitution.

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422 KesavanandaBharti v State of Kerala,(1974) 1 SCC (JI) 3
423 Article 32(4), Constitution of India 1950

Did the L. Chandra Kumar judgment clearly overrule the S.P.Sampath Kumar judgment?

A very interesting observation to note about L.Chandra Kumar case was that, it did not per se overrule the judgment of S.P.SampathKumar, because the courts in this case, did not negate the validity and the necessity of a tribunal. As this case accepted the illustrious idea behind setting up of a tribunal and that being:

1) The need for a speedy disposal of cases.

2) The requirement of an expert person in certain exceptional situation that calls for specialist categories of dispute settlement.

3) In order for reducing the prolonged delay in effective judgment because “Justice delayed is justice denied”.

4) Lastly, for reducing the burden of high court.

But still at the end it held that these cases would under the scrutiny of the high courts, which will eventually defeat the basic rationale behind the formation of these tribunals at the first place.

DroitAdministratif in India?

The L.Chandra Kumar ruling deviated from the original intention of the legislature behind the 42nd constitutional Amendment. The legislature through this amendment purported to establish tribunals specifically for adjudicating the disputes related to service matter. The intention of this move by the legislature was to create institutions such as the Conseild’etat and the object being to
ease the burden of pending cases related to service sector form the high court and rather provide an expert and expeditious forum for disposal of disputes of Government servants relating to service matters.  

The critics of the 42nd amendment termed this implementing concept of DroitAdministratif as positive change.

The court in the case of L. Chandra Kumar case held that, an appeal from the decision of tribunal could reach a high court under article 226, and further can knock the door of the Supreme Court under article 32. This process would inevitably make these cases pending for a longer time. Irrespective of the fact that this process sounds good on paper that the idea of justice and the concept of rule of law is protected, But for a person who is expected to work with the government and assist them, it is highly unfeasible for him to continue lingering in front of the courts reason being that the civil courts are engrossed and strictly adhere to rules of pleading and evidence and; this type of strict procedure is not required while dealing with cases pertaining to service sector.

An interesting thing to note here is that if service tribunals are deemed as the final arbiter with respect to controversies like, conditions of services, on the question of seniority, may save the courts from the avalanche of writ petitions and appeals in service matters. These proceedings of such tribunals can have the merit of informality and they will not be tied down to strict rules of evidence, they might be able to produce solutions, which will satisfy many and displease only a few. This might also relieve the high court from pending cases dealing with service sector and that they can adjudicate before an institutions.

At the end I would like to state that I do agree with the fact that a complete adaptation of DroitAdministratif is not possible in India because of the power of judicial review of the supreme court of the order rendered by the tribunals, cannot be fully removed as we know that power to judicial review is an integral part of our constitution system, and without it the rule of law would become illusory but if a adequate alternative mechanism which could replace the judicial power of the high court is brought in which can effectively adjudicate upon specific matters with much more expertise, then such alternative mechanism should be welcomed.

A line of apperception for the judgment.

All being said about the judgment but at one point I agree with the L. Chandra Kumar case, with respect to functionality and quality of justice with which the judges were quite upset with, and to some extent it was justified as well because Inmy opinion the judges in L. Chandra Kumar case were correct where they held that, while the tribunal are dealing with case regarding article 14, 15, 16 the chairman’s of the tribunals lack a certain element of legal

424 See the Statement of Objects and Reasons, accompanying the Forty-fourth Amendment Bill (later renumbered as the Forty-Second Amendment Act of the Constitution.)

training therefore the composition of the tribunal needs special attention and there is certainly no doubt in the fact that measure are to be taken with respect to the composition ,qualification and the mode of appointment of the members in tribunal.

CONCLUSION

The journey of these two landmark case one being S. P.SampathKumar case and the other being L. Chandra Kumar case has certainly not being sterile, to put it very blatantly the case of L Chandra Kumar has not overruled the judgment of S. P.Sampath Kumar rather it has necessitated the need of tribunal for speedy disposition of cases.

It has also said that an important reason for the creation of tribunal was due to the backlog of cases but at the same time cases where the functioning of existing tribunals are being questioned such as the Intellectual Property Appellate Tribunal and the National Green Tribunal and are pending before the courts and may cause a further shift in the evolution of the narrative relating to tribunals426.

Its too late to shift to Napolean Bonaparte’s most applauded concept of Droitadministraiff,because it will be very hard and highly cumbersome to reform the whole judiciary but still a partial application of the Droitadministraiff like the establishment of an alternative institutional mechanism 427 which will be much more efficacious than the high courts and it will go a long way in solving the judicial prolonged problem of backlog of cases as it now accepted in all common law countries and as well as in continental legal systems and the example for the same would be of the UK, and Australia as it is been witnessed here as well that tribunalisation can be integrated for the sound performance of a country’s judiciary.

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427Minerva Mills v.UOI, AIR 1986 SC 2030 (In S. P. Samapth Kumar case, Chief Justice Bhagwati reiterated the earlier view expressed by him in Minerva Mills v. UOI about the power of Parliament to set up effective alternative institutional mechanism or arrangements for judicial review by amending the Constitution. If, by such constitutional amendment, the power of judicial review of the high-court is taken away and vested “in any other institutional mechanism or authority, it would not be violative of the basic structure doctrine, so long as the essential condition is fulfilled, i.e., the alternative institutional mechanism or authority set up by Parliamentary amendment is no less effective than the high-court.”)
CAPITAL PUNISHMENT:-
ABOLITION v. RETENTION

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INTRODUCTION

"The least offences deserve death, and I can impose no worse for higher crimes."428. This quote explains the status of death as a punishment. It is regarded as the most barbarous and preposterous punishment which can be awarded to a criminal. ‘Death penalty’ is a process where a person is punished by State through death (following the due procedure of law).

While both the terms ‘Death penalty’ and ‘Capital punishment’ are used interchangeably as eventually the criminals die for the crime committed, there is a fine line of difference between these two. ‘Death penalty’ applies to a prisoner who has been sentenced to die, but has not yet been executed; "capital punishment" refers to his actual execution.

Although the death penalty has existed from time immemorial, the need to abolish it has gained a lot of momentum in the recent times. Its movement can be traced back to the works of one of the great criminologist named Cessare Beccaria who convinced many people that death penalty should be abolished because it is inhuman, cruel and a public assassination. However, India has yet not abolished the capital punishment and is still trapped in this incessant debate.

The roots of capital punishment can be traced back to ancient India, where it was used for the most heinous, grievous and detestable crimes against humanity, following which it was stated that Death sentence should be avoided even for the greatest offences, unless the guilty was a traitor who had indulged in any activity dangerous to the security of state. Hence, only 4 successful executions have been carried out in India since 1995 which included a lot of parleys like, Whether Females should be given death penalty, Which one is better: Retributive or Reformative Constitutionality of capital punishment and what not.

Well, Death indeed is a severe and unique form of punishment mainly because of the permanent damage caused, they say dead is gone into another world making it an irreversible act which can’t be undone, it is one of primary reasons why a good quantum of people wants to abolish it. The people defending it argues that it may be of an extreme nature but is something our country needs direly.

CONSTITUTIONALITY OF DEATH PENALTY

Sir James Stephen once remarked: “No other punishment deters a man so effectually from committing a crime as punishment of death”.

Thus, Death has been used as a form of punishment since time immemorial. It is the best player in the ground when it comes to a game of punishments seeking to lessen the

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428 Draco, The first Compiler of Penal Code of Greece.
crimes. After death there is no next level of punishment, Death is Death, there is nothing more terrifying than death itself.

Every wrong must be punished and there are two main reasons for inflicting any punishment:

(a) The belief that it would be fair, just and reasonable,
(b) It discourages others from doing similar wrongs.

Abreast every punishment should be proportionate to the intensity of crime committed, so should capital punishment, but clearly it becomes a hot tiff that whether this punishment actually serves its purpose of fairness, appropriateness, and effectiveness and discourages similar crimes, or not and if not then it becomes gross violation of our rights.

Is taking a criminal’s life actually an effective way to daunt the crimes or is it just another abrogation of our human rights and constitution?

The constitutional validity of capital punishment is an issue which has troubled the constitutional courts of world as some jurist says it violates a person’s right to life which is embraced in Article 21\textsuperscript{429} of Constitution that gives us the right to life and personal liberty and Article 14\textsuperscript{430} of Constitution that gives the right to equality. The concept of equality incorporated in Art. 14 finds echo in the preamble to constitution. Capital sentence, it seems, is therefore, an anti-thesis of one's right to life. While some other jurist defends it as being constitutional.

At the same time, it is an indisputable fact that there is nothing in the constitution which expressly holds capital punishment as unconstitutional, but the mere fact that it may lead to infringement of a person’s fundamental rights is enough to create a doubt about the constitutional validity of capital punishment.

Thus, considerable question is whether death penalty is lawful or not, should it be retained or abolished?

The mass rebelling against this aberrant form of punishment argues that it debilitates our fundamental rights and is a just enough reason to do away with capital punishment, but knowing the criminals, their psychology, nature of plausible crimes and indubitably the effect on society we live in, is it what the society really needs?

No doubt, Capital punishment has always been a point of contention in our country, and because of some extreme violation of laws the judiciary has tried to save it as a punishment to be used only in rarest of rare cases which is why in the past 10 years the Indian Judiciary has sentenced 1,303 people to death but only four have been hung till death in this entire decade.\textsuperscript{431}

\textsuperscript{429}No person shall be deprived of his life or personal liberty except according to procedure established by law.

\textsuperscript{430}Equality before law: The State shall not deny to any person equality before the law or equal protection of the laws within territory of India. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

Law commission in its 35th report in 1967 recommended to retain capital punishment having regard to conditions in India, social upbringing, disparity between morality and education vastness, diversity and said that it was not the appropriate time to risk with the abolition of capital punishment.

CATENA OF JUDGMENTS

The tussle over the constitution validity of capital punishment was carried on for years through numerous cases.

The first case where the courts had the opportunity of discussing this question was of

- Jagmohan Singh v. State of U.P - The case was presented on three main grounds, firstly that capital punishment violates rights guaranteed under Article 19, secondly there is no fixed standard to be followed while giving capital punishment and thirdly this unguided and unfettered discretion violated Article 14 of the constitution, which guarantees equality, before the law. The five judge bench upheld its constitutionality stating that there is no infringement of fundamental rights.

- Rajendra Prasad v. State of U.P - Again the same contention was laid down. Justice Krishna Iyer empathetically stressed that death penalty is violative of articles 14, 19

and 21. He further said that to impose death penalty two things must be required:

(a) The special reason should be recorded for imposing death penalty in a case,
(b) The death penalty must be imposed only in extraordinary circumstances.

However, the court stated that the question whether capital punishment should be abolished or retained was a question for the Legislature and not for the Courts to decide.

- Bachan Singh v. State of Punjab - The question of the validity of capital punishment came again and this time by a majority of 4:1 the five judge bench with dissenting opinion of Bhagwati J. held that capital punishment is not unreasonable and violative of Article 14, 19 and 21. Bhagwati J. in his dissenting judgment observed that “Death penalty is not only unconstitutional being violative of Articles 14 and 21 but also undesirable from several points of view.” The five Judge Bench stated that the taking of human life shouldn’t be encouraged even in the form of punishment except in “rarest of the rare” cases, thus came the doctrine of “rarest of the rare”.

- Machhi Singh v. State of Punjab - The SC laid down the broad outlines elaborating the doctrine of ‘rarest of the rare’. Justice Thakkar speaking for the Court held that the stated five things may be regarded while deciding a case as rarest of rare cases:

(a) Manner of Commission of murder;
(b) Motive;

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(c) Anti-social nature of the crime;
(d) Magnitude of the Crime;
(e) Personality of victim of murder.

• Sher Singh v. State of Punjab 437 - J. Chandrachud expressing the view of the three judges of the Supreme Court held that death sentence is constitutionally valid and permissible within the constraints of the rule in Bachan Singh. This has to be accepted as the law of the land.

• Mithu v. State of Punjab 438 - § 303 Of IPC 439 is based on the logic that any criminal who has been convicted for life and has committed a murder while in custody is beyond reformation and do not deserve to live was declared unconstitutional and deleted from the IPC. It was struck down as violative of Article 21 and 14 of the Constitution of India as it takes away the power of judiciary to exercise its discretion and thus result in an unfair, unjust and unreasonable procedure depriving a person of his life.

In the laconic view, capital punishment is indeed regarded as constitutional in India, despite many legislative attempts to abolish it. We still stand with capital punishment to be used as a missile in our hand when it comes to some certain rare cases which is evident from the executions in India.

MODE OF EXECUTION

The execution of death sentence in India is carried out by two methods,
(A) Hanging by neck till death
(B) Shot to death.

Once the death sentence is awarded and is confirmed, the execution is done following Code of Criminal Procedure. § 354(5) of Code of Criminal Procedure states:
"When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead".

Hanging by death is the only method followed in India, while some argue that it is inhuman and painful, the defenders of this mode of execution says that it is the least painful method available.

Justice Bhagwati, in a judgment, provided a graphic description of the execution process:
“The day before an execution, the prisoner goes through the harrowing experience of being weighed, measured for the length of drop to assure breaking of the neck, the size of the neck, body measurements, etc. When the trap springs, he dangles at the end of the rope. There are times when the neck does not break, and the prisoner strangles to death. His eyes almost pop out of his head, his tongue swells and protrudes from his mouth, his neck may or may not break, and the rope claims large portions of skin and flesh from the side of the face. He urinates, he defecates, and droppings fall to the floor while witnesses look on. The prisoner remains dangling from the end of the rope for eight to 14 minutes before the doctor climbs up a small ladder and listens to his heartbeats and pronounces him dead.”

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439 Punishment for murder by life-convict.— whoever, being under sentence of [imprisonment for life], commits murder, shall be punished with death.

440 Swati Deshpande, HANGING IS THE LEAST INHUMAN FORM OF EXECUTION, (June 26,
Hence, many judges are convinced that the mode of execution should be changed to lethal injections rather than hanging, but again the latter is an unreliable method which has not been ever tested, the least we can do is let that person die without experimenting the methods to kill him and give him a civilized way to end his life.

In 2014 a verdict was given by a bench headed by former CJI P. Sathasivam which made a declaration that hanging is the least painful way of ending life. A year before he had confirmed death sentence to Yakub Menon in 2007 trial. He laid down some guidelines requiring a post mortem to check if the hanging was done accurately or not, as if it inflicted pain due to suffocation it would be violative of the ‘due procedure’.

Hanging is preferred due to the following reasons:
1. Hanging consists of a mechanism which is easy to assemble.
2. The preliminaries to the act of hanging are quick and simple and they are free from anything that would unnecessarily sharpen the poignancy of the prisoner’s apprehension.
3. The chances of an accident during can safely be excluded.
4. The method is a quick and eliminates the possibility of a lingering death.”

In a nutshell, the mode of hanging is still relied upon as no other alternative method is available yet.

THE EXECUTIONS MADE

➢ DHANANJOY CHATTERJEE
Date of execution: August 14, 2004 (Alipore Central Jail, Kolkata)

The convicted rapist, murderer of a fourteen year old school girl was hanged on August 14 which started a hot debate, was Dhananjoy guilty of rape and murder beyond doubt? As some people still believe that an innocent man was killed at the hand of the state. Before being hanged he himself said he was an innocent being punished just because he was poor. He was working as a security guard in the building where the victim resided with her mother. The judiciary declared the crime as "rarest of rare" because the guard was responsible for the protection of the society and the people living in it. The accused was scheduled to hang on June 25, 2004 but his family filed a mercy plea, which was rejected by the then President of India, A.P.J. Abdul Kalam. He was finally hanged on his 39th birthday in Alipore Central Jail in Kolkata. He was the only man hanged for a non-terrorist act.

➢ MOHAMMAD AJMAL AMIR KASAB
Date of execution: November 21, 2012 (Yerwada Jail, Pune)

The Pakistani terrorist and a member of Lakshar-e-Taiba Islamist group, through which he took part in the infamous 26/11 Mumbai terrorist attack was held guilty of

2018, 7.19 PM)

441Shatrughan Chauhan & Anr v. Union Of India & Ors (2014) (India).
80 crimes including treason, waging war against India, murder and terrorist acts etc. and a 11,000 paged charge sheet was filed against him, thus making a strong case against him. He was sentenced to death on 6 May, 2010, the sentence was upheld by Bombay High court and Supreme Court. He kept changing his statement from time to time and moved up to the Supreme Court pleading for mercy. President Pranab Mukherjee upheld the judgment of capital punishment on the November 5, 2012 and he was hanged to death on November 21, 2012.

➢ AFZAL GURU

Date of execution: February 9, 2013 (Tihar Jail, Delhi)

A Kashmiri separatist who was the master mind behind the 2001 Parliamentary attacks received a death sentence for his involvement, which was upheld by the Indian Supreme Court. Following the rejection of a mercy petition by the President of India. Five armed terrorists attacked the Indian Parliament which led to the death of 8 security personnel and a garden. The case was handed to a special cell of Delhi Police, which was able to track and arrest Afzal by December 15, 2001. He pleaded guilty in front of the media but took back his statement later claiming that he did it due to the pressure induced by the police. A special court was formed under the Prevention of Terrorism Act which finally sentenced him to death on December 18, 2002. Due to various pleas and protests the case went on till February 6, 2013, when his plea was rejected by the President Pranab Mukherjee. His execution was a carried out as a secret mission on February 9, 2013.

➢ YAKUB ABDUL RAZAK MENON

Date of execution: July 30, 2015 (Central Jail, Nagpur)

Due to the involvement in the 13 blasts that rocked Mumbai in 1993, A Chartered Accountant by profession was hanged. It is the most recent execution done by India. He is the brother of the prime suspects of the bombings, Tiger Menon and he assisted him and Dawood Ibrahim in planning and executing the bombings. He was arrested on August 5, 1994 and was found guilty of 58 offences: He was hanged by the same hangmen who executed Ajmal Kasab on his 53 Birthday.

CONCLUSION OF THE VEXED DEABTE

On 30 July, 2015 after a three hour long mid night hearing by three Supreme court judges the recent execution of Yakub Menon had lost all its hope and after a few hours he was hanged, this execution worked out as oil in the burning debate of ‘Abolition’ v. ‘Retention’. The sentence for death again became a hot cake for intense discussion in view of the fact that it has been banned in at least 140 countries because it’s inhuman and archaic but not yet in India.

One view is that capital punishment punishes a wrong doer following the principle of ‘eye for an eye’ and gains satisfaction and justice for the victim, nevertheless, Mahatma Gandhi said, ‘eye for an eye makes the whole world blind’ thus the other view is that rather than being reformative and setting an example capital punishment is actually infringing human
rights by being inhumane and torturous. Its continued use is a stain on a society built on humanitarian values.

By retaining death sentence, we may condemn someone to death, who may be able to expiate but, by giving a second chance to someone, we might be giving them a bullet to shoot us, just because they missed the first time.

Hence in simple words capital punishment should be retained only to an extent. "Each extreme is a vice; virtue lies in the middle" — Aristotle

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PROTECTION OF RIGHTS OF A PROSTITUTE IN INDIA

By Kumud Konnur
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“The worst part about prostitution is that you’re obliged not to sell sex only, but your humanity. That’s the worst part of it: that what you’re selling is your human dignity. Not really so much in bed, but in accepting the agreement- in becoming a bought person.”

- Kate Millett

Introduction:
Prostitution in India has existed from the time immemorial. Rig-Veda made it clear that there were women who were courtesans or prostitutes, these women where common to many men. The Adiparva narrates how a vaishya(prostitute) waited upon Dhritarashtra when his wife Gandhari became pregnant. Yaj II divides concubines into two categories: 1) avaruddha- one who is kept in the house itself and forbidden to have intercourse with any other male; and 2) bhujisyas- the concubine who is kept elsewhere and is in the special keeping of the person, and another person cannot have intercourse with her.442

According to the history of India, the old versions of prostitutes were known as “Devadasi” in South India, who used to contribute their whole life to the devotion of Lord Krishna. Devadasis consider the Gods their husbands and thus cannot marry other mortal men. A woman if married to any idol of any male god then she was considered to be a devadasi. The same was later called as “Nagaravadhu” or the “Bride of the town” and were called upon by the royals to sing and dance. Devadasi or Nagaravadhu’s were in the palace just to entertain the kings with their dancing and singing and due to their art and they were treated with respect and honor by the Royal families. No man, including the Kings, dared to touch them. But many doesn’t know that they were treated with immense respect and reputation of these women were very high in society alike from now. They were not treated as prostitutes until British and other rulers invaded India. But after British entered India, this golden era saw its downfall at the hands of the British. These dancers started performing their art in front of the British officers who got attracted to them and thus the culture of one night stands started. The Britishers started calling these dancers for sexual pleasures and this paved the way for Prostitution in a country like India. During the British rule, the movement of Devadasi into prostitution led to the decline of temple dances. A tawaif, mostly prevailed in North part of India, was a highly sophisticated courtesan who catered to the nobility of India, particularly during the Mughal era. The tawaifs excelled in and contributed to music, dance (mujra), theatre, and the Urdu literary tradition, and were considered an authority on etiquette. Tawaifs were largely a North Indian institution central to Mughal court culture from the 16th century onwards and became even more prominent with the weakening of

Mughal rule in the mid-18\textsuperscript{th} century\textsuperscript{443}. These women were not given a negative position in those days as they are seen in society today. Women started selling their bodies when British rule came in force due to their conditions of poverty and also for the greed of money. Female folk entertainers often sell their body for a living. During the late 16th and 17th century, when certain parts of India were a colony under the Portuguese, Japanese women were captured and brought to India as sex slaves. Another example of the increased use of women as sex workers can be during the Company Rule in India. From here the trafficking in human began. The military established brothels (Current red-light areas of Mumbai) for its troops across many parts of India. Rural women and girls were employed by these brothels and were paid by the military directly. And today these red light areas have become the biggest drawback of the society and most of the brothels are run illegally. And forced prostitution has emerged widely.

“We call our country home of the brave and land of the free, but it's not. We give a false portrayal of freedom. We're not free — if we were, we'd allow people their freedom. Prohibiting something doesn't make it go away. Prostitution is criminal, and bad things happen because it's run illegally by dirt-bags who are criminals. If it's legal, then the girls could have health checks, unions, benefits, anything any other worker gets, and it would be far better.”

— Jesse Ventura (American media personality)

\textbf{Meaning of Prostitution:}

‘Prostitution’ according to the Immoral Traffic (Prevention) Act, 1956, means the sexual exploitation or abuse of persons for commercial purposes, and the expression “prostitute” shall be construed accordingly;

Hence we can sum up essentials for constituting the offence of the prostitution are,

\begin{itemize}
  \item [a)] a female must offer her body to indiscriminate intercourse with men, usually for hire
  \item [b)] there must be sexual intercourse;
  \item [c)] It must be for hire for which the consideration may be in cash or in kind.
\end{itemize}

‘Brothel’ according to the Immoral Traffic (Prevention) Act 1956, includes any house, room, [conveyance] or place or any portion of any house, room, [conveyance] or place, which is used for purposes [of sexual exploitation or abuse] for the gain of another person or for the mutual gain of two or more prostitutes.

‘Human Trafficking’ means the action or practice of illegally transporting people from one country or area to another, typically for the purposes of forced labor or commercial sexual exploitation.

\textbf{Rights of the prostitutes:}

It is the misconception that the prostitution is illegal in India. Prostitution itself is not illegal but propagating and developing this profession is illegal. Encouraging this as a profession is illegal. And forcing one to fall under this profession is illegal. If a women by her own wish for her livelihood if she wants to practice this trade then she can, but she cannot run a brothels. The primary law dealing with the status of sex workers is the 1956 law referred to as The Immoral Traffic (prevention) Act. According to this law, prostitutes can practice their trade privately.

\textsuperscript{443} www.wikipedia.org
but cannot legally solicit customers in public. There are cases where courts have openly criticized prostitution but at the same time upheld their rights to trade for their livelihood.

Prostitution is one of the oldest professions we can say. India has seen many stages of growing prostitution in its land. But the urge or sex is growing day by day in people. Not legalizing brothels can also lead to increase trade in human trafficking because it will not be regulated. And regulating these brothels is very necessary to stop the exploitation of these women who suffer in the brothels which is run illegally. The law in India provides that having sex for money is not illegal; soliciting customers is illegal, running a brothel/pimping/organized prostitution is illegal.

A majority of the sex workers working in India surveyed by an NGO revealed that they did not choose the profession of prostitution in India by themselves but were rather forced to take out of necessity, for some it was due to fall out of marriage to support themselves, for some it was taken after being disowned by family and for some, they were tricked by their family member or acquaintance under delusion of good money. The breakdown of the agents of the prostitution in India is as follows: 76% of the agents were female and 24% were males. Over 80% of the agents bring young women into the profession of the Prostitution in India without caring about the legal aspect of same were known people and not traffickers: neighbors, relatives, etc. Over 40% of 484 prostituted girls rescued from the profession of illegal prostitution in India during major raids of brothels in Mumbai in 1996 were from Nepal. In India one estimate calculated that as many as 200,000 Nepalese girls, many under the age of 14, were sold into sexual slavery during the 1990s to boost the not so legal profession of prostitution in India. States of India such as Mumbai and Kolkata (Calcutta) have the India's largest brothel based sex industry, with over 100,000 sex workers in Mumbai and keeping the profession of prostitution alive in India. It is estimated that HIV among prostitutes have largely fallen, in last decade. Reaching women who are working in brothels has proven to be quite difficult due to the sheltered and secluded nature of the work, where pimps, Mashis, and brothel-keepers often control the profession of prostitution in India and access to the women and prevent their access to education, resulting in a low to modest literacy rate for many sex workers indulged in Prostitution in India. Despite this, several projects were launched in red light districts of Kolkata and a rise in use of condoms was seen from 27% in 1992 to 86% in 2001.444-

“...We say that slavery has vanished from European civilization, but this is not true. Slavery still exists, but now it applies only to women and its name is prostitution”

- Victor Hugo.

Protection under fundamental rights of constitution:

Article 14 and prostitution:
Equality before law - The State shall not deny to any person equality before the law

444. By Shivam Srivastava in General Legal may 9th 2018
or the equal protection of the laws within the territory of India. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. Generally all people should be treated equally, but the right of the prostitutes are not recognized and they are not treated as equal in the society may be because of the work or profession they are into, but what about those women who have entered into this profession due to helplessness and poverty.

Article 15 and prostitution:
How many people in general are ok with prostitutes having access to public hotels and public entertainment, most of them will criticize those women if she does so because they are even today thought that they are harmful to this society, but they also have the right to mingle in public like other people do. These women are always stopped from having access to general public.

Article 15(3)- Nothing in this article shall prevent the State from making any special provision for women and children.

The women and children in India is being targeted for the human trafficking and it is sad that this is running on a very wide area. Girls below the age of 16 is kidnapped or forced for the prostitution, prostitution a necessary evil, prostitution is rampant in a social system supported by a complex matrix of social forces where parents and relatives throw females into the flesh trade. Hey not only force them to be in the profession but also procure customers and thrive on their earnings, under these circumstances this article gives the provision where the state can make special provision for the protection of the interest of these women and children.

Article 16(1) and prostitution:
Women of such profession are trapped in this profession in such a way that they will be unable to come out of this. Even if they do they will be till their last breath treated as the prostitutes only and these women and their past will definitely have an impact on the other employment if she chooses to do so. Article 16(1) - There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State; under this article if any women of such profession tries for any employment or appointment to any office of the state then they shall not be denied for such employment on the bases of such past profession.

Article 19(1)(g) and prostitution:
Every Women has right to choose any profession as her wish which is guaranteed by the Indian Constitution under the Article 19(1)(g) by the reasonable restrictions, she could participate any profession by using her personal knowledge, intellectual capacity and personal physical body through protecting moral values which have been notified in the laws. If a women by her own knowledge if practices prostitution then it is not the violation if the same women is involved in human trafficking and keeping the brothels and forcing one to apt this profession then she will be punishable under law.

Article 21 and prostitution:
Protection of life and personal liberty- No person shall be deprived of his life or personal liberty except according to procedure established by law;
This article is very wide in its scope and it gives for many other rights related to this article, like life, privacy rights, dignity, livelihood and so on..women who have possessed this profession have right to life and liberty until these rights are curtailed by law in the interest of general public.

Right to privacy:Prostitutes also holds the right to privacy, any person who will curtail privacy rights and without her permission if does any videography or photograph of such act which he is not supposed to do then he is punishable under law. No women of such profession is granted such because he has paid her the money or she is of a easy virtue, even if she is in profession by her own will or any other reason she has right to privacy.

Right to dignity: dignity has always been the dream of every prostitute that is because the nature of the work they do, the society like India where the sex is the word of four walls have never accepted this profession, and will never do. The women who are sex workers, also have a dignity and they have a right to live a dignified life like any other person of any profession.

Right against exploitation: No person can force a woman to enter this profession against her will. If a women of such profession is touched or forced to do any act for which she has not agreed for or any person who runs the brothel illegally, if exploit such women for the purpose of commercial benefit then it is against the article 21.

**Article 23 and prostitution:**
Article 23 strictly prohibits human trafficking, where millions of children and women are pushed into this profession and forced labor, any person who is engaged in human trafficking will be punished under the law. Women and children are protected and provided the right against the immoral trafficking and forced labor under this article,

**Article 23 and prostitution-Prohibition of traffic in human beings and forced labor**
(1) Traffic in human beings and beggar and other similar forms of forced labor are prohibited and any contravention of this provision shall be an offence punishable in accordance with law
(2) Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them

“Prostitution is not just a service industry, mopping up the overflow of male demand, which always exceeds the female supply. Prostitution testifies to the amoral power struggle of sex, which religion has never been able to stop. Prostitutes, pornographers, and their patrons are marauders in the forest of archaic night”
- Camille Paglia

**Protection under Directive principles of state policy:**
**Article 38:** The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. The welfare of these women and children have been declining day by day as the trafficking in women is growing as a biggest and the fastest offence in the country and the regulating of these
offences are falling pale it is sad to know that most of the women fall into this profession due to poverty and need for money., welfare of such people is the duty of the state.

Article 39(f): that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Many girls are sold for the purpose of sex like a vegetables in the market, the these children are exported like any other goods to other country or places for the exploitation of their body or for the purposes of the slavery, it is the state to secure the childhood of these children and to protect against the exploitation and against moral and material abandonment, it is depressing to know that these children are given proper food and are left to die if they have fever or other medical, disabilities, these children are used for their commercial purpose until these children are useful for their business later on they are injected with drugs till they die. Health of the children is the duty of the state.

Article 45: Provision for free and compulsory education for children The State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

Till the age of 14 years the compulsory education should be provided to the children but the children in the slums will not have access to education and most of the children in this profession are from the background of the slums and povertystricken, indeed it is the mandatory duty of the state to provide for the education but somewhere this is not been implemented in the state properly, and the major drawback of these state policies are that they are not enforceable in the court of law.

Covering other aspect of education of children, the education of the children of the prostitutes becomes a big thing to worry, because the education in between the other students in the school with the children of prostitutes is seems to be difficult to accept. These children are often denied to admit in the schools and this automatically leads to continuation of the profession by the children also. All these aspects will change only when minds of the people will change and accept these prostitutes as the extract of the helpless circumstances rather than criticizing them for what they are.

“Prostitution exists for only one reason; that reason is male demand. No amount of poverty would be capable of creating prostitution if it were not for male demand” - Rachel Moran.

Protection under Human rights:
In Gaurav Jain vs. Union Of India Ors445 the court held regarding to the rights of the prostitution under universal declaration of human rights that, “Article 1 of the Universal Declaration of Human Rights provides that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2 provides that everyone, which includes fallen women and

445. (1997) 8 SCC 114;1998 SCC(Cri) 25
their children, is entitled to all the rights and freedoms set forth in the Declaration without any distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 3 provides that everyone has the right to life, liberty and security of person. Article 4 enjoins that no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. The fallen victims in the flesh trade are no less than a slave trade. Article 5 provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The fallen/trapped victims of flesh trade are subjected to cruel, inhuman and degrading treatment which are obnoxious, abominable and an affront to Article 5of the Universal Declaration and Article 21 of the Indian Constitution.

Similarly, Article 6 declares that everyone has the right to recognition everywhere as a person before the law. The victims of flesh trade are equally entitled before the law to the recognition as equal citizens with equal status and dignity in the society. Article 7 postulates that all are equal before the law and are entitled, without discrimination, to equal protection of the law. So, denial of equality of the rights and opportunities and of dinity and of the right to equal protection against any discrimination of fallen women is violation of the Universal Declaration under Article 7 and Article 14 of the Indian Constitution.

Article 8 of the Universal Declaration provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the Constitution or the law.”

“Prostitution happens to you because of troubles you had. In reality no women would choose to do that”
- Catherine Deneuve (French Actress)

Protection under Juvenile Justice Act 1986:

Again quoting the judgment of Gaurav Jain vs. Union Of India & Ors446 supreme court held that, “The Juvenile Justice Act provides for care, treatment and rehabilitation by developing appropriate linkage and co-operation between formal system of juvenile justice and voluntary agencies engaged in the welfare of the neglected or socially maladjusted children; it specifically defines the areas of the responsibilities etc. Section 2(a) defines ‘begging’. Section 2(b) defines ‘Board’ to means Juvenile Welfare Board constituted under Section 4. Terms ‘Brothel’, ‘prostitute’, ‘prostitution’ and ‘public place’ have been adopted as defined in ITP Act. ‘Competent authority’ or ‘Juvenile court’ as the case may be, is defined under Section 2(d). Section 2(f) defines ‘fit person’ or ‘fit institution’ to mean any person or institution (not being a police station or jail) found fit by the competent authority to receive and take care of a juvenile entrusted to his or its care and protection on the terms and conditions specified by the competent authority. ‘Guardian’ in relation to a juvenile has been defined under Section 2(g). ‘Juvenile’ has been defined under Section 2(h) to mean a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years. ‘Juvenile Court’ and ‘Juvenile Home’ have been defined in Section 1(i) and 2(j) respectively. ‘Neglected juvenile’ which is more relevant for the purpose of this case, has been

446 ibid
defined in Section 2(1) to mean a juvenile who (i) is found begging; or (ii) is found without having any home or settled place of abode and without any ostensible means of subsistence and is destitute; (iii) has a parent or guardian who is unfit or incapacitated to exercise control over the juvenile; or (iv) lives in a brothel or with a prostitute or frequently goes to any place used for the purpose of prostitution, or is found to associate with any prostitution or any other person who leads an immoral, drunken or depraved life; (v) who is being or is likely to be abused or exploited for immoral or illegal purposes or unconscionable gain. ‘Prostitution’ means the sexual exploitation or abuse of persons for commercial purposes and the expression ‘prostitute’ shall be construed as it is defined under Section 2(f) of ITP Act. After the amendment to the ITP Act, ‘prostitution' means sexual exploitation or abuse of person for commercial purpose.”

“Prostitution should not be a crime. Prostitutes are not committing an inherently harmful act. While the spread of disease and other detriments are possible in the practice of prostitution, criminalization is a sure way of exacerbating rather than addressing such effects. We saw this quite clearly in the time of alcohol prohibition in this country”

- Sherry f. Colb

Protection under Immoral Trafficking (prevention) act 1956:
Object of the act:
The object of the enactment was to abolish the commercial vice of traffic in women, men and children for the purpose of prostitution as an organized means of living.
Provisions of the act:
Section 3 of the act punishes any person who keeps or manages or assists such keeping or management of the brothel.
Section 4 provides for the punishment for the knowingly living on the earnings of the prostitution.
Section 5 provides for punishment for the person who procures, induces or takes person for the sake of prostitution.
Section 6 provides that if a person detains any other person in the place where the prostitution is carried on whether with or without the consent of such other person will be liable for punishment.
Section 7 if any person carries on prostitution within the area prescribed in the notification by the state government directing to not to carry on the prostitution in such areas and distance of 200 meter from public places like educational, temples or places of religious worship, hostels hospitals and the like shall be liable for punishment as prescribed under this section.
Section 8 any person who has committed the offence of seduction or soliciting for prostitution shall be punished under this section.
Section 19 provides for the provision where a magistrate can order for rehabilitation of prostitutes.

Conclusion:
The profession which existed in our country from time immemorial has been a social drawback, the morals have been left behind, the woman who is treated as ‘Shakti’-energy and ‘Prakruti’-nature is also treated as sex object, a means to sexual pleasure. Even if a woman is a Prostitute she has to offer her body with her own will and with free consent. The consent if not given by a prostitute and still a person forces on her and
does an act of intercourse will amount to rape, because women of easy virtue is no defense in rape, prostitute also has the same dignity and respect like other women in the society just because she is in such profession does not mean that her body is granted. Her body is still her right and she shall be the only person to decide what she wants to do with it. If any person forces on her, then she is protected under law. No man shall dare to touch a woman thinking that she is a prostitute and a property of the public. She holds the dignity in society and she has the right against such exploitation.
DECRIMINALISATION OF ATTEMPT TO COMMIT SUICIDE

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ABSTRACT:
Snatching one’s own life has become common in today’s scenario. Life has an intrinsic value in itself. No person in this world is immortal. Due to changing scenario, the current society is facing large number of suicidal death. In India the total number of suicide in the year 2015 is about 1, 33,623. Suicide is intentional termination of one’s own life. The reason for persons committing suicide varies from psychological to social. There is a strange provision in IPC which punishes the mentally sick person who attempt to end his life whereas the person who successfully commit suicide are not punished as once the act is successful there will not be anyone to be punished. All that the government need to do is to find steps to stop this unnatural act from recurring and not to punish the person as he is victim for his own mind. This article will deal in detail the views of religious book; Law Commission reports ;views of authoritarian institutions ; Judicial decisions about the need for decriminalization of attempt to commit suicide. Suicide is a result of manifestation of mental disorder hence all that the person who commit the act is in need of acute psychological treatment ; care; hopeful words, which helps him in socializing with the society and not punishment by putting him in prison whereby he is allowed to come in contact with criminals which worsen their conditions .Repeal of section 309 is a debate not just today but years before .Though Mental Health Care Act 2017 and Indian Penal Code (amendment) bill, 2016 decriminalizes attempt to commit suicide still section 309 of IPC remains in the code.

KEY WORDS: Decriminalization of attempt to commit suicide, mental illness, section 309,

INTRODUCTION:
The precious gift of God is the Lives on Earth. Life is not free from obstacles or hurdles even for a small creature. But the real victory lies in overcoming it. None of the living beings other than humans end their lives prematurely. The people at the time of committing or attempt to commit suicide may not have the rationality due to the severe psychological trauma, hopelessness they undergo at that time. Victims of Suicide are mentally, psychologically sick patients. Thus the duty is to serve who “call for help”. They need care and treatment. But there is a strange cruel, irrational provision in the Indian Penal Code which impose punishment on a mentally ill patients. If the reason for punishment of attempt to commit suicide is to prevent the prospective suicides by deterrence, the same is not achieved by punishing those who have made the attempts, as no deterrence is going to hold back those who want to die for a social or political cause or to leave the world either because of the loss of interest in life or for self-deliverance, as it is evident from the increase in number of suicides each year. It’s a need of the hour whereby section 309 of IPC need be effaced from IPC to humanize our penal laws as it is an anachronistic provision for human society like ours.
What is suicide?
The word suicide is derived from Latin phrase ‘sui cadre’ which means ‘to kill oneself. Suicide (felo de se) means deliberate termination of one’s own physical existence or self-murder, where a man of age of discretion and compos mentis voluntarily kills himself. The act or an instance of taking one’s life voluntarily and intentionally . (Sui-of oneself, cadre –to kill).

Self-preservation is the natural instincts of human beings .Suicide goes against this. Thus some human beings act in an unnatural way though intentionally to end their existence but not wontedly, there are many reasons for them to behave in this way .It may be social, physical, and psychological.

- Attempted suicide or suicide is a result of mental disorder .Can a person be punished because he is suffering from heart attack? Under what underlying principle does a person suffering from mental disorder, stress, heart-breaks, depressions be punished when he is under dire need of psychiatric help?

- Acute physical pain ,Chronic pain

- Other reasons for suicide would be failure in exams, unemployment, povertyprofessional/career problems, discrimination, sense of isolation, abuse, violence, family problems addiction to alcohol, financial loss, hopelessness etc.

The prolonged suffering when it reaches its peak tempt people to commit suicide

- Apart from committing suicide due to abovementioned reasons .Terrorists and suicide bombers undergo self-immolation to stop getting into hands of police. People undertaking hunger-strikes, though their intention is not to kill themselves rather to instigate their demands been done. Ascetics undergo self-immolation for religious purpose.

THE REASONS FOR SUICIDE AS PROPOUNDED BY VARIOUS THEORISTS ARE AS FOLLOWS: According to EMILE DURHEIM; Social forces and integration of individual with society are responsible for individual suicidal behavior .They are egoistic and altruistic.

According to THOMAS JOINER, INTER-PERSO-NAL –PSYCHOLOGICAL theory of suicidal behavior’ in order to inject lethal substance, an individual should habituate himself to more physical pain and fear of death .This habituation occurs by repeated exposure to painful events .

According to EDWIN SCHNEIDMEN; Humans commit suicide due to a psychological pain called “psych ache”. It

448 http://www.merriam-webster.com>sui... 
449 Dr. B.S. Yadwad, Professor &Dr.Hareesh.S.Gouda, Is attempted suicide an offence, JIAFM, 2005: 27 (2)... medind.nic.in>jal.
450 Id.
451 When people feel like they don’t belong, purposeless and desperate.
452 Excessive integration leads people to lose themselves and devote to larger goals.
454 General psychological and emotional pain that reaches intolerable intensity.
is similar to perceived burdensomeness and thwarted belongingness of Thomas Joiner 455

ARON BECKAR: emphasized hopelessness . He says those with high hopelessness were 11 times more likely to die by suicide than those with lower scores.456

ROY BAUMEISTER: He proposed escape theory of suicide . According to which person experience wide difference between expectation and reality. Person attempts to escape from negative affect as well as from the aversive self-awareness by retreating into a numb state of cognitive deconstruction.457

POSITION OF SUICIDE:
Manu’s Dharmasstra on ‘ a hermit in forest ’ says, A Brahmana having got rid of his body by one of those modes (i.e. drowning, precipitating burning or starving) practiced by the great sages, is exalted in the world of Brahmana, free from sorrow and fear.” Two commentators on Manu, Govardhana and Kulluka, says a person is allowed to undergo great departure on a journey of life in certain situations, for performing sati, when he is suffering from acute illness 458. However religious laws BhagwatGita, Holy Bible, Quran does not favor commission of suicide. Though Bible does not explicitly prohibit suicide, the taboo that is attached with suicide and denial of decent burial condemn the practice. Quran ask its men and women to wait for his/her destiny rather than snatching away from the hands of Allah 459. But Hinduism, Jainism, Buddhism does allow suicide of some reason but condemn other practices. Despite IPC condemn suicide, is not punishable perse as once the act is successful there will be no one to be prosecuted. Thus it is a strange provision as a successful act is not punishable whereas attempt to do an act is an crime and punishable. This is stated in Rattan Lal and Sheeran Lal’s commentary on Indian Penal Code

It is a unique legal phenomenon in the Indian Penal Code that the only act, the attempt, of which alone will become an offence. The person who attempt to commit suicide is guilty of the offence under section 309 whereas the person who commit suicide cannot be punished at all .460

POSITION OF ATTEMPT TO COMMIT SUICIDE:
Sec 309 of IPC states – “whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both.” Indian laws require Intention, as a major element for punishment of an offence. Thus in order to punish a person for attempt to commit suicide the act must be intentional, in Dearica Pooja v Emperor461, it is said he

456Id.
457Id.
459Rd. B. S. Yadwad, Professor & Dr. Hareesh S. Gouda, Is attempted suicide an offence, JIAFM, 2005 : 27 (2). medind.nic.in>jal.
460Attempt to commit suicide .www.livelaw.in.
4611884 ILR 8 Mad 5.
can’t be punished if he consumes overdoses negligently.

Does hunger-strike, an attempt to commit suicide? At times people adopt hunger-strikes to make their demands fulfilled. Thus it is difficult to identify whether the person resorted to hunger-strike is only having the intention of having his demand fulfilled or he intent to kill himself. If his intention is to have his demands fulfilled he is not liable under sec 309.

In a case Ram Sunder v State, the accused for employed in Mental Hospital, Bareilly he was dismissed from his work by the hospital authorities, he condemned that he was removed illegally by discrimination, thus to reinstate him he undertook hunger strike near Gandhi statute in the heart of Bareilly claiming his demands fulfilled. Since his heath condition worsened he was taken to hospital from there to jail. District court convicted him for attempt to suicide, the accused held that he did not intend to kill himself moreover he admitted that consumed juice. Allahabad H.C set aside the conviction and held him not liable. The court held that “the evidence in the present case fell short of an attempt to commit suicide. If a person openly declares that he will fast unto death and then proceeds to refuse all nourishment until the stage is reached when he may collapse any moment, then there is imminent danger of death ensuing and he would be guilty of an attempted suicide under section 309, IPC.

CONSTITUTIONALITY OF SEC 309: The constitutional validity of sec 309 was first challenged in Maruthi sripathi Dubal v State Of Maharashtra Bombay High Court speaking through J. Sawant held sec 309 is violative of Article 21 and Article 14. Fundamental rights has negative and positive aspects within it, thus Right to life in article 21 was interpreted to include Right to die. Court further held that the term Suicide has nowhere been defined under the Mode What is considered suicide in one society may not be considered suicide in others. Suicide occurs for different reasons and for different ends. Section 309 doesn’t make any distinction between all this. Thus making the provision arbitrary. Thus the provision is arbitrary and unreasonable hence is unconstitutional and need be repealed.

Chenna Jagadewshara v State Of Andhra Pradesh, the High court of Andhra Pradesh uphold section 309 stating that, by no means right to life can be said to include right to die. The court also held that the courts have adequate power to ensure that “unwarranted harsh treatment or prejudice is not meted out to those who need care and attention”.

The constitutional validity of section 309 came before Division bench of S.C in Rathinam v Union of India, whereby Honorable S.C held sec 309 as violative of article 21 as right to life includes right not to

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462 1987 Cr LJ 755
464 1987 Cr.LJ 743
465 (1988) Cr.LJ 549
466 AIR 1994 SC 1844

www.supremoamicus.org
live a forced life, but doesn’t consider it to be violative of article 14. Further states, such traumatized persons deserves treatment and not punishment. S.C observed

“Section 309 of the Penal Code deserves to be effaced from the statute book to humanize our penal laws. It is a cruel and irrational provision, and it may result in punishing a person again (doubly) who has suffered agony and would be undergoing ignominy because of his failure to commit suicide. Then an act of suicide cannot be said to be against religion, morality or public policy and an act of attempted suicide has no baneful effect on society. Further suicide or attempt to commit it causes no harm to others, because of which State’s interference with the personal liberty of the persons concerned is not called for.”

However larger bench of S.C in Gian kaur v State of Punjab overruled its earlier decision in Rathinam v Union of India, thus upholding constitutionality of sec 309, stating by no imagination extinction of life can be said to be included in protection of life. The court doesn’t discuss about detention or retention of sec309. The court observed,

“We find it difficult to construe Article 21 to include within it the ‘right to die’ as a part of the fundamental right guaranteed therein. Right to life is a natural right embodied in Article 21 but suicide is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of ‘right to life’. With respect and in all humility, we find no similarity in the nature of the other rights, such as the right to ‘freedom of speech’ etc. to provide a comparable basis to hold that the ‘right to life’ also includes the ‘right to die’. With respect, the comparison is inapposite, for the reason indicated in the context of Article 21. The decisions relating to other fundamental rights wherein the absence of compulsion to exercise a right was held to be included within the exercise of that right, are not available to support the view taken in P. Rathinam qua Article 21. To give meaning and content to the word ‘life’ in Article 21, it has been construed as life with human dignity. Any aspect of life which makes it dignified may be read into it but not that which extinguishes it and is, therefore, inconsistent with the continued existence of life resulting in effacing the right itself. The ‘right to die’, if any, is inherently inconsistent with the ‘right to life’ as is ‘death with life.’ However in this case the court doesn’t go with the concept of retention or detention of section 309 of IPC.

VIEWS AGAINST DECRIMINALISATION:
Article 21 states No person shall be deprived of life or personal liberty except according to procedure established by law. Thus the duty is imposed on the state to protect personal lives of people not only from the hands of fellow men but from their own self. By imposing punishment on the person who attempt to commit suicide the State upholds

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467 Attempt to suicide no more offence
...www.learningthelaw.in
468 AIR 1996 SC 946

www.supremoamicus.org
the value and dignity of human life. The body of individual belongs not only to himself rather to his wife, children, and government. He has duty towards society which need be done .Thus individual has no right to take his life .Parents give birth to child but no government led parents take the lives of children . Thus protagonists of criminalization claim that only when it is made punishable the persons tempting to do the act can be controlled to the extend .But reality is opposite to this.

NEED FOR DECRIMINALISATION:

- They are patients and not criminals:
  Delhi H.C, in State v Sanjay Kumar Bhatia while acquitting a young boy who attempted to commit suicide by consuming poison strongly recommended for deletion of section 309 from statute book as court observed it is an anachronistic provision for human society like ours. He is in need of psychiatric help hence treatment rather than punishment need be given.

- Does not serve to be deterrent:
  The reason for imposing punishment for any offence is to impose deterrent effect on the person, thus prohibiting him and the society at large to stop the furtherance of the act. But despite attempt to suicide is made punishable, the rate of persons committing suicide doesn’t come down.

Every hour, one student commits suicide in India according to the latest available data. The National Alliance on Mental Illness reports that suicide is the second-leading cause for death of college student after accident .Mental illness –depression plays a significant role in one’s decision to attempt suicide. The reason for children to commit suicide are family problems, illness, and failure of examination. The reason for women to commit suicide is marriage related issues, dowry problem, marital rape,

Dr. B.S.Yadwad, Professor & Dr. Hareesh.S.Gouda, Is attempted suicide an offence, JIAFM, 2005 : 27 (2). medind.nic.in>jal.

Suicides In India, ncrb.gov.in>ADSI2015>chapt...

illegitimate pregnancies, divorce. Farmers suicide occurs due to debt and the resulting harassment at the hands of money lenders is a major cause for agriculturists to commit suicide. The number of suicides in our country during the decade (2005–2015) have recorded an increase of 17.3% (1, 33,623 in 2015 from 1, 13,914 in 2005). Maharashtra reports the highest number of suicide 12.7 followed by Tamil Nadu 11.8. Family problems (27.6) and illness (15.8) constitute the major reason for persons to commit suicide. The percentage share of various causes for committing suicide:

Further problems caused by criminalization of attempt to commit suicide:

- Emergency treatment which is required for suicidal persons are not given by local hospitals and doctors as they refer the case to tertiary center to be medico-legal. Thus many lives go unsaved.
- Those who commit suicide is already under distress and psychological pain, subjecting them to undergo police investigation is like adding fuel to the fire which rise their agony and ignominy. They are in need of kind words, sympathy, lock-ups and police doesn’t serve the need.
- It leads to gross under-reporting of attempted suicide.
- This forbid the victim and his family from having access to the emotional, mental psychiatric health support which alone can help them and prevent them from further committing the same. As stated by Aron Becker, previous suicidal experience sensitizes suicidal thoughts so that they become more accessible and active to such acts.

Thus decriminalizing the attempt to commit suicide would lead to a desirable outcome in the frustrated and psychologically traumatized, stressful suicide seeker, who would not only be spared the unkind social stigma but also be in a better position to freely and fearlessly seek medical and psychiatric treatment. This in turn would

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476 Suicides In India, ncrb.gov.in>ADSI2015>chapt.


lead to a better and more socially acceptable way of dealing with the problem than through the criminal law.\textsuperscript{479} Decriminalizing attempt to commit suicide in no way support or allow persons to commit suicide.

\textbf{VIEWS OF AUTHORITATIVE INSTITUTIONS FOR DECRIMINALISATION:}

International Association for Suicide Prevention recommended Indian Government for decriminalization of attempt to commit suicide as suicidal individual need to be helped, law only make their situation worse\textsuperscript{480}.

The World Health Organization stated that ‘having suicidal behaviors specified by law as a punishable offence has many negative effects at a public health level. Moreover, punishing with imprisonment a behavior consequent to either a mental disorder or a social difficulty gives a completely wrong message to the population’\textsuperscript{481}.

\textbf{LAW COMMISSION REPORT:}

Law Commission of India in its 42\textsuperscript{nd} report submitted in June 1971 recommended repeal of section 309 as the penal provision is harsh and unjustifiable. Clause 126 of Indian Penal Code (amendment) bill, 1972 which was introduced in Raja Sabha, recommended abolition of section 309 stating such provisions are harsh, unjustifiable and thus it need be repealed.

Clause 131 of the Indian Penal Code (Amendment) Bill, 1978, as passed by the Council of States on 23.11.1978, correspondingly talk about repeal of section 309 for above said reasons. Since the House of the People was dissolved in 1979, the Bill, though passed by the Council of States, lapsed.

However after the judgement of apex court in Gain Kaur v State Of Punjab, Law Commission in its 156\textsuperscript{th} report recommended retention of section 309.

Law Commission of India in its 210 report ‘Humanization and Decriminalization of Attempt to Commit Suicide’ recommended government to initiate steps to erase punishment of attempt to commit suicide from statute book, as it is anachronistic provision despite being constitutional. It is like imposing double punishment to person who already suffer agony and ignominy from loss of dear ones, mental distress, and psychological illness. Attempt to commit suicide is a result of manifestation of diseased mind which deserve treatment, sympathy and not punishment.

\textbf{NEED TO SCRAPE SEC 309:}

Time has come where it has become necessary to scrape this anachronistic provision which is increasing the mental agony to already mentally ill patients. Laws and punishment doesn’t serve its need until people’s attitude and views change regarding life. If incase people’s attitude towards life change there will not be need for any stringent laws as people are well...

\textsuperscript{479}K.S. Latha,N.Geetha,Criminalizing suicide Attempts: Can it be a deterrent? 2004, citeeex.ist.psu.edu >view doc >download accessed on 30/5/2018.

\textsuperscript{480}Humanization and Decriminalization of Attempt to Suicide, Law Commission of India, Report No 210, Oct 2008, LawcommissionofIndia.nic.in>report210.

\textsuperscript{481}Id
regulated by themselves. Thus the burden is on the government to frame rules and laws in such way it helps people change their attitude towards life instead of punishment whereby it only adds fuel to fire.

MENTAL HEALTH CARE ACT, 2017: In a way forward in repealing section 309 of IPC, Mental Health Care Act 2017 has been framed. The said act under section 115 stated that person who undergo attempt to commit suicide are presumed to be under severe stress unless otherwise proved and by no means can be held liable under section 309 of IPC. It further states that the duty is imposed on the Government to provide care, treatment and rehabilitation to those who attempt to commit suicide and to further reduce the risk of reoccurrence. Decriminalizing attempt to commit suicide does not in any way permit people to commit the act. Rather the role of government has increased in preventing, prohibiting, combating the attempt done by people to end their life in a premature way.

ROLE OF GOVERNMENT:
India is battling high suicide rate. Suicide is both public and mental health problem which demands urgent action. Post-suicidal impact on family, society is also devastating and far-reaching. Suicide is multi-faceted, although suicide is deeply personal and individual act, suicidal behavior is also influenced by societal factors, as stated by Emile Durkheim who emphasized ‘collective societal behavior’, are responsible for letting people take this unnatural decision.

- Government should create a national strategies or national plan to give clear commitment to suicide prevention
- Follow up care for people who attempted suicide as they are more vulnerable to have their attempt successful next time. Societal support can help people develop coping technique and sense of belongingness. But for this to be successful Government and society must see suicide to be Public health danger which requires urgent demand and not as something to be stigmatized and illegal.
- Restricted access to means of suicide: If people attempt suicide impulsively, restricting access to means of suicide would reduce their temptation to suicidal thoughts. By restricting access to pesticide in local areas is effective in lowering suicide rates. But the case would be different if they have a long term intention.
- Promoting responsible media reporting of suicide and related issues: Educating public about suicide, its risk factors, its post impact of suicide, avoiding sensationalism and glamorization of suicide, and avoiding detailed descriptions of suicidal acts. Educating people about the value of life, availability of help.
- Policies to reduce harmful alcohol availability

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Promoting and supporting NGO’s.\textsuperscript{484}

In addition to above mentioned, the Government should make sure the basic needs of its people are satisfied. Unemployment and poverty being a reason for many people to commit suicide. Government should make sure these problems are resorted. Mental health should be given priorities by health planners at center and state level. Provide for rehabilitation center for people with suicidal thought.

- NATIONAL MENTAL HEALTH PROGRAMME, was launched by Government in 1982. It has three components
  1. Treatment of Mentally ill
  2. Rehabilitation
  3. Prevention and promotion of positive mental health.

The main objective of it, is to ensure availability and accessibility of mental health care for all.\textsuperscript{485}

- MENTAL HEALTH CARE ACT, 2017:

The main objective of Mental Health Care at, 2017 as stated in the preamble is to “provide for mental healthcare and services for persons with mental illness and to protect, promote and fulfil the rights of such persons during delivery of mental healthcare and services and for matters connected therewith or incidental thereto.” It further integrate mental health care service at all level of healthcare including primary, secondary, tertiary. Provide treatment in such a way to make them integrate with family and community at large. It also provides for community based rehabilitation. Further impose obligation on government to make sure their rights are not infringed. The said act is framed in accordance with the Convention on Rights of Persons with Disabilities which is signed and ratified by Government in October 2007.\textsuperscript{486}

ROLE OF NGO’s:

NGO’s bridge the gap created due to paucity of treatment facilities and psychiatrists in Government sector. Indian mental health care resources are scarcely located in some urban areas and they don’t serve the need whereas NGO’s can reach even to remote areas, through help line, they contribute much too societal needs. NGO’s play an active role in child mental health, Schizophrenia, Psychotic conditions, drug, alcohol abuse. National programs on alcohol and drug abuse reduction are implemented through grants-in-aid given to NGO’s.

- SNEHA (Chennai), ROSSINI, COOI, SNEHA INDIA FOUNDATION, VANDRAVELA FOUNDATION FOR MENTAL HEALTH, MPA (Bangalore), SAARTHAK (Delhi) work for suicide prevention activities. Some of the activities of the NGO’s include
  - Treatment: care and rehabilitation

\textsuperscript{484}DR. Poonam Khetrapal Singh, WHO Regional Director for South-East Asia, Governments can play a pivotal role in preventing, www.searo.who.int/mediacentre/features/2014/government-can-play-pivotal-role-in-preventing-suicides/en/

\textsuperscript{485}National Mental Health Programme, vikaspedia.in>health>national-mental...

• Community –based activities and prevention
• Research and training
• Advocacy and empowerment

DECRIMINALISATION GLOBALLY: Attempt to suicide is decriminalized in most countries except countries like Singapore, Pakistan, Bangladesh, Malaysia, and India. Following the French Revolution of 1789, criminal penalties for attempting to commit suicide were abolished in European countries, England being the last to follow suit in 1961. In England, the Suicide Act 1961 abrogated the law laying down that attempt to commit suicide is an offence. World Health Organization alone with International Association of Suicide Prevention celebrates September 10 of each year as World suicide day to create awareness and prohibit suicide.

CONCLUSION:
Suicide, ‘a call for help’ is a result of psychiatric disorder and not manifestation of criminal instinct, thus such persons are in dire need of treatment. Criminalizing attempt to commit suicide doesn’t serve the need. There is a change in theories of punishment from Deterrent to Reformation in criminal laws, as the main intention of laws is to reform persons. Thus in accordance with this, although Mental Health care act,2017 decriminalizes attempt to commit suicide, still section 309 remains in statute book as an offence, which need be effaced. Indian Penal Code (amendment bill) 2016 makes changes to the section 309 by which attempt to commit suicide is decriminalized, time has come whereby the bill need to be passed by parliament as early as possible to help our needy people. Thus attuning our criminal law with global wavelength.

487 R.Thara and VikramPatel, Role of non-government organisations in mental health in India, Indian journal of psychiatry. www.ncbi.nlm.nih.gov/pmc/articles/PMC3146177/

CRUELTY AS A GROUND FOR DIVORCE

By Maahi Mayuri
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INTRODUCTION

Divorce, also known as dissolution of marriage, is the termination of a marriage or marital union, the cancelling and/or reorganizing of the legal duties and responsibilities of marriage, thus dissolving the bonds of matrimony between a married couple under the rule of law of the particular country and/or state. Cruelty has been a ground for matrimonial relief under various personal laws. Cruelty as a ground for divorce is widely accepted by almost all the legal systems of the world. In countries like U.S.A, Canada, Mexico, South Africa, Australia, New Zealand, China, Japan, Russia, India and in many Latin American countries, it is a ground for divorce.

PROVISIONS FOR CRUELTY AS A GROUND FOR DIVORCE

2. Section 13 of The Hindu Marriage Act, 1955, provides for dissolution of a Hindu marriage by a decree of divorce on 13 grounds, one of them being cruelty.

Under the Hindu Marriage Act, 1955 cruelty is a ground for claiming judicial separation and is available both to husband and wife who were married either before the Act came into operation or thereafter. The Act provides that either party to a marriage, whether solemnised before or after the commencement of the Act, may present a petition for judicial separation on the ground that the other party has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party.

According to the act, “Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party has, after the solemnisation of the marriage, treated the petitioner with cruelty”

- Cruelty is one of the 12 grounds for divorce under Section 27 of The Special Marriage Act, 1954.

According to the act, “Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the district court either by the husband or the wife on the ground that the respondent has since the solemnisation of the marriage treated the petitioner with cruelty”

- Section 2 of The Dissolution of Muslim Marriages Act, 1939, provides for 8 grounds on that a girl married underneath the Muslim law is entitled to get a decree for dissolution of her marriage. One of them being cruelty.

According to the act,
“Grounds for decree for dissolution of marriage.—A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

- that the husband treats her with cruelty, that is to say,—
- 10. habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or
- 11. associates with women of evil repute or leads an infamous life, or
- (c) attempts to force her to lead an immoral life, or
- (d) disposes of her property or prevents her exercising her legal rights over it, or
- (e) obstructs her in the observance of her religious profession or practice, or
- (f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran”

- Section 32 of The Parsi Marriage and Divorce Act, 1936, provides for 11 grounds for divorce. One of them is cruelty.4

“Any married person may sue for divorce on any one or more of the following grounds, namely: that the defendant has since the solemnization of the marriage treated the plaintiff with cruelty or has behaved in such a way as to render it in the judgment of the Court improper to compel the plaintiff to live with the defendant: Provided that in every suit for divorce on this ground it shall be in the discretion of the Court whether it should grant a decree for divorce or for judicial separation only”

- Adultery plus cruelty is one of the 7 grounds of dissolution of marriage of Christians provided by Section 10 of The Indian Divorce Act, 18695

Under the Indian Divorce Act a wife is entitled to present a petition to the district court or to the High Court for the dissolution of her marriage on the ground that, since the solemnization of her marriage her husband has been guilty of adultery coupled with cruelty, or without adultery she would have been entitled to a divorce a mensa et ihiro. As is clear, cruelty under the above provision, by itself, is no ground for dissolution of marriage and the wife can sue for the relief only when there is adultery coupled with cruelty on the part of the husband.6

According to the Act, “Any marriage solemnized, whether before or after the commencement of the Indian Divorce (Amendment) Act, 2001, may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.”

None of these Acts, however, define as to what cruelty clearly is.
MEANING OF CRUELTY

Every matrimonial conduct, which can cause annoyance to the opposite, might not amount to cruelty. Mere trivial irritations, quarrels between spouses that happen in every day married life, may additionally not amount to cruelty. Cruelty in marital status life is also of unfounded variety, which might be refined or brutal. It should be words, gestures or by mere silence, violent or non-violent.

The idea, meaning and also the concept of cruelty changes from time to time, varies from place to place and differs from individual to individual. It's not identical for persons placed in different economic conditions and statuses. Perhaps, this can be the rationale why the legislature has not, in any of the Acts, outlined as to what cruelty is and has left it to the best judgement of the Judiciary to come to a decision as to what amounts to cruelty to a specific person during a particular set of circumstances. Various Judges have, in varied judgements, outlined on what amounts to cruelty, however, yet again, those definitions don't seem to be general, but are associated with the facts and circumstances of those specific cases.

“What the said provision does not define cruelty. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the court will have no problem to determine it. It is a question of fact and degree. If it is mental, the problem presents difficulty”7

“What is cruelty in one case may not amount to cruelty in another case and it has to be determined in each case keeping in view the facts and circumstances of that case”8

“What constitutes mental cruelty for the purposes of section 13 (1) (ia) Of the Hindu Marriage Act, 1955 will not depend upon the numerical count of such incident or only on the continuous course of such conduct but one has to really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude necessary for maintaining a conductive matrimonial home”9

“Mental cruelty cannot be established by direct evidence and it is necessarily a matter of inference to be drawn from the facts and circumstances of the case”10

“Allegation made in the written statement and the evidence brought on record and came to hold that the said allegations and counter allegations were not in the realm of ordinary plea of defence and did amount to mental cruelty A conscious and deliberate statement levelled with pungency and that too placed on record, through the written statement, cannot be so lightly ignored or brushed aside.”11

The key things to be understood regarding cruelty are:

a) Whether the intention is an essential element?

In P L. Sayal v. Sarla Rani 12 Case the parties who married and had two children, but it turned out to be an unhappy marriage. The wife consulted a fakir who gave her some love-potion to be administered to the
husband. She administered the same to the husband which made him seriously ill. The husband had to be admitted to the hospital. After discharging from the hospital, the husband petitioned for judicial separation on the ground of wife’s cruelty. The court granted the decree saying that the husband could not be expected to live in the constant fear that it may happen again and the intention of the wife was not important. The Court did not consider intention to be cruel as an essential element of cruelty as a ground for divorce.

b) Whether act or conduct constituting cruelty is aimed at the petitioner?

The courts are of the view that cruelty should be aimed at the petitioner. In Trimbak Narayan Bhagwat v. Kumudini Trimbak Bhagwat, the husband lost his mental balance and had to be sent to a mental home. On his release from the home, he stayed at the matrimonial home though he had not regained his mental balance completely. One day, he attempted to strangle the wife’s brother and the next day, one of his own children. The wife filed for judicial separation on the grounds of cruelty. It was held that in mental cruelty, it was not important whether the act or conduct was aimed at the petitioner or some near and dear ones of the petitioner.

c) Whether the act or conduct constituting cruelty emanates from the respondent?

In India, most couples live in joint families, and the in-laws subject many times wives to ill treatment. In Shyamsunder v. Santidevi, the wife, soon after the marriage was severely ill treated by her in-

laws, while the husband stood idly, taking no steps to protect his wife. The court held that the intentional omission to protect his wife amounts to cruelty on the husband’s part.

DEFINITION OF CRUELTY

The legislature has, in almost all the matrimonial laws, left it to the judiciary to interpret, analyse and define what cruelty is. The judiciary has crossed lengths and breadths in discharging its burden and has declared every human activity creating physical or mental hardship as amounting to cruelty. Physical force which causes bodily injury, conduct of the other party which puts the health of the petitioner in jeopardy, systematic neglect and abuse, drunkenness, refusal to co-operate in family affairs, false charge of adultery, cruelty to a child to wound the mother's feelings, insulting conduct resulting in melancholia, installing a woman in the house and threatening to elope with her, association with other women, conviction for a criminal offence in which the other spouse is implicated against his/her will, excessive or revolting sexual demands, sodomy, unjustifiable refusal to have sexual intercourse, sterilisation by the husband without the wife’s consent, unreasonable insistence on the use of contraceptives, misconduct in relation to third person, communication of venereal disease, unwarranted imputations of unchastity, insistence to change his or her religion, complete denial of coitus, have all been held to be acts of cruelty.

Let us look at the definition of cruelty, with the help of various case laws.
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- V. Bhagat v. D. Bhagat (Mrs.), (1994) SCC 337 23

A two judge Bench referred to the amendment that had taken place in section 10 and 13 (1) (ia) after the Hindu Marriage Laws (Amendment) Act, 1976 and proceeded to hold that the earlier requirement that such cruelty has caused a reasonable apprehension in the mind of a spouse that it would be harmful or injurious for him / her to live with the other one is no longer the requirement. Thereafter, this court proceeded to deal with what constitutes mental cruelty as contemplated in section 13 (1) (ia) and observed that mental cruelty in the said provision can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. To put it differently, the mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It was further observed, while arriving at such conclusion, that regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances. What is cruelty in one case may not amount to cruelty in another case and it has to be determined in each case keeping in view the facts and circumstances of that case. That apart, the accusations and allegations have to be scrutinized in the context in which they are made. Be it noted, in the said case, this court quoted extensively from allegations made in the written statement and the evidence brought on record and came to hold that the said allegations and counter allegations were not in the realm of ordinary plea of defence and did amount to mental cruelty.


It has been ruled that the question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status and environment in which they live. If from the conduct of the spouse, it is established and /or an inference can legitimately be drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse about his or her mental welfare, then the same would amount to cruelty. While dealing with the concept of mental cruelty, enquiry must begin as to the nature of cruel treatment and the impact of such treatment in the mind of the spouse. It has to be seen whether the conduct is such that no reasonable person would tolerate it.


It was held "the concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs,
"in matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Cruelty in a matrimonial relationship may take the form of violence; sometime it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty. Therefore, cruelty in matrimonial behaviour defies any definition and its category can never be closed. Whether husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula. Cruelty in matrimonial cases can be of infinite variety - it may be subtle or even brutal and may be by gestures and words" 25

RECENT CASES

• **Samdeep Mohan Varghese vs Anjana on 15 September, 2010**

HIGH COURT OF KERALA AT ERNAKULAM.
Mat.Appeal.No. 99 of 2009( Dated :15/09/2010

Issues: Does the concept of matrimonial cruelty vary in accordance with the religious persuasions of individuals? Is a spouse bound to suffer greater amount of matrimonial cruelty because the spouses belong to a religion which considered marriage as indissoluble? Can the secular constitutional republic recognise and accept the existence of different varieties of matrimonial cruelty - Hindu cruelty, Christian cruelty, Muslim cruelty and secular cruelty? Should not matrimonial cruelty entitling a spouse for divorce yield to a uniform conceptualisation notwithstanding the different semantics employed in different pieces of matrimonial legislations applicable to different religions? Should not the courts take inspiration from Art.44 of the Constitution and attempt to understand the concept of matrimonial cruelty in a uniform manner to ensure that the right to life under Art.21 s made effective and meaningful under the matrimonial roof and to liberate spouses from a marital life in perpetual fear of contumacious cruelty? These questions arise before us in these appeals.

**Facts:** The parties are spouses. Their marriage took place in accordance with the Christian religious rites on 20.1.2001. The marriage is admitted. After marriage, the spouses set up residence at Mumbai. They resided together till 14.5.2004. On that day, the respondent/wife returned from the matrimonial home and took up residence along with her sister at Bangalore. She issued Ext.A1 notice demanding divorce and return of properties on 14.12.2004. The same was served on the appellant. There was no response to Ext.A1. Thereafter, the appellant filed a petition for restitution of conjugal rights before the Family Court, Bandra on 30.12.2004. Later, the same was transferred to Family Court, Ernakulam as per order of the Supreme Court and the same was renumbered as O.P.399 of 2006. The wife filed O.P.69 of 2005 before Family Court, Ernakulam claiming divorce on the ground of cruelty and non-consummation of marriage. Wife had further filed O.P.68 of
2005 claiming return of gold ornaments, money etc. The husband/appellant herein in O.P.68 of 2005 had staked a counter claim for return of ornaments, money etc. allegedly due to him.

**Held:** The learned Judge of the Family Court, by the impugned common order, came to the conclusion that the wife was entitled for a decree for divorce on the ground of cruelty under Section 10(1)(x) of the Divorce Act. The claim of the wife for divorce under Section 10(1)(vii) on the ground of refusal to consummate the marriage was rejected by the Family Court. O.P.69 of 2005 was thus allowed. Husband's prayer for restitution of conjugal rights in O.P.399 of 2006 was turned down by Family Court. The claim for return of money in O.P.68 of 2005 was allowed in part. The counter claim of the husband was rejected. In the appeal, the impugned order was upheld.

**CONCLUSION**

Both mental and physical cruelty are included as cruelty in modern times. While physical cruelty is easy to determine, it is difficult to say what mental cruelty consists of. Perhaps, mental cruelty is lack of such conjugal kindness, which inflicts pain of such a degree and duration that it adversely affects the health, mental or bodily, of the spouse on whom it is inflicted.

In *Savitri Pandey v. Prem Chandra Pandey (2002)*, case it was held that physical cruelty comprises of the acts which endangers the physical health and includes the inflicting of bodily injury. Mental cruelty consists of conduct which causes mental or emotional sufferings. It was in the case of *G. V N. Kameswara Rao v. G. Jabilli (2002)* held that mental cruelty is to be assessed keeping in mind the social status of the parties, their customs and traditions, their educational level and their living environments. Mental cruelty can consist of neglectful and deliberate harassment, false accusation of adultery or unchastity, false charge of impotency, undue familiarity with third person, deprivation of property, drunkenness, false criminal charge by one spouse against the other, reprehensible conduct, refusal to have marital intercourse, refusal to consummate marriage, communication of disease, demand for dowry etc.

**CONCLUSION**

It is true that the Cruelty is one of the grounds of Judicial Separation and Divorce. As the word cruelty has not been defined many Acts, it has to leave on the Judiciary to decide each and every case for deciding the same. Facts are the most important in each case. Because our Indian Judiciary says that cruelty can be decided by the education, life style and social status of the spouse. It means, cruelty in one case cannot be treated as such in other cases. The life style of one case or class may be different than that of the other. And it opens the door of discussion for the courts in each case. By this way, Divorce Acts have been a heaven for the lawyers.

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CRITICAL ANALYSIS OF ANONYMOUS & MYSTERIOUS INTERPLAY BETWEEN I.T. AND TERRORISM FINANCING- A LEGAL PERSPECTIVE

By Mayura Manohar Sabne
Advocate

1. INTRODUCTION-

The science of information technology was invented to aid the human civilization. Basically being the medium of communication, storage and transmission of data, it facilitated the complex activities of human life. It brought accuracy and precision in day to day activities of humans. Besides controlling physical and mental activities, it started influencing social and physiological sphere of humans. As I.T. has positive consequences, it couldn’t remain immune from criminal elements in society also. Thus, emerged the concept of cyber space and along with that cybercrime.

Terrorism, till date, is the most inhumane and deadliest crime on the globe. It also adapted itself to the I.T. revolution and started exploiting the hidden opportunities in cyberspace to fulfill its evil agendas. Terrorism is sustained and it thrives upon finances. Finances are the soul of it. The financing of terrorism is best described as octopus with tentacles spreading across vast territories as well as across a wide range of religious, social, economic and political realities. And, the I.T. revolution and digital age is the age of digital finances and economy. Thus, these two aspects interacted together very easily and they started a deadly relationship of mutual benefit.

In the light of this background, the present research makes an attempt to understand the conceptual development of term “information technology” and “terrorism financing”. In order to understand the finer points of the research topic, the Researcher has tried to take a concise overview of the various digital ways through which funds for terrorism are obtained and channelled through which they are either placed and integrated into the financial system and then used or directly mobilized in the hands of terrorists.

After appreciating the basic concepts related with terrorism financing, the major consideration of the Researcher is twofold- to analyze the nexus between use of information technology and terrorism financing through cyberspace and the corresponding the Indian legal structure dealing with the offence of terrorism financing through cyberspace.

Thus, after going through all the above mentioned thorough exploration through legal lens, the Researcher has attempted to figure out the issues and challenges which this evil interaction poses before the Indian cyber law. This analysis has resulted into some concrete conclusions which are used by the Researcher to provide important practical recommendations.

489 Nimrod Rapheli, Financing of Terrorism: Sources, Methods and Channels, 15:4 Terrorism and Political Violence 59, 59 (2010), available at http://dx.doi.org/10.1080/09546550390449881, last seen on 17/06/2018
2. OBJECTIVES OF RESEARCH-

The present research is carried out with a view -
1] To understand the concept of information technology and terrorism financing and study its nexus;
2] To critically evaluate the Indian legal provisions dealing with suppression of terrorism financing through cyberspace;
3] To provide practical recommendations for converting failures into successes;

3. RESEARCH METHODOLOGY-

The present research is doctrinal research. It employs descriptive, analytical, evaluative and interactive legal research models. The present paper has utilized primary data available from various statute books and secondary data which are available from various books written by authors of international and national acclaim, various online journals available on the website of jstor, oxford and online resources of websites of Finance Ministry of India etc. The Researcher has used SILC Rules for citation methodology.

4. ANALYSIS-

A] CONCEPTUAL DEVELOPMENT OF TERM “INFORMATION TECHNOLOGY” AND “TERRORISM FINANCING”-

The term information technology is defined as “the technology involving the development, maintenance and use of computers and software for the processing and distribution of information.” It is science which basically deals with information which in simple terms known as “data”. This data can be of any type- social, economic, financial, political etc. Thus, the science of information technology pervades into every sphere of human life. The history of development of information technology is not very old; however, it has evolved with such a fast pace that today, every human being on the globe is living in two worlds-one is the real or physical and another is virtual world which is commonly known as “cyberspace”. Therefore, all the traditional human activities, benevolent as well as maleficient, which are carried on in the real world are now taking place in cyber space. And terrorism is no exception to it.

The World Bank and International Monetary Fund have defined financing of terrorism as “the financial support, in any form, of terrorism or of those who encourage, plan or engage in it.” The fund raising methods of wide range of groups are most often lumped together under the general rubric of terrorism financing.

Terrorism financing is generally understood as an activity which deals with collecting and accumulating funds in order to sustain terrorism or donating to the terrorist organizations or networks, sometimes with complete knowledge regarding the intentions of the receiver of funds.

490Information Technology, available at https://www.merriam-webster.com/dictionary/information%20technology, last seen on 30/06/2018

491 Thomas J. Biersteker & Sue E. Eckert, The Challenge of Terrorist Financing, 1, 6 in Countering the Financing of Terrorism (Thomas J. Biersteker & Sue E. Eckert, 2008)
the funds and sometimes with complete ignorance about the misuse of funds.

Thus, it can be seen that terrorism financing covers within its purview all those activities which provide funding to terrorist activities of individual terrorists or lone wolf fighters, terrorist organizations and networks. The terrorist activities include operation, training, propaganda, recruitment, compensation, social support mechanisms in one form or another. Therefore, it can be said that terrorism financing is the heart and driving force behind any terrorist activity.

B] NEXUS BETWEEN INFORMATION TECHNOLOGY AND TERRORISM FINANCING

After having understood the basic concepts of information technology and terrorism financing, it is important to look through the nexus between these two.

The sources of terrorism financing can be categorized according to the activities and persons or entities involved in it.

Following are the types of sources-

- State Sponsored Funds
- Self Generated Funds
- Revenue Generating Activities
- Crime
- Charities and Religions
- Diasporas
- Crowd Funding and Donations
- Cyberspace
- Invisible players

Thus, it can be seen that cyberspace is one of the main invisible players which contributes as source of terrorism financing.
Cyber space aids terrorists in the following ways-

Money generated through above mentioned sources assumes significance only when it is channeled safely through suitable path to reach its objective. Following are the various channels engaged by terrorists to move their funds and all these channels are now a days rampantly being exploited by terrorists through cyber space-

All the above depicts that in today’s digital age, information technology and terrorism financing are in beneficial mutual relationship. This interaction was evident in the year 1997, when Babar Ahmad, A British citizen from South London, through Azzam Publications and Associated websites, supporting Afghanistan-Taliban and Mujahedeen in Chechnya, incited donors under the garb of religious obligations and solicited funds for the cause of jihad. This is merely a drop in the ocean, if we consider the omnipotent presence of cyber space as of today. All the major terrorists’ organization in the world like Al-Qaeda, Hamas, Laskher-e-Toiba, Hezbollah and ISIS, throughout their operations, at all stages and levels use cyberspace for fulfilling their funding needs.

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Starting with basic function of creating propaganda and soliciting funds through simple online methods, the terrorists have adapted themselves to the most modern and advance cyber technology employed through smartphones like m and e money, internet banking, wire transfers, use of cryptocurrency for financing themselves. This mutual relationship has thrived through decades due to following reasons-

1. Cyber space masks the identity of terrorists so that they can easily use their hidden identity for spreading propaganda and attracting recruits.
2. The borderless reach of cyber space aids in training of terrorists recruits throughout globe.
3. The widest reach of cyber space in the nook and corner of globe presents infinite points for generation of funds.
4. Cyber space offers anonymity which facilitates storage of funds.
5. The speed and ease offered by cyberspace aid transfer of funds.
6. The dissolution of geographical barriers achieved by cyber space expedites the mobilization of terror money in the shortest possible time without being easily detected by the counter terrorism financing agencies.
7. The lack of privacy in cyber space offers terrorists enormous pool of data for exploitation which is utilized for committing financial cybercrimes and securing funds for their terrorist activities.
8. The transnational nature of cyber activity amplifies the potential impact of terrorism on the victim.

Thus, the Information technology through enormous veiled opportunities is assisting terrorism financing through all the above mentioned facets. At the same time, in order to harness the hidden potential of cyber space, terrorist intelligentsia is, through inventions of new technological advances, contributing towards the evolution of information technology. This mutual exchange has become the deadliest intersection of two superpowers and is posing a serious challenge before the international and Indian cyber law and in front of the counter terrorism financing agencies also.

The existence of this reciprocal relationship is universal and omnipotent and hence India is also one of the major victims of this evil collaboration.

C. LEGAL FRAMEWORK

1. AT INTERNATIONAL & REGIONAL LEVELS

The global digital community has shared the fruits of cyber technology in unanimity. Simultaneously, the absence of geographical boundaries in cyber space helped the cyber terrorists to carry out terrorism financing through multiple jurisdictions at one and the same time. This phenomenon made the various nations the victims of cyber terrorism financing and therefore, a need was felt to take stringent legal action against this cybercrime of terrorism financing through cyberspace.
Unfortunately, the global community is divided on the definition of “terrorism” itself and hence, it has failed to formulate a universal legal binding instrument specifically addressing the all-pervasive facet of cyber terrorism financing. Under the guidance of Security Council resolution bearing number 1373 of 2001 pertaining to terrorism financing, terrorism financing is made a criminal offence. Further, the Security Council Resolution number 2253 of 2015 condemned the use of modern information and communication technology by terrorists and urged the member states to take measures of identifying, listing and suppressing the activities of financing terrorism through cyberspace. However, it must be noted that these are mere resolutions and they lack effective enforcement force.

Apart from this, at regional level, there are following legal instruments which deal with cybercrime of terrorism financing:

a. The Council of Europe Convention on Cybercrime, 2000;


These legal instruments do not deal exclusively with terrorism financing but they substantially cover all those cybercrimes like data theft, hacking, phishing, credit and debit card frauds etc. which are included in financing activities of terrorists through cyberspace. Apart from these regional arrangements, The United Kingdom has pioneered in framing a national legislation to counter the use of internet for terrorist purposes495.

2] INDIAN LAW DEALING WITH CYBER TERROR FINANCING-

a. Legislations-

India has always contributed significantly in the development of international law dealing with combating terrorism and for countering it’s financing. India is signatory to The International Convention for the Suppression of the Financing of Terrorism, 2001. India has keenly and progressively implementing the Security Council Resolutions also.

India is the architect of the Comprehensive Convention on International Terrorism which has been submitted to United Nations in the year 1996 and is still under consultation in the UN Committee. After the terrorist attacks anywhere in the world, India has made an appeal to the international community to set aside their differences on various issues arising out of interpretation of the Convention and adopt the Convention collectively.


495The Use of Internet for Terrorist Purposes, Report by UNDOC and CTIFT, available at https://www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf, last seen on 30/06/2018
In regional context, it has been found that India is one of the active members of ASEAN, SAARC and BRICS. India is committed to accord regional co-operation with full strength and vigor on these multiple fore in the fight against terrorism financing.

The offence of terrorism financing is criminalized in India, pursuant to various International Conventions and Resolutions. Indian statues dealing with the crime of terrorism contains provisions which are aimed at curbing menace of terrorism financing and they are as follows:

a. The Unlawful Activities Prevention Act;
c. The Foreign Exchange Management Act [FEMA], 1999;
d. The Prevention of Money Laundering Act, 2002 (Amended Up to Date);
e. The Foreign Contribution (Regulation) Act, 2010 [FCRA]

Apart from these counter-terrorism legislations, the Indian cyber law has been laid down in the form of The Information Technology Act, 2000. Initially when the Act was enacted in the year 2000, it did not contain any provision for prevention of cyber terrorism. The reason behind this was that India was not that much technologically advanced nation at that time and the information technology revolution in India was also at nascent stage. However, with the strong influence of globalization, the information technology developed in India by leaps and bounds for the period of next six to seven years. The U.S. war on terror post 9/11 and the global efforts to curb terrorism financing through cyber space had positive impact on Indian legal fraternity. Simultaneously, India also felt a need of law to curb the growing menace of cybercrimes. In the light of all these developments, The Information Technology Act was amended in the year 2008 which incorporated new provisions dealing with cyber terrorism and national cyber security. However, the scrutiny of newly added provisions reveals that it nowhere includes the offence of terrorism financing committed through electronic medium.

The misuse of digital or crypto currency for raising funds is imminent threat to Indian financial security. However, current Indian Information Technology Act has still not taken this warning into consideration. Moreover, the terrorist organizations are mole sting opportunities on the internet and social media platforms for spreading their malevolent propaganda and ideology and for radicalizing Indian youth. In spite of having knowledge of this widespread exploitation, the said Act still has not incorporated provisions for punishing hate speech made by terrorist leaders using these cyber platforms.

b. Executive Initiatives-
Apart from formulating and enforcing the Information Technology Act, 2000 (Amended up to date), India has also framed the National Cyber Security Policy in the year 2013. The Cyber Security Policy aims at protection of information

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496 sections 66 F, section 70 A and section 70 B ,The Information Technology Act, 2000 (Amended Up to Date)
infrastructure in cyberspace, reduce vulnerabilities, build capabilities to prevent and respond to cyber threats and minimize damage from cyber incidents through a combination of institutional structures, people, process, technology and cooperation. The objective of this policy in broad terms is to create a secure cyberspace ecosystem and strengthen the regulatory framework. The policy addresses various issues like public-private partnership, collective engagements through technical and operational co-operation, research and development in cyber security, development of human resources through education and training programs and national awareness programs.

However, the critical review of the said policy reveals that in the backdrop of such speedy development of information technology in India, the policy has not been reviewed once since its birth. Though it tries to cover multiple aspects of strengthening cyber security framework in India, the dream envisaged is inadequate considering the emerging trends in cybercrime. Further, by not taking into consideration the significant development like cloud computing, the Policy proves to be insufficient for laying down strong cyber security framework. The policy creates multiple offices responsible for cyber security at various places but fails to define their exact jurisdiction and hence, it suffers from ambiguity and conflict of interest is the inevitable result of this vagueness.

Along with the above policy, National Crisis Management Plan for countering cyber-attacks and cyber terrorism has been prepared and is being updated annually. Central Govt. Ministries or Departments and States and UTs as well as organizations in critical sectors are making efforts to prepare and implement their own sectorial Crisis Management Plans. The Indian Computer Emergency Response Team (CERT-In) issues alerts and advisories regarding latest cyber threats or vulnerabilities and countermeasures to protect computers or servers on regular basis. It conducts regular training programs for key stakeholders. The critical analysis of these initiatives points out towards a grim fact that it nowhere deals with the crime of terrorism financing through cyberspace. The growing terrorist attacks and revelation of transnational terror funding links through cyber space demands effective and stringent Executive Policies and actions. In the wake of recent initiatives of demonetization policy and digital India Campaign, it is imperative of the day that the Executive must provide secure cyber environment for effective digital cashless transactions. However, that

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499 PTI, Saving Cyber Network from Criminal Treat, Press Information Bureau, Government of India (07/03/2018) available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=177079, last seen on 30/06/2018
view of cyber security is nowhere reflected in all these enterprises. All these initiatives look attractive on paper but up to what extent they have been successfully implemented in reality is the most important question which is nowhere answered by any Department or Ministry of the Indian Government.

**C. Role of RBI and SEBI**

Terrorism financing is financial crime and therefore, the financial guardians like the Reserve Bank of India (RBI) and the Securities and Exchange Board of India (SEBI) are also charged with the responsibility to devise counter terrorism financing measures in order to protect stability and integrity of Indian financial system.

The boom in the usage of crypto currency and transfer of money through such virtual currency was initially not paid heed to by RBI. RBI merely issued warning in respect of use of virtual currencies including bit coins. However, the surge in such usage and the demand of global market security currents have forced RBI to think upon the said issue seriously and in view of the associated risks, RBI decided that, with immediate effect, entities regulated by RBI shall not deal with or provide services to any individual or business entities dealing with or settling VCs. Regulated entities which already provide such services shall exit the relationship within a specified time. This circular has positive intention but RBI has failed to provide any grievance redressal mechanism for bona fide investors. As it is recently issued, its impact can be judged only over a long period of time.

The Securities and Exchange Board of India, another regulator of Indian financial market has also issued a statement that the regulations on crypto currencies should be out soon. In the light of lightening developments in the usage of cryptocurrencies and their vulnerability for terrorism financing makes it mandatory that the Guidelines and Rules must implemented with effective force and vigor.

5. ISSUES AND CHALLENGES

The detailed analysis from the critical point of view of the nexus between information technology and terrorism financing through cyberspace reveals that the information technology and its beneficial avenues are aiding terrorists in their funding. At the same time terrorists are facilitating growth and development as well as spread of information technology revolution. The international and national legal systems, being aware of this evil co-operation, have made an attempt to criminalize terrorism financing through cyberspace but their actions are interrupted due to following issues –

1. **Multiple Jurisdictions**

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50PTI. Use of Bitcoin, other virtual currencies not authorized by RBI, says govt., The Hindu(28/03/2017), available at www.thehindu.com/business/Economy/use-of-bitcoin-illegal-says-govt/article17702483.ece, last seen on 12/01/2018

50RBI, Statement on Developmental and Regulatory Policies, RBI(05/04/2018), available at

https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=43574, last seen on 30/06/2018

50Rules on Crypto Currencies should be out soon: SEBI Chief, PTI available at https://www.livemint.com/Money/VmmuGPeknFAlQspN0yzDK/Rules-on-cryptocurrencies-should-be-out-soon-Sebi-chief.html, last seen on 30/06/2018
3. Dynamic nature of Digital data and electronic evidence-
In order to carry out effective investigations into the crime of terrorism financing through cyber space, it is imperative to construct money trail. To trace the source of digital terror funding, the investigators have to collect digital data and electronic evidence from multiple jurisdictions. Most of the times, they have to recover the destroyed data. While doing all this, they have to encounter the human rights issues related to surveillance and interception. They also have to secure electronic evidence stored on multiple electronic devises which are various components of information technology. They have to preserve the digital data in appropriate manner because it has very fragile nature. They also have to answer the questions related to the originality and authentication of such evidence before the prosecution agencies. All these requirements are serious issues before the investigation as well as law enforcement agencies.

2. Anonymity-
The mysterious nature of cyberspace offers anonymity to terrorists and hence they can easily generate, store and mobilize funds. Anonymity also provides them some security as it is very difficult to keep surveillance of cyber space for all the time. The tool of encryption is further aiding the terrorists in masking their identity and hence, they can mobilize funds with ease without being detected by the counter-terrorism financing agencies. Thus, the issue of anonymity and security provided to it is one of the significant issues.

4. Lack of Cyber Jurisprudence-
The act of terrorism financing has been made an offence at international as well as national levels. However, the national legal systems do not deal with the crime of terrorism financing through cyber space as an exclusive offence. All the arena of cybercrimes which come under the purview of financial cybercrimes and which directly or indirectly, aid terrorists in garnishing funds are punished. Thus, the lack of exclusive offence of terrorism financing through cyber space hampers the effective prosecution of terrorism financing. Further, even if it is accepted...
fact that all the traditional financial crimes are committed in cyber space in the same manner, they do have some differential characteristics. These differences need separate treatment and hence, the lack of cyber jurisprudence poses an important issue.

5. Failure of Traditional Criminal Justice-
As already pointed out by the researcher, the legal architecture dealing with the crime of terrorism financing through cyber space is riddled with several lacunas. The Executive initiatives are also haphazardly drafted and poorly implemented. Along with these foundational deficiencies, the Indian criminal justice system responsible for prosecution and for punishing the said crime, itself suffers from its own inherent limitations of delay and latches. It lacks that pace of adaptation which is exhibited by the information technology revolution. The lack of technical capabilities and expertise to investigate the cybercrimes and the inadequacy of infrastructural faculties further proves to be obstacles in effective prosecution of the cybercrimes. The multiple enforcement and investigative agencies, the competition and rivalry among them and conflict of jurisdictions of multiple regulators obstruct the already weak criminal justice system. Thus, the poor legal foundation along with unsatisfactory criminal justice system is serious issue which needs immediate attention.

6. Infringement of Fundamental Rights-
While investigating the crime of terrorism financing through cyber space, sometimes investigators are required to have access to confidential financial and personal data possesses by trade entities. This interference adversely affects the fundamental right of carrying on trade. Another fundamental right which is liable to be breached during investigations and prosecution of the said crime is the right to privacy. Though nothing remains private once it enters into virtual space, the inherent and indestructible right to privacy must be safeguarded in cyber space also. Use of legitimate ways under legitimate circumstances can only protect these two fundamental rights. Only when there is unlawful or arbitrary access, disclosure or use of confidential information is evident, the investigation agency should interfere with the enjoyment of these fundamental rights. Thus, securing balance between the legitimate requirements of the investigation and prosecution of crime of terrorism financing through cyberspace and secure enjoyment of fundamental rights of to freedom of trade and to privacy creates another significant issue in this present context.

All the above discussed issues pose an array of challenges to be tackled with by the international as well as national legal fraternity-
1. Tracking and monitoring digital financial systems to construct online money trail while safeguarding right to freedom of trade and right to privacy;
2. Formulating universal legal instrument targeting terrorism financing through cyber space;
3. Implementing regional agreements and models laws which has universal application and uniform common standards accepted across multiple jurisdictions;
4. Securing electronic evidence through multiple jurisdictions and preserving its originality and authenticity;
5. Developing uniform and consistent rules of cyber jurisprudence;
6. Updating and adapting law as per the dynamic demands of the information technology revolution;
7. Encountering anonymous and secure nature of cyber space;
8. Infusing new vigor, vitality and force into the slow moving and weak Indian criminal justice system by immunizing it from delay and latches;
9. Building adequate and sufficient infrastructural facilities along with empowerment of human resource to produce technical expertise.

Apart from abovementioned particular challenges, considering the change in nature of terrorist organizations from organizations to network, from hierarchy to horizontal connections, it can be seen that the financing needs have undergone significant changes. Earlier hierarchical and large terrorist organizations required large amount of funds on consistent basis and the sources and channels of funding were limited, constrained by geographical boundaries and under greater vigilance of counter terrorism financing agencies. Whereas today individual terrorists and terrorist networks require less amount of funds that can be easily available through multiple sources and channels available through cyber space. This linked transformation has posed significant challenge before the Counter terrorism financing agencies because earlier it was easy to construct to money trail in physical world and to collect the evidence for prosecution. But today virtual nature of funding through cyber space hardly leaves any traces to be tracked and thus speed challenges investigation.

Another dilemma with respect to the same challenge is that whether to allow the trail to be continued over cyber space so that original source can be traced and destroyed or to interrupt the trail at intermediate stage to prevent its future occurrence and punish immediate perpetrators. This dilemma is the major challenge before the investigation agencies because each option presents its own pros and cons and it depends whether the counter terrorism financing policy seeks to achieve long term goals or short term results.

6. CONCLUSION AND RECOMMENDATIONS-

The pace of information technology revolution is enormous and with its rapid development, it is posing unknown dynamic challenges before law. The terrorist intelligentsia is exploring these covert avenues and securing finances for their growth and sustenance. This mutual co-existence and collaboration is creating grave issues before the international as well as national legal systems and before the counter terrorism financing agencies. These issues are challenging the capabilities of these institutions and demands their adaptation and transformation as per the changing needs and times.

The law must adapt itself to the pace of revolution and keep itself all inclusive and updated. Law must see through psychological and social foundations of the crime of terrorism financing. It must assess
the psychological and social reasons which support and sustain the terrorism by aiding and facilitating the funding of terrorism through cyberspace. Along with preventive and punitive approach, law must also provide for advocacy initiatives.

The global cyber law community must offer an integrated and coherent response and accept a common accord respecting all the diverse features and characteristics of numerous national criminal justice systems. The developed nations must work hand in hand with developing and under developed nations. They must support these technologically backward nations with efficient financial support, training and access to advanced technological infrastructure. The international legal fraternity must lay down architecture for various national legal systems to follow so that they can build and develop a strong and uniform cyber security infrastructure.

Along with contributing in the international efforts, states must also adopt positive attitude towards international legal developments. They must refrain from supporting any kind of terrorist activity. They must insulate their jurisdictions and shared cyber space from being abused by terrorists for their financing purposes. With due respect to human and fundamental rights, the states must provide stringent cyber security mechanism with effective and balanced surveillance. The said mechanism must possess effective counter terrorism financing internal compliance system empowered with adequate infrastructural faculties and capable human resources and expertise.

The challenges presented by this evil interface should be converted into opportunities to prevent and suppress the crime of terrorism financing through cyberspace. The same cyber avenues must be used to gather intelligence in advance. The infinite data must be analyzed smartly to secure sufficient electronic evidence. The online money trail must be utilized to reach the original source so that the crime can be nipped in the bud itself.

In specific Indian context, India is also the victim of above discussed issues and challenges and hence the researcher recommends that it is high time now that India must shed its political biases and become an signatory to the European Convention against Cybercrime. It will facilitate the Indian access to international legal framework working for cyber security. India is marching towards digital economy and virtual society. In the light of this development, India is continuously reviewing its cyber law but it’s very slow moving. It lags behind the speed of information technology revolution. It is need of the hour that India must make amendments to the existing cyber law so it can effectively address all the issues and challenges posed by terrorism financing through cyber space. In general context, India lacks comprehensive counter terrorism financing policy. India must formulate such policy which shall encompass all economic, criminal, financial, political, and social and cyber facets of countering financing of terrorism. The said policy, inter alia, shall provide for –
a. criminalization of terrorism financing over the internet or other cyber related services;
b. enlargement of investigative powers of counter terrorism financing agencies;
c. regulation of internet related financial services;
d. Human rights protection and adherence to the rule of law principles.

The said umbrella policy shall also provide for consolidated legislation which shall target exclusively and independently all the angles of terrorism financing from all inclusive preventive and curative perspectives. As a special requirement, it shall develop specialized judicial and evidentiary procedures for prosecuting cyber offences related to terrorism financing. India must follow the suit of European Union, Australia, Indonesia which has developed effective cyber security mechanisms targeted at preventing the spread of emerging cyber terrorism financing threats such as misuse of crypto currencies.

Last but not least, as crime emerges from the society, the community participation in detection and prevention of crime is sine quo non for suppressing any crime. The global cyber community consisting of billion users and million stakeholders shall shoulder the responsibility along with the legislative and executive machinery to prevent the occurrence, growth, spread and development of the cybercrime of terrorism financing. The public-private partnership is the best solution to suppress the crime and harness the beneficent potential of information technology revolution.

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THE “SUPERHERO” TRADEMARK

By Medha PM
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INTRODUCTION
The word “Superhero” was first used in 1917. A superhero is a kind of heroic stock character or public figure, generally possessing supernatural or superhuman strength and powers, who is committed to battling crime, protecting people and mainly battling supervillains. A female superhero is technically called a superheroine, despite the fact that the word superhuman is generally used for females too. Superhuman fiction is the genre of fiction that is fixated on such characters, particularly in American comic books since the 1930s. In early 1970s the two famous comic book franchises started focusing on licensing and trade marking their superheroes which ultimately led to both the corporations holding the trademark for the word “Superhero” in 1979.

Based on most definitions, characters do not require real superhuman strength or powers or phenomena to be regarded as superheroes. According to the dictionary the meaning of the word "hero" is "a figure, particularly in a comic strip or cartoon, equipped with superhuman strength and powers and generally depicted as battling evil or crime", the Merriam-Webster dictionary gives the definition as "a fictional character having remarkable or superhuman powers; also: an exceptionally skillful or successful individual". Terms, for example, masked crime fighters, costumed swashbucklers or masked vigilantes are used to allude to characters.

Some superheroes utilize their powers to counter every day crime and evil while also fighting dangers against humankind from supervillains, who are their criminal counterparts. Generally at least one of these supervillains will be the superhero's archenemy.

Some of the famous and long-running superheroes are Spider-Man, Batman, Iron Man, Superman, Captain America, Wolverine, Wonder Woman, Deadpool, The Flash, The Hulk etc.

Studies have shown that whenever a person hears the word “Superhero” he or she thinks of either Marvel or DC hence establishing that, these corporations have a monopoly over superhero/comic book industry. In my opinion is a reasonable claim from both the corporations over the trademark of the word “Superhero” and it was absolutely clever on their parts to own the trademark jointly.

The occasions of jointly registering trademarks are uncommon however not obscure and the words "Superhero" or "Superheroes" and every single alternate version including these words are altogether registered as trademarks of Marvel and DC both. As the years progressed, Marvel or DC has pursued litigation against individuals for infringement of their trademark.

HISTORY OF THE TRADEMARK
The word "Superhero" was first used in 1917, to allude to "a public figure of great accomplishments". Meaning, in those days a "Superhero" was practically just a successful human. It was at some point after the 1930s, that the word began taking current implications i.e. Superheroes being individuals with superhuman powers.

The exact time of the Golden Age of Comic Books is not clear, however most concur that it began with the launch of Superman in 1938. Superman is the most conspicuous and famous superhero to this day. The accomplishment of Superman produced a whole new genre of characters with secret identities and superpowers.

Neither Marvel nor DC (the Duo) pinned the word superhero, but does not act as a factor in determining the ownership of trademark. Neither of the corporations were the first to register the word “Superhero” as a trademark.

Ben Cooper Inc., was the first to register the word "Superhero" as a trademark for the product costumes, in 1967. In 1972, Mego Corporation attempted to register "World's Greatest Superheroes" for toys; however Ben Cooper Inc. sued them.504

Mego soon became burnt out on the legal proceedings and gave over the burden to Marvel and DC. Despite overwhelming opposition, Ben Cooper Inc. dropped their opposition and by the late 1970s, it had gone bankrupt and gave over all its exclusive rights concerning the trademark to Marvel and DC.

In the middle of the dispute between Ben Cooper and Mego, there was a drop in comic book sales, Marvel and DC began focusing on licensing. By the 1970s, The Duo began profiting out of licensing registered trademarks, (for example, "Superman"), than out of comic book sales. Therefore, it did not take them much time to understand the degree of lucre accessible in the mark "Superhero". The Duo obtained trademark over the word “Superhero” in 1979. Basically, by 1983, The Duo had rights over "Superhuman" over different categories.

The US Trademark and Patent Office explains over what categories they have trademark:

“Publications, Particularly comic books and magazines and stories in illustrated form, cardboard stand-up figures, playing cards, paper iron-on transfer, erasers, pencil sharpeners, pencils, glue for office and home use, such as is sold as stationery supply, notebooks and stamp albums.”

Through the years, Marvel or DC has pursued litigation against people for infringement of their trademark, the most recent being where a British Businessman was sued for the title of his book, "Business Zero to Superhero" and he won the suit. More about this can be read from here. But this suit has led to looking closely into the very existence of this trademark and on whether this is actually beneficial or not,

both to the consumers and the owners of the mark.505

Critics in the legal community dispute whether the "Super Hero" marks meet the legal standard for trademark protection in the United States: distinctive designation of a single source of a product or service. Controversy exists over each element of that standard: whether "Super Hero" is distinctive rather than generic, whether "Super Hero" designates a source of products or services, and whether DC and Marvel jointly represent a single source.506 Some critics further characterize the marks as a misuse of trademark law to chill competition.507 To date, aside from a failed trademark removal action brought in 2015 against DC Comics' and Marvel Comics' United Kingdom registration, no dispute involving the trademark "Super Hero" has ever been to trial or hearing.508

VALIDITY OF THE TRADEMARK
The instances of jointly registering trademarks are rare but not unknown and the words "Superhero" or "Superheroes" (and the diametric opposite i.e. Super villain) and all alternate versions involving these words are all registered as trademarks of Marvel and DC both. In fact, if usage of the trademark in this very article could amount to trademark infringement, provided that it is used for commercial purposes and unjust enrichment by means of free riding on the good will of the owner of the marks.

The instances of jointly registering trademarks are rare but not unknown and the words "Superhero" or "Superheroes" (and the diametric opposite i.e. Super villain) and all alternate versions involving these words are all registered as trademarks of Marvel and DC both. In fact, if usage of the trademark in this very article could amount to trademark infringement, provided that it is used for commercial purposes and unjust enrichment by means of free riding on the good will of the owner of the marks.

There had been few popular instances which are noteworthy, apart from the above mentioned case of the British author's book are, Superhero Cleaners, a house cleaning service where the employees were supposed to be dressed in the traditional tights and capes of a Superhero but Marvel and DC had sent them a notice when they attempted at registering their service under the Trademark of Superhero Cleaners, and their registration was subsequently abandoned.

Superhero Donuts, where two students aimed at selling donuts inspired not from comic books (and to avoid Marvel/DC from holding them for trademark infringement and to skip the line of usage permission) but from the heroes of the Bible. However, the term Superhero is still used by them.

However, if the term superhero is considered to be generic then why hasn't the Court struck it down yet. Further, drawing from the examples of Xerox and Frisbee

506 Coleman, Ron (March 27, 2006). "SUPER HERO® my foot".
507 Doctorow, Cory (March 18, 2006). "Marvel Comics: stealing our language".
508 Stewart, DG (June 1, 2017). ""The "Superhero" Trademark: how the name of a genre came to be owned by DC and Marvel, and how they enforce it"."
itself, the companies still do own the trademarks, despite them becoming really common among the public. To decide on whether the mark is generic or not, what must be looked at, is the way it is used as in the registration of the mark itself, it is defined as descriptive and has been used that way by both the houses. In addition to this, there exist other superheroes that are famous and do not belong to either DC or Marvel, like Hell Boy or Spawn or Teenage Mutant Ninja Turtles and all of them are pretty famous amongst the masses as comic books or licensed movies. Therefore, though Marvel and DC comics are associated with "superheroes" the claim that the public associates the term "Superheroes" with these two houses only, in my opinion, is a feeble ground, thus rendering the claim of the mark as invalid.

Secondly, the concept of trademarks works in the way of protection of the product name and goodwill of companies by means of consumer recognition and since there are two competing houses registering for the same mark, it goes against the very nature and essence of trademarks being identification of a single source for the good. Apart from this, this registration can also be viewed as a market strategy by means of two houses monopolizing on the mark, thus eliminating competition. This registration thus, just seems unfair to small businesses, which is explained in detail in this article by Ross D. Petty where he states instances as to how Marvel and DC comics often bombard the smaller businesses with notices, thus leading to them abandoning their registration application.

The concept of joint ownership in trademark law is not new, but still is rare. There are three instances where the joint ownership of a mark is permitted. The first is in the context of a "composite mark" used by a joint venture where two unrelated entities may form a single joint venture, licensing their intellectual property, including trademarks, to that joint venture for use in the market. The second situation is "concurrent use," whereby two parties are granted separate registrations, permitting them to use the same mark in connection with a similar product albeit in different geographic markets. The third scenario is when joint ownership is permitted and appears to extend logically from the classic Menendez doctrine: a trademark registration may be jointly owned by, and the goodwill associated with the mark apportioned among, the heirs of a unitary owner.509

The joint ownership of the mark by DC/Marvel was not evolved overnight and in fact, both the competing houses had originally decided to battle for the owning the mark as well, by filing separately for the same. However, both these houses (and their smart lawyers) realized that the other would be using the mark as much as the one owning it, thus competing against one another in the courts for something as simple as the name of the book that they are publishing as well. To minimize this and the confusion at the source, joint registration of the mark was allowed and the rest they say is history.

Marvel and DC monitored registrations for trademarks that contained the word “superhero” and instead of immediately filing an opposition, they simply asked the registration office for more time to file an opposition. The applicant, upon learning about the Duo’s chagrin, would be intimidated by the Duo’s might or might settle with them. Not one application (of 36 so far) has seen a trial.

Apart from monitoring registration applications, they also bully around enterprises through the mere threat of suing. The Duo’s strategy seems to be to take the opposition right to the precipice of a trial, hoping that the opposition would either back out or settle before that. Even if they don’t put across any threats, the mere knowledge of the Duo’s formal ownership over the mark makes competitors weary of using “superhero”.

**CONCLUSION**

When someone thinks of a superhero, they undoubtedly think of a product from either DC or Marvel. The term “superhero” has become distinctly known as coming from DC or Marvel.

Whether or not this mark is actually a means of eliminating competition by limiting their usage of the term "Superhero" or is exploitative to smaller businesses or is what two owners of a registered mark do as their genuine duty for the protection of the mark is something that needs to be decided by the courts as and when disputes arise on a case to case basis but the recent case is a glimmer of hope, an exception to the usual rulings and stands true to one of the principles that "Superheroes" embody, nothing is impossible.

Therefore, it is imperative that trade mark officers take up the responsibility that competitors haven’t. There is a need for registration officers to scrutinize an applicant’s mark in a comprehensive manner, because otherwise, we have seen how a registered mark can be misused. Even after registration, when the companies have to revive their trademarks, reviewers need to have a much closer look for testing generosity. If the US trade mark office had done that in 2006, the Duo might not be having their trademark today.

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FACTS OF THE CASE –
The case is in between the suspended government officer and the union of India. The appellant was posted as the Defence Estate Officer Kashmir Circle. There was a large portion of the land which was owned by the Union of India. Approximately 4 acres of land does not cover the defense land but they were private land and for those NOCs were issued by the appellant but these were the government property. Afterward, appellant admits the mistake and denied any mala fide in issuing the NOCs, therefore the appellant was suspended, various litigations were filed which were fruitlessly initiated by appellant and the first one which was initiated was in Central Administration Tribunal. There were 4 frequent suspensions of 180, 180, 90, 90 days respectively. The CAT (Central Authority Tribunal) ordered that the inquiry is concluded in the time bound manner. The respondent i.e. Union Of India, against this judgment filled the writ petition in Delhi High Court asserting that the power exercised power not possessed by CAT. The writ petition was allowed in the High Court and the Central Government directed to pass appropriate orders. Against this direction of the High Court, the appellant filed the appeal in the Supreme Court. The Supreme Court directed that the government has to serve the charge sheet on the appellant before the expiry of the fourth extension of suspension to ensure the appellant human dignity and right to speedy trial.

ISSUES-
• Whether the Right to Speedy Trail is violated?

INTRODUCTION –
The case Ajay Kumar Choudhary v Union of India deals in the service law jurisprudence, based on the principle of human dignity and the right to speedy trial. This case mainly deals with the Section 167(2) of the Cr.P.C. as to reviewing suspension order in case of departmental and disciplinary inquiries and the right to speedy trial which is enshrined in the extended concept of Ar. 21 of the Indian constitution, which encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision, and re-trial as in this case there was continuous suspension, thus violation of the right to speedy trial. As in this case, the petition has been filed to seek redresses and to acquire the post again in the reasonable time period as there has been an infringement of the appellant right to speedy trial as the appellant suspension was in continuous and without reasonable time fixed for inquiry. The appellant was not served with the charge sheet by the respondent. Due to which the appellant filed the petition in the Supreme Court of India which was dually accepted for safeguarding the rights, therefore the government has directed the respondent to serve the charge sheet for the suspension and this protected the right to the speedy trial of the petitioner. The appellant has been served with the charge sheet and the petition was disposed of.

AJAY KUMAR CHOUDHARY V. UNION OF INDIA

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www.supremoamicus.org
**JUDGMENT**

Initially, the petition was filed by the Appellant in the Central Administrative Tribunal (CAT) Chandigarh Bench. During the pendency of the proceedings, the second extension was ordered for another of the 180 days. For this, the Central Administrative Tribunal gave order that no employee can be indefinitely suspended and that the disciplinary proceedings have to be finished within the reasonable time period. Further, the Central Administrative Tribunal ordered that if no charge sheet issued till the appellant expiry of the fourth suspension, then the prevailing period the appellant would be appointed in the service. The Central Administrative Tribunal ordered that if it has to be decided to conduct the inquiry, it had to be concluded in the time bound.

Against this the UOI filed a writ petition in High Court, the court ordered that the government was allowed to pass the appropriate order regarding the suspension or regarding the relevant factors associated with this case. This has led the appellant to file the writ before the supreme court of India for seeking relief for taking the post and the right to speedy trial. The Supreme Court ordered that the suspension order should not go beyond the three mothers i.e. 90 days, within this period the Memorandum of Charge sheet should be served to the suspended officer if the charge sheet not provided in this duration then the suspended officer should be reposted. The court further ordered if the charge sheet stated the reason, then if the government wants to increase the suspension then the government has to pass the order of the suspension. The government is free to transfer the concerned person to any of its department in its offices. The government may also restrict him from contacting any person or handling records and documents. The court ordered to serve the charge sheet before the expiry of the fourth suspension, the government provided the charge sheet to the appellant in the time period.

After this, the Supreme Court of India disposed of the appeal filed by the petitioner. Thus the court safeguarded the interests of the appellant as various aspects were explored as the right to the speedy trial and the suspension for 90 days i.e. three months.
A STEP TOWARDS CRIMINALIZING MARITAL RAPE

By Minakshi Yadav
From Manipal University, Jaipur

INTRODUCTION

Marital rape (or spousal rape) is the act of sexual intercourse with one's spouse without the spouse's consent. It is a form of domestic violence and sexual abuse. Although, historically, sexual intercourse within marriage was regarded as a right of spouses, engaging in the act without the spouse's consent is now widely recognized by law and society as a wrong and as a crime. It is recognized as rape by many societies around the world, repudiated by international conventions, and increasingly criminalized. Still, in many countries, marital rape either remains outside the criminal law, or is illegal but widely tolerated. Laws are rarely being enforced, due to factors ranging from reluctance of authorities to pursue the crime, to lack of public knowledge that sexual intercourse in marriage without consent is illegal. Marital rape is more widely experienced by women, though not exclusively. Most countries criminalized marital rape from the late 20th century onward—very few legal systems allowed for the prosecution of rape within marriage before the 1970s. Criminalization has occurred through various ways, including removal of statutory exemptions from the definitions of rape, judicial decisions, explicit legislative reference in statutory law preventing the use of marriage as a defense. Advancing well into the timeline, marital rape is not an offence in India. Despite amendments, law commissions and new legislations, one of the most humiliating and debilitating acts is not an offence in India. A look at the options a woman has to protect herself in a marriage, tells us that the legislations have been either non-existent or obscure and everything has just depended on the interpretation by Courts.

Position in India - Legislative Apathy to Marital Rape

So far as Indian law on marital rape is concerned, it can be said that the criminal law takes a very narrow approach in addressing the issue, and marital rape is more often viewed as a form of noncriminal domestic violence in India, and not generally as a distinct sexual offence in all cases. The Indian Penal Code (IPC), 1860 recognizes marital rape to a limited extent in Section 375, the exception to which states that “Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape.” This age has been now proposed to be raised to 16 years which ironically still remains below the legal age for marriage in India.

Whatsoever, it is to be noted that the Penal Code in India makes a man guilty of raping his minor wife and not otherwise. Section 376 of IPC provides punishment for rape. The only situation other than this where a man can be held guilty of raping his wife is contemplated in Section 376-A which makes any form of sexual intercourse between a judicially separated couple without the consent of the wife punishable with imprisonment for a term which may extend to two years as well as with fine. It therefore follows that any married women in India not
below the above specified age and not living apart from her husband has no power to punish her husband for the degrading and inhumane sexual torture meted towards her; she can at best seek divorce from him on the ground of cruelty or have recourse to Section 498-A of IPC dealing with cruelty, provided she can prove the fact of ‘perverse sexual conduct by the husband’, which often appears to be something too difficult to establish or correctly interpret. Is excessive demand for sex perverse? Is marriage a license to rape? There is no answer, because the judiciary and the legislature have been silent.

Surprisingly, like the legislature, the Judiciary in India which has otherwise been playing a proactive role in securing social justice in India has not been that sensitive enough in cases of marital rape as it should have been and has not been very effective in alleviating the miseries of married victims. In recent cases of Bodhisattva Gautam v., Shubra Chakraborty and Sakshi v. Union of India the Supreme Court failed to recognise marital rape as a separate criminal offence and refused to criminalize the same. It is hence pathetic to note that in a country which casts a fundamental duty upon citizens to denounce derogatory practices against women and where every person is assured of protection of his life and personal liberty, wherein right to life is interpreted to denote right to live with human dignity, women are left in a deplorable condition to without the right of representation or the right to redress grievances against their wrongdoer just because they happen to be their husbands.

Status of Criminalization Of Marital Rape across the Globe with special reference to India

The wife’s role has traditionally been understood as submissive, docile and that of a homemaker. Sex has been treated as obligatory in a marriage and also taboo. Atleast the discussion openly of it, hence, the awareness remains dismal. Economic independence, a dream for many Indian women still is an undeniably important factor for being heard and respected. With the women being fed the bitter medicine of being “good wives”, to quietly serve and not wash dirty linen in public, even counseling remains inaccessible. The wife’s role has traditionally been understood as submissive, docile and that of a homemaker. Sex has been treated as obligatory in a marriage and also taboo. Atleast the discussion openly of it, hence, the awareness remains dismal. Economic independence, a dream for many Indian women still is an undeniably important factor for being heard and respected. With the women being fed the bitter medicine of being “good wives”, to quietly serve and not wash dirty linen in public, even counseling remains inaccessible.

Legislators use results of research studies as an excuse against making marital rape an offence, which indicates that many survivors of marital rape, report flash back, sexual dysfunction, emotional pain, even years out of the violence and worse, they sometimes continue living with the abuser. For these reasons, even the latest report of the Law

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2 A.I.R 2004 S.C. 3566
3 Article 21 of the Constitution of India
Commission has preferred to adhere to its earlier opinion of non-recognition of “rape within the bonds of marriage” as such a provision may amount to excessive interference with the marital relationship. A marriage is a bond of trust and that of affection. A husband exercising sexual superiority, by getting it on demand and through any means possible, is not part of the institution. Surprisingly, this is not, as yet, in any law book in India.

Marital rape is illegal in 18 American States, 3 Australian States, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, Soviet Union, Poland and Czechoslovakia. Rape in any form is an act of utter humiliation, degradation and violation rather than an outdated concept of penile/vaginal penetration. Restricting an understanding of rape reaffirms the view that rapists treat rape as sex and not violence and hence, condone such behaviour.

The 172nd Law Commission report had made the following recommendations for substantial change in the law with regard to rape.

1. ‘Rape’ should be replaced by the term ‘sexual assault’.

2. ‘Sexual intercourse as contained in section 375 of IPC should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.

3. In the light of Sakshi v. Union of India and Others [2004 (5) SCC 518], ‘sexual assault on any part of the body should be construed as rape.

4. Rape laws should be made gender neutral as custodial rape of young boys has been neglected by law.

5. A new offence, namely section 376E with the title ‘unlawful sexual conduct’ should be created.

6. Section 509 of the IPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.

7. Marital rape: explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, section 376 A was to be deleted.

8. Under the Indian Evidence Act (IEA), when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.

India takes first step towards criminalizing marital rape. Supreme Court and various High Courts had observed the growing misuse of section 498A (harassment caused to a married woman by her husband and in laws ). Citing the Justice J S Verma Committee Report on ‘Amendments to Criminal Law’ , it said it was recommended that the exception to marital rape be removed , but it also pointed out that it is also important that legal prohibition on marital rape is accompanied by changes in the attitude of the prosecutors, police officers and those in society generally.

Mostly western countries have criminalized marital rape . The Centre said it does not necessarily mean India should also follow them blindly because this country has its own unique problem due to various factors like literacy, lack of financial empowerment of the majority of females , mindset of the
society, vast diversity, poverty, etc. and these should be considered carefully before criminalizing marital rape.

**Need of Reforming the Stagnant Laws in India – High Time to Change**

In a country like India, where women have remained a subject of discrimination and persecution for ages and the low socio-economic status accorded to them through structural factors makes them remain a vulnerable class, a refreshing change in the attitude of lawmakers is a dire necessity to assure a woman of her right to dignity, her right to a self identity within the bonds of marriage, for marriage is not the tool of depriving a woman of her basic human rights and fundamental freedoms. The recent deliberation made by the law makers of our country that marital rape ought not to be criminalized for it is capable of destroying the sanctity of marriage is entirely erroneous. This is because marriage is a bond of love and trust which forms the basis, of its purity and in a marriage where dominance, violence and sadism reigns supreme, the sanctity of marriage is already lost. It is therefore not the sanctity of marriage which is sought to be protected but the perverted offenders who are sheltered under the veil of marital relationship. Also there is need to correctly interpret the implied consent theory which does not preclude a woman to resist at reasonable times from having unwanted sexual intercourse. Sex is a part of marriage no doubt but forced cohabitation is definitely not the sole obligation of a wife to perform as per the whims and fancies of her husband who tends to dominate her physically, emotionally or sexually. The legislators have further opined that criminalization of marital rape might increase instances of false and fabricated claims against innocent husbands in India. This approach is however untenable, both logically and legally. It is illogical to say that laws should not be made because someone might be at risk of a fabricated claim. If this was so, no law pertaining to the protection of any specific class would have ever been enacted in the country. And legally speaking, when it is already difficult to prove a claim of rape, it would be much tougher to prove a fabricated claim of rape against someone beyond reasonable doubt. Besides, taking into consideration the societal norms of our country, it can be further inferred that accusing one’s husband of rape and dragging him into court is one of the least possibilities for an Indian woman to do, who values her family reputation more than her life and worships her husband like deity, and unless she is compelled by unbearable circumstances, no woman would take such stringent action. Weird though it may sound, but this is the stark reality of Indian women who are genuinely an embodiment of tolerance which often leads them to compromise with their liberty and dignity throughout their lives.

The absence of legal provision to this effect would hence add to the misery of women, who would find no assistance or remedy of law even if they dare to stand up against all atrocities, defying the societal and cultural norms. Hence not enacting a law in fear of possibility of fabricated and malicious claims is definitely not the solution. Further, it is high time that the Indian Judiciary should take positive concrete steps in regard for unless women are protected within the bonds of marriage, right to equality
enshrined in Article 14 of the Indian Constitution would have no meaning. Article 21 of the Constitution which guarantees every woman a fundamental right to life and personal liberty, would become a sheer mockery, unless interpreted as to include her right to bodily integrity at all times, irrespective of marital status. The Judiciary being the custodian of fundamental rights of all citizens has an inherent duty to secure justice to the fairer sex ensuring that no man has a license to rape his wife, just because she might be fed and clothed by him through his earnings. The task is not difficult for it is the same institution which has once mandated that even a woman of easy virtue has a right of privacy and no person has a right to violate her person. The only essential requirement is that the Judiciary is to rise above any sort of prejudice which may cripple it and shed off any patriarchal biasness for the greater cause of justice to thousands of married women in India, whose miseries often go unheard, unwept and unsung.

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4. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”
5. “ No person shall be deprived of his life and personal liberty except according to the procedure established by law”.
EUTHANASIA: IS IT A GOOD LAW?

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ABSTRACT

Euthanasia is the good death that the person seeks being on the death bed intentionally. It’s the way of ending the life in an assisted manner through voluntary or involuntary basis in a protected manner. Through various countries, it may vary in different forms and there may be many complexities in the ethical, legal, religious, spiritual, social and cultural aspects which may put on retrospective and prospective glance in the field of Euthanasia. The outlook in the world may vary in different parts. Relatives and Acquaintances can’t see their loved ones suffering on bed and hence, they get affected by heart. The third party intervention when it comes to the involving of a doctor is the showing up of the legal eye. Even if, the people who lose hope and want to die peacefully post progression of money spent on their health and injuries don’t wish for the long survived vegetative state. The necessity is the merciful and secluded end to life which the doctors can succour. This should not be confused to abetment to death as it has been over the ongoing cases in the Indian Courts. The view from the Crime and Justice needs to be enhanced and the IPC needs to be refilled with the new sections and provisions of Euthanasia. The Indian Constitution although won’t permit the Right to Die as against the Right to Life, but, the part of it can be sustained and needs to be focused upon. The precious present state of people may not be affected and it can be a help and relief to many people in the family as well as the mind state of the conservative and reserved classes of people. The Living Will can be entertained as well and the legal validity of it should be accepted in a wide manner.

EUTHANASIA: IS IT A GOOD LAW?

“Death is not the opposite of Life, rather a part of it where it comes to talk about the meaningfulness of the survival.”

1. INTRODUCTION

Euthanasia, as derived as the word comes from the Greek euthanatos, which means “easy death.” In English, euthanasia has been used in exactly this sense since the early seventeenth century, when Francis Bacon described the phenomenon as “after the fashion and semblance of a kindly & pleasant sleep.” Nowadays, the word usually refers to the means of attaining such a death.516 The very term of Euthanasia is legally valid in some parts of the world when it comes to the various nations and guiding factors to it. One of the significant things that can help them out is the intention and motive behind the assisted death is fully fledged promotion by the family or the person ridden on the bed and no one else who can conduct the procedure itself alone. People argue upon some facts, circumstances and situations where one doesn’t wish to stay with their current environment and thus, as an easy

516Reference: https://www.merriam-webster.com/dictionary/euthanasia
method to get rid of certain things, wish to cut upon the thread and free themselves by ending up their lives. This method is very sarcastic when it comes to mature thoughts and mostly, today’s younger generations are acquiring the lacunae how precious life is and how to make it shine in it’s own way.

Taking back the case of practicability of the practice of an easy death, medical cases and emergency situations can be entertained with other precautions and practices like enhanced government support and palliative health care systems. Even if, compassionate health care communities can make the public aware of their exquisite lives and hence, control their nervous stimuli restricted to oneself for a longer life. Motivation and skills to create a good motive within the mind can make a person feel really special and confident about oneself. Hence, the person on death bed also can, also be alive again if he gets an opportunity again to be mentally strong first. Organizations like EPCC in the North American countries like USA and Canada have already started such inspiring services and they focus on the purpose of Life.\(^{517}\) Comparing to other scenario, grass is greener on the other side as well. People seriously want to give up their lives in serene but doltish manner not because of any medical reasons, but from such situations which strangulate them in day to day affairs.

2. **HISTORICAL BACKGROUND**—

Euthanasia was believed to have started long back in ancient Greece and Rome around the fifth century B.C. Ancient Greeks and Romans tend to support euthanasia, they performed frequent abortions as well as both voluntary and involuntary mercy killings. Although the doctors were supposed to follow the Hippocratic Oath, prohibiting them from giving poison to the patient. This oath was strictly followed by them. During Middle Ages Christians and Jews have opposed suicide as it was contravening one’s duty to one self and going against the Gods authority over life. During the 17th and 18th century the common law tradition had disapproved both the ideas of euthanasia and assisted suicide. But in the 18th century, a law was passed in Prussia that had reduced the punishment of a person who killed the patient with an incurable disease.

In 1828, for the very first time the American law the assisted suicide was declared as illegal, this was enacted in New York. But there were still many states in America who were still trying to get a law passed at state level. During the 1930s, the euthanasia had gained support both in USA and England. However when the World War Two broke out, to everyone’s surprise that had changed euthanasia forever. Hitler and the Nazis killed thousands of people using euthanasia. They did this by gassing, drugs, and starving the people. By this the Americans grew less fond of euthanasia and put a halt on the euthanasia movement. The late 20th and early 21st century would be the time for euthanasia. Then the Netherlands had become the first country in the world to legalize

\(^{517}\)Reference: [https://www.epcc.ca/about-us/purpose](https://www.epcc.ca/about-us/purpose)
euthanasia, which was later followed by Belgium further Australia also allowed euthanasia for a brief time in the mid-90s. Then in 1998, some of the states of US also allowed euthanasia.

3. **MORALITY OF EUTHANASIA**

   Morality in real meaning says about the different intentions and the principles concerned about the good and bad behaviour. It shows two different pathways between what is right and what is wrong, of which a person has to choose one of them before conducting an act. This can witness the fairness of the situation and understand the situations and circumstances under which the action was undertaken and also, if the action suits the scenario at the very moment. The approach may be optimistic or pessimistic, but the mindset of the person enacting the action leads to another person speak about his morality. Morality guides the laws as well and sometimes, there is a need to take a brutal step to showcase the difference between right and wrong so as to provide absolute justice.

   In order to connect, Morality and Death, one would turn from a healthy existing life to a posthumous non-existence where one can’t return back to the normal life. It is assumed that death is painless and worst scenarios had led to the end of life and many more reasons may accentuate this way en route death. In the medical scenario regarding Euthanasia, the question of morality lies because of a thin line of distinction between if it is better to let a person die and killing someone who is on the death bed undergoing sufferings and severe pain. There is a need of the proper justification on row for debating the topic and stick to the roots of it of a question “WHY” a person is led to go for Passive Euthanasia and what factors led the doctor and the medico-legal committee approve of such an idea. The physical pain faced by the terminally ill patients lead them to mental suffrage and that increases further with time when the patients think there is no reason for their existence. Their existence is simply a havoc to the whole family and they are worth nothing. They think they are unnecessarily dependent upon their family members and they are the source of negative vibes for the whole family. Such feelings force them to think more about death and when, one person thinks more and more about death, the existence is belittled. Everything seems to be a challenge starting from dignity till peace.

4. **LANDMARK CASES UNDER EUTHANASIA**

   The soundness of permitting euthanasia is one of the debated issues in India. The euthanasia can be either active or passive. In India euthanasia is illegal and unless it is expressly permitted by law it’s seen as a crime. So the cases of mercy killing felt directly under the section 300, clause one of the Indian penal code, 1860 and the doctor would be punished under the sec 304 of Indian penal code, 1860 which is for culpable homicide not amounting to murder and the exception to this is only applicable if it falls under voluntary euthanasia.
In the case of **Gian Kaur vs. State of Punjab**518, in this case the appellant along with her husband was convicted under sec 306 of Indian penal code, 1860 for abetting the commission of suicide by Kulwant Kaur. Here the trial court had sentenced to six years along with the fine of Rs.2000, whereas on the appeal to high court the conviction of both was kept the same only the sentence of Gian Kaur was reduced to three years. In this case the five constitutional bench held that both assisted suicide and euthanasia were unlawful in our country. It was also held that the right to life is inherently inconsistent with the right to die. The judgment of this case was overruling the judgment of **P. Rathanam vs. Union of India**519. This case also dealt with the right to die where the right to die was recognized and included under the right to life and liberty Article 21 of the constitution and along with that the legal validity of sec 306 and sec 309 of Indian penal code that is abetment of suicide and suicide was questioned. This case dealt with the difference between the euthanasia and suicide. Suicide is ending of the life in an abrupt manner when no terminal illness is known to have taken place where as in the case of euthanasia or mercy killing the patient is suffering from incurable disease, this is the practice of intentionally ending the life to relieve pain and suffering.

**ARUNA SHANBAUG CASE**520: This case created a great impact and gave a new dimension to the euthanasia laws in our country. The facts of the case stated that the petitioner Aruna Ramachandra Shanbaug was working as a staff Nurse in King Edward Memorial Hospital, Parel, Mumbai. On the evening of 27th November, 1973 she was attacked by a sweeper named Sohanlal Walmiki, who was working in the hospital. He wrapped a dog chain around her neck and tried to rape her but finding that she was menstruating, he sodomized her. In order to immobilize her during this act he twisted the chain around her neck. The next day, a cleaner found her in an unconscious condition lying on the floor with blood all over. It was alleged that due to strangulation by the dog chain the supply of oxygen to the brain stopped and the brain got damaged. Aruna Shanbaug continued to be in a vegetative state for 41 years and then she was diagnosed with pneumonia. In December 2010, Pinki Virani, who was the friend of Aruna and was also an activist-journalist filed a mercy killing petition in the Supreme Court which was later rejected in March 2007 but however the Supreme court legalized the passive euthanasia in our country.

In this case the court has explained the concept of euthanasia and its two types that is active and passive euthanasia. This classification was on the basis of the process in which it is carried out. Passive euthanasia is usually defined as withholding of medical treatment with deliberate intention of causing the patient’s death. Here the doctors are not actively killing the patient rather they are simply not saving them by switching off the life-supporting machines, detaching the feeding tube and not carrying out any life extending operations nor providing the patient with any life extending operations.

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518REFERENCE - 1996 (2) SCC 648 : AIR 1996 SC 946
519REFERENCE -1994 AIR 1844, 1994 SCC (3) 394
drugs. Whereas in active euthanasia the medical professionals deliberately takes specific steps such as injecting the patient with poison to cause the his death. This is considered to be an intentional act in order to cause death of the patient so many moral questions were raised against it. A further classification of euthanasia is between voluntary euthanasia and non-voluntary euthanasia which is based upon the consent. In voluntary euthanasia a person makes a conscious decision to die and asks for help to do this so we can say that it is conducted on the consent of the patient. This is also known as assisted suicide whereas in case of non-voluntary euthanasia the consent of the patient is not available.

5. **LEGALITY OF EUTHANASIA ACROSS THE WORLD**

It is humane and merciful as an idea when people aren’t willing to stay for a longer period of time with inoperable and incurable situations being faced. Hopelessness is the last option of medical profession. It will sound inhumane and dangerous not to prohibit Euthanasia in different States, but, different states have different opinions and thoughts which may promote Active or Passive Euthanasia. A progressive society should limit its power over human beings instead of expanding it lest, it is gone out of control and people are in favour of a new medico-legal practice. Checks and Balances must be there to control the overuse and misuse of powers by the physicians. Otherwise, it would create psychological and technical situations beyond human endurance.

Recent studies have concluded the legality of Euthanasia in various states according to the views of the people in the nation, on basis of relief of medical practice and the extent of deep thoughts by the nation towards the people who are suffering along with Constitution coming into play. The line of difference between active and passive Euthanasia has also come along to show the difference of mindset of various states.

Netherlands is the first country to legalise Euthanasia and assisted suicide in 2002. It was followed by Belgium and then, France in a disruptive manner where the president, François Hollande, promised to look at the “right to die with dignity” but has always denied any intention of legalising euthanasia or assisted suicide. In European Union, it’s alike in various countries as in Switzerland, Assisted Suicide is legal whereas Euthanasia isn’t legal. So, they term these medical practices as very nearby to each other and respect the life and dignity of a human being. They focus on the maximum chances to save the life of a human being and help them to survive as long as they can. But, US has different laws varying across states within themselves and the glitch between various legislators to allow the euthanasia amongst various states is there on a trembling situation. Euthanasia is illegal in most of the states in the United States. The line of distinction separating euthanasia from assisted suicide is that, in cases of assisted suicide as per seen yet, an individual receives an assistance, but ultimately voluntarily causes their own death. It was concluded by the US Supreme Court that it’s illegal for the doctors to assign lethal drugs to the dying patients.

But, in case of Euthanasia, an individual does not directly end his own life, but another person acts to cause the individual's death with consent. But I greatly doubt upon the legalization of euthanasia until the gravity of the act won’t turn into a criminal offence.

After Brexit, Euthanasia and Assisted Suicide are completely banned and is declared illegal in the UK. Previously also, assisted suicide was considered illegal under the terms of the Suicide Act of 1961 and because of evading laws, one can be punishable by up to 14 years' imprisonment mercilessly. Trying to kill yourself is not a criminal act. But, depending on the circumstances, euthanasia is regarded as either manslaughter or murder. The maximum penalty is life imprisonment. The subject of Euthanasia is a highly tendentious, emotive, cumbersome and a topic spread on labyrinthine, raising an array of perplexed principles, ethical merits, social, tensions, philosophical imbalance, legal pitfalls and religious concerns which can bring many political issues in a State and it has also promoted the discussions and comparison of laws all across the world.

But, in Canada, where suicide was decriminalized in 1972, the ideas of assisted suicide and voluntary euthanasia came into play in 2016. Being lenient, the loopholes of Euthanasia has recently shown increasing statistics of Parents wishing for Euthanasia for their sick kids. The motive and intention doesn’t go hand in hand with the action which aggravates the situation of looking it from a criminal angle of Murder rather than a better work. This is where the system of checks and balances lack, people being criminal minded sway under the nose being innocent and hence, sick kids sign off from life. Overlooking such issues, Russian Federation disagrees with passing the Bill of allowing Euthanasia to be legal in their nation. Similarly, it's completely banned and is illegal in Australia as well and also, the Islamic States in the Middle East where this is treated as a forbidden act and Allah has made a cure to every illness. Patience is what should be formulated instead of assisting someone for death and it seems more of a pessimistic approach.

6. CONCLUSION-
Euthanasia from the very starting has been a controversial subject because there are a number of different view points attached to it. There are some people who think euthanasia should be legalized because every person has the right to die in a dignified manner whereas as some people see it as a crime as it is against our morals and ethics. It came into lime light when the Supreme court passed the judgment on legalizing passive euthanasia in Aruna Ramchandra Shanbaug v. Union of India. Yet, there are many new and better laws like this to be passed.

According to our above discussions on the different aspects of euthanasia, what we believe is that voluntary euthanasia should be allowed in India and our legislature must make some special laws related to euthanasia keeping in mind the recommendations that were put forward by the Law commission of India in Aruna Shanbaug case. The law should be such where there is adequate safeguards in order to fight the loopholes and also to prevent the misuse of euthanasia. Peace is the ultimatum of everyone’s life and all religions along
with communal parties will march definitely for this path. So, at the end it should be said that, medical practices like Euthanasia and Assisted Suicide may be promoted for self-satisfaction without any moral guilt but, it should be always placed under the ambit of law and order.

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ANALYSIS OF SECTION 144 OF CRIMINAL PROCEDURE CODE

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Abstract
The researcher wish to explore and study about wide powers have been conferred on an Executive Magistrate to deal with the emergent situations under Criminal Procedure Code, 1973. One among such provisions deal with the power of magistrate to impose restrictions, on the personal liberties of individuals, whether in specific locality or in town itself, where the situation has the potential to cause unrest or danger to peace and tranquility in such area, due to certain disputes. Section 144, Criminal Procedure Code, 1973 confers power to issue an order absolute at once in urgent cases of nuisance and apprehend danger. Specified classes of Magistrate may make such orders when in their opinion there is sufficient ground for proceeding under the section and immediate prevention or speedy remedy is desirable.

Key words : Public peace, Public tranquility, annoyance, danger, apprehend, prevent.

Need for study:
Since Section 144 of Criminal Procedure Code, 1973 is prohibitory in nature. It restricts public gathering but doesn’t bar it all together. The Researcher feels the need to analyse this particular section because the position in India regarding this remain controversial at times.

Objective/Aim of the study:
The researcher aims to analyze Section 144 of Criminal Procedure Code, 1973. He/she also aims to find out whether it is inadequate to confront urgent cases of nuisance and apprehend danger.

Research Methodology:
The research methodology adopted for the purpose of study is doctrinal in nature. Sources of data are secondary i.e. books, statutes, online website, articles, case laws.

Introduction:
A very well known and frequently used Sec 144 of Criminal Procedure Code, 1973 grants powers on senior magistrate to issue order in urgent cases of nuisance or apprehend danger. This section deals with another category of preventive jurisdiction of Executive Magistrate which extends to cases of nuisance or danger which need prompt and urgent action. This section even empowers the Magistrate to pass ex- parte orders to remain in force for short duration up to two months which may be extended by state government up to six months in exceptional cases. It is a settled law that Magistrate is authorized to act under Section 144 (1) and (2) only when he is satisfied as regards the existence of such an emergent or urgent situation or circumstances which are likely to disturb the public tranquility and such reasons must be reflected in order itself with reasons thereof. A mere statement that he is satisfied that there is possibility of serious breach between the parties as well as
public tranquility isn’t sufficient enough to exercise such wide powers under Section 144 (1) and (2) of the code.

This power conferred under Section 144 of the code acts as a major tool in hands of Executive Magistrate to prevent obstruction, annoyance, injury etc to the general public. This section requires the Magistrate to issue the order in writing setting forth the material facts of the case and the order is to be served according to Section 134 of the code. While taking the action, the court not only consider those situations assessed by Magistrate but would also take in consideration the factors as to whether the orders issued under Section 144 were vague or directed to a specific person.

The paper under this Section 144 is not arbitrary, nor is unlimited, it is reasonable. Section 144 is attracted only in an emergency.

The paper begins its analysis by first expounding on the scope of Section 144 followed by the conditions that need to be fulfilled in order to invoke it. Further in the paper, details of an order under this section are elaborated upon, like its contents, duration, and mode of its service. While explaining the above, judicial pronouncements have been relied upon to substantiate as well as elucidate the meaning of the section.

**Section 144 of Criminal Procedure Court, 1973**

It provides that,
Power to issue order in urgent cases of nuisance of apprehended danger.

(1) In cases where, in the opinion of a District Magistrate, a Sub divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, of an affray.

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed ex parte.

(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.

(4) No order under this section shall remain in force for more than two months from the making thereof: Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an
order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification.

(5) Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section, by himself or any Magistrate subordinate to him or by his predecessor in office.

(6) The State Government may, either on its own motion or on the application of any person aggrieved, rescind or alter any order made by it under the proviso to sub section (4).

(7) Where an application under sub section (5) or sub section (6) is received, the Magistrate, or the State Government, as the case may be, shall afford to the applicant an early opportunity of appearing before him or it, either in person or by pleader and showing cause against the order; and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it shall record in writing the reasons for so doing.  

Constitutional Validity of this Section:

Hidaytullah, C . J, stated in the celebrated case of Madhu Likhaye v/s S.D.M Monghyr [28th November, 1970], that section 144 of Criminal Procedure Code, 1973 is not unconstitutional if property applied and the fact that it may be abused is no ground for its being struck down. And the provisions of the code properly understood are not in excess of limits laid down in the constitution for restricting the freedom guaranteed in it and that is precisely why the court held that section 144 of Criminal Code is valid and constitutional.  

Since the propriety of the order is open to challenge, it cannot be said that by reason of the wide amplitude of power which section 144 confers on certain magistrates, it places unreasonable restrictions on certain fundamental rights. The conferment of such wide powers on magistrate doesn’t therefore amount to an infringement of the rights guaranteed under the Constitution.

In the above said case, the Magistrate gave a prohibitive order under section 144 in order to avoid a scuffle between members of two labor unions. The petitioner here challenged the provisions as giving arbitrary powers to the Magistrate. Basically, there were five points enumerated in the judgment, which justified the constitutionality of section 144.

They are as follows:

- Although the Magistrate has the power under this section to pass orders ex parte, however generally the procedure that is followed is to serve notice to the person against whom the order is passed. Only in cases of extreme critical situations that the Magistrate has to resort to passing an ex parte order.
- Additionally, the person aggrieved by the order has a right to challenge the order on the grounds they find appropriate. This


523 https://indiankanoon.org/doc/496236/
supports the view that the power granted under this section is not arbitrary.

- To substantiate the above, an opportunity for hearing and to cause is also provided to person challenging the order of the magistrate. Thus, the principle of Natural Justice has also been included.
- Next the court also stated that the fact that the aggrieved party has the right to challenge the propriety of the order, makes the action of Magistrate more reasonable and based on cogent reason.
- Finally, the High Court’s power of revision under Section 435 of the code read with section 439 of the code also makes up for the condition that the order under section 144 is non-appealable. The High Court can either quash the order or ask the magistrate for the material facts, therefore ensuring accountability of the Magistrate.

Therefore, in this case, there has been a number of cases where the courts have accepted this approach and held that the preventive action under Section 144 is justified. Also, any restrictions, which is opposed to the fundamental principles of liberty and justice. One of the tests to identify whether a restriction is reasonable or not, whether the aggrieved party has a right of representation against the restriction imposed or proposed to be imposed. No person can be deprived of his liberty of without being given an opportunity to be heard in defense and that opportunity must be definite, adequate, fair and reasonable. Also, the courts need to make sure whether the restrictions are in excess of the requirement or whether it is in an arbitrary manner.

Scope:
The actions taken under this section are anticipatory, i.e. it utilized to restrict certain actions even before they actually occur. These actions are generally imposed in case of emergency, where there is an apprehend danger of some event that has potential to cause major public nuisance or cause danger to public tranquility or public peace. The crux of action taken under Section 144 is the urgency of situation; the capability is the likelihood of being able to avoid certain harmful occurrences. Protection and preservation of public peace and public tranquility is the very first function and the aforesaid power is conferred on Executive Magistrate, enabling it to perform such function effectively and efficiently during the emergent situations.

In case of Radhe Das v/s Jiram Mahto, 123 Ind Cas 73 [February 8th, 1929], the dispute was over a piece of property. The petitioner requested to issue order avoiding respondent to enter into the property, which further was granted under Section 144 by the Magistrate. However, while the proceedings, the respondent too claimed for the same prohibition on petitioners, which was subsequently granted by Magistrate under the same section of the code. Also, the respondent in response to present action brought action on the ground that their rights over the property was violated.

The court then held that, if the situation demands any action, then for the preservation of public peace and public tranquility, rights of an individual can be renounced and society’s benefit is taken into
consideration. 524 “To give jurisdiction under this section, the Magistrate shall be of opinion that immediate prevention or speedy remedy is desirable and that the direction he proposes to make is likely to prevent a disturbance of the public tranquility or a riot or an affray. In such circumstances private rights must give way.” 525

The principles which must be borne in mind before the application of this situation has been elaborated in case of ‘Manzur Hasan v/s Muhammad Zaman’ 526, and has further approved in case ‘Shaik Piru Bux v/s Kalandi Pati.’ 527 They are:

➢ Urgency of situation and use of such power only for preservation of public peace and tranquility.
➢ Rights of individual i.e. private rights can be renounced when there is conflict between public rights and private rights.
➢ Question of titles over any property or entitlement to rights or disputes of civil nature are not open for adjudication in proceeding under this section.
➢ Where those questions which have already been decided and given consideration by civil courts or judicial pronouncements, the Magistrate should exercise their powers under Section 144 in aid of rights and against those who interfere with the lawful exercise there of.
➢ The consideration shouldn’t be that restriction which would affect only particular section of society or community rather than a large section more vociferous and militant. 528

Several more examples:

During the Senior Secondary Exams of class 11th in Udupi, [2011], Section 144 was declared within limits of 100 meters radius of all exam centres to avoid ‘malpractice and indiscipline.’

In 2010, hunger strike against Renuka Dam in Himachal for violating Section 144, as their health was getting affected, along with the tranquility of their relatives.

In Kashmir, Section 144 has been in force for more or less continuously since 2008. 529

Although the powers granted under this section are extraordinary considering the fact that it enables them to suspend the lawful rights of person if they are of thought that such suspension will be in favor of public interest. But the Magistrate should also keep in mind that every citizen has right to ventilate his grievances either in public or in private and ask for redress.

In case Acharya Jagdisharanand v/s Police Commissioner’ 530, it was held that, the order issued under Section 144 of Criminal Procedure code, 1973 can be either of permanent or semi – permanent nature.

524 https://indiankanoon.org/doc/93983/
525 http://www.legalservicesindia.com/articles/crpc.htm
526 (1921) ILR 43 All 692
527 1970 AIR 1885, 1969 SCR (2) 563
528 https://indiankanoon.org/doc/265287/
529 http://thelegiteye.in/2017/10/03/analysis-section-144-crpc/
530 1984 AIR 512, 1984 SCR (1) 447 ; {
https://indiankanoon.org/doc/798012/}
In , Restaurant and Lounge Vyapari v/s State of Madhya Pradesh \(^{331}\) [August 21\(^{st}\), 2015], the Magistrate used Section 144 of Criminal Procedure Code, 1973 and imposed ban on Hookah in city of Indore. It became unlawful as it possess the danger of causing injury to human life as well as disturbing public tranquility.

**Rationales for application of Section 144 of Criminal Procedure Code, 1973 :**

- Annoyance
- Injury to human life
- Disturbance to public tranquility
- Orders cannot be made to give advantages to one party.

**Contents of order:**

- Order must be in writing.
- Order must be specific and definite in terms and conditions.
- ‘Material facts’ must be stated in order.
- Prohibition must be clearly stated

**Service of prohibiting order under Section 144:**

Once the form of order is appropriate, the magistrate must then serve the order upon those expressly mentioned in the order itself. For this purpose, Section 134, CrPC is attracted. Under Section 134, the order must be served on the person against whom it is made (sub-sec. 1); or else, when such personal service is not feasible a copy of the said order must be stuck up at such place(s) as may be deemed fit (sub-section 2). The notice issued must follow the provided terms of the order passed and should not be couched in wider terms. Therefore, if the said procedure were not properly as well as appropriately followed, the order made would then be deemed illegal or void. The person can then not be convicted for any defiance of the order under section 188 of the Criminal Procedure Code, 1973. However, if it can be shown that the person against whom the order was directed did in fact have knowledge of such order being issued against him, any irregularity in the method of promulgation would not by itself make the order ultra vires.

**Duration of order:**

As expressly mentioned, any order passed under Section 144 shall be valid for period of two months only. \([\text{Sub- Clause (4) }\] . Also, as already mentioned, it is not competent to Magistrate to review or resuscitate his orders from time to time. Such an exercise of power would clearly constitute abuse of power.

However, the State Government can extend this time period of two months to a maximum of six months from the date of the expiry of the initial order, if it finds it imperative for prevention of certain situations causing disturbances of safety, health or peace. Although the power granted upon the Government in this respect is executive in nature, and there can be revision of order by a Magistrate in case the court finds the arbitrary or unfair exercise of power.

**Conclusion :**

After careful analysis of the concerned section in the light of judicial pronouncement and academic commentaries, the paper can be concluded with the assertion that, section 144, albeit discretionary, is an essential element in the

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\(^{331}\) https://indiankanoon.org/doc/64903563/
set of measures that are undertaken by the executive body of any district in order to prevent as well as manage urgent situations. There have been number of cases filed against the section challenging the constitutional validity of the section and an equal number of decisions upholding its legitimacy. Though, discretionary powers are conferred upon the magistrate under this section, there are various factors on its exercise so as to prevent arbitrariness or unfairness in the order. What makes this section more rationale is that. The High Court can review the order of Magistrate. Moreover, seeing the increased cases of riots, affray and other incidents ruining and disturbing public peace it has become necessary to confer such powers to the judicial authority so that peace can be maintained. However, there has emerged a need to balance the plenary power of legislature and need to protect personal liberty and other freedoms of citizens.
DEMYSTIFYING THE MYTH OF INDEPENDENT DIRECTOR

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ABSTRACT:
In this research paper titled “Demystifying the myth of Independent director”, the primary aim of the author is to come at par with the reality of “independent” director. The concept derives its origin from the days of financial hardships and breakdowns in USA when the investors’ faith was defeated due to repeated breach of the legalities. In the light of such situations, India also chose to strengthen its budding corporate governance regime and chose to adapt to the international standards after improvising them as per it requirement. An independent director, till date, has been regarded as integral tool in the monitoring mechanism of the company. This is mainly because of the presence of the trait of “independence” as compared to other directors. But the food for thought is how far an “independent” director is actually independent? Is he/she actually serving the purpose it was intended to, at the time of improvising this tool? The paper intends to dissect and examine the myth and evaluate how true it stands in today’s scenario.

INTRODUCTION:
Independent directors today are the keystone of the corporate governance world. The entire foundation of corporate governance revolves and emerges from it. Increase in number of independent directors on the board has been said to bring a deterrent effect when it comes to fraudulent activities. They have been affiliated to preventing mismanagement, inequality, erosion of legal foundation and footage of the company. They have also been titled as forerunner for striking the balance and maintain checks in the company. But is that all that can be attributed with the role of an independent director? Since every coin has two sides, does the coin of independent director not possess another side? The other side refers to how it has failed to satisfy the purpose of the system and proved to be burden on the company.

The definition of ID is defined under section 149(6), Companies Act, 2013. An independent director is generally regarded as the person who has severed all his ties with such aspects that are likely to impact the decision of the director. However, mere the fact that there are no ties involved cannot be said to render the quality of “independence” over the director. It is imperative for a person to possess the traits of loyalty, unbiased and other managerial elements so as to be regarded as an independent director, (referred as ID hereafter).

To delve and develop upon the research proposition, the researcher shall primarily rely on secondary data for the purpose of research. The intent is to look into the survey conducted, legal opinions and rely on the national and international journals and books by the experts in the field to conduct a detailed study to come to the conclusion inclusive of both online and offline materials This paper aims at demystifying the myth of “independent director”. It shall also try to identify the other side of the coin on having
an ID in the company. The paper seeks understand if at all, having an ID can be a hurdle in the growth of the company. The paper shall unfold tracing the history of origin of independent director in India particularly. ponder upon what is the concept of independent director, identify roles and functions of an ID followed by the problems that the presence of an independent director may bring to the company and conclusion. While all this is dealt with in detail, the author shall simultaneously dissect and examine the reality behind the myth of “independent” director while defining what an ID, in reality is.

**LITERATURE REVIEWS:**

- **LITERATURE REVIEW 1:**
The author Roberta S. Karmel in the article “Is the Independent Director Model Broken” begins with tracing the legislative growth and requirement of having an Independent director in the Sarbanes-Oxley Act, 2002 and the status of an independent director around the world. The model of independent director is put forth before the readers followed by the problems faced, substantiated with the help of several studies. As per a study conducted in 2009, it was concluded that the companies which had more number of independent directors experienced worst stock crisis. Indeed the author has very beautifully laid the tussle between independent and non independent director and makes one conscious of the need to striking the balance. The paper then throws light on an altogether different model which is a combination of shareholder primacy and independent director. The author, who was a director herself once, through this article makes a suggestion that the expertise of the director is more important that the independence of the director.

- **LITERATURE REVIEW 2:**
The article “The Independent Director: Has It Been Indianised Enough” written by Madhuryya Arindam is set in the Indian regime. The paper begins with tracking the reasons for development and growth of independent director. It has very well attempted to define and portray an evolution in the meaning of “independent director” in context of its functions. In order to give a holistic idea about the independent director, the author has also delved with the nomination, election and removal of the independent director. An additional study that the paper supplies to its audience is over whether the psychological factors have any effect on the performance of such directors is an intriguing element of the paper. The author then drops the curtains over the paper with her last remarks in form of suggestions and alternatives in which working of the institution can be made more effective in presence of independent directors.

- **LITERATURE REVIEW 3:**
In the research paper, “The Role of Independent Directors in Controlled Firms In India: Preliminary Interview Evidence” the authors, Vikramaditya S. Khanna And Shaun J. Mathew have conducted empirical study to understand the role of the independent directors on the board. This involved conducting interviews in both controlled and dispersedly companies. As a result, it was found that most of the people didn’t perceive the independent directors to play the role of a
watchdog and neither did the companies seem to welcome their ideas. Rather it was found that imposing monitoring duty seriously proved to be detrimental in the interest of the company. In terms of liability, their compensation was found to be grossly inadequate. Since the paper is set in the post Satyam regime, the research attempts to conclude it by briefly exploring reforms undertaken to improve the current scenario.

**EVOLUTION:**
It was in the year of 2000 when SEBI issued a mandate for all the large public listed companies in India to abide by the requirement of having minimum number of independent directors in their companies. The root cause of emergence of this requirement takes us to the corporate governance situations prevailing in U.S. and U.K. during the 1990s. Unlike U.S. and U.K., India is said to have an insider model. Holding organizations, banks, other nonfinancial partnerships, and familial control are predominant highlights of insider framework. In other words, insider corporate structure means that the management and the board is a composition of the people not independent of the company. They may be called to be the parties having interest in the working of the company. Such insider structure based management has technically all the control over the structure of the board and management and has upper hand over the working of the company and its affairs. Such a model of company is also called as the "family/state" model. These companies run with the tradition of passing on the control of the company into its own lineage. Some of the famous examples of such companies in India are The TATA Trust, Aditya Birla Group, and Reliance Industries Limited etc. Perhaps this resulted in the conflict of interest between the shareholder’s of the company and the management, where both want to reap the benefits of the companies working all by themselves. This kind of situation very quickly became the talk of the town for the analysis in the field of economics and was named "agency problem”. The corporate literature defined agency problem to be a pack of three types. India is said to succumb to the conflict between the majority shareholders and minority shareholders.

As an antidote to this problem “monitoring board” theory was devised. Monitoring board theory lays down the foundation of a new model of the structure and check mechanism of the company which involved the executive officers, the board dominated by the outsiders’ helping in ensuring keeping a check on the performance of the management. Professor Melvin Eisenberg

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534 La Porta et al. *Law and Finance*, The Journal of Political Economy, 1113, 1115 (1998) (describing insider systems as "characterized by the significance of the state, families, non-financial corporations, employees, and banks as a source of funding and/or control").
536 Dent. G. *The Revolution in Corporate Governance, The Monitoring Board, and The
was an ardent advocate of this model. He emphasised on finding the useful functions that a board can perform rather than making any unrealistic demands and the most important function of the board was found of that of monitoring.\footnote{\textit{Director's Duty of Care}. 61 B.U. L. REV. 623, 645 (1981).}

The seed for the growth of this theory is found to be sown from the era of Berle and Means’ study. However this theory was more of “manager- shareholder conflict centred”. It rightly enunciated that there is difference between ownership and control which leads to the interest of the shareholders become secondary as against the managers. Since the shareholders of the company are generally widely spread out, the managers get an upper hand when it comes to decision making. This thus gives unbridled power to the manager leading to the abuse of his position and powers. Two economists, Alchian and Demsetz explored this issue with an opinion that the party which gets the residual income would be deemed to be the best monitoring authority. This is based on the premise that such a party shall reap the maximum amount if the monitoring is done at its best, thus giving incentives to monitoring authority to supervise the firm’s conduct properly.\footnote{Armen, A. and Harold, D. \textit{Production, Information Costs, and Economic Organization}, The American Economic Review. 62, 777 (1972).}

They suggested that the appropriate authority for this is the shareholders since they are the ones who are the recipients of the residual income of the company. Since the shareholders’ are going to be the claimants of the residue of the company, it is argued that they are the most appropriate monitors for the company.\footnote{Bainbridge, S. \textit{Participatory Management Within a Theory of the Firm}, 21 J. Corp Law Review,657, 672 (1996).} In any case, while the law provides investors with the right to cast vote and power to ensure enforcement of a policy decision, these are to be retained for situations of urgency.\footnote{Id. at 680.} In general, investors have nothing like the legal right, ability or the longing to exercise the type of control required for proper monitoring of the agents i.e. directors of the company.\footnote{Id. at 682.} This problem ultimately led to the entrustment of this monitoring responsibility on the independent directors. But with the board of director comprised of the insiders, it was nearly impossible to expect an independent director to do his task religiously. For the independent director to serve the motive of its establishment, it was necessary that he/she must be independent of the management. Thus, the composition of the board now began to gained importance.

The corporate governance mechanism to tackle this menace was long developed in the era of 1970s in U.K. and U.S.A. It came in form of various legislations such as Sarbanes- Oxely Act in U.S. and Cadbury Committee Report and Greenbury Code in U.K. India, after suitable modifications as per its conditions, decided to transplant the same into the Indian scenario. India saw a radical shift in its economic conditions and policies after liberalization in 1991 which called for change in the corporate governance policies of the nation. The year of 1992 bought SEBI as a threshold to the
change. SEBI developed its own rules and regulations to prevent insider malpractices and encourage the shareholder interest in the companies. In 1998, the initiators of the change called for making of the Confederation of Indian Industry (CII) and recommended a Code for Desirable Corporate Governance which was accepted by several companies willingly. 542 Thereafter in 1999, SEBI under the chairmanship of Shri Kumar Mangalam set up a committee called as Kumar Mangalam Birla Committee to raise the standards of good corporate governance in case of listed companies. Its main objective was to review the current standards of corporate governance from the shareholders’ and investors’ perspective and prepare a suitable code to suit the changing environment.543

SEBI in a meeting held on 25th January, 2000 considered the recommendations of the committee and decided to make the necessary amendments to the listing agreement namely, introduction of clause 49.544 Post the Enron, WorldCom and other major break downs of the companies due to lacuna in the corporate governance code of USA and subsequent enactment of Sarbanes- Oxley Act, SEBI again decided to bring forth the reforms to strengthen the governance regime. This was done with the help of the Murthy committee established under the chairmanship of Narayan Murthy.545 The committee was required to revisit Clause 49 and provide recommendations for changes as per the prevalent scenario. The revised version was issued on October 29, 2004. However it was bought into force only on January 1, 2006.546

DEFINING INDEPENDENT DIRECTOR:

There is no particular definition of independent director. However an attempt to do so is evident in section 149, Companies Act, 2013 whereby the legislatures expound the nature of the independent director. For the purpose of this paper, the author shall not delve into the scope of the section but throw some light on the concept of Independent director across the world of corporate governance. For the layman’s understanding the definition of the term “independent director” is evident meaning thereby that such a director who has no pecuniary or any kind of relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors which may have any impact over the decision of the director is known as an

546 Ibid.
independent director. An independent director is expected to make decisions’ based on the merit of the matter placed before the board rather than on superfluous determinants.

Such a director is usually non-executive and an outsider in the management of the company. He can also be called as an outsider since he is a non employee and non management director of the company. As far as his liability is concerned, he shall be liable only for those acts of omission or commission on behalf of the company which had occurred with his knowledge derived (a) during board process (b) with his consent or connivance in the commission of offence; or (c) where he has not acted diligently or prudently. It is mandatory for every listed company to have at least one-third of the total number of directors as independent director. Such a director can hold the office for the tenure of five years only. After the lapse of these five years, he is bound to vacate the office. In no event can a director be elected for the period for more than two terms consecutively. So far, it is difficult to specify the defining trait of an independent director. Some of the scholars argue that autonomy is the defining trait of the independent director. There are also certain scholars who beg to differ and distinguish autonomy from independence.

Daniele Marchesanit, in the article “The Concept of Autonomy and the Independent Director of Public Corporations” has very diligently argued the difference between the two. Citing Dworkin, Frankfurt and Robert Young the article defines “autonomous” as a person who not only formulates his life plan in accordance with his own values and desires, but also carries through with it. In the present context it would mean that a director is said to be autonomous when he has the power to decide the goals of the company and define the pathway and plan to achieve the goals and objectives so put forth by him. He must be free from all the constraints and possess the positive qualities to achieve them. While the word independence is defined as free from influence of others. It is also argued that the trait of independence alone is not enough for the director to be termed as an independent director. This is because the absence of the trait of autonomy shall deprive such a director from any powers for carrying out and fulfilling its responsibilities. The author has argued that the current definition of the independent director is misleading and portrays the independent director to be a person who will be an effective and therefore trustworthy director, but the requirements of the definition are inadequate for this purpose.

547 Companies Act, 2013. § 149.
549 Supra 1.
551 Companies Act, 2013. § 149(3).
552 Companies Act, 2013. § 149(10).
553 Companies Act, 2013. § 149(11).
557 Supra note 15.
558 Ibid.
559 Supra note 15.
The learned author of the paper suggests an alternate definition as stated below\textsuperscript{560}

“\textbf{The definition should require that a director be free from compromising ties and have the motivation, skills, and other characteristics necessary for him to be effective. It should also account for structural and procedural elements that may affect the director’s ability to act. Only a person who satisfies all of the conditions for autonomy will be reliable as a director who will set his own objectives and effectively pursue them to satisfy his obligations under the law.}”

However, the researcher totally agrees to the opinion of the learned author. The researcher strongly feels that if the independent directors’ role and definition was not made to be as stated above, it would override the concept itself. As soon as the director finds the element of motivation to work effectively and efficiently in the company the purpose of choosing a person “who has no interest in the company” is defeated. Applying the Maslow’s hierarchy of needs and motivation where he opines no work, no motivation formula and states that an unsatisfied need will always motivate person to work to achieve it, none of the independent directors can be called to be independent in real sense. As soon as the word “purpose”, “motivation” or “remuneration” is attached with this concept, it inherently defeats the idea of an “independent director”. In event where director’s remuneration becomes genuinely lucrative, some directors might become too dependent on their positions and lose the independence that is felt to be critical to good corporate governance, since outside directors play a central role in overseeing management.\textsuperscript{561} Another major contradiction comes through the wordings of the legislation whereby the legislators mandate both that the “independent director” should have no pecuniary relation with the company but be provided with the remuneration for their work. The Ministry’s Guidelines recommend that independent directors be paid “adequate sitting fees” based both on the company’s net worth and turnover.\textsuperscript{562} For no man would work in a company and devote his time and efforts, unless he is derives benefit out of it none of the independent directors are independent of the company in real sense.

\textbf{ROLES AND FUNCTIONS OF INDEPENDENT DIRECTOR:}

The literature and code in corporate governance has defined various roles of an independent director. It includes addressing the governance related problems, being

\textsuperscript{560} Ibid.


“watch dog” or monitoring the activities of the company on behalf of public shareholders, serving as a strategic advisor to the controlling shareholder etc.\(^{563}\) However, there is no one role carved for the independent director to play. There are several assumptions with regards to the role of the independent director and one of them is monitoring the related party transactions although not barred by law, may nonetheless erode shareholder value if conducted without following proper valuation practices.\(^{564}\) An independent director is expected to act as a guard of the minorities and build up the confidence of the shareholders’ on the company.\(^{565}\) They are also expected to bring onboard their specialist knowledge and business connections and thus make the board more efficient.\(^{566}\) Presence of an independent director on board helps in bringing diversity, effectiveness and balance to the blood of the company. They are called to be the “conscience keepers” who could guide the company towards the right path.\(^{567}\) Due to the presence of the trait of “independence”, an independent director is sought to as an effective middleman to resolve the conflicts in the company.\(^{568}\)

Independent director is generally presumed to maintain a check on the development policy and strategies of the company. They do so by critically examining the performance and acts of the management and ensure that the actions fall within the purview of their power regime. They are a part of the system of reporting and accountability and provide for proper internal control and audit requirements.\(^{569}\) Since they are independent of the management, their decisions are less susceptible to mala fide and prejudice. They question the working of the business and challenge it in the event of any discrepancies. In nutshell, they are the advocates of sustainable development of the company and believe that the growth of the company and the stakeholders go hand in hand.\(^{570}\)

The new act categorically emphasize on appointment of an independent director as a member or as a chairperson in various committees.\(^{571}\) Unlike earlier, an independent director is supposed to keep himself updated with the workings of the company. He/she must be regular at annual general meetings and discuss the problems faced by the non-executive team of management. The code described in schedule IV of the Act, 2013 clarifies the role, function and duties of the director in detail.

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\(^{563}\) Supra Note 28.

\(^{564}\) *OECD Principles of Corporate Governance*. Principle IV.D.6, “One of the functions of the board of directors is to monitor and manage potential conflicts of interest of management, board members and shareholders, including misuse of corporate assets and abuse in related party transactions.”


\(^{568}\) Supra note 31.

\(^{569}\) Ibid.

\(^{570}\) Ibid.

\(^{571}\) Ibid.
Having an Independent director on board, has become a mandate in today’s corporate governance regime. After a massive breakdown of companies like WorldCom, Enron etc the legislatures were said to be practically living their worst nightmares. Public had lost its faith in investing in the corporations. The legislatures had no option but to work on this issue with immediate effect. The role, structure and function of the Board in a company were required to be revamped. This led to the emergence of the “monitoring board” which further led to the introduction of the independent director. The growth of an independent director in the corporate regime has already been discussed above. The concept of independent director was introduced with the hope of securing the coming future and rights of the public in the corporate world. It was expected that independent director would prove to be a whistle blower in a company. This paradigm shift came with multiple disclosures and financial controls over the company and the corporations had to adopt it or elucidate the reason for not doing so. Most of the companies across U.S., U.K. and India quickly adopted this change. But the real question that arises whether this reform actually serves its purpose? Whether the introduction of the independent director actually helps in improving the corporate governance performance of the company or is it a mere burden on the stakeholders and the company? For the purpose of this paper, I shall only limit myself to the cons of having an independent director in the organisation since the potential pros are already widely known.

Even U.S., the birthplace of this reform does not give a clear picture as to how much have this reform contributed in the improvement of the corporate governance. For this purpose the author prefers to resort to an interview conducted by Vikramaditya S. Khanna and Shaun J. Mathew in 2010 wherein the directors themselves threw some light on their role and real time experiences. Time and again, numerous directors, have expressed strong sentiments regarding their “expected” role as a watchdog in the company. They have admitted that they’re reluctant in doing so where there’s a scope for reputational damage and incurring liability. There have been instance where they have been served with arrest warrants for the reason that they were acting as a whistle blower in the company, which ideally was expected to be their role. Speaking of the role of the director, they have also revealed that they are not playing a very significant role in the board when it comes to being an advisor. The “ritual” of independent director giving advice to the board is adhered to, but it’s always the promoter’s choice that prevailed. There have been some instances as well where heated boardroom conflicts have lead to abandonment of the independent director. In the event where the independent director is not able to exercise its tools and powers to deter promoter’s inappropriate activities, they prefer resigning from the company expecting that this may send a “watchdog’s” signal to the general public.

572 Refer heading in the paper “Evolution”.
573 Supra Note 27.
574 Ibid.
575 Supra Note 28.
The interview also revealed the extent of “independence” of the independent director. Each director who was interviewed, at least once has been approached by the promoters’ directly without following a selection process. The reason for the same was that the board cannot simply have strangers put together to arrive at a conclusion in welfare of the company. In order to do that efficiently the board needs to be collegial in nature. Some directors have also expressed their grief in terms of insufficient updates on timely performance and development of the company. While the rest of the directors who got access to such resources submitted that they were poor in quality and insufficient.

Apart from this interview, there are more studies which throw light on the cons of having an independent director on board and suggest that independent director are not a sure shot solution to the problem and prove to be a burden on the company. Scholars have argued that lack of experience amongst independent director causes them to adopt a conservative approach when it comes to decision making. It is also submitted that since they have “artificial interest” in the company they are not willing to take risks. It is not so easy to take a strong stand in favour or against the presence of independent director. Bearing in mind that we are considering only the element of “independence” of these directors, it would be too early to jump to any conclusion. Nevertheless, if improvised and empowered independent director can be a powerful tool against frauds and law evaders.

**CONCLUSION:**

With the end of this paper, the author has discovered that the concept of “independent director” does not exist per se. No director is independent of the firm in literal sense. Some or the other tie will always exist between the company and the director. The author believes that the concept like this can never exist in reality. It is difficult to have a director become independent of the company while having a pecuniary relation in form of remuneration, and prestige connected with the company. As long as there is a relation between the two, the director can never be said to be independent. Noting this, there will never be a situation where person may work selflessly for a company without anything in return. Thus, the author finds no hesitation in negating the concept of the “independent” director completely.

Also it is extremely difficult to find someone fulfilling the requisites of an ID i.e. presence of integrity, probity and high ethical standards. It is a rare and difficult chance to find an appropriate a candidature with these qualities coupled with suitable qualifications and interest in being an independent director. Thus it is that same few selected group of people who perform the task of independent director in the companies.

With regards to the limitations of having an ID, so far, the author has found no reason as to why should one deter from keeping an “independent” director in his/her company. Considering this, when a pseudo-independent director can be so great help to the companies, there is no doubt as to what wonders an ID is capable of doing. Therefore it is strongly believed that there’s an ardent need there and vast scope of improvement in this concept so as to make it a full proof
device against the menace. So far it is a boon with minimal effect but it definitely has potential to widen its effects.

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THE MEDIA WAR OF ISIS AND ITS IMPACT

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ABSTRACT
The social media is one of the essential tools of the ISIS to garner attention of the people so as to get them to support their cause, motivate the people to join them and spread terror around the world. The organization is known to have many social media accounts and have also created their own website on which they upload explicit posts which contain disturbing contents such as videos of the members torturing or beheading hostages. Using the social media as a platform to promote their propaganda, the organization has gathered a huge following, which has helped in recruiting members from around the world.

The use of social media by the ISIS has caused many people to act on their digitized demand. While many get recruited, there are some who get inspired by their cause and act on their own account. The social media has become a mechanism to manipulate and exaggerate the attention of the people. This has caused deaths of millions of people, destruction of properties and environment and other socio-economic problems. Women and children have been subject to abduction, sexual assaults, mutation and forced marriage, all of which is posted on their social media accounts. Their acts have gravely violated human rights. It is because of social media that the world public immediately creates a social cohesion against rulers and governments that find human rights abuses, suffering, and death acceptable.

The paper seeks to elucidate upon the many facets of social media usage by ISIS and the impact of such social propagation of religious terrorism on the society. It will also shed light on the possible measures that can be taken to curb such usage by the outfit for the overall safety and security of the international community.

Introduction
In a world run by technology, the Islamic State has been able to combine their interpretation of the theories and beliefs of Islam with the internet by use of social media to expand their influence around the world. Social media platforms like Facebook, YouTube and Twitter have become handmaidens to their dangerous and radical propagandas, mostly because of the convenience and easy access to these social media websites.

The internet helps people collect information on anything they want to learn about and with the development of mass media system, terrorist organizations have been able to change the way they work as they try to manipulate the social media platform to communicate with the world about their ideas and strategies. After any terrorist attack, they want the world to know that it was them and they do so by using such platform. In fact, any type of media wants to be the first to cover such an event, whether it is the newspaper, television or radio, to be the ones to break the news only furthers the purpose of these organizations to attract attention.
The symbiotic relationship between social media and terrorism has become more intertwined and mutually beneficial and often puts the media and legal authorities in a conflict. On one hand, the media capitalizes from the confusion and consternation caused by terrorist attacks to produce the kind of dramatic news that draws the attention of its viewers and readers. On the other hand, the terrorists carefully enact their plans to generate ample media attention to advertise their messages on a global level. Walter Laqueur has called the media as the “terrorists’ best friend” and Margaret Thatcher had once condemned the media as the “oxygen” for the terrorists. Leaving behind the traditional media outlets, today, the Islamic State uses social media as a tool to spread their propaganda, influencing the global community, for recruitment purposes, gathering intelligence, sharing news, videos, etc, among many things and has emerged as one of the most dangerous users of social media. Even though the ISIS is almost defeated on the ground, their online operations has eclipsed its military operations and, therefore, its virtual caliphate will continue to live in the form of social media.

What is ‘Islamic State’?

The Islamic State, or the Islamic State od Iraq and Syria (ISIS), or the Islamic State of Iraq and Levant (ISIL), was founded in 1999 by Abu Musab al-Zarqawi, a Jordanian extremist. They are considered to be Islamic extremists who seek to eradicate obstacles to restoring God's rule on Earth and to defend the Muslim community, or umma, against infidels and apostates. They follow an extreme form of Islam called Salafism, which in Arabic means “pious forefathers”. It promotes violence and slaughter to establish and maintain qurânic domination through a strict adherence to the Quran and the Shari’a law. ISIS adheres to an apocalyptic theology and believes that the Mhadi, or “guided one” will soon arrive and redeem Islam. ISIS has declared jihad against all infidels which includes westerners, Christians and Jews and also any other Muslims who do not pledge their allegiance to them, like the Hamas.

A few years after its foundation, the ISIS started to associate themselves with al-Qaeda and their insurgent group in Iraq, AQI. After the death of their founder in 2006, the group renamed themselves as the Islamic State of Iraq (ISI), however, the group was weakened by the US troop surge steadily and by the Sunni Arab tribesmen, who rejected their brutal ways. In 2010, the group appointed a new leader, Abu Bakr al-Baghdadi and soon after, the group was carrying out dozens of terrorist attacks in Iraq.

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579 A Brief History of ISIS, Chosen People Ministries, https://chosenpeople.com/site/ministry-news-brief-history-isis/
It was in 2013 that the group announced their merger with the forces in Syria and were rebranded as the Islamic State of Iraq and Levant. The al-Qaeda rejected this move since they were establishing the al-Nusra front. The two were at war with each other and eventually the al-Qaeda disassociated themselves with the ISIS, calling their methods to be too extreme.

With the onset of the Syrian Civil War, the ISIS started capturing major cities and in 2014, the group captured Mosul in Iraq and drove south until it was on the borders of Baghdad. A few weeks later it rebranded itself as the Islamic State, a Caliphate and demanded that all Muslims pledge allegiance. Groups like Boko Haram in Nigeria and Ansar Beit Al Maqdis in Egypt’s Sinai began pledging allegiance and flew the black flag of ISIS.  

From 2014 till the end of 2017, the ISIS was on the news almost every month. From their capturing of major cities in Iraq and Syria to the terrorist attacks all over Europe, the ISIS seemed to be on a roll, gathering attention of the whole world. Their acts have led to the death of thousands of people and destruction of infrastructure and the environment. However, as a result of counter-terrorism, many ISIS fighters have been killed and its leadership has shrunk with the re-capturing of cities like Raqqa, Mosul and Rawa by the Iraqi forces, forcing the Islamic State to lose their grounds in both Syria and Iraq.

**Use of Social Media by the ISIS**

Many terrorist organizations have had their own propaganda websites for decades. Al Qaeda had launched their first official website way back in 2001. The use of internet by them has inspired several other such groups to do the same, most famous being the Islamic State.

Unlike the traditional media, which is dominated and controlled by established institutions that disseminate information to their audience, social media enables anyone to publish and access information without editorial limit and control, by adding further complex dimensions to reporting, such as in interactivity, reach, frequency, immediacy and permanence.  

The ISIS discovered the power of digital media and has since then, maximized its reach by exploiting several social media platforms like Facebook, Twitter, YouTube and Telegram despite losing its grounds in Iraq and Syria. They are very astute in using the social networks and the internet to spread their propaganda of terror, as well as recruit fighters all over the world.

The social media is one of the most essential tools of the ISIS which helps attract the attention of the people around the world. This helps them in getting people to support their cause, motivate them to join their organization, spread their ideologies across the global community and also spread terror around the world. The group is known to have accounts on Twitter, YouTube, Facebook, Telegram and Surespot. They have their own website and has also created website on the Dark Web.

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581 Laura Scaife, Social Networks as the New Frontier of Terrorism #Terror, 84-85, (1st Ed. 2017)

582 Supra note 5
The group uploads contents like videos, articles, flyers, etc., which are disturbing in nature. These contain their interpretation of Islam, videos luring people to join them, videos of their hostages being tortured or beheaded by the members. Women and children have been abducted, subject to sexual assaults, mutations, slavery and forced marriage, all of which is posted online on their social media accounts. These online platforms have become a mechanism to manipulate and exaggerate the attention of the people.

ISIS uses its presence online to communicate, both internally and externally, with a key goal of projecting its propaganda into areas outside its physical domain. These messages often contain shockingly sadistic violence, designed to inspire or recruit people with borderline personalities to carry out their own violence in ISIS’s name, whether as fighters with the organization or in so-called “lone wolf” terrorist attacks where they live. In sharp counterpoint to its grisly executions, ISIS also sends out carefully manipulated images of life in its territories, which it depicts as idyllic and utopian, although tinged with harsh, violent justice for any who fail to conform to its warped vision of Islamic law.  

Today the Islamic State is as much a media conglomerate as a fighting force. According to Documenting the Virtual Caliphate, an October 2015 report by the Quilliam Foundation, the organization releases, on average, 38 new items per day—20-minute videos, full-length documentaries, photo essays, audio clips, and pamphlets, in languages ranging from Russian to Bengali. Unfortunately, their effort have helped them gathering support and in the expansion of their organization with thousand of people around the world joining them.

ISIS’s social media success is a product of a (1) centralized and controlled message, (2) a propaganda machine with a tightly organized production team and a distribution team in which various members have discrete tasks, and (3) the use of deceptive technology (such as bots) and hashtag campaigns. These factors allow ISIS to create a highly visible message that is broadly disseminated, resonating with a wide audience and giving ISIS a disproportionate presence on the Internet.

At least 38,200 foreign fighters—including at least 6,900 from Western countries—have travelled to Syria from at least 120 countries since the beginning of the conflict in 2012. Out of these, all, or at least most of them, had spent hours and hours on the internet declaring their feelings about the Islamic State. They have expanded their base beyond Iraq and Syria. From Middle-East to Europe to the United States. The


world from 2014 till 2017 witnessed series of terrorist attacks starting from the Beirut Bombings, several attacks in Paris, Westminster and Manchester Bombings, etc. for which the ISIS claimed responsibility.

Their influence has inspired many homegrown extremist violence in the United States of America.\(^{587}\) The Orlando Nightclub shooting is one such example. An American-born man who'd pledged allegiance to ISIS gunned down 49 people early Sunday at a gay nightclub in Orlando, the deadliest mass shooting in the United States and the nation’s worst terror attack since 9/11.\(^{588}\)

The key element of their social media campaigns is its projection of strength, which has surpassed that of their parent organization, i.e., al-Qaeda, claiming that they are already victorious where the al-Qaeda failed: re-establishing the caliphate.\(^{589}\) This projection is already becoming the “normal” model for other terrorist organizations. Furthermore, the process of globalization is only being appreciated by terrorists more and more with time because their channel of communication is no longer confined to a specific area. They can now reach any corner of the world in an instant by using the social media platform causing the virtual jihad and its ideas to spread within minutes.

This is when ethics come into the picture. The ISIS on a regular basis releases messages and videos on social media which contain explicit and/or graphic contents like beheading of hostages. Once these are uploaded and shared, the ethical debate with respect to sharing of highly explicit contents and how to deal with such situation arises. According to the Society of Professional Journalists (SPJs) and their Code of Ethics (2014), there should be a guideline for handling the dilemmas of vicious propaganda, and four pillars are key in this regard\(^{590}\):

- Seek truth and report it;
- Minimize harm;
- Act independently;
- Be accountable and transparent.

However, these tools are not enough as they are insufficient since people are geographically spread and it is difficult to find and hold them accountable. There is lack of efforts by society as a whole to help curb this problem. Another challenge is that the rules and regulations on how social media should approach terrorism differ from one country to another. Even though many efforts are made by the government to remove such contents, the account or the websites completely, one may say that blocking such websites or contents violates the freedom of speech and expression. Also, the efforts to ban lack consistency because most of the times the rule is not applied evenly and, therefore, the usage of social media platform by ISIS continues to grow.

\(^{587}\) Donna Farag, \textit{supra} note 10 at 844
\(^{589}\) Donna Farag, \textit{supra} note 10 at 845

\(^{590}\) Tuva Julie Engebretsen Smith, \textit{Islamic State and Social Media: Ethical Challenges and Power Relations}, Institute for Defence Studies and Analysis; https://idsa.in/idsacommments/IslamicStateandSocialMedia_tjesmith_230115
Impact of Social Media Usage by ISIS

1. **Threat to international and national peace and security**
   Despite the counter-terrorism programmes, on ground or in the cyberworld, initiated by many states and international organizations, the Islamic State continues to pose a significant threat to security and peace at both national and international level. In a Security Council meeting on 08 February 2018, Vladimir Voronkov, the head of the UN Counter-Terrorism Office spoke of international peace and security caused by terrorist acts and said, “The rapidly evolving and transnational threat from ISIL presents a difficult challenge for Member States and the international community...ISIL is no longer focused on conquering and holding territory. It has been forced to adapt and focus primarily on a smaller and more motivated group of individuals who remain committed to inspiring, enabling and carrying out attacks.”

   Their usage of social media is leading to a large influx of people to join them and carry out terrorist attacks and are also inspiring vulnerable individuals to do the same, thus, causing a threat to the global community.

2. **Threat to cyber-security**
   The popularity of social media around the world provides a huge potential audience for terrorist content. Unfortunately, because of states' inability to cooperate, previous attempts to govern and police the Internet have failed. Any regulation of the Internet or social media also raises collective action problems. It has several features advantageous to dissemination of content: open access to users, the ability to reproduce and transmit information quickly, and easy-to-use interfaces.

   With the use of videos and messages of hate and propaganda on social media platforms, the ISIS have been able to create a new generation of cyber-jihadists which has helped spread their ideologies to their online sympathisers. As a result, ISIS have been able to attract vulnerable young minds who are most of the time surfing online through these sites. Their online influence has led to people join them and even carry on the “lone wolf” attacks. Therefore, the use of social media is not only becoming a threat to cyber-security but also furthers the scope for cyber-terrorism.

3. **Expansion by recruitment**
   The nature of participation on the Internet and participation in online discussion via social media is the new political activism. This process of turning to political violence is an active one, and not a passive one. To recruit more people, the ISIS uses more interactive internet platform like

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593 Id
Twitter, Telegram, WhatsApp and other online chat rooms which helps form an ideological relationship with the users thereby radicalizing the young minds. The use of emotional and psychological factors lures people into joining the ISIS. They post radical as well as misleading contents of how the organization works such as members of ISIS visiting hospitals, playing with rabbits, their interpretation of the ideologies of Islam, etc.

Vulnerable individuals are influenced by these posts and are often eager to join the group or provide any sort of assistance to them. The number of members of ISIS has increased massively. They carry out terrorist activities and provide with information to them via apps like WhatsApp. These posts also influence the “lone wolves”, who carry out acts of terror on their own after being inspired by the ideologies and acts of ISIS. Therefore, the social media usage by ISIS has become a psychological warfare.

4. Human rights violation
On March 1, 2011, Arid Uka, an Albanian Muslim living in Germany, was online looking at YouTube videos. Like many before him, he watched a jihadist video that presented the gruesome rape of a Muslim woman by US soldiers—a clip edited and posted on YouTube for jihadi propaganda purposes. Within hours of watching the video, Arid Uka boarded a bus at Frankfurt Airport, where he killed two US servicemen and wounded two others with a handgun. Investigators reviewed the history of Arid Uka’s internet activity. It showed a growing interest in jihadist content, subsequent self-radicalization, and ultimately his viewing of the aforementioned video, which led him to take action in an alleged war in defense of Muslims. Many individuals are often influenced by the messages and online contents of social media put up ISIS and this was one such example. They even propagate people to kill others and cause mass destruction by self-sacrificing, calling it the only way to reach heaven.

Their posts also contain vile messages, disturbing contents like beheading of soldiers and civilians, journalists in particular, videos declaring that women and children have been abducted and are subject to physical tortures, sexual assaults, mutations, forced marriage and slavery. Some of these are even put up on the websites. This shows that they have been violating human rights of their hostages such as Art. 4-prohibition of slavery, Art. 5-protection from tortures and punishment, Art. 7-protection against any discrimination, Art. 13-right to move freely, Art. 16-right to marry with consent and Art. 18- right to freedom of thought, conscience and religion, to name a few, of the United Nations Universal Human Rights Declaration.

5. Economic impact

Terrorism affects the economies of countries. Every year, terrorist attacks make a considerable impact on the world’s economy. According to the 2017 Global Terrorism Index, the impact fell by seven percent in 2016, the second year in succession that it declined. Despite the decline, costs still reached a grim $84 billion last year. Since the attacks on 9/11, economic losses from terrorism generally fluctuated before reaching $41 billion in 2007, primarily because of violence in Iraq. Amid the rise of ISIS, there was a further surge in losses since 2012 and they reached a peak of $104 billion in 2014. The impact of their acts, whether it is on the ground or on the social media platform, may be primary or secondary in nature. Primary impact will include physical destruction of infrastructure and human casualties and are direct impacts arising from the immediate aftermath of the terrorist event. Furthermore, secondary impact is the result of an interdependent economic system wherein the terrorist attacks cause disruption of economic activities which may feed through even to economic entities which have not been direct targets of the attack; that is, terrorism may also produce considerable but indirect effects like fall in FDIs, savings and investments, tourism, increased uncertainty in the markets. This may lead to unemployment and ultimately poverty. Supporting counter-terrorism programmes also requires huge amount of money to be spent by the government further draining out the money from the government’s pocket.

6. Social impact
   i. Wrong religious education.
   Every religion has peaceful and violent ideologies from which the followers can choose, and these ideologies are what the terrorists use to justify their actions. The rise in religious terrorism is also connected with the rapid spread of Western influence, especially in the Muslim world. Much education in the Islamic world is provided by Muslim clerics, or religious leaders, who are less concerned with subjects like science and math than in drumming basic religious values into the minds of their young male students. Graduates of such schools may well be convinced that the way to heaven is through strict observance of religious rules and removing Western influences from their society. Thus, violent terrorist acts are viewed as evidence of religious devotion, and self-sacrifice is praised as a way to get to paradise.

   ii. Propagation and sponsorship of terrorism by states.
   It has been reported by many international organizations and human rights organizations that many terrorist

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600 Id
organizations are sponsored by the states. Iran, Syria, North Korea and Sudan are currently on the list of “State Sponsors of Terrorism” made by the United States Department of States. Many governments use violence to gain control not only over the society but also over their political opponents. Whether it is in terms of money or in terms of training and arms, governments of many countries have been accused of sponsoring the terrorists to achieve their political and economic goals.

Conclusion

The continuous acts of ISIS have made the people around the world witness millions of people die and destruction of properties. Their acts have crossed national borders and they have become a threat to international peace and security. They have destroyed the basic philosophy within which the concept of human rights is rooted. Therefore, to curb the presence of ISIS, offline and online, states and their governments have turned to counter-terrorism programmes. The government agencies, to restrict ISIS and similar organizations, have turned to “new media”, i.e., social media platforms and other digital media to restrict the presence of such organizations.

Although these organizations are almost defeated on grounds but they continue to live in the cyber world. Young adults are joining or following their accounts on social media platforms rapidly, but the government has not been able to do anything to curb it down. Therefore, there is need for strong cyber-policing to- (i.) Catch hold of the perpetrators by tracking them down, (ii.) stop such accounts or media pages from being started and (iii.) prevent the people from joining these terrorist organizations.

The cost of making a new account being negligible, censorship policies of the social media companies should be stronger and stricter. The need of the hour, therefore, is a strong cyber-policing game by states and their governments. Conventions should be mandatorily implemented. Account holders should be tracked down, tried and punished for their crimes. Awareness must be spread about the usage of social media by ISIS and similar organizations and its impact so that people can report any of their online activities they come across so as to remove them from the digital platform.

International organizations must try to coordinate regulatory efforts between states and also, provide them with useful information from their sources so as to hinder the use of social media by terrorists. Costs regulatory initiatives should be launched and imposed on the private actors of the society, they can help identify best ways to solve the problems. The member states should invest in IT and cyber-crime experts to get their opinions and develop protocols and standards and other counter-measures. These organizations should also have a separate body to monitor and bring down websites like the Dark Web where the best brains of the world can work together.

The Eighth UN Congress on Prevention of Crime and the Treatment of Offenders in 1990 called for member states to intensify their efforts to fight cyber-crimes by way of modernizing their criminal laws, improving computer security and come up with
prevention measures. The Organization of Economic Cooperation and Development adopted the Guidelines for Security Systems, recognizing the need for greater cybersecurity protections. These are some successful conventions still in application.

Due to the growing terrorist presence on social media, regulation to limit and remove harmful content has the potential to save lives. With expert technologists developing and improving the information technology and the new media, their efforts have made it possible for users of social media to report the accounts of ISIS and their sub-organizations. The security community has to adjust counterterrorism strategies to the new arenas, applying new types of online warfare, intelligence gathering, and training for cyber warriors.

The National Security Agency, the Department of Defense, the CIA, the FBI, the Defense Intelligence Agency, other US and foreign intelligence agencies, and some private contractors are already fighting back. They are monitoring suspicious websites and social media, cyberattacking others, and planting bogus information. The virtual war between terrorists and counterterrorism forces and agencies is vital, dynamic, and ferocious.

There is a need for more comprehensive tactic for countering and thwarting violent online radicalization to empower community strength. However, no such strategy has been formed till now. The social media usage by ISIS has posed several challenges and requires strategic thinking to counter terrorism, cyber-terrorism specifically, so that the global community, is able to prevent human rights violations and work to protect human welfare.

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601 Supra note 17 at 297
603 Supra note 17 at 283
604 Supra note 20 at 14
Creating a feminist liability in Adultery in a male chauvinistic society is akin to rewrite the dictates of Manusmriti. But whoso committeth Adultery with a woman lacketh understanding: He doeth it, destroys his own soul. A wound and dishonour shall beget and his reproach shall not be wiped away.  

Adultery is a threefold evil. It sullies the body of the women. It torments the women in her mind. It impliedly states that the sole responsibility for this grave sin is of the male partner. If the marriage is not thought of in terms of sexual property but in terms of a free partnership between persons of equal status, then irremediable breakdown of the relationship should be the real test of dissolution rather than the matrimonial guilt or misconduct.  

The paper is aimed at analysing in depth the ground of divorce. “When Chastity of wife is under an attack, the Court depends upon circumstantial evidences. The over-emphasis upon these evidences may result in a serious miscarriage of Justice.” Henceforth, it gets clear Adultery is an offence against women under Indian Penal Code, 1860.  

The question arises about the eclipsical provision of the Hindu Personal Laws and the Indian Penal Code. This Article has attempted to articulate these controversies from the legal point of view in contemporary India addressing the question of legal dilemma that whether the legal regulation of Adultery in either laws is relevant or not?

“As between the husband and the wife social good will be promoted by permitting them to 'make up' or 'break up' the matrimonial tie rather than to drag each other to the criminal court. They can either condone the offence or a spirit of ‘forgive and forget’ or live together happily again.”

- Justice M Thakker

1. Introduction

Adultery also known as infidelity or extra marital affair is certainly a moral crime and is thought out a sin by almost all religions. Hinduism does not support adulterous liaison. Individuals who get involved in treacherous or illegitimate relationship have to face a lot of public disrespect and societal humiliation. The contemplation of evidently, is that the wife who is involved in an illicit relationship with another man is the victim not the author of the crime. Though the laws of India uphold the sacredness of the matrimonial tie and punish the intruders there remains many lacunas and loop holes, the Hindu Marriage Act, 1955 is one of them.

605 See The Holy Bible (proverb – 6/32-33)  
607 Ibid., 106.  
608 Sec. 497.

609 V. Revathi v. Union Of India 1988 SCR (3) 73.  
610 Soumithri Vishnu v. Union of India & Anr. AIR 1985 SC.
Though the society has undergone many historical, political, and economical and value based developments surprisingly the condition of women remains stagnant up to a mark where it is unable to reach the same footing as that of male. The purpose of this research paper is to review and revisit the legislative provision of adultery under Section 497 of Indian Penal Code, 1860 and Section 13(1)(i) of Hindu Marriage Act, 1955 which are in controversy among themselves and making analysis on the issue and the judicial standing regarding it. Hence, there is a need to revisit and review the present provisions of Hindu Marriage Act, 1955 and bring necessary changes. This research paper is designed to achieve the following targets-

- To represent the existing provision of adultery under Hindu Marriage Act, 1955.
- The reason for which the women should not be charged for adultery.
- To address the dictates of Manu – “Exemption of feministic liability in adultery.”
- Various opinions of Apex Court in lieu of exempting effeminate arrearage favouring Articles 14 & 15(3) of the Indian Constitution.
- To recommend the necessary amendment which the researcher deems fit in the backdrop of 21st century.

2. Concept: Meaning of adultery

It is commonly accepted that the active participant is a man who is seducer and not the women. And it is considered as an anti social and illegal act by any peace lover and citizen of good morals who would not like anyone to be indulged in such acts before their nose. Women are treated as a victim not the author of the crime because women are starved of the love and affection of their husband. They are still considered as beauty manikins, advertising models and emotionless objects in hands of the male dominating society.

2.1 Definition-

Voluntary sexual intercourse of a married man with women other than his wife or of married women with men other than his husband. When someone who is married has sex with someone who is not their husband or wife. Adultery is consensual sexual intercourse between a married people. Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of someone. Adultery is the willful violation of the marriage bed. Adultery is the offence of incontinence by married person. Adultery is voluntary sexual intercourse between a married person and a person who is not his or her spouse.

3. Historical background

3.1 Origin-Adultery which finds its root in ‘adulterate’ means “to make something impure”.

3.2 Ancient -

3.2.1 What Hinduism says?

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612 Webster’s encyclopaedic dictionary, p.11.  
613 Longman word wise dictionary(2ed.),p.11.  
615 Concise law dictionary (3ed.),p.35.  
616 The new oxford American dictionary , p. 22.
In Hindu Shastras Adultery is considered as a serious breach of Dharma, Hinduism consider marriage highly sanctified relationship. Hinduism is not based on a particular scripture or wisdom of a lone spiritualist; instead it is a set of values and customs which have evolved over a span of time. Its ethnicity have been derived from varied religious activities developed in the Indian sub-continent that has common ideology, ethics and belief which represents its central dogma. Hinduism is an elaborate fusion of assorted religious trends and can be viewed from three major prospective viz., Vedas, Upanishads, Epics and Puranas.

3.2.2 Manusmriti-
Manusmriti was the eternal code of conduct for ancient Indians and the general public followed it religiously which say: - “Day and night woman must be kept in dependence by the males (of) their (families), and, if they attach themselves to sensual enjoyments, they must be kept under one’s control.”

The principle settled both by law and logic is that a sensible person shall abstain from impregnating the wife of another. It has been stated in RULE 134 of CHAPTER IV, that adultery is the highest sin and curtails longevity of the adulterer.617 The hymn is evidence that adultery is not uncommon. A women even after her pollution from adultery, becomes pure after her husband accepts her for his union. As a general rule the women become outright pure after they have menstruated. RULE 108 OF CHAPTER V. The women have the privilege of being restored to their status even after adultery. The husband has the legal right to condone adultery. This power to condone is associated with guardianship since chances of adultery are more probable during wedded life, and the other guardians, namely a father and a son can also condone, or implore his father to condone the misdeed of the women.618 Adultery is said to be the highest moral quandary, rampant in any society in any age, as the fancied foible among men and women.619 Adultery is a three-fold evil. It sullies the body of the women. It torments the women in her mind. It offends the husband of the women. As for the body it is purified just on her ensuing menstruation [RULE 108 OF CHAPTER V]. As for her moral compunction, the same can be relieved by penances followed by chanting of hymns [RULE 21 OF CHAPTER IX]. The person most offended by this guilt, is the husband, and it is, therefore, within his right to condone it and the offence is deemed to be condoned if the husband, thereafter, accepts her for sexual intercourse [RULE 20 OF CHAPTER IX].620

3.2.3 Vishnu Purana-
A man should not think incontinently of another’s wife, much less address her to that end for such a man will be reborn in a future like a creeping insect. He who commits adultery is punished both here and hereafter, for his days in this world are cut short and when dead he falls into hell.621

3.2.4 Ramayana –
Ancient Hindu society was not free from the problem of adultery. Hindu mythology has a number of stories illustrating the manner in

617 Rule against sowing seed in another’s soil.
618 Hymn or restoring purity.
619 Advice to reconcile.
620 Husband can condone adultery.
621 Vishnu Purana.
which got themselves often indulged in adulterous thoughts and actions. LORD RAMA banished his wife Seeta into the forest on the mere allegations of possible adultery.

3.2.5 Hindu divinities - The stories depicting the libidinous activities of Hindu divinities such as INDRA and AGNI with the wives of virtuous Rishis are well known.

3.3 Modern –
3.3.1 Hindu Marriage Act, 1955- Has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse.

3.3.2 Indian Penal Code, 1860 – Whoever has sexual intercourse with a person who is and whom he knows or has reason 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 imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Feministic protection enshrined in Part III of the Indian Constitution – Article 14-
Which talks about equality before law and equal protection of law which together aims to maintain equality of status as enshrined in the Preamble of the Indian constitution. Where equal protection of laws implies “Equality of treatment in equal circumstances”. One dominant idea common to both the strands of Article 14 is that of Equal Justice. The rule is like that the like should be treated alike and not unlike should be treated alike. The varying needs of different classes of persons often require separate treatment. In fact identical treatment in unequal circumstances would amount to inequality.

Test of reasonable classification - The differentia must have a rational relation to the object sought to be achieved by the Act.

Article 15 clause 3- Women and children required special treatment on account of their very nature. It empowers to State to make special provisions for them. The reason is that women’s physical structure and the performance of material functions place her at a disadvantage in the struggle well-being becomes an object of public interest and care in order to preserve the strength and vigour of the race. When law comes within the prohibition of Article 15 it cannot be validated by recourse to Article 14 by applying the principles of reasonable classification.

4. Judicial opinion –

624 Dr. V. N. Shukla- Constitution of India, p.27(5th ed.)
626 K. Thimmappa v. Chairman, Central Board of Directors, SBI AIR 2001 SC 467.
627 Kathi Ranning v. State of Saurashtra, AIR 1952 SC 123.

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275
Adultery is an invasion on the right of the husband over his wife. In other words, it is an offence against sanctity of the matrimonial home and an act which is committed by a man. It consists in having carnal knowledge of married women with knowledge of that fact, without the consent or connivance of her husband.

In Yusuf Abdul Aziz, The Supreme Court observed that section 497, Indian Penal Code is not ultra virus under article 14, 15 & 21 of the Constitution on the ground that it is only the man, who is held liable for adultery and not the wife with whom adultery is committed. The wife is saved and is not punished as an abettor. Held sex is a reasonable and sound classification accepted by the Constitution, which provides that state can make special provisions for women and children vide Article 15 clause 3 of the Constitution. The reason for not punishing a wife has been summarised by the framers of the code in the following words:

“Though we well know that the dearest interest of the human race are closely connected with the chastity of woman and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead humane man to pause before he determines to punish the infidelity of wives. We are not so visionary as to think of attacking by law, an evil so deeply rooted in the manners of the people of this country as polygamy... but while its exists, while it continues to produce its never failing effects on the happiness and respectability of women, we are not incline to throw into a scale, already too much depressed, the additional weight of the penal law.”

In Soumithri Vishnu case:
Supreme Court looked into the meaning and purpose of law more closely. It said,”it is commonly accepted that it is a man who is seducer and not the women”. It is also said that – the contemplation of the law evidently is that the wife who is involved in an illicit relationship with another man is a victim and not the author of the crime.” And that adultery is –“an offence against the sanctity of matrimonial home, an act which is committed by a man as is generally is.” The Court went on to say –“The legislature is entitled to deal with the evil where it is seen most and man seducing the wife of another.”

The alleged transformation in feminine attitudes, for good or for bad, may justly engage the attention of the law-makers when the reform of penal law is undertaken. If the paramour of a married woman can be guilty of adultery, why can an unmarried girl who has sexual relations with a married man not be guilty of adultery? That is the grievance of the petitioner.

629 Dalip Singh, AIR 1949 All 237.
632 Draft Penal Code, Note , p. 175. See supra n. 35, p. 1933-34.
In V. Revathi case-
The Court held that that Section 497 of the Indian Penal Code is so designed that a husband cannot prosecute the wife for defiling the sanctity of the matrimonial tie by committing adultery. Thus the law permits neither the husband of the offending wife to prosecute his wife nor does the law permit the wife to prosecute the offending husband for being disloyal to her. Thus both the husband and the wife are disabled from striking each other with the weapon of criminal law.634

5. Concluding Remarks –
Taking into view of the Hindu literature, controversial provisions and a plethora of judicial opinions and the present social status of woman, we may not include the female liability in adultery and making her one of the party to it. Although, the condition of women is somewhat enhanced, but it has till now not reached to the equal footing as that of males. So the law makes the women more vulnerable in society and also deprives them of legal protection. The object of making adultery an offence and restricting it was to deter man from having sexual relations with the wives of other men and to restrain them from taking advantage of the women who starved of the love and affection of their husbands.

6. Suggestions-
We live in a society where far from prosecution even an allegation of woman’s unfaithfulness is sufficient to reap havoc in her life. It is in unequivocal terms with other religious law like – in Hindu Law punishment is given to women also but in other personal laws the condition is not so, whereby Hindu women would suffer a grave injustice. Women till today suffered as a citizen of third world country and are also a victim to the patriarchal society.

Macaulay by taking into the view the societal actions has given the protection to the women and yet legislature has not amended it as it is relevant till now. So, Hindu personal law is needed to be amended. In case women are punishable for adultery would become heaven for all husbands and in-laws wanting to get rid of their wives and daughter-in-law at the cost of the women’s social status. Once a woman’s reputation is ruined she will become an easy prey for the abuse by other men. The legislature must understand that what is equal cannot be equalised by changing definition. Making the provision which make a woman lose her reputation in Indian society is like killing the soul of the person while keeping only the body alive in no case should such a murder be allowed.

634 V. Revathi v. Union of India, AIR 1988 SC 835.
DEFENSE DIPLOMACY IN US-INDIA STRATEGIC RELATIONSHIP

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RESEARCH AIM-
The purpose of this study is to appraise about the role of Defense diplomacy in U.S. – India strategic relationship. The study will primarily focus on huge potential that the Indian defense market holds the common security challenges that the two countries face and common training values, interests and visions that they share. It will examine that how defense diplomacy can play an important role in further strengthening this strategic relationship between the two countries.

SCOPE OF RESEARCH-
The scope of this research focuses and highlights that what is the role of defense diplomacy in U.S. - India strategic relationship. It also deals with the defense cooperation, counter-terrorism and internal security, joint military exercise, military education and training between the two countries. At last it deals with U.S. support for India’s membership in UNSC and UN peacekeeping. Challenges of defense diplomacy have been also discussed.

RESEARCH METHODOLOGY-
The research methodology adopted for the purpose of the study is Doctrinal. Sources of data used are both primary and secondary, i.e., namely statutes, books, articles, reports and online websites.

REVIEW OF LITERATURE-
In this research D.C. Bhattacharyya has beautifully describe the concept of ‘International relations’ and India- U.S relations and the defense and security system and its impact on each other.

CENTRAL ARGUMENT-
This research is basically focusing on the central argument over how the defense diplomacy is effective in both the countries, i.e. U.S and India and how it is helpful in making healthy relations between the two.

RESEARCH QUESTIONS-
1. What is present status of U.S. - India defense cooperation?
2. What has been achieved in recent years through defense diplomacy between the two nations?
3. What are the challenges and problems that they are likely to face in further strengthening bilateral relationship?
4. What is the future of this relationship and how will defense diplomacy address their common challenges and concerns?

RESEARCH SCHEME-
CHAPTER01- INTRODUCTION
CHAPTER02- DEFENSE COOPERATION-
- DEFENSE TRADE
- CIVIL NUCLEAR COOPERATION
- DEFENCE COOPERATION
- COUNTER TERRORISM AND INTERNAL SECURITY
- JOINT MILITARY EXERCISE
- MILITARY EDUCATION AND TRAINING
Defense diplomacy plays an important role in achieving specific foreign and security policy objectives of nations. It facilitates cooperation at political and economic level. Since the end of cold war and collapse of Soviet Union, the U.S.-India relations have improved considerably. Defense diplomacy has also helped in building trust and confidence between the two nations. After the cold war, India reoriented its foreign policy and security due to need of the emerging international security environment. Even U.S. decided to maintain 'cooperative engagement’ with militaries of the friendly countries.

Lessening of differences on many global as well as bilateral issues promoted military in both countries to utilize opportunity to develop closer relations. The visit of Lieutenant-General Claude M. Kickleighter, commander-in-chief, U.S. army pacific command, to India in 1991 marked a turning point in the relationship.

‘Kickleigher proposals’ helped in expansion of cooperation and partnership between militaries of two countries. Executive steering groups ESGS) were established in both countries to intensify military-to-military cooperation followed the formation of navy and air force EGSs in March 1992 and August 1993.


U.S. programmers related to defense diplomacy emphasis on military cooperation and assistance which include International military education and training ; non-combat and non-technical training in areas like defense management, civil-military relations and military justice, foreign military interaction involving a wide range of military to military contacts with other states, foreign military financing in form of grants and loans, joint combined exchange training of special forces, military sales, program that allow transfer of weapons or training to other states in emergency circumstances or to dispose of surplus military equipment and enhancement of ability of other states to contribute to international peacekeeping missions.
achievement of foreign and security policy goals. Defense diplomacy in broader context is the use of armed forces in operation other than war and building on their trained expertise and discipline to achieve national and foreign objectives abroad.\textsuperscript{635}

On the other side Defense cooperation is ‘any arrangement between two or more nations where their armed forces work together to achieve mutual aims and objectives’.

These objectives are-
1. To promote intra and extra regional peace and stability through dialogue and cooperation.
2. To promote mutual understanding on defense and security challenges.
3. To enhance transparency and openness.
4. To imbibe ‘best practices’ by observing specific aspects of functioning of the militaries of more advanced countries. So Defense diplomacy not only promotes interoperability between the armed forces and good defense relations among participating countries but also creates mutual confidence and trust between the countries at large.

Due to India’s emergence as a regional power, a potential market and its importance in maintain a stable balance of power in Asia- U.S. - India defense relationship is developing.\textsuperscript{636}

This relationship is helping two in combating international terrorism, preventing the proliferation of weapons of mass destruction (WMD) ,ensuring security of resources such as energy and water, illegal migrations, human right abuses, piracy, drug trafficking and gun running, climate change and environment degradation.

1. DEFENSE TRADE-
PM Modi visited the U.S. on 26-30 September 2014. He held meetings with President Obama, member of U.S. Congress and political leaders, including from various states and cities in U.S. and interacted with members of President Obama’s Cabinet.

A vision statement and a joint statement were issued during visit and on the visit by President Obama’s visit to India on 25-27 January 2015 as Chief guest at India’ Republic day. During the visit two sides issued a Delhi declaration of friendship and adopted joint strategic vision for Asia pacific and the Indian Ocean Region.

On the second meeting by PM Modi on 23-28 september2015 during which he held a bilateral meeting with President Obama, interacted with leaders of business, media, academics, the provincial leaders and the


Indian community, including during his travel to the Silicon Valley.\textsuperscript{637}

In 2016 PM visited U.S. for multilateral Nuclear Security Summit hosted by President Obama in Washington D.C on 31\textsuperscript{st} March-1 April. PM Modi was sixth Indian PM to address the U.S. congress.

This is frequent interaction between the leadership of the two countries, including telephone calls and meetings on sidelines of international summits.

President Trump and PM Modi have spoken thrice over phone since the former’s election in November 2016. A hotline has been established between PM’s office and U.S. white house.

\textbf{2. CIVIL NUCLEAR COOPERATION-}

Bilateral Civil nuclear cooperation agreement was finalized in July 2007 and signed in October 2008. During P.M Modi’s visit to the U.S in September 2014, the two sides set up a contact group for advancing the full and timely implementation of India-U.S. civil nuclear cooperation agreement and to resolve pending issues.

Nuclear power Corporation of India ltd. and Westinghouse are in talks toward finalizing the contractual arrangements and addressing related issues.

\textbf{3. DEFENSE COOPERATION-}


Due to ‘New framework for India-U.S Defense relations’ in 2005 defense relationship has emerged as a major pillar of India-U.S. strategic partnership and resulting in intensification in defense trade, joint exercises, personnel exchanges, collaboration and cooperation in maritime security and counter-piracy and exchanges between each of three services.

Defense framework Agreement was updated and renewed for another 10 years in June 2015.

The two countries now conduct more bilateral exercises with each other than they do with any other country. India participated in Rim of the Pacific (RIMPAC) exercise in July-August 2016 for the second time with an Indian Naval Frigate. Bilateral dialogue mechanisms in the field of defense include Defense Policy Group (DPG), Defense Joint Working Group (DJWG), Defense Procurement and Production Group (DPPG), Senior Technology Security Group (STSG), Joint Technical Group (JTG), Military Cooperation Group (MCG), and Service-to-Service Executive Steering Groups (ESGs).

The agreements signed during the past one year include, Logistics Exchange Memorandum of Association (LEMOA) signed in August 2016, Fuel Exchange Agreement signed in November 2015, Technical Agreement (TA) on information sharing on White (merchant) Shipping signed in May 2016 and the Information Exchange Annexed (IEA) on Aircraft Carrier Technologies signed in June 2016.

Aggregate worth of defense acquisition from U.S. Defense has crossed over US$ 13
billion. India and the United States have launched a Defense Technology and Trade Initiative (DTTI) aimed at simplifying technology transfer policies and exploring possibilities of co-development and co-production to invest the defense relationship with strategic value. The DTTI Working Group and its Task Force will expeditiously evaluate and decide on unique projects and technologies which would have a transformative impact on bilateral defense relations and enhance India’s defense industry and military capabilities. During President Obama’s visit in January 2015, the two sides agreed to start cooperation on 4 DTTI pathfinder projects and 2 pathfinder initiatives, which are currently at various stages of execution. During RMS visit in December 2015, the two sides also identified opportunities for bilateral cooperation in production and design of jet engine components.

During Secretary Carter’s visit in April 2014, two more G-2-G DTTI projects were added to the list. The DTTI meeting in Delhi in July 2016 decided to broaden its agenda by setting up five new Joint Working Groups on: Naval Systems; Air Systems, Intelligence, Surveillance and Reconnaissance; Chemical and Biological Protection; and Other Systems.

During the visit of Prime Minister to the U.S. in June 2016, the U.S. recognized India as a “Major Defense Partner”, which commits the U.S. to facilitate technology sharing with India to a level commensurate with that of its closest allies and partners, and industry collaboration for defense co-production and co-development.

4. COUNTER- TERRORISM AND INTERNAL SECURITY-

Cooperation between U.S and India in counter-terrorism has seen considerable progress with intelligence sharing, information exchange, operational cooperation, counter-terrorism technology and equipment. India-U.S. Counter-Terrorism Cooperation Initiative was signed in 2010 in order to expand collaboration on counter-terrorism, information sharing and capacity building and a Homeland Security Dialogue was announced during President Obama’s visit to India in November 2010 to further deepen operational cooperation, counter-terrorism technology transfers and capacity building. This dialogue contains two rounds, held in May 2011 and May 2013, with six Sub-Groups steering cooperation in specific areas. In December 2013, India-U.S Police Chief Conference on homeland security was organized in New Delhi. Police Commissioners from India’s top four metropolises paid a study visit to the U.S. to learn the practices of megacities policing in the U.S. in November 2015.

The two sides have agreed on a joint work plan to counter the threat of Improvised Explosives Device (IED). For further enhance the counter terrorism cooperation between India and the U.S., an arrangement was concluded in June 2016 to facilitate exchange of terrorist screening information through the designated contact points. India-

U.S. Joint Working Group on Counter-Terrorism held its 14th meeting in July 2016 in Washington DC.

5. JOINT MILITARY EXERCISE-

In the recent times, the US-India military exchanges have reached an all time high considering the number of joint military exercises. While the US and Indian armies planned to undertake nine joint exercises in India in 2010, the air forces and the navies of both the nations are also planning similar programmers for the year 2010-11. India conducts the maximum number of joint military exercises with the US, and their growing strategic partnership is taking these operations to highly advanced levels.

In some last few decades India and the US have held over 60 exercises. While India is keen to gain the practical experience of learning through military war games, the US is also interested in learning from the Indian expertise in various fields as improvised explosive devices (IED) detection, counter-insurgency and mountain and jungle Warfare skills. In November 2010, the US and Indian troops held annual joint military exercises involving airborne specialist operations in sub-zero temperatures at joint Base Elmendorf-Richardson in Alaska. Even Indian and American Special Forces also engaged in the “Vajra Prahar” counter-terrorism exercise at the Belgaum commando school in Karnataka, India.639

The US army itself viewed “Yudh Abhyas” (war games) as “a challenge, something unique and definitely a lesson in patience with the language barrier,” as it involves training foreign troops in American operational doctrines. During the exercise, training included instruction on various US army weapons systems, evaluating and evacuating a casualty, and hands-on training with the engagement skills trainer. The weapons training included hands-on instruction on the M-4 carbine with which the Indian troops later performed live-fire training.

The US soldiers and their Indian counterparts also took part in cultural exchanges to improve partnership readiness and cooperation between the two armies. The exercise further aimed at sharing peace-keeping experiences with focus on counter-insurgency and counter-terrorism in a semi-urban scenario.

Yudh Abhyas is a regularly-scheduled, conventional forces training exercise, sponsored by US army (Pacific) and the Indian army. The exercise is designed to promote cooperation between the Two militaries to promote interoperability through the combined military decision-making process, through battle tracking and maneuvering forces, and exchange of tactics, techniques and procedures. Continued robust exercises and exchanges will Expand contacts between the US and Indian Militaries.

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A key element of the US engagement process through defense diplomacy is the enlarged

International Military Education and Training (IMET) program. The IMET program is an instrument of US national security and foreign policy and a key component of US security assistance that provides training on a grant basis to students from allied and friendly nations. The United States IMET assistance to India has gone up from $0.5 million in 2001 to $1.364 million in 2009.\footnote{640} Below is the account levels for IMET for fiscal years 2006-2011, including 2006-2009 (actual - funding actually provided in fiscal years 2006-2009 including supplemental funding), 2010 (estimate funding allocations for the 2010 fiscal year) and 2011 (requested-funding requested under the president’s fiscal year 2011 budget).

In essence, the IMET, whose estimated allocation for India was $1.2 million in 2010, allows its personnel to attend courses from the 2000 offered annually at some 150 US military schools, receive observer on-the-job training in addition to orientation tours. In comparison, Pakistan’s IMET allocation has more than doubled from $2.03 million in 2006 to $5 million in 2010.

Moreover, in October 2010, the US announced to a whopping $2.29 billion in new military aid to Pakistan to bolster its army’s anti-terror capabilities, notwithstanding India’s concerns that Islamabad has been diverting much of this assistance against it. Two billion of these amounts are under the foreign military financing programmers and $29 million is being given under IMET funding.

External affairs Minister Sushma Swaraj and Defense Minister Nirmala Sitharaman will hold talks with their American counterparts Mike Pompeo and James Mattis. The maiden India-US 2+2 Dialogue will be held on 6 July, 2018. The key issues that would be discussed would include counterterrorism, cyber security, defense cooperation and regional security.

**CHAPTER 03-** US SUPPORT FOR INDIA’S MEMBERSHIP IN UNSC AND UN PEACEKEEPING

The US President Obama and Prime Minister Singh in their joint statement noted that “India and the United States, as global leaders, will partner for global security, especially as India serves on the security council over the next two years” starting from January 1, 2011.

They also agreed “to hold regular consultations on UN matters, including on the long-term sustainability of UN peacekeeping operations.” President Obama’s support to India’s inclusion in the UN Security Council is also an important manifestation. The Indian military has been a very active participant in UN peacekeeping operations since the independence.\footnote{641} India was also one of the

\footnote{640} “ABCDE of Obama’s Sales Pitch”, The Business Standard, New Delhi, November 22, 2010.

\footnote{641} Schlosser, John, "Future Prospects of Indo-US Strategic Partnership, with Special Emphasis on Defence
founders of the UN and has consistently shown great interest in and commitment to the initiatives of the world body towards maintaining global peace and security.

The first deployment started in 1950’s, when India sent troops to Korea in 1953-54. It has participated over forty UN peacekeeping missions. Its troops have taken part in some of the most difficult operations, and their professional excellence has won them universal admiration. Its forces have demonstrated their unique capacity of sustaining large troop commitments over prolonged periods. It has considerable experience in de-mining activities and made a significant contribution to demining work in various peacekeeping missions. Opportunities are also provide for training to military officers from different countries. Additionally it established the Centre for UN Peacekeeping (CUNPK) in New Delhi in September 2000, to provide a level of training equal to the level of commitment. This training institution fulfils the training and concept-related requirements of India’s UN peacekeeping obligations, while enabling future peacekeepers to benefit from India’s vast peacekeeping experience. India’s unique combination of being the largest democracy in the world with a strong tradition of respect for rule of law and the successful experience in post-colonial nation-state building makes it particularly relevant in the context of twenty-first century peace-building.

India’s large contribution to UN peacekeeping operations over the past few decades have also contributed towards further improving defense cooperation with a large number of countries, especially with the US. The US has an elaborate training programme and funding for training other nations in peace keeping operations under the Global Peace Operation Initiative (GPOI). The US funds for UN training and simulation facilities in target countries. Though India chose not to join GPOI as a partner, but Indian personnel have participated in some GPOI training events through the use of non-GPOI funds. India’s defense cooperation also leads to optimizing of UN peacekeeping as well as disaster management. However, much more can still be done in this field to further advance foreign and security policy objectives of the two nations.

CHAPTER04-COOPERATION IN HUMANITARIAN AND EMERGENCY SITUATIONS-

The United States and India can build on the successful humanitarian crisis cooperation demonstrated in their joint response to the 2004 Asian tsunami. Joint naval exercises have served to further consolidate the ability of their navies to work together, along with others in Asia, and this should clearly continue. A much more engaged maritime and humanitarian cooperation will unfold as India modernizes its naval capabilities. \(^{642}\)

India’s decision to purchase maritime surveillance aircraft from an American supplier (Boeing) will give it stronger warning capabilities in its own region, and the prospect of more extensive Indian defense procurement from US suppliers would further enhance US’ ability to coordinate response. India does have its own developmental needs, but in recent years it has made important direct contributions to other countries (such as Afghanistan) facing situations of scarcity. And in 2008, the Indian government granted an export exemption that allowed the World Food Programme to purchase Indian rice for provision to 22 countries with severe needs (Liberia, Sierra Leone, and Haiti, among others). So close coordination between the US and India, especially in cases where India offers substantially more cost-effective means for providing assistance, mark the beginning of new kinds of humanitarian cooperation.

Furthermore, while US army and disaster relief personnel cooperated with India in the aftermath of tsunami disaster in December 2004, India reciprocated by airlifting supplies to victims of Hurricane Katrina in August 2005.643 The US undersecretary of defense for policy Michele Flouncy in her speech at the Asia Society in July 2010 stressed that “We will continue to build on our experience working together on disaster assistance and humanitarian relief, and develop procedures to facilitate more seamless cooperation in future contingencies.”


trade now constitutes 41 per cent of the GDP. Of this, 77 per cent of the trade and over 90 per cent by volume is carried by sea.

Now, 70 per cent of crude and oil products are being carried through the Indian Ocean. In this regard, the QDR report states that the US has a substantial interest in the stability of the Indian Ocean region as a whole, which will play an ever more important role in the global economy. In addition, “the Indian Ocean provides vital sea lines of communication that are essential to global commerce, international energy security and regional stability. Ensuring open access to the Indian Ocean will require a more integrated approach to the region across military and civilian organizations”.

As the main resident power in the Indian Ocean region, we have a vital stake in the evolution of a stable, open, inclusive and balanced security and cooperation architecture in the region. By definition this would need to be a consensus-based process, where all the stakeholders who have a legitimate presence in the region make their respective contributions to regional security”. The Indian navy, thus, is seeking a cooperative regional approach to maritime security, as demonstrated by its recent participation in regional naval exercises. The increasing interoperability in India’s military exercises with foreign navies offers its navy an advantage in security operations. These exercises assist in developing skills for joint operations to address problems related to piracy, terrorism, drug trafficking, the smuggling of arms and people as well as disaster relief and humanitarian assistance. Interoperability has also facilitated institutionalized cooperative naval exercises with the navies of the United States and with other countries like Russia, UK.

CHAPTER06- CHALLENGES TO DEFENSE DIPLOMACY-

1. Managing Bilateral Relations-

United States and India both countries are facing challenges in managing their relations with regard to the many regional and global security issues that they face. These relate to their policy positions on their relationships with Pakistan, China and Iran. Issues such as climate change, nuclear non-proliferation, international financial crisis, energy and environment are also very important. However, bilateral cooperation on the Indian armed forces’ structural reform, domestic counter insurgency, personnel acquisition and management reform, among others offers opportunities that might offset the areas of disagreement.645

India faces a complex strategic environment in the region as well as at home. Indian strategy has responded by showing maximum flexibility in terms of security partners but without compromising of domestic development. The US and India continue to make enormous strides toward the type of strategic relationship that befits the status of each as a leading democracy but without being in a de facto alliance. These difficulties must be managed in order to fulfill the promise inherent in the relationship.

2. Reliability of Supply and US Export Control Reforms-

India’s doubts as to the reliability of the US as a supply partner, the United States’ reluctance to release certain technology, and worry over the transferability of specifications to less-trusted, third end-users. These doubts have their origin in the United States imposition of sanctions after India’s nuclear tests in 1974 and 1998 and have not been entirely removed despite subsequent, positive developments in the bilateral relations.

India has not yet signed the three agreements that the US wants India to sign such as the Logistics Support Agreement (LSA), the Communication Interoperability and Security Memorandum of Agreement (CISMOA), and the Geospatial Agreement, each required under US domestic laws in order to transfer sensitive defense technology. India seeks recognition from the US that it is a special partner entitled to receive certain priorities and concessions that are not extended universally. If the US wants its appropriate share of the large economic opportunity presented by India’s defense market, it is necessary for the political and bureaucratic leadership of the two countries to remove discretionary barriers and extend administrative and regulatory preferences.

- **DIFFERENCES ON COUNTERTERRORISM**

  There are differences in defining the threat: the Americans see it as a global challenge; Indians are more preoccupied by regional eruptions - in Kashmir, Nepal, Sri Lanka, and occasionally along the Indo-Burma and Indo-Bangladesh borders. There are divergent views on the roots of terrorism, with Indians seeing Pakistan as the root of the problem, not a solution, and the Americans viewing Pakistan as a key ally in their overall war against terror. Pakistan’s unequivocal support, at the government level at least, to the United States’ war against terrorism was beginning to cast a shadow over recently mended India-US relations.

  In its avowed war against terrorism the US was not only accepting the support of a state. India has been asking to be declared a terrorist but also appears to have succumbed to Islamabad’s blackmail and done a deal behind India’s back. However, India, with its stable democratic institutions and strong credentials on the socio-economic front is being increasingly looked upon as a country which can make significant contributions towards world peace and stability. The transformation of defense relationship through the mechanism of defense diplomacy is essential that could help meet these challenges.

**CONCLUSION**

The US-India strategic relationship is evolving in response to the changing role of India as a regional power, growth of the

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Indian economy and technology, and its attendant impact on the US regional and global interests. The most important strategic convergence is that both nations seek regional stability, support nonproliferation and want to counter international terrorism and religious extremism. In the coming years, defense cooperation will thrive if this remains embedded in the larger context of the bilateral relations and cooperation encompassing political and economic relations. It can be said that defense diplomacy would continue to play a larger role in building trust and confidence between the two nations on a range of issues that the two nations face. The transformation in India-US defense cooperation in recent years has strengthened mutual understanding on regional peace and stability, enhanced both countries, respective capacities to meet humanitarian and other challenges such as terrorism and piracy, and contributed to the development of the strategic partnership between India and the United States.

The two Governments resolved to further strengthen defense cooperation, including through security dialogue, exercises, and promoting trade and collaboration in defense equipment and technology. The two leaders also pledged that as strategic partners, India and the United States would continue to consult each other closely on regional and global developments, and remain sensitive to each other’s interests.

In recent years, the two countries have made substantial progress in their strategic relationship. The launching of US-India joint working group (JWG) on counterterrorism in 2000, high technology cooperation group (HTCG) in 2002, statement of principles for US-India high technology commerce in 2003, next steps in strategic partnership (NSSP) in 2004, Energy Dialogue in 2005, civil nuclear cooperation in July 2006 are significant achievements to further promote and strengthen strategic relations. Moreover, a ten year programme of defense cooperation signed in June 2005 between the two countries encompasses advanced joint exercises and training, expanded defense trade, defense technology transfer, missile defense collaboration, and defense procurement and co-production.

Hence, the strategic partnership agreements signed between the two countries formalized collaboration on the transfer of high technology, civil nuclear energy, economic capacity building, trade and investment, science, education, agriculture, and other areas, all designed to achieve their security and foreign policy interests and further develop US-India strategic relationship. From a long term perspective, it is imperative that the two countries need to work toward building architecture for a durable defense relationship while keeping the core national interests intact. If both sides play their diplomatic cards wisely, this strategic relationship could shape the geo-political contours of the 21st century in a manner that enhances peace, stability and prosperity in the world over.

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UNDERSTANDING THE CONCEPT OF VIGILANTISM IN INDIA

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1. INTRODUCTION:
The driving force of any democracy is the trust shared between the State and its citizens. If the citizens do not feel that their government is doing its best to alleviate their grievances and problems, they start to lose faith and may turn against the State. This leads to resentment, and ill-feelings towards the government in the minds of the people of the State. This is one of the leading causes of the rising Vigilantism in the world, and particularly, in India. Vigilantism is often characterised by violent tendencies of the people towards the government and its officials, due to their mounting frustration against the Government’s lax attitude. According to Denkers (1985), vigilantism means any spontaneous and immediate act of private citizens without consulting the police or justice department against suspects/perpetrators of a criminal act which they are a direct victim or a direct witness as a bystander. It can also be defined as a planned criminal act carried out by one or more private citizens in response to (the perceived threat of) a crime committed by one or more private citizens targeting the (alleged) perpetrator(s) of that crime.

In India, vigilante refers to when a group metes out extra – legal punishment to alleged lawbreakers. Vigilantism is also referred to as "mob justice". It is usually caused by perception of corruption and delays in the judicial system.

Vigilantism can be viewed with different perspectives: it can either be an unlawful activity which is carried out extra-judiciously by the citizens of this country. Or, it be a product of failure of democratic rule of the country.

In India, Vigilantism, of late, has become a common occurrence. In this paper we will discuss two prominent forms of vigilantism prevalent in the country at present. One possesses the potential to have a positive impact on the society, another, with a negative leaning. In this paper, the researchers will do a comparative study on cases of The Pink Sari Brigade (Gulabi Gang) and The Naxalite Movement.

2. AIMS AND OBJECTIVES:
The basic aim of this research paper is to understand the concept of vigilantism and what prompts vigilantism in India. While analysing the case studies, we shall also uncover the motivations leading to acts of vigilantism. The aim is also to understand whether the effects of vigilantism, positive or negative as they may be, pose a threat to the system of governance in India, and restrain democratic functioning.

3. THEORETICAL FRAMEWORK:
3.1 Vigilantism:


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Scholars have for years had different opinions on the definition of vigilantism. Some argue that it should be considered a social movement whereas others argue that it is rather a sort of social reaction. The commonly used definition of vigilantism as “taking the law into one’s own hands” is an oversimplification of the concept. Instead they argue that vigilantism should be something that “consists of acts or threats of coercion in violation of the formal boundaries of an established socio–political order”. In other words, the vigilant strategies are motivated by the result of the loss in faith in the police, the state and other authorities that lead to the organization of self-help measures.

The sociologist Les Johnston’s conceptualization of vigilantism could be useful as a supplement to the other definitions. In his article “What is Vigilantism?” Les Johnston (1996) provides six necessary features for a group to be called vigilante:

Firstly, he argues that, for an action to be defined as vigilante, there must be some sort of planning or preparatory activity to it. Hence can vigilante activities not occur completely spontaneously.

Secondly, the engagement of the members must be voluntary, meaning that it cannot happen on demand of others than by the person in question himself.

Thirdly, the members need to be autonomous citizens and hence not be in collaboration with or supported by state authority.

Fourthly, the group either uses or threatens to use force.

Fifthly, the vigilante actions arise when the social order is under threat of the transgression or the attributed institutionalized norms.

Lastly, aims to control social infractions by bringing guarantees of security to the participants and others.

3.2 Motivations to Vigilante Actions:
Based on the work of a group of scholars of social movements and vigilantism such as Sidney Tarrow, Earl Conteh-Morgan, Paul Hoffman, Manfred Schmitt, Jon Rosenbaum & Peter Sederberg, it can be

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657Ibid at 3.
argued that there are two main motivations to vigilante actions.

Firstly, that vigilante activity is motivated by the group’s experience of the state not being efficient and/or not living up to its purpose; and

Secondly, that the participants of the group in question experience some sort of relative deprivation motivating them to resort to violence as a strategy.\(^{658}\)

The disappointment that rises in the citizens after relentless pleas for improvement in their living conditions to the government forces the vigilantes to break the law and leaves them with no other options.

4. CASE STUDIES:

4.1 The Naxalite Movement

The Naxalite movement has used force to snatch land from the rich landowners and give it to the poor and the landless. Its supporters advocated the use of violent means to achieve new political goals. In spite of the use of preventive detention and other strong measures by the West Bengal government run by the Congress party, the Naxalite movement did not come to an end. In later years, it spread to many other parts of the country. The Naxalite movement has by now splintered into various parties and organizations. Some of these parties, like the CPI-ML (Liberation), though, participate in open, democratic politics.

4.1.1 Historical Background

It is important to investigate the historical background and growth of the Naxalite insurgency to assess the relatively successful current phase of the movement and the challenges posed by its rise. For the past 10 years, it has grown mostly from displaced tribal people and natives who are fighting against exploitation from major Indian corporations and local officials whom they believe to be corrupt.\(^{659}\) Naxalism is based upon an extremist belief that the Indian government is a semi-colonial, feudalistic, and imperial entity that needs to be overthrown. Naxalism’s objective is to seize state power through a protracted armed struggle against big landlords and petty government officials.\(^{660}\) Naxalism takes up the cause of the marginalized sections of society. They claim to be fighting for the poor and the marginalized, demanding loyalty and shelter from villagers, while government forces seek public support in protecting those same villagers from the Maoists.\(^{661}\) Both the Maoist rebels and the security forces seem engaged in a cycle of violence, with ordinary citizens caught in the middle, suffering losses of lives, livelihoods, and living in an atmosphere of fear and intimidation.\(^{662}\)

Born out of the uprising for fair justice, this movement has become more violent in the last few decades. According to them, choosing violence to eradicate injustice is

\(^{658}\) Ibid at 7.
\(^{661}\) Infra 1, pp.2973.
their only option. Naxalism is the most significant political movement since independence. It has been the most long-lasting though it has had its ups and downs. Despite its fragmented nature, a continuing thread with some variations can be seen in the ideological thrust, strategy and tactics of mobilization of different groups within its fold. It is the only movement which started in one police station of a single district in West Bengal in 1967 and has expanded its activities covering over 460 police stations in 160 districts across 14 states, despite the police force and infrastructure having grown manifold during this period. The movement’s capacity to challenge the state has also enormously increased considering the incidents of violence and casualties resulting from them. The movement is viewed with greater anxiety in the government because it is most intense precisely in areas which are rich in natural resources and, therefore, targeted for fast-track industrial development. These are also the areas which have a history of mass protests by the peasantry against colonial policies. The movement is also unique in that it tends to mobilize the most subdued and socially marginalized sections and lays bare, as probably no other movement has done, the sharp fissures in the society, politics and economy. Unlike the political mass movements with violent underpinnings featuring in the border areas, Naxalites do not seek to secede from the Indian union to establish a sovereign independent state of their own but only to capture political power through armed struggle to restructure society.

After a long factional history of the Naxalite movement due to differences both in approach and ideology, unification was achieved in 2004 under the leadership of Ganapathy, who formed the Communist Party of India – Maoists (CPI-M). Since then the movement has turned more dangerous in its activities.

The tribal and dalit people are among the poorest of the poor and the most socially marginalized sections of the society. They are also the most peace – loving communities who are not easily persuaded to challenge even a locally dominant authority let alone resist the state power. But they are also the groups for whom the movement has great appeal and who form its large support base. Of them, those who are conceptually wedded to the ideology of the movement and engage in executing the directives of the party are only a few thousands. The rest of the population only lends tacit support. Some among them may be doing so out of fear rather than genuine attraction to its program.

### Reasons leading up to the Uprising

The problem has been in the Indian state’s perception of the causes of the Naxal movement. There must, therefore, be something compelling in the social situation which drives these people to lend this support. The credit for the survival of the movement for over 4 decades goes to the Government which has failed abysmally in addressing the causes and conditions that sustain the movement. Three committees constituted by the Government of India one in 1960s, the second in mid 1980s, and the

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third in late 1980s have looked into the causes of disaffection in the population in these areas. There are, in addition, academic studies and reports of the civil society groups. All these reports with varying emphasis have brought out the factors contributing to the growth of radial left movements.

Individuals have exploited the state for their own benefits, but the problem lies with the failure of governance by the state, but not with individuals. The reason for the growth of Naxalite problem could be enumerated. The main causes fuelling this movement in the country are: -

1. The slow implementation of land reforms is one many reasons for the growth of Naxalism. Landlords often moved the court to delay implementation of these reforms. Siding with the bureaucrats and the local authorities, the land owners made the land reform slow and unmanageable.

2. Discrimination of people of society based on caste is a common evil prevalent in Indian society. This is the main cause that helped in nurturing of Naxalism in development deprived regions. The people from lower caste felt so humiliated that they joined the movement to fight the pernicious of society.

3. It is well established fact that poverty is the mother of most of the evils in the society. Deprivation leads to frustration. If not handled maturely, this section of society is easy prey for radicals.

4. The low literacy rate in the central belt of the country is the fourth cause. Due to lack of infrastructural commitments by various state agencies involved. This leaves a vast majority of tribal and low caste groups oblivious to the working and the benefits of the policies formulated exclusively for their welfare provided to them by the Central Government and its associated groups. There, this ignorance subjects them to exploitations by the society. This leads to discontentment among them.

Lack of afore mentioned facilities do breed discontentment and becomes catchment areas for recruitment for separatists. Alienation of the tribal from the mainstream Indian communities also contributes to more of tribal joining such movement. Being oblivious to the benefits provided to them by the Central Government and the associated groups, they are influenced by this uprising and fall in the trap and refuse to come out of it.

4.1.3 Laws made by the Government

1. Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013
Under this Act, land in change of land will be given, job prospective to at least one member of the family, vocational training and housing benefits including houses to people in rural areas and urban areas will be some of the benefits.

2. Forest Rights Act, 2006

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Ibid 1 pp. 2793

www.supremoamicus.org
As per this Act, the traditional forest dwelling communities get legal rights carry out their activities. This Act also gives such communities and public a voice in forest and wildlife conservation.

4.2 The Gulabi Gang

4.2.1 Who are the Gulabi Gang?
The Gulabi Gang is a group of women that have mobilized to fight against caste – based oppressions, gendered violence, and patriarchal norms. The distinctive features of the Gang include their pink saris and wooden sticks, as well as their use of physical confrontation when necessary. The group calls itself a “group for justice” and fights for gender equality in the rural villages in the state of Uttar Pradesh in Northern India.666

It all started when Sampat Pal Devi, who went on to become the leader of the group, witnessed a man beating his wife up. She pleaded with the man to stop, who paid no heed to her at first, but after her relentless pleas, beat up Sampat Pal Devi too. The next day, she returned to the man’s house with five other women and beat him up to teach him a lesson.667 Following this incident, it took about a decade to mobilize the Gang. This was done by traveling from village to village, where the women would sing songs about their protests and try to get support from other women.668 They started out with smaller projects like fighting male abuse and gained widespread support from women. Furthermore, they started to practice techniques of counter-aggression and self-defence to gain legitimacy.669

Despite the use of other techniques, the Gulabi Gang is most famous for the use of bamboo sticks to strike fear, or to threat or harm the perpetrator of violence. The main issues that the group is focusing on and fighting against is abuse, discrimination and sexual violence.670

4.2.2 State Inefficiency and Corruption

The Gulabi Gang focuses primarily on bringing justice to women, who are victims of abusive men.671 The Gang is also known to make use of sticks, axes, and cricket bats to beat up government officials publicly to shame them. They have also forced police officers to register domestic violence issues by slapping them and forcing those accountable to build new roads by physically dragging them to the dust track in question.672 Even if the Gang started out by fighting local concerns of dowry demands, marital violence and abusive in-laws on a

670 Ibid at 3.
671 Ibid at 4.
7 Ibid at 3.
grass-root level, the Gang has with its growth in members started to address issues such as land disputes and helping women to gain access to education.673

The gang usually deals with issues that are often neglected by the police as well as the local authorities, such as abuse and discrimination against women and sexual violence. It must be noted, that all their actions are a result of the nonchalance displayed by the authorities, to all their suggestions. Even if the women often do put forward complaints to the police, they are generally not taken seriously.674

The work of the Gang is the counter-response to the widespread corruption in the society as well as evident neglect of women’s issues in the political agenda. Uttar Pradesh, which is the active site of the Gang’s operations, is arguably the most unsafe state for women in the country,675 and is also the most populated and impoverished.676 It is a likely conclusion that the Gulabi Gang is incensed with the State’s lack of responsibility and decided to take the matters into their hands. It is further argued that the judicial system of Uttar Pradesh is corrupt. The leader of the Gang and up to 40 other members have all been charged with offences such as “unlawful assembly, disturbing the peace by inciting a crowd to commit a crime, causing a riot, deliberately causing hurt, assaulting with a weapon, defamation, insulting and deterring a public servant from discharging his duty”. 677 Ironically, the men guilty of committing acts of violence against women are rarely punished.678

4.2.3 Fraternal Relative Depravation
The Relative Deprivation construct has been extensively used in social psychology, sociology and other social sciences for more than half a century.679 In sociology, relative deprivation theory is a view of social change and movement, according to which people act for social change in to acquire something like opportunities, wealth, status that others possess and which they feel they should possess too. Fraternal Relative Depravation as a theoretical framework is often used to understand the motives behind civil wars, rebellions, etc. Thus, the adoption of violent tactics by the Gulabi Gang may be explained by this theory too.680

Women have always had an inferior status to that of men in India.681 A woman is

8 Ibid at 4.
13 Ibid at 7.
681 Shrivastava, Jaya & Tanchangya, Rangabi (2015). Dalit women’s quest for justice: Cases from India and
usually recognised as a man’s daughter, wife or mother, and her actions are usually controlled by such men. Women have been deprived of attaining education, appropriate nourishment, health care, political participation, and ownership of property. Furthermore, women are oppressed due to patriarchal structures in the Indian society such as a deeply rooted son preference and hence killings of newly born girls, being married away at a young age against their will, killings of wives to make it possible for husbands to remarry and collect a new dowry as well as women being victims of domestic and sexual violence. The subordination of women and the gender inequality in the Indian society is still today one of the biggest social issues.

It can be concluded from the facts that there exists an inequality between the social positions of men and women, especially in the state of Uttar Pradesh. Thus, the men in Uttar Pradesh can be viewed as the group that the women compare themselves to, as possessors of status and rights which they themselves do not possess. These women feel marginalised by the men due to the constant violence against them.

5. SUGGESTED REFORMS:
There are several reforms that can be undertaken by the State to keep a check on rampant vigilantism. Some of them are:
1. Be responsive to the demands of the marginalised section of the society. It is often the nonchalance or carelessness of the local authorities towards the needs of the citizens that force them to turn to violence. There is a growing need to formulate water tight legislative framework that will ensure that the under privileged people are not exploited.
2. Provide such assistance to women which makes them self – sufficient and independent in their finances, so that they do not have to suffer through domestic abuse.
3. Eradicate caste – based discrimination and instil an equalist value – based system through education.
4. The law enforcement agencies must be reprimanded in case of their mistreatment of the poor and discriminated people.
5. Vigilante’s enjoy the support of the local people which is acquired by either threats or working for the benefits of the people. Increasing awareness and sensitising the local authorities to the needs of the citizens is necessary.
6. A Committee can be set up, which must be a government body, that can take direct and

planned actions to eradicate the very need of vigilantism.

8. Such committee must have a vast out–reach, penetrating the rural India so the voices of the marginalised can be heard.

6. CONCLUSION:
All said and done, the end should not justify the means. Any approach that propagates taking of arms against the state will have adverse impact on the society. Such approach may not yield the results promised by the propagators. However, the government may have a solution to tackle the problem. Some of the confidence building measures that may yield positive results can be implemented such as sincere development of infrastructure, especially in the field of education and healthcare. Awareness in the society to ensure eradication of discrimination should be also be taken care of. Employment opportunities in the affected regions should be created. The government should ensure peace in these areas so that these people don’t suffer more than they already have and this can be done only if the government takes proactive measures so as to ensure social justice and inclusive growth for the benefit of the marginalized sections. Even though the acts carried out by the Gulabi Gang are commendable, their cause should be paid more attention than they are receiving at this moment. The very existence of such a group is a blot on the current status of our Government and other law enforcing agencies. The members of society should have unflinching confidence in the system. It is the collective responsibility of society and the state to create conducive environment to ensure people are not forced to resort to VIGILANTISM. The state has to ensure that justice delivery mechanism is robust and fail free.

GENDER JUSTICE - STILL A FAR CRY IN INDIA

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Abstract
This article seeks an answer to the question that why even after so many legislation and constitutional safeguards gender justice in India is still a far cry and this article also focuses on the problems which we face in our daily lives which hinder our path towards the attainment of the goal of gender equality. The reasons behind this deplorable condition are the deep-rooted patriarchy in our culture and lack of proper education which resulted in a psychological phenomenon of overlooking and ignoring the role and importance of women. Despite new efforts which have made by the current government and other governments, it continuously fails to achieve the goal of balance society because of the reasons that the government, even the judiciary, is heavily affected by this dominant patriarchy which results in an ineffective implementation of the enactments which have been legislated by the legislature.

A. Introduction
Gender justice is a combination of two words gender and justice. The word gender is basically an interrelationship of three dimensions namely body, identity and expression and these three dimensions basically determine the ultimate characteristics of men and women. According to world health organization, Gender refers to the socially constructed characteristics of women and men – such as norms, roles and relationships of and between groups of women and men. It varies from society to society and can be changed. While most people are born either male or female, they are taught appropriate norms and behaviors – including how they should interact with others of the same or opposite sex within households, communities, and workplaces. When individuals or groups do not “fit” established gender norms they often face stigma, discriminatory practices or social exclusion – all of which adversely affect health. It is important to be sensitive to different identities that do not necessarily fit into binary male or female sex categories.” Hence gender is more of a societal point of view towards the personality of a person.

While the term justice, though having a protean face Earnest Barker in his seminal work, “Principles of Social and Political Theory”, tries to define word justice and noted that the term ‘justice’ is derived from the Latin word jus which embodies ‘the idea of joining or fitting, the idea of bond or tie’. In other words, we can define justice as the kind of behavior or treatment which is not unjust.

Gender justice can be as a concept which focuses on a world where there is no discrimination on the basis of the person’s gender. It goes without saying that why there is the need for gender justice as

Friedrich Engels in his classical writing “Origin of the Family, Private Property and the State” pointed out that “Woman was the first human being that tasted bondage. Woman was a slave before slavery existed”. Since the eternity men and women are distributed various types of societal roles there are innumerable reasons behind that but primarily because of biological, physical and psychological structure and this resulted in the basis of the difference in social behavior and formation of gender roles and in due course of time these roles became very stereotypical of women. That was the time when the seeds of difference have been sown in mankind since that time women are acting subservient to men. Till this time various movements and reforms have been occurred and done but still we as a society got failed somewhere and that place is mind, which is being possessed by the patriarchal ghost and the current world is not devoid of this ghost instead the ghost has become more powerful than ever now the current world is quite a tough world for women and India is no different case.

In India, we chant,  
*Yatra Naryastu Pujyante Ramante Tatra Devata Yatraitaastu Na Pujyante Sarvaastratrafalaah Kriyaah //*

"Where Women Are Honored, Divinity Blossoms There; And Where They Are Dishonored, All Action Remains Unfruitful."

But in reality the situation is otherwise; recently in global entrepreneurship summit Prime Minister Narendra Modi inaugurated an event, the theme of which is ‘Women First, Prosperity for All. Before this, he launched a national programme called Beti Bachao (Save Our Girls). All these activities illustrate that how deplorable our conditions are when it comes to the security and protection of young girls and women let alone justice. According to the National Crime Records Bureau of India, reported incidents of crime against women increased 6.4% during 2012, and a crime against a woman is committed every three minutes. Likewise, In a survey conducted by the International Men and Gender Equality Survey (IMAGES) it found that 65% of Indian men believe women should tolerate violence in order to keep the family together, and women sometimes deserve to be beaten. In India, a woman is raped every 29 minutes. Incidents of reported rape increased 3% from 2011 to 2012. Incidents of reported incest rape increased 46.8% from 268 cases in 2011 to 392 cases in 2012. The statistics are nothing but a proof that India is at war with its women and justice for them is still a far cry.

**B. Women and the law**

Until relatively recently, women were legally invisible. Inheritance laws passed property from fathers to sons, and marriage laws passed women from fathers to husbands as if they were property. Children were the property of their father and belonged to their father in the case of divorce. Even the money or property that women-owned independently before marriage became the property of the husband on marriage. These legal patterns have existed in both Western and Eastern cultures. However it is not difficult to see how it was maintained: by preventing

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688Frederich Engels, ‘Origin of the Family, Private Property and the State’ (1884)
women access to a legal voice, through either standing in court or the vote, and by preventing women from accumulating their own wealth, there have been few means of enforcing a more equitable status for women. Ultimately, change began through the efforts of women to organize themselves to gain power in numbers where it was not available any other way. Hence the need for women-oriented legislation arose due to centuries of domination and subjugation did by men over women; women are the suppressed lot. They are the target of a myriad of violence and discriminatory practices done by men all over the world. India is no different, like others, Indian women also have been subjected to innumerable atrocities, from the time immemorial women have always been put into the second pedestal.

Discrimination against women and girls occurs in many forms — through gender-based violence, economic discrimination, reproductive health inequities, and harmful traditional practices (such as child marriage), to name just a few. To either away all these obnoxious traditions and discriminations various provisions has been incorporated in Indian constitution and various other legislation also been made. The Constituent Assembly, itself, was a male-dominated body with only 15 women members out of the total of 296 members. However, women like Rajkumari Amrit Kaur and Hansa Mehta were placed on the important committees in the sub-committee on fundamental rights. In constitution assembly debates Hansa Mehta\(^\text{689}\) pointed out that “….The average woman in this country has suffered now for centuries from inequalities heaped upon her by laws, customs and practices of people who have fallen from the heights of that civilization of which we are all so proud…….They are put behind the purdah, secluded within the four walls of their homes, unable to move freely. The Indian woman has been reduced to such a state of helplessness that she has become an easy prey of those who wish to exploit the situation…” in that very same debates Renuka Ray\(^\text{690}\) while speaking for equality of status and justice for women said that M…Through the centuries of our decadence, subjecting and degradation, the position of women who has gone down until she has gradually lost all her rights both in law and in society.”Hence, the erudite and farsighted framers of our “ideal” constitution have felt the importance and acknowledged the role of women in a balanced society and thus for attaining the goal of “societal peace and harmony” they incorporated the sacrosanct ideals of justice in the form of certain rights especially for women so as to transform these abstract ideas into a concrete form.

(i) Constitutional Rights
The rights and safeguards enshrined in the constitution for women in India are listed below:

- **Preamble:**

  The Preamble to the Constitution of India assures justice, social, economic

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and political; equality of status and opportunity and dignity to the individual. Thus it treats both men and women equal.

❖ **Fundamental rights:**
1. The state shall not discriminate against any citizen of India on the ground of sex [Article 15(1)].
2. The state is empowered to make any special provision for women. In other words, this provision enables the state to make affirmative discrimination in favor of women [Article 15(3)].
3. No citizen shall be discriminated against or be ineligible for any employment or office under the state on the ground of sex [Article 16(2)].
4. Traffic in human beings and forced labor are prohibited [Article 23(1)].

❖ **Directive Principles of State Policy:**
5. The state to secure for men and women equally the right to an adequate means of livelihood [Article 39(a)].
6. The state to secure equal pay for equal work for both Indian men and women [Article 39(d)].
7. The state is required to ensure that the health and strength of women workers are not abused and that they are not forced by economic necessity to enter avocations unsuited to their strength [Article 39(e)].
8. The state shall make provision for securing just and humane conditions of work and maternity relief [Article 42].

❖ **Fundamental duties:**
9. It shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women [Article 51-A(e)].

❖ **Other Constitutional Provisions:**
10. One-third of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women [Article 243-D(3)].
11. One-third of the total number of offices of Chairpersons in the Panchayats at each level shall be reserved for women [Article 243-D(4)].
12. One-third of the total number of seats to be filled by direct election in every Municipality shall be reserved for women [Article 243-T(3)].
13. The offices of Chairpersons in the Municipalities shall be reserved for women in such manner as the State Legislature may provide [Article 243-T(4)].

(ii) **Legal Rights to Women:**

The following various legislations contained several rights and safeguards for women:

1. **Protection of Women from Domestic Violence Act (2005)** is a comprehensive legislation to protect women in India from all forms of domestic violence. It also covers women who have been/are in a relationship with the abuser and are subjected to violence of any kind—

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691 By team, 'Women Rights in India: Constitutional Rights and Legal Rights', (3 August 2017) [https://edugeneral.org/blog/polity/women-rights-in-india/] accessed on June 3, 2018
physical, sexual, mental, verbal or emotional.

2. **Immoral Traffic (Prevention) Act (1956)** is the premier legislation for prevention of trafficking for commercial sexual exploitation. In other words, it prevents trafficking in women and girls for the purpose of prostitution as an organized means of living.

3. **Indecent Representation of Women (Prohibition) Act (1986)** prohibits indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner.

4. **Commission of Sati (Prevention) Act (1987)** provides for the more effective prevention of the commission of sati and its glorification on women.

5. **Dowry Prohibition Act (1961)** prohibits the giving or taking of dowry at or before or any time after the marriage from women.

6. **Maternity Benefit Act (1961)** regulates the employment of women in certain establishments for certain period before and after childbirth and provides for maternity benefit and certain other benefits.

7. **Medical Termination of Pregnancy Act (1971)** provides for the termination of certain pregnancies by registered medical practitioners on humanitarian and medical grounds.

8. **Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act (1994)** prohibits sex selection before or after conception and prevents the misuse of prenatal diagnostic techniques for sex determination leading to female feticide.

9. **Equal Remuneration Act (1976)** provides for payment of equal remuneration to both men and women workers for same work or work of a similar nature. It also prevents discrimination on the ground of sex, against women in recruitment and service conditions.

10. **Dissolution of Muslim Marriages Act (1939)** grants a Muslim wife the right to seek the dissolution of her marriage.

11. **Muslim Women (Protection of Rights on Divorce) Act (1986)** protects the rights of Muslim women who have been divorced by or have obtained divorce from their husbands.

12. **Family Courts Act (1984)** provides for the establishment of Family Courts for speedy settlement of family disputes.

13. **Indian Penal Code (1860)** contains provisions to protect Indian women from dowry death, rape, kidnapping, cruelty and other offences.

14. **Code of Criminal Procedure (1973)** has certain safeguards for women like obligation of a person to maintain his wife, arrest of woman by female police and so on.

15. **Indian Christian Marriage Act (1872)** contain provisions relating to marriage and divorce among the Christian community.

16. **Legal Services Authorities Act (1987)** provides for free legal services to Indian women.

17. **Hindu Marriage Act (1955)** introduced monogamy and allowed divorce on certain specified grounds. It provided equal rights to Indian man and woman in respect of marriage and divorce.
18. Hindu Succession Act (1956) recognizes the right of women to inherit parental property equally with men.

19. Minimum Wages Act (1948) does not allow discrimination between male and female workers or different minimum wages for them.

20. Mines Act (1952) and Factories Act (1948) prohibits the employment of women between 7 P.M. to 6 A.M. in mines and factories and provides for their safety and welfare.

21. The following other legislation’s also contain certain rights and safeguards for women:
   1. Employees’ State Insurance Act (1948)
   2. Plantation Labor Act (1951)
   4. Legal Practitioners (Women) Act (1923)
   5. Indian Succession Act (1925)
   6. Indian Divorce Act (1869)
   7. Parsi Marriage and Divorce Act (1936)
   8. Special Marriage Act (1954)
   10. Indian Evidence Act (1872)

22. National Commission for Women Act (1990) provided for the establishment of a National Commission for Women to study and monitor all matters relating to the constitutional and legal rights and safeguards of women.

23. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act (2013) provides protection to women from sexual harassment at all workplaces both in public and private sector, whether organized or unorganized.692

C. Judicial inroads into gender justice
The judiciary is the branch of the state which administers justice in accordance with the law time being in force. This branch of the state is often tasked with ensuring equal justice under law and in the last 60 years of its existence, the Indian judiciary has made long-lasting contributions to the system of governance that has impacted the life of the people and the nation on various occasions the apex court of the country made us realize that it has understood the truth that it is only through the way of women empowerment we, as a nation, can achieve the ideals of gender justice. What is the use of the so-called “economic development”? When around half of the population of the country is suppressed and inactive, we can only make ourselves fool by turning a blind eye and living in the illusion of economic prosperity and social justice. Therefore, the Supreme Court is trying its best to break down the orthodox societal tradition and norms that look down upon women have given judgments to prevent violence against women and to put them equally as men in the society.

There are several judgments which shed light on the activism which is done by Supreme Court in Vishaka & Ors. V. State of Rajasthan &Ors.693 where supreme court issued Guidelines to prevent sexual

692Ibid 5.
693[1997] 6 SCC 241
harassment against women in work-places. However, this verdict was later neutralized by the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. When it came to the dignity of prostitutes, supreme court in its progressive judgment of Budhadev Karmaskar v state of West Bengal stated that what if she is a prostitute, she is a women and human being too and hence they also have a right to live with dignity under Article 21 of the Constitution of India. Their problems also need to be addressed. In lillu @ rajesh and another’s v state of Haryana, where for the first time, the Supreme Court realized the agony and trauma of a rape victim who had to go through two-finger tests and held that it is a violation of victim’s right to privacy and dignity. Nargesh Meerza v Air India that a woman shall not be denied employment merely on the ground that she is a woman. This leads to violation of Article-14 of the Constitution. In the present case, an air-hostess of Air India challenged the service rules of Air India where air hostesses were barred from getting married within a period of 4 years from the date of their joining. The rule further stated that the airhostesses shall lose their jobs if they become pregnant and also that they will retire at the age of 35 years (exception can be made only if managing director extends the term by 10 years at his own discretion). The Apex Court that even though the first provision is reasonable, the second and third provisions are cruel, arbitrary and unconstitutional.

In Shamim Ara v. State of U.P., The Supreme Court, in this case, held that the requirements of a valid talaq are: that the talaq must be for a reasonable cause; and it must be preceded by attempts of reconciliation between the husband and the wife by two arbiters – one chosen by the wife from her family and the other by the husband from his family. If their attempts fail, talaq can be affected.

Since our judiciary is as much a part of our societal structure as our executive or our lawmakers, it shares the same prejudices and biases as the society at large. On top of that, much of the judiciary is seriously compromised by its own selfish links to men and groups wielding power and political clout. All this ensures that the judicial system often takes the most regressive, reactionary stand on social issues.

Indeed these are a few glaring examples of those judgments which shows the brighter and the better side of the judiciary but if one looks closely and look precisely into the history of the nature of decisions of supreme court then he or she will find that there are

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694 <https://indiankanoon.org/doc/1302025/> accessed on 5 June 2018
695 <https://indiankanoon.org/doc/7884212/> accessed on 5 June 2018
697 <https://indiankanoon.org/doc/1903603/> accessed on 5 June 2018
698 [2002] 7 SCC 518
699 ApoorvaMandhani, ‘Women’s Day Special: 15 Supreme Court judgments that made India a better place for women’, (March 8, 2015)<https://www.livelaw.in/womens-day-special-15-judgments-that-made-india-a-better-place-for-women/> accessed on June 5, 2018

www.supremoamicus.org
several judgments of this court which are problematic and will show a tendency that Indian courts have had a long problem accepting women’s free choices.

The problem again arises only because of one reason and the reason is gender inequality. The participation of women in this system is so deplorable that it is severely putting the whole justice delivery system in jeopardy for example if one look the decision of Justice Markanday Katju in D. Velasamy700 in which he had termed a second Hindu wife as ‘mistress’ and ‘keep’, and thus she was not entitled to maintenance. But in 2011, another bench which included a female judge, Justice Gyan Sudha Mishra, opined that a deserted wife is entitled to marriage regardless of validity of her marriage. Justice Anil Dave and Adarsh Goel’s judgment in Prakash v. Phulwati701 refused to give retrospective effect to a social welfare legislation, i.e, the 2005 Amendment to the Hindu Succession Act under which daughters were also for the first time recognised as coparceners. Thus, the pro-women judgment of the Karnataka high court was reversed by the apex court. The high court had given the benefit of the new amendment to the daughter as the Supreme Court itself in Geetha’s case702 had held that any development in law will inevitably apply to pending proceedings. Very strangely in the second part of the same judgment, Justice Goel expressed concerns about Muslim women and the discriminatory nature of Muslim Personal Law though he did accept that the matter was not in dispute before them. He also noted that the Supreme Court itself in Ahmedabad Women Action Group had held that such issues are a policy matter and are best left to the wisdom of the government, yet he went ahead and directed the registry of the court to file a public interest litigation on the discriminatory provisions of Muslim Personal Law. Why did the court not consider discriminatory provisions of the Hindu Succession Act, which were very much before it, i.e., a Hindu mother, Hindu wife and Hindu daughter-in-law are still not coparcener? Similarly, if there is an issueless Hindu couple, the property of the husband goes to his parents, but strangely even the property the wife goes to the husband’s parents rather than her own parents. Similarly, a Hindu can deprive his/her daughter from self-acquired property through testamentary powers of will. Under Muslim Personal Law, on the other side,

no heir can be deprived of his/her share and through a will, not more than one-third of property can be given to a non-heir.703

Exactly a year later, in Narender v. K. Meena704 the same bench of Justice Dave and Goel passed another strange order which came as a bolt from the blue for women. In this case, the learned judges explicitly held that under Hindu traditions, a wife on marriage is supposed to fully integrate herself with her husband’s family and if she refuses to live with her in-laws,

700[2010]10 SCC 469
701Civil Appeal No. 7217 of 2013
7022009(3)KLJ484
703Faizan Mustafa, ‘Judicialaberrations on gender issues are worrisome’, (8 march 2018), <https://thewire.in/women/is-the-indian-judiciary-going-back-on-gender-justice> accessed on 5 June 2018
704Civil appeal no. 3253 of 2008
it would amount to cruelty and the husband would be entitled to divorce her under the Hindu Marriages Act. Here, too, the high court had ruled in favor of the wife. But the Supreme court, reversing the high court’s order observed that “in India, generally people do not subscribe to western thought, whereupon getting married or attaining majority, the son gets separated from the family. In normal circumstances, a wife is expected to be with the family of the husband after the marriage. She becomes integral to and forms part of the family of the husband and normally without any justifiable strong reason, she would never insist that her husband should get separated from the family and live only with her.” 705

Recently in much celebrated Hadiya judgment 706 where the supreme court hits a tight slap in the face of love jihad by ruling that adults choosing both their religion and whom to marry are both fundamental rights, guaranteed by Constitution, some feminist lawyers stirs the controversy that gender has played a role in the Hadiya case. They argue the questions like custody and protection of Hadiya, the questions against the freedom of a woman to love a man of her choice, the questions against a woman to have a mind of her own, these questions certainly wouldn’t have been raised by anyone, in public discourse or elsewhere, if it was not for her gender. Likewise, Prompted senior lawyer Indira Jaising, who was representing Shafin Jahan in this case asked a question if the Supreme Court’s decision was driven by gender. Jaising asked the court if it would have acted in this manner had Hadiya been a man. The supreme court, however, answered in negative. But the question still remains in front of law and in front of the courts that what if in the same scenarios a male becomes the victim? The answer is no the recourse wouldn’t have been the same because the law itself is arguably embedded in patriarchal structures. Which makes it difficult to ignore the gender implications of even seemingly gender-neutral laws. Undoubtedly, a woman’s freedom to choose her husband, freedom to have children, freedom to work and freedom to live her life have come under threat. This is not the first case in which the higher judiciary has ignored the law and been driven by gender. In the Farooqui judgment, for example is a disastrous illustration that shows laws resistance to change in this case the Delhi High Court suggested that a woman’s feeble no may mean a yes. There was no explicit statutory basis supporting that interpretation of the law. As in Hadiya’s case, the rape judgment seemed to be influenced by patriarchy and culture in addition to the law. 708

These inconsistencies in the judgments of supreme court somewhere exposes our society and exfoliate the politics behind the veil and the truth is that our society is deeply embedded in patriarchal psyche and it’s really a deplorable situation that even after 7

705 Ibid, 16
706 CRIMINAL APPEAL NO. 366 OF 2018
decades of independence our women didn’t get their dues.

D. No Country for Women

According to the UN Women website, “A safe city is one where women and girls can enjoy public spaces and public life without fear of being assaulted...one that promotes equal opportunities for men and women in all the spheres of social, economic, cultural and political life.”

(i) The Rape Culture

According to the 2013 annual report of national crime report bureau rape is the fourth most common crime against women and approximately 95% of them are done by the ones who know them. Imagine in such situation can one expect a girl or a woman to go anywhere with a calm heartbeat if she can ever trust those men around her with this shocking realization that a fellow one may want to harm them just because they can. After the barbarous incidence of Kathua rape and Unnao rape 49 retired civil servants, in an open letter to Prime Minister Narendra Modi, wrote that “......The bestiality and the barbarity involved in the rape and murder of an eight-year-old child shows the depths of depravity that we have sunk into. In post-independence India, this is our darkest hour and we find the response of our government, the leaders of our political parties inadequate and feeble. At this juncture, we see no light at the end of the tunnel and we hang our heads in shame. Our sense of shame is all the acuter because our younger colleagues who are still in service, especially those working in the districts and are required by law to care for and protect the weak and the vulnerable, also seem to have failed in their duty...”

What becomes more dangerous is that rape is being used as an instrument of political coercion now it’s being used by megalomaniacs as a means of intimidation and control which function to perpetuate the subordinate status of women and men and now, children in patriarchal or more or less criminal societies. The eight-year-old girl's rape and murder in Kathua, Jammu, was primarily to scare away her community, Bakerwals, from that region. And today there is a movement spearheaded by local leaders with the support of two erstwhile BJP ministers of the state to protect the rapists. In this case, rape is a tool for control over resources, a war supported by right-wing politics. In Kandhamal and Gujarat, women were raped not just for being women, but for being Christians or Muslims. In fact, the rapists have even articulated this while raping. Women in Kashmir and the Northeast were raped in large numbers not just for being women, but for being part of a marginalized identity. If one looks closely

709 Ashwaq Masoodi, ‘No country for women’, (17 February 2017)<https://www.livemint.com/Leisure/H1JOQO2sUDNCh6Ei66ubcJ/No-country-for-women.html> accessed on June 5, 2018

710 The wire staff, ‘Former Civil servants slam Modi’s belated promises’ on Kathuva, Unnao Rape Cases, (16 April 2018)<https://thewire.in/politics/narendra-modi-open-letter-kathua-unnao> accessed on June 5, 2018
then he will notice a pattern of repeated targeted attacks on women of minority religious communities in which rape and sexual harassments have been employed as instruments of violence by workers of political parties.\textsuperscript{711}

At present in India, the marital rape is not recognized and exception 2 of section 375 explicitly excludes all marital acts of violence from the ambit of the word rape hence in India it is not illegal for a man to rape his wife.

(ii) Marital Rape

Marital rape is a widespread problem in India. According to a 2018 National Family Health Survey, more than 80 percent of married women who have experienced sexual violence named their current spouse as the perpetrator in fact marital rape exists in facts but not in law and hence it should be decriminalized as a woman should be entitled to refuse sexual relations with her husband as the right to bodily integrity and privacy is an intrinsic part of article 21 of the constitution.

After The brutal rape of Jyoti Singh (Nirbhaya) in December 2012 led to a revamping of laws that dealt with rape and sexual violence against women. The Justice Verma committee, tasked with the drafting, recommended removing the exception for marital rape. Clearly the opposition to criminalizing it is non-

partisan. Government’s lawyers argued for the need to increase “moral and social awareness” to deal with marital rape, and said that it would be unfair to rest all the burden of proof on the husband. Leave aside the minor fact that 51 countries, including the UK – on the basis of whose system our penal code has been drafted – have criminalized marital rape. With Section 375, which criminalizes rape, making an exception for marital rape, and no other law giving wives recourse to justice, there’s very little the Protection of Women from Domestic Violence Act of 2005 can do.\textsuperscript{712}

(iii) Women in the personal laws

Isn’t it sound like an oxymoron: India is a secular country but still it has personnel laws which are based on religious beliefs and sentiments? Well, the rationale behind this is purely subjective and those who support this notion argues that minorities in India and the people who believe in these religions are not ready for it as they are highly sentimental towards their religions and their religious practices and therefore cannot be tampered with. India, in theory, is a purely secular nation with freedom of religion at the same time it also prohibits anything that might offend religious sensitivities. However a marked feature of all religious scriptures that women have fewer rights than men and somewhere it

\textsuperscript{711}Ujjawal k Chaudhari,’ sorry, but rape is political issue in India’,(April19,2018)<https://www.dailyo.in/variety/pm-modi-do-not-politicise-rape-unnao-kathua-rape-cases-london-uk-visit-crime-against-women/story/1/23568.html> accessed on June 4, 2018

\textsuperscript{712}Maya Mirchandani,’ Triple Talaq and Marital Rape: Politics and Patriarchy Trump Gender Justice’,(31 August 2017)<https://thewire.in/law/triple-talaq-marital-rape-patriarchy-politics-gender-justice> accessed on June 4, 2018
manifests the woven patriarchy in all scriptures. Personal laws in our country are shining beacons and often personal laws are retrograde, discriminatory and do not do justice between women and men, for example the Hindu Succession Act, 1956, though amended in 2005 to give an equal share to daughters in inheritance, still remain discriminatory up to some extent like Section 15 of the act says If a Hindu woman dies without a will, her property goes to her husband’s heirs if there is no spouse or children. The law assumes that the women become part of the husband’s family after marriage. In Hindu guardianship laws, Section 6 of the Hindu Minority and Guardianship Act, 1956 considers the father to be the ‘natural guardian’ of a Hindu child. The mother is considered a guardian only in the absence of the father or if the child is under five years of age. Parsi laws Children born to a Parsi woman and a non-Parsi man are not considered Parsi in the eyes of the law. A non-Parsi wife of a Parsi man can inherit only a part of his property, but his children can inherit it completely as they are considered Parsis.

(iv) Adultery
Adultery is defined in sec 497 of IPC as “Whoever has sexual intercourse with a person who is and whom he knows or has reason 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 imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case, the wife shall not be punishable as an abettor.”

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. The adultery law in India is a throwback to the times when women were considered as a property of their husbands. So, if a man sleeps with the property of another man, how dare he? A married woman, however, cannot challenge another woman, as to how dare she slept with her husband. 

On the basis of aforementioned factors, the question arises that when we have the law then why there is not a proper enforcement of these laws. Every political party has its own ideologies and ambitions but when at a given point of time that party forms the government then it’s the duty of that government to work for the public good and not for its own ulterior motives. Now, Gender violence is not limited to the limits of religion nor to the limits of class or caste but it has now spread its wing into the cruel political manifestations also. Patriarchy is universal, and it takes away a woman’s agency over her body and her mind.

E. Conclusion
All the aforementioned statements and evidence proves the reason that why after so many years of independence and so many welfare legislations we, still, are way behind

713Avani Bansal, ‘India needs to debate about law on adultery’, (February 7, 2017) <http://www.livelaw.in/india-needs-debate-law-adultery/> accessed on June 4 2018
to achieve it, and why it is still a far cry in India. It is not that this goal cannot be achieved it can be achieved but it will, however, take time, money and a combined effort on the part of many people. Firstly we have to understand there is nothing we as a society can give to women than acknowledgment and recognition because as Michael J. Sandel rightly puts it out “Justice is not only about the right way to distribute things. It is also about the right way to value things.” And if we expect that women should get the same freedom as men, they do the same work as men do, they breath the same air as man breathe then we must provide them the same things and environment which we provide to men. We have to leave our unrelenting stubborn and almost maddening proclivity towards patriarchy. We must ensure that all groups and communities can express their voice without fear; we have to make it ensure that every citizen of India, not the few, should get the benefit of the profit of the country. We have to make women more visible and increase their role in public life as well as in policy making. Robert Kennedy has very well said that, The glory of justice and the majesty of law are created not just by the constitution, nor by the courts, nor by the officers of the law, nor by the lawyers but by the men and women who constitute our society who are the protectors of the law as they are themselves protected by the law. Being a man is certainly takes more than that of being a male and a real man is a man who treats a woman like a human in a society which heavily undermines the importance the role of women.

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ARUNA SHANBAUG V. UNION OF INDIA

By Pranay Bhattacharya
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INTRODUCTION

"No life that breathes with human breath has ever truly longed for death"
- Alfred Tennyson (The Two Voices)

The Right to Life is the most heightening fundamental right granted by our Constitution. It is an astoundingly expanded right which has diverse shades to its essentials and synchronizes the word play of other rights through its interpretation. In other words it is the heart and soul, and is an exceptional standout amongst the other fundamental rights treasured in Article 21 of the Constitution of India. Article 21 of sense is vast in its degree as it represents everything that a man requires going ahead with a quality life, so he can shoulder the cost of the odds to enhance his life, more gainful and secure.

But, the request rising here is whether this benefit with various estimations can be given another estimation called Right to Die? 'Life' as indicated under Article 21 implies not simply living or the physical showing of inhaling and exhaling. So, the question that evaporates here is whether this fundamental right to ‘Life’ can also include right to ‘Die’ in the same provision.

The Constitution of India guarantees 'Right to Life' to each one of its citizens. The consistent, routinely persisting verbal encounter on whether 'Right to Die' can in like manner be scrutinized into this game plan still holds up mixed-thoughts all around. Of course, with more highlight being laid on the informed consent of the authorities in the medical field, the possibility of Euthanasia in India has gotten a heterogeneous comeback from one of the major landmark judgment in the history by the honorable Supreme court i.e. Aruna Shanbaug v. UOI.

BETWEEN LIFE AND DEATH-

SNIPPET OF THE CASE

The petitioner, Aruna Ramachandra Shanbaug, 25, was working as a junior nurse in King Edward Memorial Hospital, Mumbai.

On the evening of 27th November 1973 she was brutally assaulted by a sweeper, Sohanlal Bhartha Walmiki, who wrapped a dog chain around her neck and assaulted her. He tried to rape her but on finding that she was menstruating, sodomized her. The suffocation cut off the oxygen to her cerebrum, bringing about brain stem contusion damage, cervical line damage, and cortical visual impairment. The following morning she was discovered by a cleaner with blood splattered all over.

From the day of the ambush till the day died, she could only survive on mashed nutrition supply. She couldn't move her hands or legs, couldn't talk or play out the fundamental elements of an individual.

One of the next friend of Aruna, Writer Activist Pinki Virani filed a writ petition under article 32 of the constitution in the
Supreme Court of India requesting the legitimization of euthanasia so Aruna's continuous suffering could be ended by pulling back medical support. She contended that the patient had been in a perpetual vegetative state for the past numerous years and did not show any chance of recuperation whatsoever. The court dismissed the appeal to on 7 March 2011, but made a landmark change by allowing passive euthanasia in the country.

To be able to adjudicate upon the previously mentioned issues, the court explained as to what is euthanasia is: Active Euthanasia which is the act of killing a patient by some lethal substance which includes injecting while Passive Euthanasia means withdrawal of life support system or stopping the treatment given to the patient.\(^5\)

Shanbaug finally died from pneumonia on 18 May 2015\(^6\) in the wake of being in a tenacious vegetative state for almost 42 years but leaving traces of a landmark change in the course of future.

**COMMENT**

The judiciary was meticulous that without proper legislation, legalizing euthanasia can become another corrupted arm of law which can be exploited by individuals.

Therefore, it is for the lawmaking body to make fitting law administering euthanasia and furthermore keep up the said strategy as set up by Supreme Court like in the present case of Aruna to guarantee that there is no abuse of law or strategy. Further, Aruna was sleeping, languishing over in excess of three longed decades. A judgment for terminating her life care was very much reasonable from public point of view but the bone of contention was that there was no innovation that can read and comprehend what her psyche and body needed right then and there of time, or whether she herself wanted to be alive or not.

Since, there was no family member to look after her particularly, nor did she have any unremitting visitor who could relate to her, it was enormously difficult for the court to articulate who ought to choose her fate.

The court stated that the privilege to take choice for the benefit of Aruna was vested with the hospital not Ms. Pinki. So to guarantee that there is no abuse of this method the Supreme Court has vested the power with the High Court to choose if life is to be ended or not.

Subsequently, in the wake of the matter the Supreme Court permitted passive euthanasia, subject to the order by the High Court with an established procedure of by-laws set aside to be followed.

But the core quandary is that there exists no enactment setting out the technique to allow someone to take his/her own life as seen in the present case. The absenteeism of any law administering the subject outcomes in individuals taking plan of action to courts to look for 'consent' to end their own lives, or the lives of others over whom they have some control. These would incorporate petitions for euthanasia recorded by people who don't wish to live, or by relatives for the benefit of the individuals who endure outrageous torment or serious distress. The courts progress toward becoming mediators of the destiny of such individuals. What happens now is that the courts are called...
upon to choose, without having the advantage of enactment to direct their basic leadership. Such extraordinarily delegated decisions encounter the evil impacts of intervention and helplessness — two attributes that make for horrendous law.

**CONCLUSION**
To conclude we can say that the landmark case can be looked with another facet that whether the sanctity of human life under article 21 which includes right to life can encapsulate right to die as well, by the prerogative of right of choice. The argument extends to whether this fundamental right of choice gives right to die as well because there is no indisputable exhibit required to be performed to live life. The judiciary is yet to come up with a solution.

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COMPARATIVE ANALYSIS OF LANDMARK JUDGMENTS ON HOMOSEXUALITY IN INDIA: SECTION 377

By Prisha Sinha
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Introduction

"The Constitution is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."

- Thomas Jefferson

The Constitution has always been recognised as a reservoir of our basic rights, an armoury with weapons of protection against arbitrary state action, with the Judges at various level of Judiciary acting as soldiers, guarding the citizens of our country and their fundamental rights.

The Constitutional Assembly understood the significance of separation of powers between the different organs of the State and the overpowering necessity of a system of checks and balances, hence powers awarded by the Constitution also came with certain duties bestowed on these institutions of the state.

The Judiciary’s mission since time immemorial has always been to provide justice and due to the diverse nature of Justice, it has also been its greatest strength. It is a kaleidoscope in the hands of the Judiciary, contingent to how the Judiciary decides to rotate it, the reflection that appears must be in consonance with the constitution of our country.

The responsibility of the Judiciary becomes more pertinent if there is in existence an unreasonable legislation, that incapacitates the constitutionally warranted rights to a certain class of citizens, unrecognised and powerless against the antiquated beliefs of the majority, in the society. The legal maxim, Justitia nemininegandaest, which means that- Justice is to be denied to no one, reiterates this power of the Judiciary.

This duty of the judiciary had been invoked in the infamous case Suresh Kumar Koushal &Anr vs Naz Foundation &Ors714. But was the Hon’ble Supreme Court, the Sentinel of the Citizens, successful in safeguarding their Fundamental rights? After all, Lex non deficere potest in justitia exhibenda - The Law cannot fail in dispensing justice.

Background

The relationship between a statute and the Constitution of a country is symbiotic, while a statute is created to secure the constitutional notions of Justice, Liberty, Equality and Fraternity, at the same time, it derives its authority from the supreme law of the land- The Constitution.

Hence the Constitution awards a Legislation with both, purpose and power, with the precondition, that the word of the law and the word of the constitution must be in harmony, any discord would result in stripping the law from its power to

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714 CIVIL APPEAL NO.10972 OF 2013
command. It is rather peculiar, how the notorious legislation, within the Indian Penal Code, Section 377 which criminalises sexual activities against the ‘order of nature’, including homosexual sexual activities, has continued to survive.

Sex has always existed as a taboo within India, a hushed theme within the society begging for attention and acceptance. This extensive blindness to an integral element of human life, has resulted in a significant portion of the population in either suppressing a basic component of their personality or running away from the public eye, to a place where the law can’t punish them or protect them.

Sodomy as a crime, finds its origin in the Common Law of England, according to which the punishment was immolation. Acts of sodomy later became officially penalized by hanging under the Buggery Act of 1533 which was re-enacted in 1563 by Queen Elizabeth I, after which it became the charter for subsequent criminalisation of sodomy in the British Colonies.

Homosexuality is not a modern day concept or a path selected by the youth to rebel against the society, it has an elaborate history in India, from the pre-colonial era, when it was treated as a mere minor offence, which took a severe turn during the colonial era when it was criminalised by the British, in accordance with their Judeo-Christian beliefs, based on procreative and non-procreative forms of sexual activity. Post-Independence, however the law continued to find shelter in the statute books and soon became a part of the society, as all laws do.

Naz Foundation, a Non-Governmental Organisation believed in the struggle of the LGBTI (Lesbian, Gay, Bisexual, Transgender and Intersex) community gradually growing in India, while their fundamental rights continue to wither under the shadow of Section 377, Hence they filed a writ petition in the High Court of Delhi, asserting the constitutional infirmity embedded within the law.

It was submitted in Naz Foundation vs Government Of Nct Of Delhi715, that the number of MSM (Men who have sex with Men) in India, is estimated to be 2.5 million as of 2016, but no definite number can be found legally, it can only be assumed that the number is increasing and as the numbers increase, there’s a decrement in the power of the constitution to protect.

The High Court of Delhi, in their judgment, given on the 2nd of July, 2009 understood this and decriminalised it, whilst starting a legal revolution for the LGBTI community, which was soon supressed as are all revolutions in Contemporary India. A number of individuals and institutions rebelled against the judgment given by the Delhi High Court and appealed against it in the Supreme Court of India, which while reversing it, criminalised Homosexuality, once again.

A Comparative Analysis of Judgments in:
- Naz Foundation versus Government of NCT of Delhi and Others (Hereafter referred to as Naz Foundation Judgement)

715 WP(C) No.7455/2001
• Suresh Kumar Koushal and another versus NAZ Foundation and others (Hereafter referred to as the Koushal Judgement)

Liberty and Equality are the golden and silver threads that weave Part III of the constitution into its sustainable self, all fundamental rights find their genesis in the indispensable need for both Liberty and Equality, for every individual in a nation. Hence these were two essential elements touched upon in the, Naz Foundation Judgement, the two vital Fundamental Rights that form the foundation of the constitutionally created armour for every citizen.

The Petitioners, in the Naz Foundation Judgement, contended that Section 377, violated Article 14- Right to Equality, Article 15- Prohibits discrimination on grounds of Religion, Race, Caste, Sex, Place of Birth, Article 19 (a)-(d) Right to Freedom, Article 21- Right to Protection of Life and Personal Liberty, of the LGBTI community within India. The Respondents in The Naz foundation Judgement, constantly claimed that there isn’t sufficient data to claim that these Fundamental Rights are being infringed in the first place, which was later reiterated by the Appellants in the Koushal Judgement accepted by the Hon’ble Justice G.S. Singhvi. However, the Court has failed to understand the cause behind the lacuna in quantitative data representing discrimination by the law or for the knot tied tightly around their personal liberty. The reason behind that is, because identifying them, equally amounts to incriminating them.

Justice Singhvi, states that Section 377, does not identify a particular community that should be penalised, but instead penalises a particular conduct or act committed by an individual. However, an important question has been ignored by the Hon’ble Supreme Court, ‘What if the act is between consenting adults, in private?’ The court has completely disregarded vital factors, that are relevant while penalising the act, such as age, consent and privacy.

According to the 172nd Report of the Law Commission which has been referred to in both Judgements, the report suggested deletion of Section 377. Paragraph 83, of the NazFoundation Judgement states that “In the 172nd report, the Law Commission of India, focused on the need to review the sexual offences laws in the light of increased incidents of custodial rape and crime of sexual abuse against youngsters, and inter alia, recommended deleting the section 377 IPC by effecting the recommended amendments in Sections 375 to 376E of IPC.” It goes on to say that “Though the Law Commission report would not expressly say so, it is implicit in the suggested amendments that elements of “will” and “consent” will become relevant to determine if the sexual contact (homosexual for the purpose at hand) constitute an offence or not.” The Hon’ble Supreme Court stated that the Law Commission merely offered a suggestion in its Report, regardless the law has continued to exist and is free from any constitutional infirmity.

Right to live Life with Dignity
Mahatma Gandhi said that “To believe that what has not occurred in history will not
occur at all, is to argue disbelief in the dignity of man.”
While it’s true that Dignity cannot be given an elaborate legal definition, the Courts all over the world, have attempted to classify requirements that need to be fulfilled to, lead a life with Dignity. The Canadian Supreme Court, in Law v. Canada (Minister of Employment and Immigration) state that “Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences.”716(Para 53, Pg. 106)

Under the purview of the term “carnal intercourse”, the legislation criminalises sexual acts between consenting homosexual adults, in private. To lead a life with Dignity is to lead a life where an Individual can satisfy one’s basic biological and physical needs and live free from arbitrary state created encumbrances, for example legislations such as Section 377.

Right to Privacy
The Hon’ble Supreme Court, in its landmark Judgement, given in 2017, Stated that “Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy.”717(Part-T, Conclusion, 3(F), Pg. 263)

The Naz Foundation Judgement, relying on The National Coalition for Gay and Lesbian Equality v. The Minister of Justice, said that “privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which one gives expression to one’s sexuality is at the core of this area of private intimacy. If, in expressing one’s sexuality, one acts consensually and without harming the other, invasion of that precinct will be a breach of privacy”(Para 40, Pgs. 34-35)

The Hon’ble Supreme Court, stated that the Delhi High Court,in its “anxiety to protect the so-called rights of LGBT persons and to declare that Section 377 IPC violates the right to privacy, autonomy and dignity” have “extensively relied upon the judgments of other jurisdictions” and that “they cannot be applied blindfolded for deciding the constitutionality of the law enacted by the Indian legislature.”(Para 52, Pg. 93)

An essential fact though has been overlooked by the Hon’ble Supreme Court, that due to the absence of legislations protecting and recognising the LGBTI community in India, Judgements on such laws and community would therefore also be absent. Most countries have come to accept and legally recognise the LGBTI community, while India continues to choose

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716 Nancy Law v. Minister of Human Resources Development [1999] 1 SCR 497
717 Justice K S Puttaswamy (Retd.), &Anr. Vs Union Of India And Ors., W.P. (CIVIL) NO 494 OF 2012

www.supremoamicus.org 318
‘public morality’ over ‘constitutional morality’.

Right to Health
Right to Health and Medical attention has been considered as an essential element of an individual’s Right to life, the same has been accepted by the Supreme Court in Paschim Banga Khet Mazdoorsamity Vs. State Of West Bengal.718

Ministry of Health and Family Welfare supported the petition to decriminalise Section 377, they stated that, it is a hindrance in their HIV intervention efforts towards Sexual Minorities, such as the MSM. The National Aids Control Organization, a division of the Ministry of Health and Family Welfare, submitted in the Naz Foundation Case, that “Section 377 acts as a serious impediment to successful public health interventions. According to NACO, those in the High Risk Group are mostly reluctant to reveal same-sex behaviour due, to fear of law enforcement agencies, keeping a large section invisible and unreachable and thereby pushing the cases of infection underground making it very difficult for the public health workers to even access them.”(Para 62, Pg. 51)

The NACO is of the opinion, that it is very important that the MSM and gay community have the right to be safely visible through which HIV/AIDS prevention can be successfully conducted.

Mental Health, is a crucial part of an individual’s health in general, the fear created by such a statute obstructs personality development in a gay individual, it creates hatred and lack of self-worth, which eventually leads to depression or an abnormal mental state.

Right to Equality
Article 14 of the Constitution, prohibits unequal treatment but allows the state to make a reasonable classification, while creating a statute. The classification must be based on an intelligible differentia which must have a reasonable nexus with the classification. However, Section 377 is entrenched in arbitrariness, the unreasonableness of the statute begins itself by the indirect unfair classification drawn on the basis of the act condemned by the Statute, without giving due consideration to probability of an absence of harm and the conditions deciding the nature of the act.

The High Court said “Thus it is evident that the disparate grouping in Section 377 IPC does not take into account relevant factors such as consent, age and the nature of the act or the absence of harm caused to anybody. Public animus and disgust towards a particular social group or vulnerable minority is not a valid ground for classification under Article 14.”(Para 91, Pg. 75)

The Supreme Court, in the Koushal Judgement however dismissed this argument stating that there isn’t sufficient data given by the Appellants to prove unfair or discriminatory treatment by State Agencies or even the Society, according to them, there is an absence of any form of classification, at all.

The Supreme Court, however has neglected the fact, that Section 377 is a loaded weapon

7181996 SCC (4)37, JT 1996 (6)43
in the hands of the state, with the word of the law, as a bullet.

Prohibition against Discrimination

Article 14 gives a general proposition regarding Equality, which is given a particular application on various grounds in Article 15 of the Constitution. Article 15 prohibits discrimination on the ground of sex. The High Court stated “The argument of the petitioner is that 'sex' in Article 15(1) must be read expansively to include a prohibition of discrimination on the ground of sexual orientation as the prohibited ground of sex discrimination cannot be read as applying to gender simpliciter.” It goes on to say that, “The purpose underlying the fundamental right against sex discrimination is to prevent behaviour that treats people differently for reason of not being in conformity with generalization concerning “normal” or “natural” gender roles.” (Para 99, Pg. 82)

The High Court referring, John Vallamattom v. Union of India said “The Court held that Article 15's prohibition of sex discrimination implies the right to autonomy and self-determination, which places emphasis on individual choice. Therefore, a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to strict scrutiny.” (Para 108, Pg. 89)

‘Strict Scrutiny’, was a concept borrowed in the above case from American Jurisprudence, which is to be utilised for the perusal of the consequences of a specific statute. Another concept taken from Canadian and European Jurisprudence was, ‘Proportionality Review’, which meant that the degree of proportionality between state intervention and purpose of the legislation, should not unfair or arbitrary, in a modern democratic society.

Right to Freedom

Article 19, guarantees six freedoms. The Delhi High Court hasn’t dealt with this constitutional provision, it states that “In the light of our findings on the infringement of Articles 21, 14 and 15, we feel it unnecessary to deal with the issue of violation of Article 19(1)(a) to (d). This issue is left open.” (Para 126, Pg. 101)

However, an organised society is a precondition to all civil liberties and an organised society is created upon the foundation laws and statutes, protecting citizens and communities within the society. Absence of law, leads to an Absence of protection.

Conclusion

It has been 5 years, since the Supreme Court declared Section 377 constitutional, 5 more years in hiding for the LGBTI community, 5 more years the state has chosen to ignore the problem, hoping it will go away. Is that Constitutionally Correct? Hoping a certain group or community in the society, would cease to exist?

The revolutionary NALSA judgement came in 2014, where the law acknowledged that gender can no longer be conceived as a binary notion, it was for the first time, that the third gender was given recognition and protection by the law. Justice Radhakrishnan
explained that “Binary notion of gender reflects in the Indian Penal Code, for example, Section 8, 10, etc. and also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations like NAREGA, 2005, etc. Non-recognition of the identity of Hijras/Transgenders in the various legislations denies them equal protection of law and they face wide-spread discrimination.” 719 (Para 75) One such legislation is Section 377, which takes away a basic biological right we have as human beings, from this community.

In the recent landmark judgement, given by the Supreme Court in August, 2017 declared that “Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.” 720 (Para 126, Pg. 124) I believe this is the first step taken by the Supreme Court, in giving this community and its fundamental rights, constitutional recognition and protection.

‘But are we ready? Is the Society ready?’ Are relevant questions that come into our minds, as we move further to this community’s constitutional victory, but we must also ask ourselves, ‘If not now, then when?’ With the societal notions in the past, there was never a good time to abolish untouchability or give women equal rights, but the State must always act in regard to the spirit and the culture of the Constitution and not only of the society.

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719 National Legal Services Authority v. Union of India, WP (Civil) No 604 of 2013
720 Supra note 4, at Pg. 6
SPACE DEBRIS: THE NEAR FUTURE DISASTER & FAILING INTERNATIONAL REGIME

By Priya Kotwani
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Abstract
The paper discusses an emerging threat to the near space from space debris. Space debris is the non-functional objects found at outer space and are capable of destroying not only the material satellites but also affecting the environment. The major problem is, out of five UN conventions on outer space none of them specifically deals with space debris. Also, many signatories to the convention have not implemented the provisions in their legislation. The paper further focuses on the loopholes in the present conventions dealing with the outer space and desires to make an effective legislation at both international and domestic level to deal with the issue. It is also desirous to adapt a universal legislation that shall be implemented on all the countries being signatory to it.

INTRODUCTION
Space is an area with no defined boundaries. It has been subjected to many research experiments, explorations by the leading experts from the countries across the globe. Now, almost a decade has been over since the launch of Sputnik the first man-made object to orbit the Earth by USSR in 1957. There has been a number of scientific furtherance in the field. From International Space stations to approaching the threats that will come from outer space human beings have left no stone unturned.

The field of space law has evolved and it has widened its scope to deal with questions such as property rights, weapons, space debris, protection of astronauts and more. Also, there is question of legal jurisdiction on space crafts and other bodies. When in 1957 the USSR launched Sputnik, In 1958 the United Nations General Assembly created a committee on the peaceful uses of outer space (COPUOUS).

The advancement of technology and curiosity of human being is forcing him to explore the outer space as much as possible. And such exploration is also beneficial for further betterment. Since the man-objects launched in space, many problems have been solved. But it has also created some hazardous threats that are increasing with the man-made and artificial objects particularly space debris.

Space Debris is rapidly increasing and threatening the sustainable use of space by human beings. The countries that heavily depend upon space for their economic and strategic purposes for instance; the United States will be affected more by the increased space debris.

The concern regarding the growing number of space debris is increasing among the
nations. That is also indicating that it’s time for the legislature to make specific laws at International and domestic levels to reduce the number of debris. The space law at present is combination of many treaties and conventions. First treaty in such regard was the outer space treaty, which came into force in 1967\textsuperscript{721}. After that many treaties and conventions were made in this regard to protect the environment and the interest of the countries involved namely:

2. The Astronaut rescue and return agreement1968.

The problem is that the issue of space debris has not been specifically dealt by any of the UN treaties dealing with the outer space, due to which it becomes difficult to impose a liability on particular country to pay for the damages done by satellite research experiments leaving debris at the outer space.

Law is very precise but when it comes to space law, it is filled with a number of lacunas not providing for any specific meaning to the words, the jurisdictional issues, the amount of liability to be paid and so on, the list is not exhaustive. The legal convention and legislature must be created keeping in mind not only the present or past but also the future conditions as far as foreseeable.

Concept of Space Debris

There is no universally accepted definition of Space Debris. But the word “Debris” is derived from the French word “Debriser” which means to break down. According to the report of Second UN Conference on Exploration and Peaceful Uses of Outer Space 1982, Space Debris consists of dead satellites, spent rocket motors, nuts, bolts, etc.

Also, “Space debris” is\textsuperscript{722}

- A space object as defined by Article I(d) of the Liability Convention and Article I(b) of the Registration Convention;
- That no longer performs its original function or has no tangible function;
- That either re-enters the atmosphere, remains in Earth orbit, in outer space on the Moon or another celestial body, or on the Moon or another celestial body, is either created intentionally or through the actions or inactions of a launching state;
- May have economic value to a launching state;
- And/or may have continued national security value to a launching state.

It is stated that except for those artificial objects that are being tacked in Earth Orbit and known as functional satellites; every other particle found in the outer space is Space Debris. They range in the size from abdicated lens caps to spent rocket stages. The most dangerous pieces of debris are those ranging from one to ten centimeters of diameter, they are large enough to cause serious damage. Even if they are small in size they are capable of ruining the International space stations and threaten still-active satellites.

\textsuperscript{721} The Outer Space Treaty, 1967.

\textsuperscript{722} Michael Listner, Legal issues surrounding space debris (August 6, 2012)
Inception of Space Debris

Orbital Debris are increasing in the space since the launch of first man-made satellite i.e; Sputnik. They’ve been threatening the near space of Earth. From where, these debris are coming? What could be the possible source? Well, there are number of sources giving birth to these junks in outer space. It could be the detached part of an exploded satellite or non-functional satellites, material objects, rockets, tools dropped by astronauts in space by mistake or some lost material object, fragmentation events either accidental or intentional anything or everything ranging from the size of a small marble to a bigger stone. The remains further create more debris and this is how they increase in number by each passing day.

It is also believed that fragmentation debris is the largest source of space debris. As per the data published by NASA in the year 2008, at present three major countries are responsible for 95 percent of the fragmentation debris namely, China (42 percent), United States (27.5 percent) and Russia (25.5 percent). It also stresses that these countries should contribute more to cleaning up the near space environment that other countries.

Why Is It So Important to Remove Space Debris?

The issue of Space Debris has been highlighted time and again in number of incidents. This is not the first time that somebody is coming up with such problem. As one of the developed nation, The US is highly concerned with the emerging threats posed by the space debris.

Remember the fictional movie Gravity released in the year 2013 in which an astronaut was stranded in space after her ship was hit by flying remains of a detached Russian satellite? The movie somehow showed the possibility of what could be the dangerous effects of these orbital remains in the outer space.

Travelling at roughly 17,000 miles a marble can be a possible threat to functioning satellite. The wake-up call was made only in the year 1996 when a French microsatellite collided with a remnant of an exploded Ariane launcher. It was not the only clash; the number of space debris has grown significantly thereafter. In 2007, more than 2,000 new junk elements were created by China’s anti-satellite test. (ASAT) Which was followed by an accidental collision between the Iridium 33 and Cosmos 2251; again creating more than 2000 new debris. Many accidental collisions in outer space have been reported previously but the collision between the Iridium 33 and Cosmos 2251 was the first involving two intact spacecrafts.

The list is not exhaustive, according to a survey it is expected that with the increased

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723 Bruce Schaufhauser, the director of Lockheed Martin’s.
726 See Brian Weeden, “2009 Iridium-Cosmos Collision”, SWF Fact Sheet (10 November 2010)
number of such elements at the outer space, the collisions are likely to happen in every 5-6 years. In coming years, they are surely going to endanger the life on Earth.

**Impact on Environment**

It is important to note that these scientific activities leave some impact on the environment as well. It is all we have got from the nature. But sometimes human is so much indulged in his experiments/activities that he almost forget about the duty, he owe towards the environment, ie; to keep the environment sustainable. It is recognized that the survival of human actually depends upon the nature, such as- the trees, forest, temperature, etc rather than some experiment on space or may be the construction of satellite.

Space science has always been hard on environment. The instance of Altai Republic(where Russian rockets are being launched) survey shows that several times in a month the farmers in that region find bits of space junk raining down over them. This has killed so much of livestock and also caused illness among the local population. But who shall be liable? Who will clean the mess? The situation can get worst in the future in the space prone regions. The general International law principle of preventive action imposes an obligation on states to adopt such measures as to prevent “damage to the environment and otherwise to reduce or control activities that might cause or risk such damage.”

Also, it was pointed out by the International Court in the *Pulp Mills case*, that “the principle of prevention is a customary rule”. Therefore, it is the duty of state to remove the debris caused by the activities they perform at outer space. But, the states as well as the International law are deliberately failing, the former in performing and the later in casting such duty.

**The Legal Challenges**

Indeed the Outer Space Treaty of 1967 is the *Magna Carta* of the International Space Law. But the treaty does not provide any specific provision to deal with the harmfulness of Space Debris. Even there is no universally acceptable definition of “Space Debris” till now. Furthermore, certain provisions such as Article VI of the Outer Space Treaty mentions that the “International Responsibility” for the activities conducted by the countries (govt. agencies or private) in outer space and for ensuring that such activities are obedient with Outer Space Treaty.

Further Article VII elaborates: ‘Each State Party to the Treaty that launches or procures the launching of an object into outer space, including the Moon and other celestial bodies, and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its component parts on the Earth, in air space or in outer space, including the Moon and other celestial bodies’.

Furthermore, the Liability Convention provides that liability to pay compensation is

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absolute if any damage has been done to the surface of Earth or to an aircraft in flight. Also the Liability convention defines the term “launching state” as a state that launches or procures the launching of a space object or from whose territory or facility a space object has been launched. It means that the convention impose a liability upon the state who launches any space object that causes damage to the outer space or object of any other state.

The question arises that whether the definition of Space Object includes Space Debris?

Article I(d) of the Liability Convention and Article I(b) of the Registration Convention states that the Space Object includes component parts of a space object as well as it’s launched vehicle and parts. This definition does not specifically include space debris. It means that person liable to pay compensation as per the provisions of the Liability Convention may or may not be held responsible for the junk created by them. And in case, if it is held responsible for collision or any loss due to their space component then there is no precise method to calculate the quantum of amount to be compensated by them.

Law is very precise but, when it comes to Space Law lot of puzzles remained unsolved and the treaties are open to a bunch of necessary amendments to be made, keeping in mind the present needs. But it is applaudable that countries are making efforts to improve the situation. For instance

The United State’s National Law

The United States one of the most powerful nation in the world is also one of the major countries in space exploration. The country at present is very much concerned regarding the space debris, which is shown in its efforts as well.

Mitigation is one of the ways of removing Space Debris which means, reducing the further creation of Space Debris. The United State’s domestic law contains a provision for the mitigation of Space Debris. The country has its own mitigation standard practices. These practices “encompasses all program phases, from initial concept development to space hardware disposal, focusing on the minimization of the intentional debris releases, and the occurrence of accidental explosions, it also provides for avoidance of hazardous collisions and responsible disposal of space hardware. These standard practices serve as a foundation for specific orbital debris mitigation requirements issued by the US government agencies including the Federal Communications Commission and the Federal Aviation Administration.

Furthermore, it requires every person making application for the Space stations authorizations; to provide information and statement as regard to that the space station limited probability of space stations becoming a source of junk by explosion or collision with other small debris or detached

729 Liability Convention, art II (1972).
rockets. It also, requires make a statement detailing the post mission disposal plans for the space station including the quantity of fuel that will be deserved for post mission disposal, the altitude selected and the calculations used in deriving the disposal altitude.

The US has undoubtedly the world leader in space in space debris mitigation efforts and it is making more efforts to come up with more strict rules and regulations. Withal, for the propose of ensuring its compliance with International obligations, the country imposes conditions under its regulatory framework to obtain a license to conduct any space activity. Some of these conditions also relates to space debris mitigation measures.

Position in India

India’s space researches and technologies have crossed new thresholds in past few years. In 1963, the country launched its first rocket under the guidance of Dr. Vikram Sarabhai. Subsequently, the country launched Aryabhatta, India’s first scientific satellite. Since, then the country has never stopped in making efforts and is marked with tremendous success. With the introduction of Polar Satellite Launch Vehicle (PSLV) and Geosynchronous Satellite Launch Vehicle (GSLV), India gained its position to become only the seventh nation in the world with indigenous satellite launch capabilities.

At present the country is competing with the giants such as The United Nations and Russia. It means that the country must be equalizing in terms of making adequate space laws. But, unfortunately this is not true. Indeed, India has developed new technologies, satellites, space stations but when it comes to space laws, the country is lagging behind. There are many countries such as Canada, Germany, South Africa, Ukraine, who does not come in the list of the top space technology countries but still they have managed to create their legal framework effectively. On the other hand, India is vacuous of national space laws.

India has ratified four out of five UN treaties relating to the activities in outer space. But, almost four decades have been passed the enactment is still awaited. The only provision governing the space activities in India is determined under the Constitution of India, 1950, the revised remote sensing data policy, 2000 and the Satellite Communication Policies, 2000. These policies merely sketches out what the government wished to do without any legal obligation attached to it.

The growing concerns of space debris have reached to India as well. Though India is signatory to The Convention On International Liability for Damage Caused by Space objects, 1972, the country has not implemented any legislation in this regard which has caused a trouble and India is now in the middle of an International Dispute over the fall of debris from an Indian satellite to a Japanese village. As a signatory to the convention, India is absolutely liable to pay the compensation but due to lack of any national space law the country is having difficulty in determining the damages owned.
This clearly emphasizes that India is in need of space laws. The absence of any effective space legislation is surely going to hinder the future growth of the country.

**Conclusion**

After sixty years of sending satellites, rockets into space, the situation has become more crowded over there. The above discussion has clearly shown that how important it is to implement effective space legislation, particularly in regards to the space debris. No doubt, that the UN conventions and treaties have given birth to the space laws but they lack some important definitions such as, *Space object, Space Debris* etc. But the space is not free from problems. The 2009 collision between Iridium 33 and Cosmos 2251 raised concerns among the giant nations like US, China, Russia.

This was not the only incident may known incidents have took place and will pose serious threat in future. The crowd of junk is increasing every year. It’s high time to make some technological and legal changes to tackle with this serious issue. As it is better to make laws keeping in mind not only the needs of present but also the growing concerns of future. It is important to make effective laws at International and domestic level.

The present conventions must be amending by keeping in mind the issue of space debris. Coming to the domestic laws of the states, The United States is making serious efforts and has become a worldwide leader in space debris mitigation efforts. The country is also complying with its international obligations by imposing conditions to obtain license to conduct any space activity. Also, the country has its own mitigation practices including a number of guidelines.

The Liability Convention 1972 imposes liability on the country to cause damage at the near space or to the satellite of other country. But, the problem is many signatories to this convention including India had not implemented the provisions of the convention in their domestic legislature which makes difficult to decide the quantum of damages when any dispute arises between the states.

Also, only those parties can file the claim, those are party to this convention. It also requires to identify the space object causing damage, and further prove that the damage was caused by the element of liable state. But, there is no specific guideline on proving the fault which makes it difficult to impose the liability and claim compensation.

Apart from that, none of the five conventions on outer space deals with specific removal of space debris. Neither any country has taken major steps except the United States which is still at better place. In India, the only regulations dealing with the space laws are The Constitution of India 1950, the revised remote sensing data policy, 2000 and the Satellite Communication Policies, 2000. These policies merely sketches out what the government wished to do without any legal obligation attached to it.

The treaties mentioned above were made for the best of mankind but they are not enough to satisfy the present day needs. The space
debris is posing serious threat to environment and to the future of mankind. It is important to solve the problem of space debris to prevent any future threat. If the amount of risk is to be analyzed the government should turn their heads on this issue which has the capability of hampering the growth of the nations as well. It is desirous that a Universal code must be prepared, implementing on all the nations of the world without any ratification with international cooperation. All countries must focus on planning, drafting and developing a universal approach.
ALTERNATIVE DISPUTE RESOLUTION MECHANISM (ADR)

By Ritayan Ghosh
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“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.” - Abraham Lincoln.

Words of wisdom from one of the greatest statesman who used a unique strategy to deal with his critics and to deflect the prejudices of his supporters without yielding to him. Try as we can, disputes are an unavoidable part of any relationship or organization. Disputes can be resolved through either through litigation i.e., in a court of law or through Alternative Dispute Resolution (ADR) Mechanism. Alternative Dispute Resolution includes resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. It is a collective term for the ways that parties can settle disputes, with the help of a third party. ADR has gained widespread acceptance among both the general public and the legal profession in recent years. The rising popularity of Alternative Dispute Resolution Mechanism is because ADR imposes fewer costs than litigation, there is a preference of confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute. Indian Judiciary is one of the oldest judicial system and there are lots of pending and long unsettled cases. ADR provides scientifically developed techniques to Indian judiciary which helps in reducing the burden on the courts.

The modes of Alternative Dispute Resolution are:

A) Arbitration
B) Conciliation
C) Mediation
D) Negotiation

LEGISLATION OF ADR IN INDIA
CODE OF CIVIL PROCEDURE

The Code of Civil Procedure, 1859 in its sections 312 to 325 dealt with Arbitration in suits while sections 326 and 327 provided for arbitration without court intervention. The Code of Civil Procedure 1908 has laid down that cases must be encouraged to go in for ADR under section 89(1). Under the First Schedule, Order XXXII A, Rule 3, a duty is cast upon the courts that it shall make an endeavour to assist the parties in the first instance, in arriving at a settlement in respect of the subject-matter of the suit.¹

The second schedule related to Arbitration in suits while briefly providing Arbitration without intervention of a court.² Order I, Rule 1 of the schedule says that where in any suit, all the parties agree that any matter in difference between them shall be referred to Arbitration, they may, at any time before judgement is pronounced apply to the court
for an order of reference. This schedule supplemented the provisions of Arbitration Act, 1899. The most important legislation in India with respect to Alternative Dispute Resolution Mechanism was The Arbitration and Conciliation Act, 1996. The government enacted The Arbitration and Conciliation Act, 1996 in an effort to modernize the 1940 Act. The preparation of a Model Law on Arbitration was considered the most appropriate way to achieve the desired uniformity. The full text of this Model Law was adopted on 21st June 1985 by UNCITRAL. In India, the Model Law has been adopted almost in its entirety in the 1996 Act. Its primary purpose was to encourage Arbitration and International Commercial Arbitration. It marked an epoch in the struggle to find an alternative to the traditional adversarial system of litigation in India. Arbitration, as practiced in India, instead of shortening the lifespan of the dispute resolution, became one more ‘inning’ in the game. Not only that, the arbitrator and the parties lawyers treated arbitration as “extra time” or overtime work to be done after attending to court matters. This resulted in elongation of the period for disposal.

MODES OF ADR IN INDIA
1. Arbitration- The definition of Arbitration in section 2(1)(a) reproduces the text of Article 2(a) of the model law- ‘Arbitration means an any arbitration whether or not administered by a permanent arbitral institution.’ It is a procedure in which the dispute is submitted to an arbitral tribunal which makes a decision which is known as an “award” on the dispute that is binding on the parties. It is a private, generally informal and non-judicial trial procedure for adjudicating disputes. There are four requirements of the concept of Arbitration:
   A) An arbitration agreement.
   B) A dispute
   C) A reference to a third party for its determination.
   D) An award by a third party.

Types of Arbitration:
A) Ad-hoc Arbitration- An ad-hoc arbitration is one which is not administered by an institution and therefore, the parties are required to determine all aspects of arbitration like the number of arbitrators, manner of their appointment etc provided that the parties approach the arbitration in a spirit of cooperation, ad-hoc proceedings can be more flexible, cheaper, faster than an administered proceeding.

B) Institutional Arbitration- An institutional arbitration is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as according to the rules of that institution. It is important to note that these institutions do not arbitrate the dispute, it is the arbitrators who arbitrate. Institutional arbitration throughout the world is recognized as the primary mode of resolution of international commercial disputes. It is an arbitration administered by an arbitral institution.4

The amended Arbitration and Conciliation Act 2015 has provided for a decrease in judicial intervention of the court process. It has narrowed down the scope of challenge to an arbitral award and has done away with the automatic suspension of the
arbitral award till the review of the courts was complete. Judicial intervention has been reduced by restricting the scope of pre-arbitration review by courts to a 'prime-facie' review of the existence of an arbitration agreement.5

2. Mediation- Mediation is a process in which the mediator, an external person, neutral to the dispute, works with the parties to find a solution which is acceptable to all of them. The basic motive is to provide the parties with an opportunity to negotiate, converse and explore options aided by a neutral third party, to exhaustively determine if a settlement is possible. The concept of mediation is not foreign to Indian legal system as there existed different aspects of Mediation. The Village Panchayat and Nyaya Panchayat are good examples of this. In India, mediation has not been popular. One of the main reasons for this is that mediation is not a formal proceeding and it cannot be enforced in a court of law.

3. Conciliation- Conciliation is a form of arbitration but it is less formal in nature. It is the process of facilitating an amicable resolution between the parties, whereby the parties to the dispute use conciliator who meets with the parties separately to settle their dispute. According to Section 62(1) of The Arbitration and Conciliation Act, 1996 ‘The party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of dispute.’ Conciliation proceedings shall commence if the other party accepts in writing the invitation to conciliate. The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute. The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.

4. Negotiation- Negotiation-communication for the purpose of persuasion is the pre-eminent mode of dispute resolution. Compared to processes using mutual third parties, it has the advantage of allowing the parties themselves to control the process and the solution. The essentials are:
A) It is a communication process
B) It resolves conflicts.
C) It is voluntary exercise.
D) It is non-binding process.
E) Parties retain control over outcome and procedure.

In India, negotiation doesn’t have any statutory recognition. Negotiation is self-counselling between the parties to resolve their dispute. Negotiation is a process that has no fixed rules but follows a predictable pattern.

PROBLEMS OF IMPLEMENTATION OF ADR IN INDIA

Any implementation is always conferred with problems. Some of the problems faced during implementation of ADR are:
1. Attitudes- Although Indian law favors dispute resolution by arbitration, Indian people has always abhorred the finality attaching to arbitral awards. Aid and abetted by the legal fraternity, the aim of every party to an arbitration is: “try to win if you can, if you cannot do your best to see that the other side cannot enforce the award for as long as possible.” An arbitration
award should only be permitted to be set aside for reasons extraneous to its contents—such as, lack of jurisdiction of the arbitrator, fraud or corruption of the arbitrator or fundamental miscarriage of justice in the conduct of arbitral proceedings. The spirit of ADR mechanisms is to create a WIN-WIN situation, but the attitude of the people is changing it into a WIN-LOSE situation.

2. Lawyer and Client Interests- Lawyers and client often have divergent attitudes and interests concerning settlement. This may be a matter of personality or money. In some circumstances, a settlement is not in the clients interests. Still, a satisfactory settlement is always in the clients interest. It is the inability to obtain such settlement, that impels a client to seek the advice of the counsel in the first place. The lawyer must consider not only what the client wants but also why the parties have been unable to settle their dispute.

3. Legal Education- Law schools train their students more for conflict than for the arts of reconciliation and accommodation and therefore serve the profession poorly. A serious effort to provide cheaper methods of resolving disputes will require skilled mediators and judges, who are trained to play a much more active part in guiding proceedings towards a fair solution. An understanding of the adversarial system, stare decisis, and the process of litigation remains critical. At the same time, students need to enhance their skills as negotiators and to appreciate. Law students also need to understand the suitability and advocacy issues in ADR at more sophisticated levels and to understand the important keys to problem solving.

4. Ignorance- One of the major reasons for the failure in implementation is the ignorance of the existing provisions of law. Legislators have made the necessary laws, but have never thought of implementing them at the grass-root level. They do not help in building up the awareness of those laws, so that people will utilize them. ADR mechanisms are well known only in the big business circles in India. Most of the educated elite are also unaware of the availability and possibility of such mechanisms in India. Ignorance of laws is not an excuse in our country.

5. Corruption- Corruption is not a new issue in our country. It has always been a virus to the nation and is sucking out the very purpose of independence. Today, not a single gets done without having to bribe the way through even in our legal system. ADR mechanisms have a great risk of being ridden by corruption. Thus, corruption can be a raging problem in ADR.

**CONCLUSION**

Because justice is not executed speedily men persuade themselves that there is no such thing as justice. Chief Justice said in his speech on Law Day, “I am pinned to observe that the judicial system in the country is on the verge of collapse. These are strong words I am using but it is with considerable anguish that I say so. Our judicial system is cracking under the weight of errors.” Arrears cause delays and delays means negating the accessibility of justice in true terms to the common man. Countless
rounds to courts and the lawyers chamber can turn any person insane. With the advent of Alternate Dispute Resolution, there is new avenue for people to settle their disputes. There is an urgent need for justice dispensation through ADR mechanisms. The ADR movement needs to be carried forward with greater speed. The recent trend is to shift from litigation towards Alternate Dispute Resolution. It is a very practical suggestion which if implemented, can reduce the workloads of civil courts by half. It is important here to mention the statement made my John F. Kennedy, “Let us never negotiate out of fear but let us never fear to negotiate.”
RIGHTS OF PRISONERS IN INDIA

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INTRODUCTION
The Supreme Court of India has been actively involved in responding to human rights violations committed in Indian jails and in the process has recognized a number of prisoners' rights by interpreting articles 21, 19, 22, 32, 37 and 39-A of the Constitution in a positive and human way. In order for a prisoner system to be regulated fairly and effectively, and on the basis of national legislation, policies and practices must be guided by international standards designed to protect the human rights of prisoners.

Who is a prisoner?
Any person who is kept under custody in jail or in prison in violation of any criminal and civil law for committing an act prohibited by law of the land. “prison” means any jail or place used permanently or temporarily under the general or special orders of a State Government for the detention of prisoners, and includes all lands and buildings appurtenant thereto, but does not include—
(a) any place for the confinement of prisoners who are exclusively in the custody of the police;
(b) any place specially appointed by the State Government under section 541 of the Code of Criminal Procedure, 1882; or
(c) any place which has been declared by the State Government, by general or special order, to be a subsidiary jail.\(^7\)

Promulgations and rules:
1. The Prisons Act, 1894:
This law is the first legislation on prison regulation in India. The following are some of the important provisions regarding the rights of the prisoner:
- Housing and sanitary conditions for prisoners.
- Provisions related to the mental and physical state of the inmates.
- Exam of inmates by a qualified medical officer.
- Separation of prisoners for men, women, criminals, civilians, convicted and under trial.
- Provisions for the treatment of trials, civil prisoners, probation and the temporary release of prisoners.

2. The Prisoners Act, 1990:
- It is the duty of the government to remove any prisoner detained under any order or sentence of any court, who has an unpleasant mind to an insane asylum and to another place where he receives adequate treatment.
- Any court that is a superior court may, in case it has recommended to the government the granting of a free pardon to any prisoner, allow it to be released to their own knowledge.

3. The Prisoners Transfer Act of 1950:

1.Prisons Act, 1894

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This act was enacted for the transfer of prisoners from one state to another for rehabilitation or vocational training and from overcrowded prisons to less congested prisons within the state.

4. Prisoners (assistance in court) ACT, 1955: This law contains provisions authorizing the removal of prisoners to a civil or criminal court for presenting evidence or responding to the accusation of a crime.

Issues of concern regarding prisoners in Indian

Indian judiciary has understood and recognized a long list of prisoner’s right in India. India has not codified rights for prisoners. These are:

- 80% of prisoners are in process
- Delay in the trial.
- Although bail is granted, prisoners are not released.
- Lack of or inadequate provision of medical care for prisoners
- Callous and insensitive attitude of prison authorities
- Punishment by the prison authorities is not compatible with the punishment granted by the court.
- Strong mental and physical torture
- Lack of adequate legal assistance
- Corruption and other bad practices.

RIGHTS OF PRISIONERS IN INDIA

The Indian legal society is based on non-violence of human rights and mutual respect of human dignity of individual. Codified prisoners rights are necessitated because of the human life. Conviction of a crime does not reduce a person from human being to non-human being so all the prisoners are entitle for an absolute humanitarian rights which are available to all citizen as well as prisoners.

The court which held a person, prisoner has a responsibility to ensure his rights during detention. According to William Black “Prisons are built with stone of laws” so when human rights are violated behind the bars, judiciary plays a prominent role of protector. No one shall be subject to torture or cruel, inhuman or degrading treatment of punishment.

It is felt that, all rights of the prisoners should be codified for the awareness in the State. Moreover, prisoners are not aware of these rights, or not aware of procedure thereof. V.R. Krishna Iyer (J) has rightly observed: “In our world prisons are still laboratories of torture, warehouses in which human commodities are sadistically kept and where spectrums of inmates range from drift-wood juveniles to heroic dissenters.

SC also said that there could be several factors that lead a prisoner to commit a crime but nevertheless a prisoner is required to be treated as a human being entitled to all the basic human rights, human dignity and human sympathy.

Right to Speedy Trial

The right to a speedy trial is a fundamental right of a prisoner implicit in Article 21 of

733 Universal Declaration of human Rights, 1948 article 1
734 M.P.v S.shyamsunder Trivedi (1994) SCC 395
the Constitution. It guarantees fair, fair and reasonable procedure. The fact that a speedy trial is also in the public interest or that serves the social interest as well, does not make it less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused be determined as quickly as possible under the circumstances. In Hussainara Khatoon case, there was a surprising state of affairs with regard to the administration of justice. An alarming number of men and women, including children, are held in prisons for years waiting to be tried in court. The crimes that were imputed to some of them were insignificant and, although proven, would not justify punishment for more than a few months, perhaps a year or two, and yet these unfortunate and forgotten examples of humanity were imprisoned and deprived of their freedom, for periods ranging from three to ten years without their trial being initiated.

The Honorable Supreme Court expressed its concern and said that:

What faith do these lost souls have in the judicial system that denies them a naked judgment for so many years and keeps them behind the bars, not because they are guilty: But they are too poor to pay bail and the courts do not have time to try them.736

Right against Solitary Confinement, Handcuffing & Bar Fetters and Protection from Torture.

Solitary confinement in a general sense means the separate confinement of an inmate, with only occasional access by any other person, and also at the discretion of the prison authorities. Strictly speaking, it means the complete isolation of a prisoner from all of human society. Torture is considered by the police / investigative agency to be a normal practice for verifying information about the crime, the accomplice, extracting the confession. Police officers who are supposed to be the protector of civil liberties of the citizens themselves violate the precious rights of citizens. But the torture of a human being by another human being is essentially an instrument to impose the will of the strong on the weak. Torture is a wound in the soul so painful that sometimes it can almost be touched, but it is also so intangible that there is no way to heal. A person detained or imprisoned on trial should not be subjected to a handcuff in the absence of justified circumstances. When it is discovered that the accused are educated persons, who selflessly dedicate their service to the public cause, have no tendency to escape and are tried and convicted of offenses, there is no reason to handcuff them while being taken from prison to court.

In D.K. Basu case, the Court which dealt with the letter addressed to the Chief Justice as a request for writing made the following order: In almost all states there are accusations and these allegations are increasing in the frequency of deaths in custody, generally described by newspapers as careless deaths. At present, there seems to be no mechanism to deal with such allegations. Since this is an all-India issue for all States, it is desirable that notices be issued to all State Governments to see if they wish to say anything about it. Let the notices issue to the entire State Government. Allow notification also to issue to the Indian Law Commission with a request that

736Hussainara Khatoon v/s. Bihar State

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337
appropriate suggestions can be made on the matter. Notification will be made returnable within two months from today. Custody torture is a naked violation of human dignity and degradation that largely destroys the individual personally. It is a calculated attack against human dignity and when human dignity is wounded, civilization recedes. Fundamental rights occupy a place of pride in the Indian Constitution. Article 21 provides that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. Personal freedom, therefore, is a sacred right and cherished under the Constitution. The term life or personal liberty has been considered to include the right to live with human dignity and, therefore, would also include in itself a guarantee against torture and assault by the State or its officials. Article 22 guarantees protection against detention and detention in certain cases and states that no detained person shall be detained without, being informed of the reasons for such detention and shall not be denied the right to consult and defend himself by a lawyer of his choice.

Therefore, the Court considered it appropriate to apply the following requirements in all cases of arrest or detention until legal provisions are taken on its behalf as preventive measure.

Right to meet friends and Consult Lawyer
The horizon of human rights is expanding. The rights of prisoners have been recognized not only to protect them from physical discomfort or torture in prison, but also to save them from mental torture. In PIL filled by Sunil batra, the Supreme Court recognized the right of prisoners to be visited by their friends and relatives. The court favored his visits but subject to the search and discipline and other criteria of security.

The court observed:
Visits to prisoners by relatives and friends are a consolation in isolation, and only a dehumanized system can derive vicarious pleasure in depriving prisoners of this human amenity. The Supreme Court ruled that the right to life and liberty includes the right to live with human dignity, so a detainee would be entitled to interviews with relatives, friends and lawyers without severe restrictions. The Court emphasized the need to allow prisoners to meet their friends and relatives. The court held that the prisoner or detainee could not move freely out of jail and could not socialize with people outside of jail.

The court said that:
Personal freedom would include the right to socialize with family members and friends subject, of course, to any valid prison regulations and under art. 14 and 21 such prison regulations should be reasonable and not arbitrary.

Right to Reasonable Wages in Prison
The remuneration, which is not less than the minimum wage, has to be paid to any person who has been requested to provide work or service by the state. The payment must be equivalent to the service provided; otherwise

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737 D.K. Basu v/s State of West Bengal
738 Article 22 of Indian Constitution
739 Sunil Batra (II) Vs. Delhi Administration 1980
740 Sunil Batra (II) vs Delhi Administration 1980
it would be "forced labor" within the meaning of Article 23 of the Constitution. There is no difference between a prisoner serving a sentence inside prison walls and a free man in society.

All convicted prisoners must be forced to work subject to their physical and mental fitness as medically determined. Work should not be conceived as an additional punishment, but as a means to promote the rehabilitation of prisoners, there training for work, formation of better work habits, and to prevent idleness and disorder. Punitive, repressive and distressing work in any form should not be given to prisoners. Work should not become heavy work and imprisonment. Work and training programs should be treated as important ways to impart useful values to the inmates for their vocational and social adjustment and also for their definitive rehabilitation in the free community. Wage rates must be fair and equitable and not merely nominal or insignificant. These indices should be, standardized to achieve broad uniformity in the wage system in all state and Union cash prisons.

Whenever during imprisonment, prisoners are forced to work in prison; They must be paid wages at a reasonable price. Wages should not be less than minimum wages.

In the case of MahammadGiasuddin v. State of A.P., the court ordered the State to take into account that wages should be paid at a reasonable rate. It should not be lower than the minimum wage, this factor must be taken into account at the end of the rules for the payment of wages to prisoners, as well as to give retroactive effect to the salary policy.741

In the case of the Popular Union for Democratic Rights v. Union of India, the Bank noted as follows: Therefore, we consider that when one person provides work or service to another or a remuneration that is lower than the minimum wage, the work or service that he/she provides clearly falls within the scope and scope of the words "forced labor" Article 23.742

In the same case, Thomas J said that fair wages payable to prisoners can be calculated after deducting expenses incurred by the Government in food, clothing and other services provided to prisoners from minimum wages set in the Minimum Wages Act, 1948. Wadwa J in the same case, held that the prisoner is not entitled to the minimum wages set in the Minimum Wages Act of 1948, but there must be a rational 7-foot base for the salaries of the prisoners.743

In the same year, the Honorable Supreme Court has held that the work taken from the prisoners without paying adequate remuneration was "forced labor" and a violation of Article 23 of the Constitution. Prisoners have the right to be paid a reasonable salary for the work done and the court is obliged to assert their claim. The Court took a step forward and said there are three types of payments: "fair wages", "living wages" and "reasonable wages". Prisoners must receive reasonable wages, which actually exceed minimum wage.744

Facilities in prison


742Peoples Union for Democratic Rights v. Union of India 1982 AIR 1473, 1983 SCR (1) 456

743State of Gujarat v Hon 'ble High Court of Gujarat, AIR 1998 SC 3164 (Para 45 and Para 77)

744Sanjit Roy v. State of Rajasthan, AIR 1983 SC 328
Right to food and water-The administration will provide all prisoners, at normal times, with food with adequate nutritional value for their health and strength, of a healthy quality and well prepared and served. And drinking water must be available to every prisoner when he needs it. Rule 20 of the "Minimum Rules for the Treatment"of Prisoners, 1957 "adopted by the UN and India is a party. Right to adequate housing-The Honorable Supreme Court has issued instructions to the State of UP, that wherever these arrests are stored the detained persons must be housed in a dungeon that will provide at least 40 square feet per person. Person with minimal facilities of some furniture such as a cradle for each of the detainees and supply of drinking water. Taking into account the climatic conditions of the place, the blockade must provide an electric fan. There must be hygienic arrangements for the bathroom. The State will guarantee the satisfaction of these conditions in any place where such arrests and detentions are used.745

Right to Expression
In Prabhakar Panduranga case, the court held that the right to personal liberty includes the right to write a book and get it published and when this right was exercised by a detained his denial without the authority of law violated Article 21.746
In the case of AUTO SHANKER CASE and others, the petition raises a question concerning press freedom in relation to the right to privacy of the citizens of this country. It also raises the question of the parameters of the right of the press to criticize and comment on the acts and conduct of public officials.747 The court held that petitioners have the right to publish what they claim to be the Auto Shankar's life / autobiography story to the extent it appears in public records, even without their consent or authorization. But if they go further and publish their life history, they may be invading their right to privacy and will be responsible for the consequences in accordance with the law. Similarly, the State or its officials cannot prevent or restrict such publication.

Right to Legal Aid
In the case of M.H. Wadanrao Hoskot v. State of Maharashtra, the Court held that the right to legal aid is one of the ingredients of fair procedure. The defence should never be refused legal aid of competent counsel. This implies that true and legal papers should be made available to defendant along with the service of counsel.748
Free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty.749 The requirement of the free legal aid, the Supreme Court has extended this right and directed the Government to provide financial aid also to the affiliated law colleges as the Government is providing to the medical and engineering colleges.750

745T.N.Mathur v State of UP, 1993( 1) SCC 722
746The state of Maharashtra v Prabhakar Panduranga 1985 SC 231
749Sukdas v. Arunachal Pradesh, AIR 1986 SC 991

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If, a prisoner is unable to exercise his constitutional and statutory right of appeal including Special Leave to Appeal for want of legal assistance, the court will grant such right to him under Article 142, read with Articles 21 and 39A of the Constitution.

Right to bail during the pendency of appeal

Refusal to grant bail amounts to deprivation of personal liberty of the accused persons. Personal liberty of an accused or convict is fundamental right and can be taken away only in accordance with procedure established by law. So, deprivation of personal liberty must be founded on the most serious consideration relevant to the welfare objectives of the society specified in the Constitution. In the circumstances of the case, the court held that subject to certain safeguards, the appellants were entitled to be released on bail.

All the undertrial prisoners, who have been in remand for offences other than the specific offences under the various Acts, who have been in jail for period of not less than one half of the maximum period of punishment prescribed for the offence shall be released on bail forthwith in accordance with the direction of the Supreme Court.

The court also directed that all the district judges shall regularly visit the Central Jails, District Jails, and sub-jails in their jurisdiction and take appropriate action as per the provisions of the Code.

UN NELSON MANDELA RULES
(Revised STANDARD MINIMUM RULES-SMR)

Standard minimum rule for treatment of prisoners first adopted in 1957 and revised in 2015 as Nelson Mandela rules. These rules are a key standard for treatment of prisoners all over the world and are widely used and still playing a major development role in human rights. The revised SMR were adopted by UN General Assembly on 17 December 2015.

Eight substantive areas were revised:
- Respect for prisoners inherent dignity
- Medical and health services
- Training of staff
- Complaints and independent inspection
- Access to legal representation
- Protection of vulnerable groups
- Investigation of death and torture in custody
- Disciplinary measures and sanctions

Conclusion

All human beings are born independent, free and equal in dignity and rights. They are endowed with reason and conscience and should act accordingly, living in a high spirit of love and brotherhood. The practice of torture in prison has been widespread and predominant in India since time

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751 Babu Singh v. State of UP, AIR 1978 SC 527
754 UN-DOCA/Res/70/175

www.supremoamicus.org
341
immemorial. Unchallenged and unrestricted, it has become a ‘normal’ and ‘legitimate’ practice all over. In the name of investigating crimes, extracting confessions and punishing individuals by the law enforcement agencies, torture is inflicted not only upon the accused but also on bona fide petitioners, complainants or informants amounting to cruel, inhuman, barbaric and degrading treatment, grossly derogatory to the individual dignity of the human person. Torture is also inflicted on women in the form of custodial rape, molestation and other forms of sexual torture. Supreme Court again in has held that right to fair treatment and right of judicial remedy are pre-requisites of administration of prison justice.\textsuperscript{755}

Beside improving the service and working condition of the prisoner staff, what is needed is the introduction of mechanisms that would ensure an element of transparency and accountability in the prison administration.\textsuperscript{756}

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\textsuperscript{755} R.D. Upadhyay's V. state of A.P 2001 SCC 437
\textsuperscript{756} KAPOOR COMMITTEE ON PRISONS REPORT 1986
EVIDENTIARY VALUE OF NARCO-ANALYSIS

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ABSTRACT
As science has outpaced the development of law there is unavoidable complexity regarding what can be admitted as evidence in court. Narco-Analysis is one such scientific development that has become an increasingly common term in India. Recent times have witnessed a spate in the use of modern scientific techniques such as the lie detector, brain-mapping and Narco-Analysis, for use in criminal investigation. Although the legal and ethical propriety of their use has been in doubt, they may in fact be a solution to many a complicated investigation. Narco-Analysis has been the most debated topic amongst the legal fraternity, media and common masses. With recent advent of technologies in every sphere of life, criminal investigation is no more left out of its effects. Narco-Analysis is one of such scientific forms of investigation in which some sort of statement from the accused is acquired which might form an evidence. The Evidence Act is completely silent on such employment of scientific process.

INTRODUCTION
The term Narco-Analysis was introduced in 1936 for the use of Narcotics to induce a trance-like state wherein the person is subjected to various queries. The term Narco-Analysis is derived from Greek word ‘narke’ (meaning anesthesia or torpor) and is used to describe a diagnostic and psychotherapeutic technique that uses psychotropic drugs, particularly barbiturates, to induce a stupor in which mental elements with strong associated affects come to the surface, where they can be exploited by the therapist. The term Narco-Analysis was coined by Horselley. The Narco-Analysis test is based on the principle that a person is able to lie using his imagination and, under the influence of certain barbiturates, this capacity for imagination is blocked or neutralized by leading the person into a semi-conscious state. It becomes difficult for the person to lie and his answers would be restricted to facts he is aware of. The statements made by the accused are recorded on audio and video cassettes, and the report of the expert is helpful in collecting evidence. The use of such drug in police work or interrogation is similar to the accepted psychiatric practice of Narco-Analysis and the only difference in the two procedures is the difference in the objectives. Narco-analysis is also known as the truth serum test. An injection known as Thiopentone is used for one such test. Its chemical name is sodium pentathol and it is mixed in distilled water before being administered to the accused. Narco-analysis is also known as the truth serum test. An injection known as Thiopentone is used for one such test. Its chemical name is sodium.
pentathol and it is mixed in distilled water before being administered to the accused.

**UTILITY IN INVESTIGATIVE PROCESSES**

The scientific tests may be employed in two ways, that is, they may directly be used as evidence in court in a trial or they may be used merely as clues for investigation. Where the tests involve the making of a statement, they may be directly adduced in evidence, provided they do not amount to a confession because proof of a confession before a police officer or in the custody of a police officer is prohibited. However, if the statements are merely admissions, they may be adduced in evidence. Alternately, where no statement has been made or the statement cannot be adduced without an interpretation of the report prepared at the end of the test, the results of the test as interpreted by an expert may be furnished to the court. A third alternative is whereby the statements may be used as proof of the specific knowledge of the accused with regard to those facts, information about which has resulted in subsequent discoveries during the course of the investigation. Lastly, they may be used merely as clues for the investigation, where the statements are not adduced at all in evidence. However, the evidence gathered from the investigation is independently used in evidence, without the statements.

**NARCO-ANALYSIS VIS-À-VIS THE EVIDENCE ACT**

Expert evidence and criteria for appreciation

The Evidence Act permits evidence of the opinion of persons (called ‘experts’ under the Act itself) especially skilled upon a point of foreign law, science, art, or as to identity of handwriting or finger impressions, the opinions upon that point. Expert evidence is appreciated based on several factors such as the skill of the expert and the exactness of the science as stated in PratapMisra v. State of Orissa. If the science itself is imprecise, expert opinion is only of corroborative value and insufficient to secure a conviction by itself. In Shashi Kumar Banerjee v. Subodh Kumar Banerjee, wherein the Supreme Court held that an expert’s evidence as to handwriting being opinion evidence can rarely, if ever, take the place of substantive evidence. The question which then arises is regarding the credibility of the evidence gathered from the Narco-Analysistests, which is studied from a twofold perspective, firstly, as perceived by the scientific community, and secondly, as perceived by the courts.

**ACCEPTABILITY OF NARCO-ANALYSIS**

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759Sections 25-26 of the Evidence Act, 1872
760Section 17 of the Evidence Act, 1872 defines admission as a statement, oral or documentary or contained in electronic form which suggests any inference as to any fact in issue or relevant fact.
761Section 27 of the Evidence Act, 1872 states that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.
762Section 45 of the Evidence Act, 1872
763State v. S.J. Choudhary, (1990) 2 SCC 481, para 8; 1990 SCC (Cri) 364.
764(1977) 3 SCC 41, para 5: 1977 SCC (Cri) 447.
765AIR 1964 SC 529.

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Admissions and confessions
In the lie detector test, the accused is not obliged to make a statement, as he may choose not to answer the question at all. However, the statements in fact made under the scientific tests may be classified into admissions or confessions, as they suggest an inference as to a fact, including a blanket denial of any knowledge of the crime, or the statement may substantively admit to the commission of the crime itself. Confessions made to the police by way of such statements are inadmissible in evidence as no confession made to a police officer or in the presence of a police officer is admissible, unless made in the immediate presence of a Magistrate. The only event in which they may be admissible is when they are made before a Magistrate. Before a confession is made before a Magistrate, the Magistrate is to explain to the subject that he is not bound to make such a confession and the Magistrate may only record it if he believes that it is being made voluntarily. The Narco-Analysis test, on the other hand proactively involves the making of statements by the accused. However, a Magistrate would not record the statements as they are involuntary and induced and also not reliable as held in the case of Balbir Singh v. State of Punjab. They may be useful for investigative purposes as the latter inherently entail a significant bit of trial and error work, but they may not be perfectly accurate all the time to be recorded as evidence and relied for conviction.

Admissions made to police officers are admissible in evidence. This causes problems with the lie detector and brain-mapping tests as the police may prefer a longer investigation. Admissions nevertheless, are caught by the general rule stating that no statement made in course of an investigation, even if reduced to writing, is to be signed by the maker. Further, even if the statement is oral, and the factum of its being made to a police officer is proved, it cannot be used as evidence.

The last way of offering any statement in evidence, whether confession or not, is by adducing it alongside a discovery made pursuant to the statement. This makes it a cakewalk for the investigation as it can conduct Narco-Analysis and discover all the incriminating material that is required, and offer the statement in conjunction with the recovery. However, a recovery under Section 27 will not be admissible if compulsion has been used in obtaining the information leading to it. The possibility of the element of compulsion under the Narco-Analysis test has been recognized if the statements made under its influence are sought to be adduced in evidence and if they are incriminatory, in which case they are to be excluded. This conclusion shall restrict the application of Section 27 of the Evidence Act which allows adducing statements made to police officers if they are supported by subsequent discoveries such that statements made under the influence of Narco-Analysis shall be excluded as coerced. However, whether the discoveries made pursuant to those statements shall also

766 Section 25 of the Evidence Act, 1872.
767 Section 24 of Evidence Act.
769 AIR 1957 SC 216: 1957 Cri LJ 481.
be excluded has not been assessed by the judiciary.

Till today, due to the lack of a final and clear-cut judgment on the same, illegally or falsely obtained evidences are still admissible in the court, and regretfully the court still accepts them as proper evidence. The same can be said for Narco-Analysis and brain mapping as they are techniques of obtaining evidence in an illegal manner, without the consent of the accused. The condition continues from Malkani case771 to State (NCT of Delhi) v. NavjotSandhu772 where the illegality of the evidence is not taken into consideration at all. The clear violation of Article 20(3) by such Narco-Analysis which strikes even the commoner in the face is completely ignored and neglected by what the country calls the Seat of Justice.

ARGUMENTS AGAINST GIVING EVIDENTIARY VALUE TO NARCO-ANALYSIS

The Constitution of India has clearly stated that a person cannot be compelled to be a witness against himself, 773 and therefore, any statement given during the Narco-Analysis test cannot be considered evidence in the constitutional framework of the country. In fact, studies have shown that sometimes the subject (person undergoing the test) gives false statements during the test. If the test was given evidentiary value, the police would harass innocent persons under the garb of tackling terrorism.774 The principle of the Indian legal system is based on the fact that until proved guilty, a person is innocent and we cannot convict an innocent even if we need to surrender hundred criminals. With such objectives in mind subjecting a person to Narco-Analysis without his consent will be surely undermining his individual rights which are absolutely negating the principle of a right based society.

Narco-Analysis is carried out only after a detailed medical examination of the accused. If the accused is found medically fit to undergo the procedure, then only will it be done, otherwise not. However, it has been argued in various cases that sodium pentathol or sodium amytal is a barbiturate and thus has ill effects on the body.

The use of evidence obtained under duress has been prohibited by the Human Rights Committee by stating - the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment. The Committee has further stated that, the law should require that evidence provided by any form of compulsion is wholly unacceptable.

In India Article 20(3) and Section 161(2) of the Code of Criminal Procedure protect the accused from self-incrimination. Article 20(3) and Section 161(2) of the Code of Criminal Procedure states, No person accused of any offence shall be compelled to be a witness against himself and such person shall be bound to answer truly all questions

773 Article 20(1) of the Constitution of India.
774 Narco-Analysis Test has No Evidentiary Value, Indian Express, 27-9-2009.
relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture respectively. In Nandini Sathpathy v. P.L. Dani775, it was held that no one could forcibly extract statements from the accused that have the right to keep silent during the course of interrogation or investigation. However Article 20(3) can be waived of by a person himself.

Section 45 of the Evidence Act, 1872 does allow expert’s opinions in certain cases. However, this section is silent on other aspects of forensic evidence that can be admissible in court in criminal proceedings. Section 161(2) of the Criminal Procedure Code also provides that every person is bound to answer truthfully all questions, put to him by [a police] officer, other than questions the answers to which would have a tendency to expose that person to a criminal charge, penalty or forfeiture. Hence, Article 20(3) of the Constitution and also Section 161(2) of the Code of Criminal Procedure enshrine the right to silence. To judge whether statement given is confession or not, is by adducing it alongside a discovery made pursuant to the statement. Some writers are in opinion that in cases where an incriminatory set of statements is additionally backed by discoveries which are sufficient to incriminate the accused independently of the statements, then the discoveries too should be excluded from evidence. This is because the discoveries, which comprise all the evidence that is required for conviction, directly follow from incriminatory statements of the accused. However, where the discoveries are not sufficient to result in incrimination, but only amount to evidence of some facts against the accused, they may be admissible in evidence, as they are merely the equivalent of admissions as they require collection of additional evidence.

ARGUMENTS FOR GIVING EVIDENTIARY VALUE TO NARCO-ANALYSIS

In United States v. Solomon777 there was a detailed discussion on the topic of Narco-Analysis. In this case the expert opinion given to the Court established that truth serum is generally accepted as an investigative technique. It need not be said that prevention of crime and punishment for the crime are the duties of the State. Fetters on these duties can be put only in extreme cases where the protection of fundamental rights weigh more than the fundamental duty cast on the State moreover every person is required to furnish information regarding offences.778

Protection against self-incrimination was instrument for the protection of the innocent and not intended for the acquittal of the guilty. The framers of the Bill of Rights believed the rights of society were paramount to the rights of the criminal. Believing in the same principle in a spate of high-profile cases, such as those of the Nithari killers, the Mumbai train blasts, Aarushi murder case, Malegaon blasts and the most recent Mumbai blasts case suspects have been made to undergo Narco-Analysis, drugged with the sodium pentathol.

775 (1978) 2 SCC 424 : 1978 SCC (Cri) 236.
777 753 F 2d 1522 (9th Cir 1985).
778 Section 39 of the Code of Criminal Procedure.
Judiciary and the State Government seem to have supported this practice. Furthering its support the Supreme Court has held that the right to life includes right to health but subjecting a person to a scientific test as part of investigation will not amount to denial of health. Therefore it will not amount to denial of reasonable and just procedure as held in the case of State of Punjab v. Mohinder Singh Chawla.779

In today’s complex social milieu with proliferating crimes against the society and the integrity of the country, it is necessary to keep in mind the interest of the society at large and the need for a thorough and proper investigation, as against individual rights, while ensuring that the individual constitutional rights are not infringed. If these tests are properly considered to be steps in the aid of investigation and not for obtaining incrimination statements, there is no constitutional infirmity whatsoever. Section 53 of the Criminal Procedure Code accords the requisite statutory sanction for conducting these tests.

The Bombay High Court, in a significant verdict in Ramchandra Ram Reddy v. State of Maharashtra780, upheld the legality of the use of P300 or brain-mapping and Narco-Analysis test. The Court also said that evidence procured under the effect of Narco-Analysis test is also admissible. As crimes going hi-tech and criminals becoming professionals, the use of Narco-Analysis can be very useful, as the conscious mind does not speak out the truth, unconscious may reveal vital information about a case.781 The judgment also held that these tests involve minimal bodily harm.

SurenderKoli, main accused in the Nithari case, was brought to Forensic Science Laboratory in Gandhinagar in January 2007 for Narco-Analysis. Polygraph test was conducted on Moninder Singh Pandher and his servant SurenderKoli, accused of serial killing of women and children in Nithari, to ascertain the veracity of their statements made during their custodial interrogation. Various confessional statements were made by the accused under the effect of the drug, he could remember the names of the females he had murdered and revealed his urge to rape them after murdering them.

Post Selvi case: highlighting the present position In Selvi v. State of Karnataka782, the Supreme Court rejected the High Court’s reliance on the supposed utility, reliability and validity of Narco-Analysis and other tests as methods of criminal investigation. First, the Court found that forcing a subject to undergo Narco-Analysis, brain-mapping, or polygraph tests itself amounted to the requisite compulsion, regardless of the lack of physical harm done to administer the test or the nature of the answers given during the tests. Secondly, the Court found that since the answers given during the administration of the test are not consciously and voluntarily given, and since an individual does not have the ability to decide whether or not to answer a given question, the results from all three tests amount to the requisite

780 2004 All MR (Cri) 1704.
781 Syed TazkirInam, Scope of Narco-Analysis in Criminal Investigation.
782 (2010) 7 SCC 263.
compelled testimony to violate Article 20(3).

The Supreme Court found that Narco-Analysis violated individual’s right to privacy and amounted to cruel, inhuman or degrading treatment. Article 21 protects the right to life and personal liberty, which has been broadly interpreted to include various substantive due process protections, including the right to privacy and the right to be free from torture and cruel, inhuman, or degrading treatment. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted in accordance with Section 27 of the Evidence Act. The Supreme Court left open the possibility for abuse of such tests when it provided a narrow exception, almost as an afterthought, namely, that information indirectly garnered from a voluntary administered test i.e. discovered with the help of information obtained from such a test can be admitted as evidence. The power of the police to coerce suspects and witnesses into voluntarily doing or not doing certain things is well known. It is highly probable that the same techniques will be applied to get suspects or witnesses to agree to Narco-Analysis and other tests, resulting in a mockery of the essence of the Supreme Court’s judgment.

**CRITICISM OF NARCO-ANALYSIS TEST AS AN EVIDENCE**

Narco-Analysis has been criticized on the ground that it is not hundred per cent accurate. It has been found that certain subjects made totally false statements. It is often unsuccessful in eliciting truth as such it should not be used to compare the statement already given to the police before use of drug. It has been found that a person has given false information even after administration of drug. It is not much help in case of malingerers or evasive, untruthful person. It is very difficult to suggest a correct dose of drug for a particular person. The dose of drug will differ according to will power, mental attitude and physique of the subject. Successful Narco-Analysis test is not dependent on injection.

For its success a competent and skilled interviewer is required who is trained in putting recent and successful questions. Narco-Analysis test is a restoration of memory which the suspect had forgotten. This test result may be doubtful if the test is used for the purposes of confession of crimes. Suspects of crimes may, under the influence of drugs, deliberately withhold information or may give untrue account of incident persistently. Narco-Analysis is not recommended as an aid to criminal investigation. In medical uses like in treatment of psychiatric disorder Narco-Analysis may be useful. Unless the test is conducted with the consent of the suspect it should not be used in criminal investigation.

**NARCO ANALYSIS IN INDIA**

A few democratic countries, India most notably, still continue to use narco analysis. This has come under increasing criticism from the public and the media in that country. Narco analysis is not openly permitted for investigative purposes in most developed and/or democratic countries. In India, the narco analysis test is done by a team comprising of an anesthesiologist, a

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psychiatrist, a clinical/ forensic psychologist, an audio-videographer, and supporting nursing staff. The forensic psychologist will prepare the report about the revelations, which will be accompanied by a compact disc of audio-video recordings. The strength of the revelations, if necessary, is further verified by subjecting the person to polygraph and brain mapping tests.

Narco analysis is steadily being mainstreamed into investigations, court hearings, and laboratories in India. However, it raises serious scientific, legal, and ethical questions. These need to be addressed urgently before the practice spreads further. Narco analysis has become an increasingly, perhaps alarmingly, common term in India. It refers to the process of psychotherapy conducted on a subject by inducing a sleep-like state with the aid of barbiturates or other drugs. In a spate of high profile cases, such as those of, the Nithari killers and the Mumbai train blasts, suspects have been whisked away to undergo an interview drugged with the barbiturate sodium pentothal.

**SUGGESTION**

It has become absolutely necessary for the State Governments to work with the Central authorities to enhance the investigative capabilities of their police departments. The Indian criminal justice system has an alarmingly low conviction rate and the situation needs to be rectified with emphasis on real science and state-of-the-art technology. The Central Government must make a clear policy stand on Narco-Analysis. The legal system should imbibe developments and advances that take place in science as long as they do not violate fundamental legal principles and are for the good of the society. Narco-Analysis for criminal interrogation has proved to be a valuable technique, which profoundly affects both the innocent and the guilty and thereby hasten the cause of justice which has seen in various cases like the Aarushi murder case, Nithari killings case, Telgi scam and Mumbai blasts case. Courts in India have taken into account an incomplete consideration of the law, which is the reason for their conclusion in favour of the tests. While the tests may be a practical necessity, the sanction of the law for some of them is difficult to find, and extensive safeguards need to be laid out to prevent their abuse. It is time for our legislature and judiciary to act immediately for the sake of justice and fair procedure to bring Narco-Analysis within the scope of Article 20(3) of the Constitution.

**CONCLUSION**

The manner in which modern-day criminals make use of science and technology in perpetrating their criminal activities with relative impunity has compelled rethinking on the part of the criminal justice establishment to seek the help of the scientific community to come to the help of the police, prosecutors and the courts. The criminal procedure, rules of evidence, and the institutional infrastructure designed more than a century ago, are now found inadequate to meet the demands of the scientific age. The absence of a national policy in criminal justice administration in this regard, is felt to be a serious drawback. The Evidence Act may need to be amended to make scientific evidence admissible as substantive evidence rather than opinion
evidence and establish its probative value, depending on the sophistication of the scientific discipline concerned.
RIGHTS OF CHILDREN AGAINST SEXUAL OFFENCES

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Abstract:
Child Sexual Abuse(CSA) is a social evil existed in all societies for centuries. It is the sexual exploitation and victimization of a child by an adult, adolescent, or other child. Despite the gender, religion, class, caste, education barriers child sexual abuse takes place irrespective of background of the abuser and the child which amounts to serious forms of human rights violation. Almost 30-50% children are abused by persons known to them as relatives, family friends, neighbours, drivers, watchmen, religious leader, etc... In India, before the emergence of POCSO( Protection Of Children From Sexual Offences Act,2012) the ordinary criminal laws are totally inadequate to protect the children, where sec 375 of IPC deals with sexual offences against women and not for children. The recording of the statements of child victims need special provision in Crpc. These sections do not include the common forms of child sexual abuse nor their impact on the children. This article exclusively covers the legal rights of children favouring protection against sexual offences in both national and international path ways. Moreover, the author would be suggesting some recommendations for the effective prohibition of child sexual abuse.

1. Introduction:
One child goes missing every eight minutes in our country or seven children every hour. 331 children went missing in India’s capital between 1st June and 1st July 2001 according to zonal integrated peace network. It was defined by the standing committee on sexually abused children that, “Any child below the age of consent may be deemed to have been sexually abused when a sexually matured person has by design or by neglect of their usual societal or specific responsibility in relation to the child engaged or permitted engagement of that child in any activity of a sexual nature which is intended to lead to the sexual gratification of the sexually matured person”.

The NSW child protection council definition states, “Child sexual assault occurs when an adult or someone bigger than a child uses his power or authority over the child and takes advantage of the child’s trust and respect to involve the child in sexual activity. Inherent in the various definitions are concepts of violation of trust, abuse of power, the child inability to consent, age difference between the abuser and the child, the cognitive, emotional, psycho-sexual development level of the child and the sexual intent of gratification. Thus sexually abusive acts against children encompass a range of behaviours along the non-contact continuum.”

2. Historical perspective:
Child sexual abuse has been in society as long as the society existed. While girls are more vulnerable to being sexually abused against popular belief, boys too are victims. The selling off of girls for prostitution or even for the religious and cultural practices

785 http://www.childlineindia.org.in/Understanding-Child-Sexual-Abuse.htm
happened during those ancient times. Those practices were ceased to exists even in this era.

2.1. Devadasi system:
Its a religious practice in parts of southern India whereby parents marry a daughter to a deity or a temple. The marriage occurs before the girl reaches puberty and requires the girl to become a prostitute for upper caste members. Here, the girl child got abused both mentally and physically losing its entire childhood.

2.2. Child marriage:
A marriage where the woman is below age 18 or the man below 21 is said to be child marriage. Most child marriages involve under aged woman because of their poor socio-economic condition. Being a child, it is impossible for them to secure a family and most prominently they have no mental maturity to enter into sexual life.

2.3. Child prostitution and trafficking:
The prostitution of children is seen as a part of the commercial sexual exploitation of children(SEC) and is sometimes connected to the trafficking of children for sexual purposes and to child pornography. In those days, they were treated as slaves and trafficked for sexual purposes.

3. Statistical perspective:
India is a home to 19% of children. For every 115th minute a child less than 16 years is raped, for every 13th hour a child under 10 and one in every 10 children is sexually abused at any point of time.787

Most CSA cases are unreported. According to research studies over 7,200 children, including infants are raped every year788. The number of cases registered for child sexual abuse raised from 8,904 in the year 2014 to 14,913 in the year 2015, under the POCSO act789. 94.8% of rape cases saw children being raped by someone they knew, not strangers. These acquaintances include neighbours(3,149) who were the biggest abusers (35.6%). 10% of cases saw children being raped by their own direct family members and relatives790. About 488 cases saw the victim raped by their own father, brothers, etc...It is also said one in four families do not come forward to report child abuse.

The latest data add to this, finding that 25% of rapes of children in the year 2015 were committed by their employers and co-workers791. In child labour cases, boys are abused as frequently as girls according to 2007 study conducted along with the ministry of women and child development.

4. National measures:
4.1. Indian Penal Code:
Before the POCSO act, 2012 the cases of child sexual offences are governed under the Indian penal code, 1860.

- Sec 375: It doesn’t protect male victims or anyone from sexual acts of penetration other than traditional peno-vaginal intercourses.
- Sec 354: It lacks a statutory definition for the term “modesty”. It carries a weak

787 The number of CSA cases raised from 8,904 in the year 2014 to 14,913 in the year 2015 under the POCSO act.
790 Ibid.
791 Ibid.
penalty and is a compoundable offence. Further, it does not protect the modesty of a male child.

- Sec 377: The term “unnatural offences” was not defined. It applies only to the victims penetrated by their attacker’s sex act and is not designed to criminalise sexual abuse of children. Thus, IPC section lack in penalties and provisions favouring to those children who are traumatized sexually.

4.2. Justice Verma committee:

It is the committee headed by Justice J.S.Verma, former chief justice of India. This committee constituted immediately after the brutal gang rape of a medical student in Delhi on 16th Dec 2016 to recommend amendments to the Criminal Law so as to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault against women and children.

The committee submitted its report on 23rd Jan 2013. It made recommendations on laws relating to rape, sexual harassment, trafficking, child sexual abuse, medical examination of victims, police, electoral and educational reforms.

Owing emphasis to sexual assault of children the committee recommended that the terms ‘harm’ and ‘health’ be defined under juvenile Justice act,2000 to include mental and physical harm and health respectively of the juveniles.

4.3. POCSO ACT, 2012:

The parliament of India passed the Protection of children from sexual offences bill in the year 2011 to enact a new law for children in order to prevent them from sexual offences. As per the bill POCSO(Protection Of Children from Sexual Offences) act came into force on 19th June,2012.

The act defines child as any person below 18 years of age. It defines different forms of sexual abuse, including penetrative and non-penetrative assault as well as sexual harassment and pornography. Under this act serious penalties/punishments were imposed for aggravated forms of sexual assault such as when the child is mentally ill or when the abuse is committed by a person in a position of trust or authority like family member, police officer, teacher or doctor etc.

It is made compulsory for the Special Juvenile Police(SJPU) or the local police to report the matter to the Child Welfare Committee (CWC) within 24 hours of recording the complaint, for long term rehabilitation of the child. The act further makes provisions for avoiding the re-victimization of the child at the hands of judicial system. It provides for special courts that conduct the trial in-camera and without revealing identity of child.

Above all the act provides for mandatory reporting of sexual offences against children. It stipulates that a case must be disposed within one year from the date the offence is reported.

4.4. NCPCR:

The National Commission for Protection of Child Rights was set up in March,2007 as a

792Parliament passes bill - protect children from sexual offences, NDTV,22nd May 2012.
statutory body under the commission for protection of child rights act,2005. The mandate of the commission is to monitor all laws, policies, programmes and administrative mechanisms in the country, to ensure that the rights of child as enshrined in the constitution of India and also the UN convention on the rights of child(UNCRC) are protected.

The NCPCR also mandated to monitor the implementation of Juvenile Justice(care and protection)act,2000 and POCSO act,2012 and finally Rights of Children to Force and Compulsory Education act,2009.Both NCPCR and SCPCR have been made the designated authority to monitor the implementation of these aforesaid acts.

Considering the large number of cases relating to CSA being reported in media every day, NCPCR developed a POCSO e-box, an easy and direct online medium for reporting cases of CSA under POSCO act. Through this mechanism, NCPCR reduces the burden of reporting the crime against children.

4.5.Role of NGO’s:
4.5.1. CHILDLINE: CHILDLINE has come a long way today, by becoming a nationwide emergency helpline for children in distress. It is a platform of bringing together the ministry of women and child development, government of India, department of telecommunication, street and community youth, non-profit organisation, academic institutions, the corporate sector and concerned individuals. CHILDLINE provides a tool free number 1098 with 24 hours service for children in need of aid and advice.

4.5.2. Tulir : Tulir is a centre for the prevention and healing of child sexual abuse(CPHCSA) is a registered non-governmental, non-profit organisation constituted working against child sexual abuse in India. They provide training programs on personal safety education to children, multi-disciplinary approach is the therapeutic services for abused children and is premised on the holistic caring, healing and teaching model, along with socio-legal assistance.

5.International measures:
5.1.UNCRC:
The United Nations Convention on the Rights of the Child (CRC or UNCRC) is a human rights treaty which sets out the civil, political, economic, social, health and cultural rights of children. It came into force on 2nd Sep 1990. Under this convention, Ar.34 says that children and the young people have the right to be protected from sexual abuse.

Under this article the UNCRC emphasis the point that being married before being legally old enough is a form of sexual abuse. So it is the duty of the government to protect their rights and to ensure that their rights have been protected.

5.2.UNICEF: According to United Nations International Children’s Educational Fund study

793 3 Louis Engel Brecht and Anita Pecson, Preventing and healing sexual offences,2000.
794 http://www.cypes.org.uk.
conducted in the year 2014 estimates that around 20 million girls under age 20 (about 1 in 10) have been subjected to forced sexual intercourse or other forced sexual acts at some point of other lives.

As part of UNICEF’s commitment to CRC, optional protocol on sale of children, child prostitution and child pornography and the Rio de Janeiro declaration and call for action to prevent and stop sexual exploitation of children and adolescents.

UNICEF works to prevent and respond to sexual violence by engaging different government sectors and supports the government in strengthening the child protection systems at national and international levels. It also works with committees and general public to raise awareness about the problem and address attitudes, norms and practises that are harmful to children.

5.3. UDHR:
According to Universal Declaration of Human Rights, a child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection before as well as after birth. Whereas, the need for such special safeguards has been stated in the Geneva declaration of the rights of child of 1924 and recognized in the UDHR. Certain principles were given under this declaration to protect the rights of the child. Some of them are,

- The child shall enjoy all the rights set forth in this declaration irrespective of race, colour, sex, language, religion, political and other opinion.
- The child shall enjoy special protection and shall be given opportunities to enable him to develop physically, mentally, morally and socially in a healthy and normal manner.
- The child shall be protected against all forms of neglect, cruelty and exploitation.

6. Regional convention:
The council of Europe legal instrument have proposed many conventions. For example, the European social charter, convention on cyber crime, council of Europe convention against trafficking in human being. Among them the council of Europe convention on the protection of children from sexual exploitation and abuse gives special attention in protecting children and young people against violence or exploitation.

This convention was also known as “Lanzorote convention” which was the first international instrument to cover various forms of sexual abuse against children as a criminal offence.

7. International tribunal:
The international tribunal for children’s rights was founded by International Bureau for Children’s Rights (IBCR) in 1995 was a moral not a formal legal institution responsible for investigating children’s rights, violations and proposing concrete solutions to the problem.

The tribunal collected testimonies from children, international children’s rights specialists, and experts in the field of humanitarian aid, human rights, psychiatry. In its capacity as the founders of the
tribunal the international bureau for children’s rights oversaw the discrimination and implementation of the recommendations from the tribunal.

8. Conclusion:
Rights of the children against sexual abuse can be protected through these legal frameworks available for them universally. It is not only the duty of the government, but also the people whom the child would trust the most should have proper awareness and knowledge to secure a child. If once, people started reporting fearlessly about a child being sexually abused, then there comes the digital India, ruining the myth called culture. So, each and every child irrespective of their disabilities could enjoy their childhood peacefully.

9. Suggestion:
Though there exists Juvenile Justice Board (JJB) and Mahila courts to protect and to deal children from heinous offences there is no particular tribunal for children to assist them. Generally ‘tribunals’ is an administrative body established for the purpose of discharging quasi-judicial duties. It is neither a court nor an administrative body. There would be no delay in justice administration if this tribunal got initiated for children in national level.

Depending upon the international tribunal alone does not give any justice for children under sexual violence in India. So, the immediate measure is to create National Children’s Tribunal. The most satisfying thing was that the recent judgment, in a case where a 7 year old girl was brutally raped and burnt by her neighbour in Tamil Nadu got death sentence within a year as per POCSO act and many other provisions under IPC. It implies that justice was still alive. Verdicts like this, turns to be an alarm for those offenders, who destroy the young souls for their sexual needs.

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796Kailash Sathyarti bats for-national children’s tribunal, Indian Express, New Delhi, 17/10/2017.
797Engineer sentenced to death-in TN, CNN news 18,Feb 19, 2018.
SEXUAL MISTREATMENT OF CHILDREN: A UNIVERSAL EPIDEMIC

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ABSTRACT:
Sexual abuse has always been a difficult subject to talk about, and when it comes to child sexual harassment it even becomes worse. Child sexual abuse is an epidemic no one talks about. It may be easier to live in denial but child abuse happens everywhere in your neighbourhood, in family, in institutions. Whether or not there is at least one case of child abuse in our surrounding. While great awareness and voice has been raised about sexual exploitation against women in India, much less is known about the problem of sexual abuse of children. A survey by United Nations International Children Education Fund (UNICEF) on demographic and health was conducted in India from 2005 to 2013, which reported that nearly 42% of Indian girls have gone through the trauma of sexual violence before their teenage. Childhood sexual abuse is a traumatic experience not only affect the lives of the victims but those close to the victims as well. When sexual abuse goes unreported and no assistance given to children they left suffer in silence. It is a problem that has taken roots in the society and indeed a challenging one to curb. The motivation behind this examination is to recognize the fundamental privileges of youngsters inside the subtype commonness of child abuse a “Acts or omissions by a care giver leading to actual or potential damage to health and development, and exposure to unnecessary suffering to the child” with demonstrating an expanding pattern in India. India having a vast child population and children are being defenseless against mishandle, abuse and disregard. This paper will further explore the research on sexual abuse of children, measures and suggestions for protection of child rights regarding child abuse.

KEYWORDS: Child Sexual Abuse, Protection Of Child Rights, Sexual Violence

RESEARCH METHODOLOGY:
The researchers utilized an exploratory research system based on past literature from annual reports, newspapers, magazines, interviews and publications covering wide gathering of scholastic writings.

OBJECTIVE OF THE STUDY:
1. To research on child abuse.
2. To research about sexual violence against children.
3. To research on various measures by government and other forums to protect child rights.

1. INTRODUCTION OF CHILD ABUSE
Children who are the segment of society that is the most defenseless, vulnerable, and completely dependent on adults. It is the fault of grown-ups when children wind up in zones of cataclysmic events and disasters or zones of military combat activities and turn into the victims and casualties of physical, sexual, and enthusiastic savagery. In education today, as in years past and clearly in years to come, child abuse and neglect is and will be a staggering scourge.
The danger of a child being abused ascents if there is destitution, social confinement, unemployment, lodging issues, or absence of parenting abilities. The pattern is clear, kids who have poor and uneducated guardians are at high danger of being abused. Child abuse ‘Acts or oversights by a parental figure prompting actual or potential harm to wellbeing and development, and introduction to superfluous enduring to the child’s of worldwide concern and have been an issue. The Child Abuse Prevention and Treatment Act (CAPTA) defines child abuse and neglect as: “Any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse, or exploitation, or an act or failure to act which presents an imminent risk of serious harm”.

Child abuse constitutes all types of physical or potentially enthusiastic sick treatment, sexual abuse, disregard or careless treatment, or business or other exploitation. Ignoring about real or potential damage to the child’s wellbeing, survival, improvement or dignity with regards to a relationship of obligation, trust or power. Despite the fact that numerous progression have been taken by government to avoid it. Measurement demonstrates that child abuse cases are expanding for as long as years. Kids encounter violence in all space most well-known to them, for example, in school, homes and group they live in. They likewise also suffer abuse and exploitation in orphanages, set up of detainment and on lanes. The wilful maltreatment of children has been perceived globally as an issue of incredible sociological contact with lawful noteworthy and therapeutic concern.

2. TYPES OF CHILD ABUSE

2.1 PHYSICAL ABUSE-Physical abuse is generally defined as :
- “Any nonaccidental physical injury to the child” and can include striking, kicking, burning, or biting the child, or any action that results in a physical impairment of the child.
- Inflicting or allowing physical injury, impairment of bodily function, or disfigurement; A condition or death that is not justifiably explained, or where the History given concerning the condition or death is inconsistent with the degree or type of condition or death, or circumstances indicate that the condition or death may not be the result of an accidental occurrence.
- Physical injury that results from permitting a child to enter or remain in any structure or vehicle in which volatile, toxic, or flammable chemicals are found or equipment is possessed by any person for the purpose of manufacturing a dangerous drug.
- ‘Serious physical injury’ means an injury that is diagnosed by a medical doctor and that does any one or a combination of the following:
  - Creates a reasonable risk of death
  - Causes serious or permanent disfigurement
  - Causes significant physical pain
  - Causes serious impairment of health

800 CHILD ABUSE INVESTIGATION: From Dispatch to Disposition By Donald A. Hayden

www.supremoamicus.org
2.2 NEGLECT- Neglect is defined as—
- the failure of a parent or other person with responsibility for the child to provide needed food, clothing, shelter, medical care, or supervision to the degree that the child's health, safety, and well-being are threatened with harm.\textsuperscript{802}
- Permitting a child to enter or remain in any structure or vehicle in which volatile, toxic, or flammable chemicals are found or equipment is possessed by any person for the purposes of manufacturing a dangerous drug.\textsuperscript{803}
- 'Neglected or dependent child' means a child:
  - Whose parent, guardian, or legal custodian has abandoned him or her or has subjected him or her to mistreatment or abuse, or whose parent, guardian, or legal custodian has allowed another to mistreat or abuse the child without taking lawful means to stop such mistreatment or abuse and to prevent it from recurring.
  - Who lacks proper parental care through the actions or omissions of the parent, guardian, or legal custodian.
  - Whose environment is injurious to his or her welfare.
  - Whose parent, guardian, or legal custodian fails or refuses to provide proper or necessary subsistence, education, medical care, or other care necessary for his or her health, guidance, or well-being.
- Who is homeless, without proper care, or not domiciled with his or her parent, guardian, or legal custodian through no fault of his or her parent, guardian, or legal custodian.\textsuperscript{804}

2.3 SEXUAL ABUSE- The term 'abuse' here includes: \textsuperscript{805}
- Inflicting or allowing sexual abuse
- Sexual conduct with a minor
- Sexual assault
- Molestation of a child
- Commercial sexual exploitation of a minor
- Incest
- Child prostitution

2.4 EMOTIONAL ABUSE- It means—
- “Injury to the psychological capacity or emotional stability of the child as evidenced by an observable or substantial change in behavior, emotional response, or cognition” and injury as evidenced by “anxiety, depression, withdrawal, or aggressive behavior.” \textsuperscript{806}
- 'Serious emotional injury' means an injury that is diagnosed by a medical doctor or a psychologist and that does any one or a combination of the following:
  - Seriously impairs mental faculties
  - Causes serious anxiety, depression, withdrawal, or social dysfunction behavior

\textsuperscript{801} www.childabusestories.org,state-definitions,arizona-definition-child-abuse-and-neglect
\textsuperscript{803} www.childabusestories.org,state-definitions,arizona-definition-child-abuse-and-neglect
\textsuperscript{804} Childwelfare.gov, https://www.childwelfare.gov/pubPDFs/define.pdf
\textsuperscript{805} www.childabusestories.org,state-definitions,arizona-definition-child-abuse-and-neglect
\textsuperscript{806} Childwelfare.gov, https://www.childwelfare.gov/pubPDFs/define.pdf
to the extent that the child suffers dysfunction that requires treatment

- Is the result of sexual abuse, sexual conduct with a minor, sexual assault, molestation of a child, child prostitution, commercial sexual exploitation of a minor, sexual exploitation of a minor, or incest.  

3. CHILD SEXUAL ABUSE: CRIME AGAINST AN INNOCENT LIFE

India is home to 430 million children which is approximately includes one in every five children below the age of 18 years, in the world. Malnutrition, illiteracy, trafficking, forced labor, drug abuse, sexual abuse, pornography etc. are not uncommon among the children in India. Child abuse is a serious and widespread phenomenon that occurs both within and beyond the family system. The World Health Organisation (WHO) defines CSA as “the involvement of a child in sexual activity that he or she does not fully comprehend and is unable to give, informed consent to, or for which the child is not developmentally prepared, or else that violate the laws or social taboos of society.”

Child sexual abuse is evidenced by activity between a child and an adult or another child who by age or development is in a relationship of responsibility, trust or power, the activity being intended to gratify or satisfy the needs of the other person.  

This may incorporate yet isn't constrained to: The inducement or compulsion of a child to take part in any unlawful sexual activity, the exploitative utilization of a youngster in prostitution or other unlawful sexual practices, the exploitative use of children in explicit execution and materials, female sex unaccompanied children, children in child care, adopted kids, step children, physically or rationally incapacitated kids, history of past abuse, Poverty, war/outfitted clash, mental or psychological helplessness; single parent homes/broken homes, social disconnection, parent(s) with dysfunctional behavior, alcohol or drug dependency.

The child in specific cases is compelled to keep the sexual abuse a mystery and at first feels caught and helpless. These sentiments of helplessness and the youngster’s dread that nobody will trust the exposure of abuse prompt will lead to accommodated conduct. On the off chance that the youngster discloses, disappointment of family and experts to ensure and support the child satisfactorily, increase the child's misery and may prompt withdrawal.

The procedure of revelation ought to be secured however isn't done as such additionally if a child sexual affirmation has been accounted then there is a demand for an examination by the kid insurance specialists as well as the police. The youngster is brought by a relative or alluded by a social insurance proficient in light of the fact that an assertion has been made yet

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807 www.childabusestories.org,state-definitions.arizona-definition-child-abuse-and-neglect
810 Childline.org.in, child sexual abuse medical procedures and protocols
not answered to experts. Behavioral or physical pointers have been distinguished (e.g. by a parental figure, social insurance expert, instructor) and a further assessment is asked for however that likewise does not happen.

As per the record India has the world's largest number of CSA cases: For every 155th minute a child, less than 16 years is raped, for every 13th hour child under 10, and one in every 10 children sexually abused at any point of time. Studies propose that over 7,200 children, including infants, are raped every year and it is believed that several cases go unreported. It is estimated by the government that 40% of India's children are susceptible to threats like being homeless, trafficking, drug abuse, forced labor, and crime.

3.1 APPROACH TO PROTECTION OF CHILDREN

3.1.1. NGOs and other forums
India has a strong presence of non-governmental bodies, networks, community-based organizations, civic forums and peoples’ campaigns. In recent years, these organizations and platform have sharpened their focus on protection issues. The news media are also increasingly alert in playing a watch-dog role. After nirbhaya case many non governmental organisations and media played a vital role by making awareness regarding protection of child’s rights and increasing risk factors of sexual violence against children. A large number of NGOs are working in the field of child welfare and child protection, and many have created valuable models of prevention, intervention and rehabilitation. However, because of the huge numbers of children requiring protection, their efforts can make only a marginal impact.

3.1.2. Measures by government
The ultimate responsibility of protection of children lies with the state. It is their duty to implement and adopt policies and measures regarding safety and security of nation’s children. Indian government has ratified. As Indian constitution provides obligation to state to safeguard children against "exploitation, and moral and material abandonment.” Government has ratified and recognised the standard of UNCRC, in this regard National commission for protection of child rights was established.

3.1.3 National Legislations
➢ A study conducted by the UNICEF after the 2012 Delhi gang rape revealed that one in every three rape cases, the victim is a child and these incidences are increasing at an alarming rate. Before May 2012,
many provisions of the IPC dealing with sexual offences were also applied to the cases of child sexual abuse and prosecuted under the following sections:

I.P.C. (1860) 375- Rape
I.P.C. (1860) 354- Outraging the modesty of a woman
I.P.C. (1860) 377- Unnatural

However, these provisions of IPC could not effectively protect the child which resulted in serious miscarriage of justice due to various loopholes like:

IPC 375 doesn't protect male victims or anyone from sexual acts of penetration other than "traditional" pen-vaginal intercourse.

IP 354 lacks a statutory definition of "modesty". It carries a weak penalty and is a compoundable offence. Further, it does not protect the "modesty" of a male child.

In IPC 377, the term "unnatural offences" is not defined. It only applies to victims penetrated by their attacker's sex act, and is not designed to criminalise sexual abuse of children.

Under POSCO act all forms of child sexual abuses are specific offences with specific punishments for the perpetrators. Earlier, there was no law covering any non-penetrative sexual act committed against boys which is now clearly defined. The new law has also laid down certain guidelines for police and court authorities to deal with the victims.

The need for this law became more immediate after the case of Mrs.Madhu v. State of Haryana involving RuchikaGirhotra, who was molested by a police officer when she was 14 years old.

In this case, the accused asked Ruchika’s parents to send to Canada as she was a brilliant tennis player. The case was filed under Section 354 read with Section 509 IPC. The accused, SPS Rathore escaped prosecution for years even though there was an eye witness to the alleged acts.

Apart from POSCO act, UNICEF works to prevent and respond to sexual violence by engaging different government sectors - justice, social welfare, education and health - as well as legislators, civil society, community leaders, religious groups, the private sector, media, families and children themselves. UNICEF supports governments in strengthening child protection systems at national and local levels including laws, policies, regulations and the provision of comprehensive services to child victims. UNICEF also works with communities and the general public to raise awareness about the problem and address attitudes, norms and practices that are harmful to children.

The law provides for relief and rehabilitation of the child, as soon as the complaint is made to the Special Juvenile Police Unit (SJPU) or to the local police. Immediate & adequate care and protection (such as admitting the child into a shelter home or to the nearest hospital within twenty-four hours of the report) are provided. The Child Welfare Committee (CWC) is also required to be notified within 24 hours of recording the complaint. Moreover, it is a mandate of the National Commission for the Protection of Child Rights (NCPCR)

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815 The Protection of Children from Sexual Offences Act (POCSO Act) 2012
816 Mrs. Madhu v. State of Haryana, 1998(4) RCR 854
817 https://www.unicef.org/protection/57929_58006.htm
and State Commissions for the Protection of Child Rights (SCPCR) to monitor the implementation of the Act.\textsuperscript{818}

\textbf{Telephonic help lines (CHILDLINE 1098) and Child Welfare Committees (CWC) under the Juvenile Justice Act (2000)} have been established, where reports of child abuse or a child likely to be threatened to be harmed can be made and help sought.

### 3.2 FLAWS OR LOOPHOLES

The issue of CSA is still a taboo in India. In India, majority of the people remain numb about this issue. This silence is due to the fear of indignity, denial from the community, social stigma, not being able to trust government bodies, and gap in communication between parents and children about this issue. Whose responsibility is it to ensure the safe, protective and caring environment that every child deserves? Ideally, the parents should be responsible for proper care and protection of their child. However, the child must not suffer in case the parents cannot provide care and protection. It is the duty of the proximate community and the Government at large to address the issues of care and protection. In this responsibility, the State and its institutions must function proactively at all levels of governance and service.

A 2007 Indian government-sponsored survey, based on interviews with 12,500 children in 13 different states, reported serious and widespread sexual abuse, thereby putting the government on notice about the gravity of the problem. Smaller surveys conducted by nongovernmental organizations (NGOs) have also painted a disturbing picture. Children are sexually abused by relatives at home, by people in their neighbourhoods, at school, and in residential facilities for orphans and other at-risk children. Most such cases are not reported. Many are mistreated a second time by a criminal justice system that often does not want to hear or believe their accounts, or take serious action against perpetrators.

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. Campaigners say most of the abusers are people known to the victims, like parents, relatives and schoolteachers.\textsuperscript{819} Indian government has adopted various standards but there is a gap between adopting a policy and its implementation many children fall through the gaps. Government should take adequate steps to implement policies more effectively. Policymakers must heard the child’s voice. It is the duty of state, community ,parents and other forums to ensure the security of children.

Families and the community must be educated, informed and enabled so that they can provide care and protection to their children. All those entrusted with the child’s upbringing and development must learn that the best approaches are non-violent.

### 3.2 EFFECTS OF CHILD ABUSE


Victims of such abuse frequently end up managing serious mental repercussions for quite a long time and physical outcomes of having been abused. There are different types of direct, psychotherapy, therapeutic and self improvement assets accessible for individuals who have been abused and need help and support for managing problems and issues they have developed because of being abuse such post-abuse issues are some of the time called 'abuse sequela' by health experts. While no treatment is equipped for deleting the impacts of abuse, such assets can give genuine and important help with limiting the negative impacts of mishandle which may not facilitate the frequency of abuse in a child's life, can prompt further types of alienation and trauma.

This child abuse may transform into Post Traumatic Stress Disorder which is the level of apparent individual threat, the formative condition of the child, the relationship of the victim to the perpetrator, the level of help the casualty has in his everyday life, Guilt, Resilience later in life. Statistics demonstrate that females are significantly more likely than guys to create PTSD because of encountering child abuse. Inspecting particular kinds of abuse, deadly instances of physical abuse and neglect are no doubt among youthful newborn children, and this seems to remain constant crosswise over nations and societies.

In the United States in 2003, 78.7% of youngsters who were killed by guardians or different parental figures were under 4 years old. Reliably in the United States, kids under 1 year old are those destined to be murdered by guardians or different parental figures this focuses out that over the globe, newborn child deadly physical abuse. There are characteristic and clear organic vulnerabilities of newborn children: their physical improvement enables them to be all the more effectively lifted, dropped, tossed, or shaken, and generally little force is required to cause serious or deadly harm. The shortcoming of their neck muscles elevates the danger of cerebral injury, the main source of attack for newborn children.820

4. CONCLUSION
One of the main things that is essential is to show guardians what is harmful for kids. This incorporates how they act, how they respond, how they think and how they develop. In the event that a parent has a decent understanding of these couple of issues they will probably be able to respond to circumstances all the more properly. The guardians likewise need to hone what they have realized in a precisely observed circumstance. This should be possible by carrying on or demonstrating situations to with the guardians, by and by so they can perceive what it would seem that to respond properly to circumstances.

While honing these abilities a parent may need to rehearse their compassionate aptitudes, once a parent acknowledging how their extreme discipline influences their kids to feel, they may understand that they have to learn these abilities and actualize them.

A couple of practices that are decidedly connected with the improvement of sympathetic comprehension:

1. Responsive, nonpunitive, nonauthoritarian conduct of moms toward their preschool kids
2. Disclosing to kids the impacts of their conduct on others
3. Calling attention to youngsters that they have the ability to make others cheerful by being kind and liberal to them
4. Parental demonstrating of compassionate, mindful conduct
5. Disclosing to children who have harmed or others why their conduct is harmful and giving them recommendations for offering some kind of reparation to those hurt
6. Urging school-age youngsters to talk about their sentiments and issues.

Teachers assume a vast part in the aversion of youngster manhandle and disregard. An educator needs to guarantee security, structure, consistency and consistency in their classroom. Not only an instructor need to comprehend what to do when faced with a circumstance of child abuse and disregard yet they have to realize what to do with that kid when they know about it. There are numerous things that a teacher can do to help an understudy who is in a harsh situation. It is so critical to seek these youngsters out; they require a man to be there, a man that can be their emotionally supportive network since they don't have anyone else there.

Some awesome thoughts that will help an educator in helping an understudy that has been mishandled. The thoughts are:

1. Put aside a place in the classroom for kids to "assemble themselves together" or quiet down
2. Give the kid his own particular arrangement of cards with pictures of various inclination states and urge them to put the card that mirrors his inclination state on the corner of his desk so you can easily see it.
3. Plan together with the class for times when somebody moves toward becoming overpowered.
4. Give the kid an assignment, for example, conveying a "note" in a fixed envelope to another educator with whom you have made earlier courses of action
5. Common outcomes, for example, doing incomplete homework amid break are very effective if applied to all youngsters.
6. Continuously hinder improper conduct and divert the kid. A grin consoles the tyke that you are not at risk, that he or she is still safe.

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JUDICIAL APPOINTMENTS IN INDIA: A QUEST FOR DEMOCRATIC LEGITIMACY

By Samarth Khanna
Advocate

ABSTRACT
The role, position, and significance of the Indian Judiciary is as complex as the country itself. On October 16, 2015 a Constitution bench of the Supreme Court of India declared the 99th Constitutional Amendment and the National Judicial Appointments Commission Act, 2014 ultra vires the Constitution. The Court by reverting to the collegium system of Judicial Appointments has once again set the tone for Judicial Supremacy over Constitutional Democracy and breached the sacred Doctrine of Separation of Powers.

This essay highlights the Court’s hijack of the process of Judicial Appointments, reducing the role of the Executive to that of a mere postman, comfortably placing such Judicial (mis)interpretation in the grey and ever so exploited area of Judicial Review.

I. INTRODUCTION
The Indian Constituent Assembly’s exercise of insulating the Judiciary from coercive political forces was a careful and tedious one. Several key provisions were drafted keeping in mind Judicial Isolation including the salaries and allowances of the Judges.

823 Constitution of India, 1950, Articles 129 and 215. (The power to punish for contempt is accorded only to the Supreme Court and the High Courts).
824 Constitution of India, 1950, Article 124(4) and 217(1)(b).
826 Constitution of India, 1950, Article 124(2) and 217(1) (Concerning the appointment of Judges to the Higher Judiciary).
declared a nationwide emergency and upon facing resistance sought to transfer as many as 16 Judges of various High Courts including Justice Sankalchand Sheth, who challenged this order of transfer. This case observed that, the term "consultation" used in Article 222 of the Constitution ought to be interpreted literally adding that the process of consultation had to be "Real, substantial and effective," and "Based on full and proper materials placed before the Chief Justice by the Government."830 Were the government to depart from the Chief Justice's opinion, “Such a decision could be subject to Judicial Review.”831 This position was however later reversed in SP Gupta v. Union of India832 wherein, Court ruled that the President, acting through the Council of Ministers had the power to completely disregard the Chief Justice's opinion833 further noting that, consultation could never mean concurrence.834

Notwithstanding Judicial Grant of Executive Supremacy, out of 547 appointments made between January 1983 and April 1991, only 7 were not in harmony with the opinion of the Chief Justice.835 Yet, more than a decade later, the Supreme Court decided to review the SP Gupta Judgement in the case of Supreme Court Advocates-on-Record Association and Others v. Union of India836 (Hereinafter: “Second Judges Case”). The Court took a dramatic turn practically re-writing the Constitution,837 in the guise of Constitutional interpretation. The Court ruled that the word "consultation" in Articles 124(2) and 217(1)838 denoted "concurrence" and that the primacy of opinion of the Judiciary in matters of Judicial Appointments rested with the Chief Justice.839 The bench created the collegium system wherein, the Chief Justice was now required to consult with his two senior most colleagues,840 before making a binding recommendation to the President. Later, the collegium was expanded to include the 3rd and 4th junior most Judges as well in the Third Judges Case.841

In one full sweep, the Supreme Court arrogated to itself the process of appointment of Judges. The discussions of the collegium were shrouded in secrecy and the criteria employed for appointments kept completely outside the scope of democratic deliberations leading to widespread criticism of the said system.842 This process of Judicial

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829 Constitution of India, 1950, Article 222. (Concerned with the transfer of Judges).
831 Ibid.
832 1981 Supp (1) SCC 87 (Famously known as the First Judges Case).
833 Ibid[30], [87](Bhagwati J.).
834 Ibid [30], [48] (Bhagwati J.).
835 Supreme Court Advocates-on-Record Association and Another v. Union of India (2016) 5 SCC 1 [1149] (Chelameswar J.).
838 Constitution of India, 1950, Article 124(2) and 217(1). (Dealing with appointment of Judges to the Higher Judiciary).
839 Second Judges Case (n 16) [478(5)], [478(6)] (Verma J.).
840 Ibid [450], [478] (Verma J.).
841 In Re Presidential Reference, (1998) 7 SCC 739 (Famously known as the Third Judges Case).
Appointments seemed rather ironic for a country championing the cause of Constitutional Democracy.

Taking a cue from international practices of UK\(^{843}\) and Israel,\(^{844}\) recommendations of the Law Commission \(^{845}\) and of the National Commission to review the Working of the Constitution, \(^{846}\) the Parliament passed the 99\(^{th}\) Constitutional Amendment Act 2014 establishing the National Judicial Appointments Commission (hereinafter: NJAC) for appointments and transfers to the higher Judiciary replacing the collegium system of appointments.

**III. THE AMENDMENT**


\(^{843}\) Constitutional Reforms Act 2005, Part 4, Chapter 1, Section 61 (Schedule 12) (The Judicial Appointments Commission in the UK is responsible for selection of Judges in Courts and tribunals in England and Wales and for some tribunals whose jurisdiction extends to Scotland or Northern Ireland. The Commission has fourteen members including lay persons (5), Judicial (5), professional members (2), Tribunal Judge (1), non-legally qualified Judicial member (1)).

\(^{844}\) Basic Law- The Judiciary, Chapter II, Section 4 (The Israeli Judicial Committee appoints Judges to the Israeli Courts. The committee has nine members including members of the Cabinet (2), Judges (3), Lawyers (2) and Legislature (2)).


The 99\(^{th}\) Constitutional Amendment introduced Articles 124A, 124B and 124C in the Constitution. Article 124A provided for the composition of the NJAC.\(^{847}\) Article 124B set forth the duties of the NJAC, which included appointments to Higher Judiciary and recommending transfers. Article 124C permitted the Parliament to regulate appointment procedures and empower the NJAC to enact regulations necessary to carry out its functions. The NJAC Act, 2014, was a direct product of the power vested in the Parliament through Article 124C. However, an important aspect of the Amendment was the power of veto wherein the NJAC could not recommend a nominee for Judicial office if two of its six members did not concur with the said appointment.\(^{848}\)

**IV. THE JUDGEMENT**

The 99\(^{th}\) Amendment and the NJAC Act 2014 were challenged in the Supreme Court in the case of *Supreme Court Advocates-on-Record Association and Another v. Union of India* \(^{849}\) (Hereinafter: “Fourth Judges Case”). The contention being that, the 99\(^{th}\) Amendment abrogated the Basic Structure of the Constitution and thus, as per the law laid down in *Kesvananda Bharati*, \(^{850}\) void. The Judgment was

\(^{847}\) Constitution of India, 1950, Article 124A (1) (As proposed in the amendment, the NJAC is a 6 member body comprising of: The Chief Justice and 2 other senior-mostJudges of the Supreme Court, Union Minister in charge of Law and Justice and two other “eminent persons”).

\(^{848}\) National Judicial Appointments Commission Act, 2014, Section 5(2).


\(^{850}\) *His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.* (1973) 4 SCC 225 is a landmark Judgement of the
delivered by a Constitution Bench of 5 Judges split 4:1 declaring the 99th Amendment and the NJAC Act 2014 as unconstitutional. The majority opinion was led by Justice J.S. Kehar, the dissent by Justice J. Chelameswar.

The majority, placing reliance on the Second Judges Case, held that by including three non-judicial members alongside an equal number of Judicial members, primacy of opinion of the Judiciary had been rendered a devastating blow. The Court said that, it was not sufficient to ensure that, “The Judicial component in the NJAC was capable enough to reject the candidature of an unworthy nominee.” Rather primacy meant that, “The Judicial component should be capable enough to ensure the appointment of a worthy candidate” notwithstanding opposition from any of the other 2 non-judicial members with veto powers. Thus, by not providing primacy to the Judiciary the 99th Amendment “Is liable to be set aside for violating the “Basic Structure” of the Constitution.”

The majority dismissed the inclusion of the Union Minister in charge of Law and Justice in the NJAC, stating that the same introduced political influence in the appointment and transfer of Judges. Since the Executive is the biggest litigant in a majority of the cases, the participation of the Minister would have the inevitable effect of undermining the “Independence of the Judiciary” and “Separation of Powers.” Hence, the same is unconstitutional.

The Court opined that, “in the absence of any positive or negative qualifications” statutorily imposed as pre-conditions for the nomination of the two eminent persons an element of vagueness is introduced in the appointment process. Noting that the possible use of veto by the two unspecified members, without any specific justification would radically shift the balance of power, the Court declared the 99th Amendment and the NJAC Act 2014 as unconstitutional.

V. COMMENTS

In my view, the majority opinion in the Fourth Judges Case is bad in law. The debate on primacy is intended to determine, which Constitutional functionary involved in the process of appointments is best equipped to discharge the burden of making the proper choice. At the same time, it is imperative to ensure that the will of the Constituent Assembly in making the process broad based is also preserved. The majority has erred in stating that primacy of opinion is a part of the Basic Structure. In fact it is one of the many basic features that constitute the Basic Structure i.e.

Hon’ble Supreme Court of India. In this case, a13 Judge bench of the Supreme Court limited the amending power of the Parliament. The Court held that, the Constitution could not be amended in a manner that destroyed or infracted its Basic Structure.

Constitution of India, 1950, Article 124A (1).

Ibid.

Ibid.

National Judicial Appointments Commission Act, 2014, 2nd Proviso to Section 5(2) and, Section 6(6).

Fourth Judges Case (n 29) [308] (Kehar J).

Constitution of India, 1950, Article 124A(1)(c).

Fourth Judges Case (n 29) [306] (Kehar J).

Ibid.

Ibid.

Ibid [319] (Kehar J).

Ibid.

Ibid [333] (Kehar J).

Fourth Judges Case (n 29) [884] (Lokur J).
Independence of Judiciary. A mere alteration in the basic feature may or may not tantamount to the abrogation of the Basic Structure itself.\textsuperscript{863}\textsuperscript{a} According to the Judiciary in the matter of Judicial appointments is not the only way of ensuring an Independent Judiciary.\textsuperscript{864} The process established by the NJAC gives the Judiciary predominance\textsuperscript{865} over the different constitutional authorities, involved in the joint exercise of appointments. Likewise, the appointment process (also a basic feature) is quintessential to preservation of Judicial Independence.\textsuperscript{866} Non-investiture of absolute power to any one of the three organs of the state is necessary to ensure an independent and efficient Judiciary.\textsuperscript{867} Thus, it is incorrect to say that a mere alteration in the collegium system and establishment of a plural and collective process violates the Basic Structure rather, it preserves it.

The Court in the Second Judges Case opined that, the appointment of Judges is a “participatory consultative process.” Yet, appointing oneself above others involved in the process defeats the very purpose of consultation with those others. The inclusion of the Union Minister for Law and Justice in the NJAC would not compromise the Independence of Judiciary since, his vote accounts for 1/6\textsuperscript{th} of the total vote of the Commission. The Minister is the representative of the Council of Ministers who are responsible to the people of the country by means of the Parliament. The Executive is accountable for the administration of a State (which would encompass within its scope, the administration of Justice as well\textsuperscript{869}) and therefore, must also have a significant role in the appointment process.

Judicial appointments made through the NJAC would not only ensure accountability but would also act as a check against arbitrariness. “To wholly eliminate the executive from the process of selection would be inconsistent with the foundational premise that, the Government in a Democracy is formed by the chosen representatives of the people.”\textsuperscript{870} Established principles of Constitutional Government, practices in other Democratic arrangements\textsuperscript{871} and the Constituent Assembly Debates clearly prohibit the inference that Executive participation in the selection process erodes Independence of Judiciary.

The majority's holding that, an element of vagueness is introduced in the absence of fixed guidelines for the nomination of

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\item \textsuperscript{863}Minerva Mills v. Union of India (1980) 3 SCC 625 [91] (Bhagwati J.).
\item \textsuperscript{864}Fourth Judges Case (n 29) [1217] (Chelameswar J.).
\item \textsuperscript{865}Second Judges Case (n 16) [450], [451] (Verma J.).
\item \textsuperscript{866}Fourth Judges Case (n 29) [126] (Kehar J.).
\item \textsuperscript{867}Ibid [1213] (Chelameswar J.).
\item \textsuperscript{868}Second Judges Case (n 16) [461] (Verma J.).
\item \textsuperscript{869}S.P. Gupta v. Union of India and Ors. AIR 1982 SC 149 [30] (Bhagwati J.).
\item \textsuperscript{870}Fourth Judges Case (n 29) [1218] (Chelameswar J.).
\item \textsuperscript{871}Unites States of America (Constitution of the United States of America, 1787, Section 2, Article II.), Japan (Constitution of Japan, 1947, Article 6), Canada (Constitution Act, 1867, Article 96) and New Zealand (The Judicature Act, 1908, Section 4(1C)). In all the aforementioned practices, the executive exercises a predominant role in so far as Judicial Appointments are concerned.
\item \textsuperscript{872}Fourth Judges Case (n 29) [1218] (Chelameswar J.).
\end{itemize}
“eminent persons” is plausible. Yet, the same is an anomaly of a rectifiable nature. The power to nominate the two eminent persons is conferred upon three of the highest Constitutional functionaries of the Democracy viz. - the Prime Minister, the Chief Justice, and the Leader of the Opposition. This brings to the fore the knowledge, experience and, scrutiny of all three organs of the State ensuring that only the best possible candidate is selected. The conferment of veto power to any two members of the Commission is primarily done to prevent any potential trade-offs either among the representing members of the Judiciary or between the Judiciary and the Executive. “The induction of Civil Society representation will bring about critically desirable transparency, commitment and participation of the ultimate stakeholders – the people.”

Arguendo, the Court always had the option to strike down the provision dealing with grant of veto powers to any two members of the Commission while upholding other provisions following the Doctrine of Severability. Just a mere possibility of abuse of power conferred by the Constitution, is no ground for denial of conferment of such power to a particular authority.

VI. CONCLUSION

873 Ibid [333] (Kehar J.).
874 Constitution of India, 1950, Article 124 (1)(d) (As introduced by the 99th Constitutional Amendment).
875 Fourth Judges Case (n 29) [1212] (Chelameswar J.).
876 National Judicial Appointments Commission Act, 2014, 2nd Proviso to Section 5 (2) and Section 6 (6).

The process of Judicial Appointments in India is neither Constitutionally nor Statutorily regulated. The 99th Amendment was a golden opportunity for the Supreme Court to correct the ills of the past and, in an age of transparency and accountability, accord to itself some form of Democratic authority. The Court’s revival of an unconstitutional status quo in the light of democratic change has dealt a blow to the foundations of Democracy and to its credibility. If the 42nd Amendment was the cornerstone of Executive dictatorship then, the Fourth Judges Case has earmarked an era of Judicial Anarchy, the rule of the neglected.

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CAPITAL PUNISHMENT: A COMPARATIVE STUDY BETWEEN INDIA AND CHINA

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RESEARCH OBJECTIVE:
The main objective of this research work is to critically examine the laws and procedure relating to Capital Punishment in India and China.

RESEARCH LIMITATIONS:
The research is limited to capital punishment in India and China. Further, the research is based on secondary sources i.e. no personal surveys are conducted to gather the views of the public on the pertained topic. Various Articles and Journals didn’t have the name of their authors. Therefore, the research is done with the available information through the resources previously categorized to emphasize on the relevant issues related to the topic.

RESEARCH METHODOLOGY:
This research is a doctrinal research and secondary sources such as books and the resources available on the Internet are used as the main sources.

THESIS STATEMENT:
“Awarding Death penalty is an inhuman act”

TENTATIVE CHAPTERISATION:
❖ CHAPTER 1: Capital Punishment in China.
❖ CHAPTER 2: Offences Punishable with Death in China.
❖ CHAPTER 3: Capital Punishment in India.
❖ CHAPTER 4: Offences Punishable with Death in India.
❖ CHAPTER 5: United Nation’s view on Capital Punishment

ABSTRACT
“Capital Punishment” or “Death Penalty” is the highest level of punishment awarded in any society or democracy to maintain law and order. But killing another human being in the name of justice is no better than murdering someone. We should focus on eliminating the crime not the criminal. China is the only country in the world where the practice of death penalty is still at its peak with over 1000 executions every year, whereas in India the doctrine of “Rarest of the Rare” is followed and often the death sentence gets commuted to life imprisonment. But still India has executed a total of 4 criminals from the period of 2002 to 2015. Both the countries have various similarities in the procedure and law of capital punishment, but in China once the death penalty is awarded it cannot be revoked. This is the reason why United Nation (UN) opposed the concept of death penalty and stated that “Life is precious, and death is irrevocable”. Further UN also said that killing another human being in the name of justice also kills the fact that we are human. We are no one to decide who gets to live and who gets to die. Therefore instead of hanging someone to death we should adapt a different approach i.e. the
reformative approach so that one could improve himself and can live peacefully thereafter.

INTRODUCTION

‘Punishment’ is the coercion used to enforce the ‘law of land’ which acts as one of the pillars of modern civilization. It is the duty of the State to punish the criminals in order to maintain law and order in the society. In the past, there wasn’t any specific law or order for such crimes and the quantum and extent of punishment was largely dependent on the King. With time modern theories of punishment were developed and voluntary submission of our rights and power to maintain law and order was given to state. The most brutal or we can say the highest punishment awarded in present time is ‘Capital Punishment’.

Capital punishment is the punishment which involves legal killing of a person who has committed a certain crime prohibited by the law. Capital punishment is also known as ‘Death Penalty’ which is sanctioned by the government in which a person is put to death by the state as a punishment for the crime he committed.

The sentence condemning a convicted defendant to death is known as ‘Death Sentence’ and the act of carrying out the death sentence is known as ‘Execution’. Whenever, the court awards a punishment there is a theory or proposition on the basis of which it passes its Judgment. These theories are known as ‘Theories of Punishment’ and are generally of five types:

1. Deterrent Theory
2. Reformative Theory
3. Preventive Theory
4. Retributive Theory
5. Expiation Theory

The word ‘Abolition of Death Penalty’ is one of the most discussed topics in United Nation (UN) where Death Penalty is considered as a violation of Human Rights. UN laid more emphasis on Reformative Theory of Punishment rather than the Deterrent Theory of Punishment.

Justice V.R. Krishna Iyer in the case of Rajendra Prasad V. State of Uttar Pradesh commented that-

“The special reason must relate, not to the crime but to the criminal. The crime may be shocking and yet the criminal may not deserve the Death Penalty.”

If we take a look at the Theories of Punishment we can say that the Reformative Theory has its fair share of advantage over Deterrent Theory. Because, in Reformative Theory there is a ‘Scope of Improvement’ present whereas in Deterrent Theory this scope is completely absent.

In India, the prisoners of Tihar Jail make ‘Essence Sticks’ and ‘DhoopBatti’ which is a good way to make them adjust or flexible with the society. Whereas, on the other hand in Deterrent Theory there is no essence of humanity neither it provides the scope for improvement.

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880 Rajendra Prasad V. State of UP, 1979 AIR 916 (V.R. Krishna Iyer)
Death Penalty is a very serious topic as it means taking away the life of a person which is a very sensitive issue. This is the reason why questions are raised against countries like China, India, USA, Arab countries for awarding Death Penalty.

Among these countries China alone carries out maximum number of executions with over 60% in number. Whereas in India Capital Punishment is given in rarest of rare cases. The punishment of death is extreme and severe; therefore it should only be used as a last resort.

If we discuss Capital Punishment with the members of our society then we will be getting two views from it-

There will be a section of people who believes that, the person who has committed the crime deserves to die. Whereas, on the other hand there will be people with the view that, the person who committed the crime should be given a second chance, it is not our place to decide who gets to live and who gets to die. Further, taking away a life of an individual in the name of law is not justice.

CHAPTER 1
CAPITAL PUNISHMENT IN CHINA
In mainland of People’s Republic of China (PRC) Capital Punishment is a legal penalty. It is mostly awarded in cases of Murder and Drug Trafficking, and executions are mostly done using Lethal Injection and Gun Shots. As of 2016, a total of 140 countries out of 198 countries have abolished the practice of Death Penalty. But still, The People’s Republic of China executes the highest number of people annually. However, the number of death sentence in China remains a State Secret.

Historical background
China has a long history of Death Penalty. In China Capital Punishment was one of the classical Five Punishments. In Chinese philosophies capital punishment was supported by the Legalists and opposed by the Confucianists. The earliest evidence or the oldest evidence available dating back to Shang Dynasty (1700-1027 BC)\(^\text{881}\).

- 5 classical punishment
  1. The first type of punishment was a system of torture (Qin Dynasty).
  2. The second type of punishment was a system of collective responsibility (Duke Wen).
  3. The third type of system was revenge based (Qing Dynasty).
  4. The fourth type was either 50 blows or death by hanging.
  5. The fifth type was a system advocating amnesty, probation, and parole\(^\text{882}\).

China’s Rule of Online Publication of Judgments
When the SPC came in power in the year 2011, it made some changes in judicial transparency policy of China for sharing the case judgments. The SPC in the year 2013 released a statement which stated that “Judgment documents from more than 3,000


\(^{882}\text{Supra}\)
courts across China will be accessible and searchable through an online database.\textsuperscript{883}

By publishing judgement documents, the SPC said it expected that public supervision will promote justice and push judges to improve their work.

As another measure to promote the transparency of courts, the SPC asked courts at all levels to inform parties and the public about court proceedings through "a platform," which could be a website, microblog and WeChat accounts, mobile phone texts or voice mail\textsuperscript{884}.

Courts will publicize open trials through videos, audio, photos, texts and microblogs, the statement said.

Courts should allow parties of a lawsuit to follow the proceedings through a computer system and videotape all proceedings so that parties can view them.

Courts have also been asked to publish information on execution of judgements at their websites or through other channels so that parties of lawsuits and the public will know what steps courts have taken to implement judgements.

Later in the same year “The Rules of Online Publication of Court Judgments” were released by the SPC. On August 29, 2016, China’s highest court, the Supreme People’s Court (SPC), revised rules concerning online publication of judgments of all Chinese courts\textsuperscript{885}.

The revised Provisions on the Publication of Judgment Documents by the People’s Courts on the Internet went into effect on October 1, 2016. The previous version of the Provisions was issued in the year 2013 and required all Chinese courts to post their judgments on an SPC online platform, China Judgments Online\textsuperscript{886}.

As of 2016, China Judgments Online published over 26 million judgment documents, among which about 20,000 are from the SPC itself.

### Rates of execution in china

The rate of execution in China is far greater than any other country, though Iran executes more prisoners per capita. In 2007, the total number of executions was subsequently reduced after the Supreme People’s Court regained power to review all death sentences.

In China, the exact numbers of people executed remains a State Secret. However, Dui Hua foundation stated that-

1. A total of 12,000 people were executed in China in the year 2002.
2. 6500 people were executed in 2007.
3. 2400 people in 2013 & 2014\textsuperscript{887}.


\textsuperscript{884}Ibid (5).


\textsuperscript{886}Supra

\textsuperscript{887}AI Act 50/001/2014
Because of this inaccessibility to official data and statistics of the number of executions that occur within the death penalty system in China, the data provided by the NGOs like Amnesty International is the only authentic data regarding these executions. In 2009, Amnesty International counted 1718 executions between 2008 and 2009.

**Legal Procedure**

At first the trial is conducted by an intermediate people’s court and if the trial concludes with a death sentence, a double appeal process is followed. The first appeal is conducted by a high people’s court if the condemned appealed to it. Since 2007 another appeal is conducted automatically by the Supreme People’s Court even if the condemned oppose the first appeal.

When a case is sent to SPC for mandatory review, the case is delegated to one of the court’s five divisions as per the geographical origin of the case.

**Execution Procedure**

The Execution procedure is defined under Article 252(34) of the Criminal Procedure Law of China.

- Death Sentences shall be executed by means of shooting or injecting.
- Death Sentences may be executed at the execution ground or in designated place of custody.
- Execution of death sentences shall be announced to the public, but shall not be held in public.
- The People’s Court that caused the death sentence to be executed shall submit the report of the execution to the SPC.
- The People’s Court that caused the death sentence to be executed shall, after the execution, notify the family of the criminal offender.

**Public Support**

Capital Punishment is widely supported in China; it’s hasn’t been opposed by any group of society or government. According to the survey conducted by the Chinese Academy of Social Science in 1995, they found that 95% of the population supported the death penalty. Similarly, in 2005 a survey showed that out of 2000 people 82.1% supported death penalty.
penalty while the rest 13.7% opposed it. In Chinese Tradition there are sayings like “a life for a life”, “killing one to warn a hundred”, “killing a chicken to warn a monkey”.

CHAPTER 2
OFFENCES PUNISHABLE WITH DEATH IN CHINA
Offences punishable by death under “PRC Criminal Procedural Law, 2013”

1. Aggravated Murder:
Under Article 232 death penalty is generally applicable to murder but the degree of sentencing coupled with the directive for a lighter sentence where circumstances indicate a low level of culpability suggests that whether a murder is committed under aggravating circumstances is considered in sentencing.

2. Murder:
Under Article 232 a person who intentionally commits homicide is punishable by death.

3. Terrorism-Related offences Resulting In Death:
- China’s anti-terrorism laws treat those participating in lethal terrorist activities under the laws for murder, kidnapping, and other crimes affecting public safety.
- A person can be sentenced to death for sabotaging means of transportation, utilities, or certain construction equipment, if the consequences are serious.
- Setting fire, breaching dikes, causing explosion, spreading poison, or employing other dangerous means that lead to death are punishable by death.
- Airplane hijacking resulting in death is also punishable by death.
- Illegal trade, manufacture or transport of nuclear materials or other weapons can be death-eligible if the circumstances are “serious”.

4. Other Offenses Resulting In Death:
- A person who commits arson, breaches a dike, causes explosion, spreads poisonous, radioactive substances or infectious pathogens and causes the death of another person is punishable by death.
- Violently or forcefully hijacking an aircraft, causing the death of another person, is a death-eligible crime.
- Producing or selling tainted food or fake medicine is punishable by death when the criminal act results in death.
- A person who causes the death of another person by intentionally inflicting injury is subject to the death penalty.
- Abducting someone for extortion or holding someone hostage, thereby

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892 PRC Criminal Procedural Law 2013, art 232.
893 PRC Criminal Procedural Law 2013, art 232.
894 Id art 120
killing or causing the death of the victim, is punishable by death.\textsuperscript{903}

- A person who causes the death of an abducted woman or a child or his or her relatives.

5. \textbf{Terrorism-Related Offenses Not Resulting in Death:}

Other non-deadly terrorist activities that lead to serious injury or property loss affecting public safety are death-eligible offenses that could be characterized as terrorism-related including:

- Sabotage of transportation, utilities, or certain construction equipment\textsuperscript{904}.
- Setting fire, breaching dikes, causing explosions, spreading poison, or employing other dangerous means that lead to serious injuries or property loss\textsuperscript{905}.
- Airplane hijacking (resulting in serious injury or damage to the aircraft)\textsuperscript{906}.

6. \textbf{Rape Not Resulting in Death.}

- Multiple Rapes, public rape, causing serious injury from rape are all death-eligible offenses\textsuperscript{907}.

7. \textbf{Rape of Child Not Resulting in Death}

- Sexual relations with a girl under the age of 14 are a death-eligible offense if it involves multiple rapes, public rape, or serious injury or other “serious” circumstances\textsuperscript{908}.

8. \textbf{Kidnapping Not Resulting in Death.}

A leader of a gang involved in abducting and trafficking women and children is subject to the death penalty, if the circumstances are additionally, abduction involving violence, coercion or anesthesia, or abduction resulting in serious harm is a death-eligible offense if the circumstances are “especially serious”\textsuperscript{909}.

9. \textbf{Drug Trafficking Not Resulting in Death.}

Use of arms or violence to cover up drug trafficking crimes or to resist arrest or detention is punishable by death a death sentence may also be imposed when opium of not less than 1000 grams, heroin or methyl aniline of not less than 50 grams, or other narcotic drugs of large quantities are involved. Participants in international drug smuggling, leaders of trafficking groups, or government officials who divert state-controlled drugs for illegal sale may also be punished by death\textsuperscript{910}.

\section*{CHAPTER 3 \newline CAPITAL PUNISHMENT IN INDIA}

“We are all the creation of god. I am not sure a human system created by a human being is competent to take away a life based on artificial and created evidence”.

- A.P.J. Abdul Kalam\textsuperscript{911}

Whenever a Punishment is awarded for the wrong doing there are two main reasons for inflicting such punishment;

1.) One is that the person who committed the wrong must suffer for it.

\begin{footnotesize}
\begin{enumerate}
903 Id art 239
904 Id art 119
905 Id art 115
906 Id art 121
907 Id art 236
908 Id art 236
909 Id art 340
910 Id art 347
911 11th President of India from 2002 to 2007
\end{enumerate}
\end{footnotesize}
2.) And, the other one is that inflicting punishment on wrongdoer acts as an example for others.

In India deciding the case for death penalty is based on doctrine of “rarest of the rare test” which was stated in the case of Bachan Singh V. State of Punjab. Which means that death penalty will only be awarded in rarest of rare cases only.\(^{912}\)

Further, in the case of Macchi Singh & Others V. State of Punjab\(^{913}\) - the Three Judge Bench followed the decision of Bachan Singh and stated that only in rarest of rare cases when collective conscience of community is in such a way that it will expect the holders of the judicial powers to inflict death penalty then it can be awarded if-

1.) When the murder is committed in an extremely brutal, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.
2.) When a murder of a member of a Scheduled caste is committed which arouse social wrath.
3.) In case of “Bride Burning” or “Dowry Death”.
4.) When the crime is enormous in proportion.
5.) When the victim of murder is-
   - An Innocent child
   - A Helpless Women or a Person rendered helpless by old age or infirmity.
   - When the victim is a person in relation to whom the murderer is in position of domination or trust.
   - When the victim is a public figure and murder is committed for political or similar reason rather than personal reason.

The Doctrine of “Rarest of Rare”

In the case of Bachan Singh V. State of Punjab\(^{914}\), the Supreme Court pointed out its view regarding death penalty that death penalty should be awarded only in rarest of rare cases. This view of Supreme Court was highly supported as it aimed to reduce the use of Capital Punishment.

The Ratio Decidenti or the Rule of Law applied by the Supreme Court in the case of Bachan Singh is that - the death penalty is constitutional only if it acts as an alternative to life imprisonment. And same shall be applied in rarest of rare case when the alternative option is unquestionably foreclosed.

Further, in the case of Santosh Kumar Satishbhushan Bariyar V. State of Maharashtra the Supreme Court further explained that “The rarest of rare dictum only serves as a guideline in enforcing the provisions mentioned in Section 354(3) of CrPC and entrenches the policy that life imprisonment is the rule and death punishment is an exception.\(^{915}\)

The Constitution of India under Article 21 states that no person shall be deprived

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\(^{912}\)Bachan Singh vs State Of Punjab, AIR 1980 SC 898 (Y Chandrachud, A Gupta, N Unwalla, P Bhagwati, R Sarkaria)
\(^{913}\)Macchi Singh And Others vs State Of Punjab, 1983 AIR 957 (Thakkar, M.P. (J)).
\(^{914}\)Id at 34
\(^{915}\)Santosh Kumar Satishbhushan Bariyar vs State Of Maharashtra, 2009 (6 SCC 498) (S.B. Sinha, Cyriac Joseph)
of his ‘Right to Life’ unless done with due process of law.\footnote{Indian Constitution, Art. 21.} In the case of death penalty when the punishment of death is awarded then it also limits the scope of introduction of new facts or law in the case. If the punishment has been executed it is irrevocable.

**Law Commission Report of 2015**

India’s Law Commission in its 262\textsuperscript{nd} Report (August 2015) recommended that the concept of death penalty should be abolished for all crimes other than terrorism related offences to safeguard national security.\footnote{Report No. 262, The Death Penalty, Law Commission of India, 2015.}

The Law Commission in its previous review in the year 1967, the commission concluded that India couldn’t risk the “experiment of abolition of capital punishment”. But in 2015 the Commission stated that “the commission feels that the time has come for India to move towards abolition of the death penalty”.\footnote{Id. at 39}

Despite the fact that death sentences are rarely executed in India, still the commission suggested that the penalty should be abolished. The commission gave following reasons:-

1.) Times have changed.
2.) It’s not a Deterrent.
3.) India’s justice system is flawed.

**Rate of Execution and Commutation of Capital Punishment in India**

In India, the concept of death penalty is present but there were only 7 executions done from year 1998-2018. Between 2004 and 2013 there were a total 1303 capital punishment verdicts but still only 3 convicts were executed between this period. From 2004 to 2012 not even a single execution was done.

In the last 20 years a total of 3751 death sentences were commuted to life imprisonment. In July, 2007 Yakub and 11 others were convicted with sentence to death. By special court for planning or carrying out the 1993 bombing in Mumbai which killed nearly 260 people and injured several others.\footnote{Id. at 39}

In March, 2013 the SC upheld Memon’s Death sentence, while commuting the death sentence of 10 others to life imprisonment while one died later.

In the past 14 years only 4 have been hung till death:

1.) Dhananjoy Chatterjee (August 14, 2004).
2.) Mohammad Ajmal Amir Kasab (November 21, 2012).
3.) Afzal Guru (February 9, 2013).
4.) Yakub Memon (July 30, 2015).

- **Commutation of Capital Punishment**

  The Constitution of India u/A 161 & 72 empower the Governor of any State and President of India to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the
sentence of any person convicted of any offence.\footnote{Indian Constitution, Art 161 & Art 72}
(a) in all cases where the punishment or sentence is by a Court Martial;
(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union/State extends;
(c) in all cases where the sentence is a sentence of death.

Under the 1950 Army Act, hanging as well as shooting are both listed as official methods of execution in the military court-martial system.

CHAPTER – 4
OFFENCES PUNISHABLE WITH DEATH IN INDIA

- Offences Punishable with death
- Penalty Under IPC

1.) Section 121 of Indian Penal Code, 1860: Waging War against the Government
2.) Section 132 of Indian Penal Code, 1860: Abetment of Mutiny
3.) Section 194 of Indian Penal Code, 1860: Giving or fabricating false evidence leading to procure one's conviction for capital offense.
4.) Section 195A of Indian Penal Code, 1860: Threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person.
5.) Section 302 of Indian Penal Code, 1860: Murder
6.) Section 305 of Indian Penal Code, 1860: Abetment of suicide by child or insane person
7.) Section 307(2) of Indian Penal Code, 1860: Attempt to murder by a life convict, if hurt is caused.
8.) Section 376A of Indian Penal Code, 1860: Rape and Injury which causes death or leaves the woman in a persistent vegetative state.
9.) Section 376E of Indian Penal Code, 1860: Certain repeat offenders in the context of rape.

Legal Procedure
Once the death sentence is awarded by a sessions (trial) court, the sentence must be confirmed by a High Court to make it final. Once confirmed by the High Court, the condemned convict has the option of appealing to the Supreme Court. If this is not possible, or if the Supreme Court turns down the appeal or refuses to hear the petition, the condemned person can submit a ‘mercy petition’ to the President of India and the Governor of the State.

The present day constitutional clemency powers of the President and Governors originate from the Government of India Act 1935 but, unlike the Governor-General, the President and Governors in independent India do not have any prerogative clemency powers.

Execution Procedure
- **Hanging**
  Hanging is the method of execution in the civilian court system, according to the Indian Criminal Procedure Code.
- **Shooting**
10.) Section 396 of Indian Penal Code, 1860: Dacoity with murder.
11.) Section 364A of Indian Penal Code, 1860: Kidnapping for ransom.

- **Chapter 28: Submission Of Death Sentences For Confirmation**

  1.) Section 366 – Sentence of death to be submitted by Court of Session for confirmation
  2.) Section 367 – Power to direct further inquiry to be made or additional evidence to be taken.
  3.) Section 368 – Power of High Court to confirm sentence on appeal or convicion
  4.) Section 369 – Confirmation of new sentence to be signed by two Judges
  5.) Section 370 – Procedure in case of difference of opinion
  6.) Section 371 – Procedure in cases submitted to High Court for confirmation

**CHAPTER – 5**

**UNITED NATION’S VIEW ON CAPITAL PUNISHMENT**

United Nation believes that death penalty breaches human rights, in particular the right to life and the right to live free from torture or cruel, inhuman or degrading treatment or punishment. Both of these rights are protected under Universal Declaration of Human Rights (UDHR). UDHR in its Article 3 clearly states, “Everyone has the right to life”\(^{921}\).

140 countries worldwide, more than two-thirds, are abolitionist in law or practice. In 2015, four countries namely- Fiji, Madagascar, the Republic of Congo and Suriname abolished the death penalty for all crimes. As of now a total of 105 countries have dropped the concept of death penalty. In 2015, Mongolia also passed a new criminal code abolishing the death penalty which came into force in 2016.

Over time, the United Nation has adopted various instruments that ban the use of the death penalty, including the following:

- **Safeguards guaranteeing protection of the rights of those facing the death penalty**

In 1984, the United Nation Economic and Social Council adopted Safeguards guaranteeing the protection of the rights of those facing the death penalty\(^{922}\).

- **Second Optional Protocol to ICCPR, aiming at the abolition of the death penalty**

In 1989, 33 years after the adoption of the Covenant itself, the UN General Assembly adopted the Second Optional Protocol to the ICCPR that provided a new abolition decisive momentum. Member States which became parties to the Protocol agreed not to execute anyone within their jurisdiction\(^{923}\).

**CHAPTER – 5**

**CONCLUSION**

\(^{921}\)Universal Declaration of Human Rights, Art. 3


\(^{923}\)Id. at 44
“Life is precious and death is irrevocable”

When a death penalty is awarded to the accused it is more than mere a punishment, we are ending or killing a person in name of justice and law. Killing a person is immoral and it demonstrates the lack of respect towards human life. And opposing death penalty doesn’t mean that someone is supporting the criminal. When a death penalty is awarded it eliminates the scope of improvement which could have changed the life of an individual, this is the reason why democracies around the world are supporting reformatory theory of punishment and abolishing deterrent theory of punishment.

“Even the vilest criminal remains a human being possessed of common human dignity” Therefore one should respect each and every human being. We are no one to decide who gets to live and who gets to die on the basis of rules and regulations which we made ourselves.

It is true that a criminal needs to be punished for the crimes he committed but we as a society need to eliminate the crime not the criminal. This is the main difference between human being and animals. We are given a precious gift – ‘we are a human’ and killing another human being falsify the mere purpose of being a human being.

We call ourselves a ‘civilized society’ but we kill another human being in the name of justice. The principle of death penalty is based on deterrent theory which in generic terms set an example by inflicting fear on the mind of others but there are certain other ways by which a leading example can be set such as in reformatory theory. The concept of capital punishment is ancient and barbaric and should be abolished as it involves killing of a human being which is immoral as life is precious and death is irrevocable. Democracies should thrive more on reformatory theory rather than deterrent theory as it provide a chance of improvement which can change the life of an individual and can offer him a chance to get back in the society and hence reformatory theory has its advantage over deterrent theory.

After looking at all the statistics and report we can conclude that China still has a long way to cover in order to abolish the concept of death penalty.

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TRIPS AND GIs: ECONOMIC SIGNIFICANCE AND RATIONALE FOR PROTECTION

By Sanika Malik
From Rajiv Gandhi National University of Law, Punjab

1. INTRODUCTION
1.1. TRIPS

The World Trade Organization or WTO is an international organization governing the trade relations between nations. It was formed in 1995 by replacing General Agreement on Trade and Tariff (GATT). It focuses on trade in goods, services and intellectual property between governments along with the trade mechanism, dispute resolution and negotiations and enforcement of trade agreements. It also provides technical assistance to developing countries and promotes cooperation between states. The need for a better protection of the intellectual property rights gave birth to the TRIPS agreement. The WTO believed that intellectual property is a trade related asset and the requirement of a similar law across nations was present. The TRIPS agreement came into effect on 1 January 1995. Before this, World Intellectual Property Organization (WIPO) was dealing with intellectual property.

All the member countries of WTO were required to create legislations for the intellectual properties based on the provisions of TRIPs. This led to the creation and amendment of various statutes such as the Copyright Act, Patent Act, etc. in different countries. This has led to more uniformity amongst the laws in different nations.

In India, the Patent Act, 1970 was amended in 2005 and the Copyright Act was amended in 2010 and enforced in 2012 to accommodate the provisions of TRIPS.

TRIPS covers various intellectual properties such as copyright, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and undisclosed information including trade secrets. It is a minimum standards agreement and the members can provide for more protection if they deem fit.

The agreement lays down certain standards of protection that have to be provided by the member states. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. The Agreement sets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions, must be complied with. Except for the provisions of the Berne Convention on moral rights, all the provisions have been made a part of the TRIPS agreement. This agreement may be called as the Berne and Paris-plus agreement.

924 At https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm#top (last accessed on 8th April, 2018).
The agreement also provides for the enforcement procedures and remedies to be provided by the members along with dispute settlement mechanism that will fall under WTO’s settlement procedure. It provides for the national and most favoured-nation treatment. While the national treatment clause forbids discrimination between a Member’s own nationals and the nationals of other Members, the most-favoured nation treatment clause forbids discrimination between the nationals of other Members.925

The Preamble of the Agreement contains its goals, which include the reduction of distortions and impediments to international trade, promotion of effective and adequate protection of intellectual property rights, and ensuring that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. This has to read along with Article 7 (Objectives) which promotes technological innovation, transfer and dissemination of technology and mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. Article 8, entitled “Principles”, recognizes the rights of Members to adopt measures for public health and other public interest reasons and to prevent the abuse of intellectual property rights, provided that such measures are consistent with the provisions of the TRIPS Agreement.926

1.2. Geographical Indications

GIs have been defined under Article 22.1 of the TRIPS Agreement:

“Geographical indications are indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.” GIs are the names of places with which a product can be identified with and has certain specific characteristics. These features can be due to environmental factors, processing methods, or manufacturing skills specific to the region from where they originate.927

The essentials of a GI are:

- It must be with respect to a good or service.
- GI should originate from a certain territory.
- It must be a sign or registrable indication.928
- It can be a mark or a combination of word and mark.
- Some countries allow GI registration for services as well.
- Goods may include agricultural products and manufactured goods.
- There must be a clear linkage between the quality or reputation of the goods and its geographical origin, for example climatic condition.

The term period given for protection to a GI is fixed by the states and usually does not allow for renewal. In India in cases where renewal is allowed, the term is around 10 years. It is possible that the GIs may be

925 Ibid.
926 Ibid.
927 At https://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bcilr/28_1/06_TXT.htm (last accessed on 8th April, 2018).
928 Ibid.
revoked if it is not used or the standards are not maintained.

The need for GIs arose when producers started to exploit their monopoly over a product and a balance between the rights of consumers and producers was required. It protects the consumers from being deceived or confusing an imitation and an original product.

Examples of GIs include- Darjeeling Tea, Agra’s petha, Kancheepuram sarees, and the like.

The GIs were given protection since the 18th century but there was no proper international agreement dealing with it. The TRIPS agreement is the first agreement dealing with GIs and also with wines and spirits.

Prior to the TRIPS agreement, there were various international treaties dealing with protection of indications. The Paris Convention, signed in 1883, was the first international treaty dealing with protection for indications of source and appellations of origin.

Next was the Madrid agreement, adopted in 1891, which provided how seizures could take place and what was the competent authority to carry it out. It also empowered the courts of a state to decide which indications of source fell within the agreement. Later, the Lisbon agreement was signed in 1958 and any member of the Paris Convention could become a party to it. It disallows any monopolistic behavior in the society but at the same time, gives the producers all the essential rights.

2. TRIPS AND GEOGRAPHICAL INDICATIONS

Section 3 of Part II of the TRIPs agreement provides for the protection of GIs and Articles 22,23 and 24 of the agreement relate to it.

2.1. Article 22

This article states a definition indicating the subject matter and the standards for registered in the International Register of WIPO.

1.3. GIs and TRIPS

Article 22 of the TRIPS agreement puts forth a standard level of protection and this should be done to avoid misleading the public and to prevent unfair competition. Article 23 provides for a higher level of protection for wines and spirits with certain exceptions.

Article 24 provides for exceptions, i.e. where GIs need not be protected or can be given limited protection.

The concept of GIs and protection granted to it began in various parts of Europe and gradually spread throughout the world. It disallows any monopolistic behavior in the society but at the same time, gives the producers all the essential rights.

929 At https://www.wto.org/english/tratop_e/trips_e/gi_back ground_e.htm (last accessed on 8th April, 2018).
protection GIs. It is derived from Article 2 of the Lisbon Agreement but the new definition is wider as it includes reputation along with quality and characteristics.

An indication is entitled for protection only if it (i) identifies the good and its area of geographical origin, (ii) possesses a given quality, reputation or other characteristics, which (iii) is essentially attributable to its area of geographical origin. Article 22.1, however, does not propose any criteria to test for what is considered ‘essentially attributable’.  

This Article provides for the scope of protection:

- protection against the use of indications that mislead the public (paragraph 2(a)) or is deceptive (paragraph 4).
- protection against the use of indications in a manner that constitute acts of unfair competition (paragraph 2(b)).
- refusal or invalidation of trademarks that contain or consist of indications, in a manner that misleads the public (paragraph 3).

Article 22.2(a) enjoins two conditions for determining an infringement/violation of GI i.e., a description on a good referring to its origin, and this reference being false, deceptive or misleading. Though Article 22.2(a) does not categorically ban the use of GIs with descriptive or illustrative explanations, such use may be disallowed if it creates deception or public confusion. The member states are allowed to implement laws to protect GIs according to their wisdom. Article 41 of the agreement states that the countries have to create enforcement mechanisms and procedures to protect infringement of any intellectual property including GIs.

2.2. Article 23

This article provides for protection for GI for wines and spirits which has been taken from the Madrid Agreement. Article 23(1) states that laws must be enacted by states to prevent use of GI for the same when they do “not originate in the place indicated by the geographical indication” even when “the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as ‘kind,’ ‘type,’ ‘style,’ ‘imitation’ or the like.” Protection is given to wines and spirits regardless of the fact that it may mislead the public or is representing an act of unfair competition.

Hence, Article 23 strictly prescribes usages of indications like ‘California Chablis,’ ‘American Champagne,’ ‘Antarctica Merlot’ and a sparkling wine ‘type Champagne’ even if they are truthful statements and not

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considered as misleading.\textsuperscript{934} This makes the protection accorded as a higher level protection.

A nation has to refuse or invalidate any trademark registrations that contain GI which identifies with wines or spirits as per Article 23(2). Article 23(3) provides for specific arrangements for homonymous GI, such as “Rioja” from Spain and “Rioja” from Argentina.\textsuperscript{935} The agreement allows for co-existence of both the names and gives to protection to both. The states have to differentiate between such GI and provide equitable treatment and ensure that the public is not misled as well.

Article 23(4) provides for future negotiations to establish a multilateral system of notification and registration of GI for wines and spirits.\textsuperscript{936} This provision was created for enforcement of the protection mechanism but has not come into force till now.

If it is found that the GI can be misleading for the consumers, it upon the plaintiff to establish that the consumers have been misled or there has been an act of unfair competition in order to defend the GI.

This article provides for future negotiations on GI protection and states certain exceptions to Articles 23 and 24 which can be invoked by nations while implementing the laws. It also states that a country cannot refuse to conduct negotiations and cannot use any exception to delay or avoid these negotiations.

Article 24(2) empowers the TRIPs Council to supervise the protection of GI.

Specifically, to accommodate those countries that were not traditionally in favor of GI protection, Article 24(4) grants a grandfather clause and exempts member countries from having “to prevent continued and similar use of a particular [GI] of another Member identifying wines or spirits in connection with goods and services [where the GI has been used] in a continuous manner with regard to the same or related goods or services in the territory of that Member” for at least ten years prior to April 15, 1994, or where this continuous use has been in good faith.\textsuperscript{937}

Likewise, Article 24(5) provides a similar clause with respect to trademarks that have been acquired or registered in good faith before the date of the application of TRIPs in the member country where the mark is registered, or before the GI was protected in its country of origin.\textsuperscript{938}

A clear compromise between “old” and “new” worlds, Article 24(6) finally provides that TRIPs countries do not need to protect GI “with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such

\begin{itemize}
\item \textsuperscript{936}ibid.
\item \textsuperscript{937}ibid.
\item \textsuperscript{938}ibid.
\end{itemize}
goods or services,” thereby exempting GI that are generic terms in some countries from being protected under their laws. Articles 24.4 to 24.9 provide for certain exceptions to balance the rights of the consumers and the GI holders. Article 24.4 states an exception to Article 23 to ensure that any previous development in the field is not disturbed. It also provides for ‘continued and similar use’ of a GI for wines and spirits in a particular territory in a continuous manner for a minimum of 10 years from 15 April 1994 or in good faith before this date. The case of ‘Budweiser beer’ is regarded as an example here. The region of Budweis, Bohemia has been brewing beer since the thirteenth century and named its beer accordingly. Budweiser, however, has also been the name of a well-known American beer since the nineteenth century. The agreement allows for co-existence of names and parties can fight for it.

Article 24.6 is designated for generic GIs with respect to all goods or services including application of the provisions to ‘products of the vine.’ Nations can be exempted from following Section 3 if the term is ‘customary in common language’ and it is the common name for such goods or services in the territory of that Member, e.g., ‘china’ for porcelain.

Article 24.8 recognizes the use of patronymic geographical names that permits a person to use his name or of his predecessor in business but such name should not mislead the public. Article 24.9 exempts states from ‘protecting geographical indications that are not or cease to be protected in their country of origin, or which have fallen into disuse in that country’. Hence, if a particular indication is not protected nationally, allegations of its misappropriation and embezzlement would legally be untenable and invalid.

3. RATIONALE FOR PROTECTION OF GIS

GIs are protected to protect the producers’ and consumers’ interests.

3.1. Arguments

Moral Argument
The Holy Bible says, ‘Thou shall not steal.’ GI is the property(intangible) of another as is goodwill and reputation. No other person is allowed to tamper with it or misappropriate it.

Cultural Arguments
GIs may have been brought into existence by a culture or tradition. It can be said to be a part of cultural patrimony which has been travelling across generations. Protection for the reputation and quality of goods is necessary which also safeguards the interests of the country.

Social Arguments
It is said that other forms of intellectual property belongs to the rich and GI usually

939 ibid.
941 ibid.
942 ibid.
belongs to the poor. GI is considered as the property of the community as a whole and can contribute in the development of rural areas. It is a collective property and cannot be any person’s private monopoly.

Any producer should not mislead the public. [Article 22.2 (a)]
Protection must be given otherwise, the amount of unfair competition will augment. [Article 22.2 (b)]
There should not be any deceptive indications. (Article 22.4)

3.2. Need for Protection

There is a need to protect GIs as:

- It can be misrepresented by some commercial industry.
- Any unauthorized party can use it falsely.
- This will lead to deception and confusion in the public.
- The actual producer will also incur loss.

The GI may become of generic or common use, i.e. the GI will be identified with an entire type of goods or has become the ‘colloquial description’ for a particular class of goods.\(^{943}\)

3.3. Method of Protection

The GIs have to be protected in accordance with the laws of the state. Example- the USA has included GI within the ambit of trademarks while in India, there is a separate legislation for GIs. Article 22.2 of the TRIPS agreement provides for creation of a statute to ensure protection and use sanctions such as fines and injunctions to prevent any misuse.

4. ECONOMIC SIGNIFICANCE

The economic rationale behind the protection of GIs is that a good is associated with a particular place as its place of origin and the resources of that place are used in the creation or manufacturing of that good. These resources enhance the worth of the good and may vary from place to place such as environment, climate, culture, production methods and the like.

Due to these resources, the good from that particular territory possesses better qualities than the same good from other region without the specific resources. This allows the producers of such a good to create collective monopolies and improve their marketing sphere. It enhances the market access of the producers and working collectively acts as a great strategy to protect the geographical indications.

The collective nature of geographical indications as a quality signal means that use of the sign is not limited to a single producer but to all producers within the designation which adhere to the code of practice. Product reputation is thus the result of the actions of different agents active in the same area of production and is projected through tradition over a period of time.\(^{944}\) Thus GIs protect the quality levels as well as the reputation of the good and producers. GIs also contribute in the development of the rural sector as quite a few of the goods


\(^{944}\) Ibid.
are created in the rural areas and the protection acts as an incentive to them. This in turn is an important factor for the growth of under-developed and developing nations. A new issue with regard to the extension of GIs under Article 23 and its potential costs is emerging. The member states, especially the developing nations, wish to extend the protection to other products as has been given to wines and spirits. However, this will cost the government along with the producers and consumers a heavy amount.

The potential cost of this includes the cost incurred by the government for implementation and administration of the new law but this would later reduce the cost concerned with the goods that will be given protection.

The consumer will also have to pay some costs as the extension to all goods will reduce competition, increase monopoly and increase prices of the products. This will however lead to confusion among the consumers as GI-extension requires renaming of products and the label used to identify with the original product will vanish.

The costs have to be paid by the producers also in case extension is granted as they have to pay to suddenly stop using the GI that was being used. This is because, GI extension may restrict the future investment and expansion plans of producers who have been using indications which are not confusing or deceptive but are similar to authentic and valid GIs, and might even compel closure of certain emerging markets. This debate is emerging as a conflict between the north and the south. The developing nations along with the under developed nations want to use their traditional knowledge, especially of the local and indigenous communities to exploit the TRIPS agreement to the fullest. This will promote the handicraft and cottage industries and reduce the fear of counterfeit products. Moreover, many developing nations economy are based on agriculture and they can produce sufficient goods for circulation in the market and gain profits out of it. This would also increase investment and allow such countries to enter into the market and gain dominance. In addition to this, the knowledge that a good is created only in a specific area may increase the tourism of that area as well contributing to the growth in the economy.

The developed countries however, are not in support of such an extension as they might lose control over the market and such extension will debar them from imitating the product in their own region. Also, the implementation cost of the same is quite high and many countries may not be able to afford it.

Therefore, there is an economic significance behind the protection given to GIs. There are also various costs that will be incurred by people in case the GI protection is extended to other goods as well.

5. OTHER AGREEMENTS TO PROTECT GIS

5.1. OAPI Agreement

It is also known as the African Intellectual Property Organization. It was signed in Bangui on 2nd March 1977 and came into force in February 2002. African countries such as Chad, Congo, etc. are a party to it who are party to the Paris Convention and TRIPS agreement. This agreement enforces and applies respective state laws on each member state besides incorporating the provision to protect GIs in free trade agreements.

5.2. EC agreements

The European Community, now European Union, has entered into various agreements with different countries such as Australia in January 1994 which provides a definition for GIs and to protect a GI, both the parties have to recognize it as one by their laws, with Canada in 2003; with Mexico in 1997 granting protection to certain mentioned spirits such as Whisky, Cognac, etc. and with Chile, South Africa and the like.

5.3. An Overview of the Legislative Framework in India

India, being a member of the TRIPS agreement enacted a legislation in 1999, i.e. the Geographical Indications of Goods (Registration and Protection) Act, 1999. It provides registration and protection of GIs excluding unauthorized persons from using it. It contains nine chapters dealing with definitions, procedure of registration, its effect and duration, etc.

Section 2(e) of the Act defines ‘geographical indications’ in relation to goods as “An indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured, one of the activities of either the production or of processing or preparation of the goods concerned takes place in. For the purpose of the aforesaid, any name, which is not the name of country, region or locality of that country, shall also be considered as the geographical indications if it relates to a specific geographical area and is used upon or in relation to particular goods originating from that country, region or locality, as the case may be”.

The Act also defines ‘goods’ which includes any:
- Agricultural goods
- Natural goods
- Manufacturing goods
- Goods of handicraft and foodstuff.

This definition is not exhaustive but merely illustrative.

The word ‘indications’ has also been defined

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946 Section 2(e) of the Geographical Indications of Goods (Registration and Protection) Act, 1999.
947 Section 2(f) of the Geographical Indications of Goods (Registration and Protection) Act, 1999.
to include: (i) any name (including abbreviation of a name); (ii) geographical or figurative representation; or (iii) any combination or suggest the geographical origin or goods to which it applies.  

The Act provides for registration by any producer, association of person or organization established by law which is representing the producers’ interests. The application must be made to the Registrar of Geographical Indications who is also the Controller- General of Patents, Designs and Trade Marks where the GI originates or is created. The application also provides for the procedure of registration that includes the withdrawal of acceptance, opposition to application, advertisement of application, certification of registration, etc.

The duration of registration of a GI under this statute is ten years or for a period till the date on which the registration of geographical indication in respect of which the authorized users is registered expires, whichever is earlier. It also provides for remedies and punishment in case of an infringement.

5.4. Cases

There have been numerous instances where the conflicts between the North and the South have become imminent. The cases below show the conflict between India and other nations with regard to the GIs of certain products.

5.4.1 Neem Tree Case

Neem tree (Azadirachta indica) is native to India but now grows in many parts of the world, such as, Australia, Africa, Fiji, Central America, South America, Puerto Rico, and Hawaii. Neem and its extracts has been used by Indians as a medicine, pesticide and fertilizer. W R Grace, a US Corporation, developed the technology to extract the active ingredient in the neem tree seed in a stable solution and patented the stabilization process and the stabilized form of the ingredient with the USPTO. The EPO also granted patent to them in 1994 for the method to control fungi on plants thereby depriving India of its legal rights over neem.

This led to widespread protests in India and an opposition was filed in 1995 against the EPO’s grant of patent. It was held that it lacked inventive step and novelty which are prerequisites for grant of patent. It was also established that its properties and use were ‘prior art’ years before the ‘proprietors’ applied for a patent.

India later succeeded in its legal battle against the US Corporation and the EPO completely revoked the grant of patent to the Corporation.

5.4.2 Turmeric Case

Turmeric (Curcuma longa) is a plant of the ginger family yielding saffron-yellow rhizomes. It is grown throughout India and Pakistan and is used as a spice in cooking.

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948 Section 2(g) of the Geographical Indications of Goods (Registration and Protection) Act, 1999.
949 Section 18(2) the Geographical Indications of Goods (Registration and Protection) Act, 1999.
951 Ibid.
952 Ibid.
953 Ibid.
Besides this, it has medicinal and cosmetic properties and can be used as a colour dye and as ant repellent.

Two expatriate Indians from the University of Mississippi Medical Centre, Jackson were granted patent by the USPTO for its use in wound healing and to treat acne. The ingredient of curcumin as being an essential of turmeric was discussed in the patent but no claim was made specifically for it.

The Council for Scientific and Industrial Research (CSIR) filed a case against USPTO claiming it to be prior art stating ancient literature which stated the use of turmeric. In 1998, the opposition was held as valid and the grant of patent was revoked as it was not novel in nature.

This case became an important one as traditional knowledge of a developing nation was used to successfully challenge the grant of patent.

Another case between India and USA related to the basmati rice which is native to India and Pakistan but a US Company, Rice Tec Inc. was granted patent by the USPTO. The Indian government was quick in challenging it as it was proving harmful to Indian exports. India also argued that Basmati was a non-generic name and its reputation was linked with the region of origin and could not be protected as a GI. The matter was resolved by the USPTO granting a narrower patent to the US Company so that India’s exports were not hampered.

6. CONCLUSION

The intellectual property law is ever evolving. Countries have come together to create certain laws and regulations for the protection of intellectual property rights. One of the most prominent agreements is the TRIPS agreement which focuses on all major types of Intellectual properties such as geographical indications.

GI are a relatively new concept and each member state of the TRIPS agreement must create a legislation for its protection. However, the countries do not have a uniform standard of protection of the GIs and the double standard protection adopted by TRIPS are posing uncertainties in the international legal regime for the protection of GIs.

More weightage is given to wines and spirits while other goods have been ignored by the TRIPS agreement. Separate protection for certain goods may be beneficial for the developed nations but not for the developing countries.

The developing countries are arguing for the extension of GI protection to other products as well otherwise it will not be fruitful for the growth of these countries economies. If this is implemented, India can give protection to Basmati rice, Darjeeling tea and many such products that are native to India. such an extension should neither effect the market, consumers or the rights acquired previously in good faith. However, this debate has reached a stalemate and

international negotiations have failed to produce any result.

There should be a distinct international mechanism dealing with the protection of GIs and no discrimination should be made between wines, spirits and other products. The level of protection must be uniform to all the goods and for all the countries of origin. Article 23 of the TRIPS agreement is the point of contention at present and this matter needs to be resolved to give adequate protection to the goods along with the rights of the producers and consumers.

Efforts must be made by the nations in order to reach a conclusion. The economies of the countries should benefit the most out of this and no excessive costs must be borne by the states. GIs is an emerging issue and the rights of the actual producer should be taken care of and no infringement of the product must be allowed.

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PROS AND CONS OF PRIVATIZATION OF AIRPORT

By Seenu tiwari
From WBNUJS

INTRODUCTION
Airport has emerged as government run enterprises. But due to globalization the trend is changing from public sector to private sector and airport is not an exception to it. The major reason for the change of mindset of government is to make available the air travel services for common man which will eventually lead to liberalization of air line services. But such services will not come alone and it will lead to increase in air traffic as well and country like India does not has such potential to handle such increased traffic at present. so in order to reduce the burden of government and to increase efficiency the government has decided for privatization of airlines. One of the other reason for privatization of Indian airports is monopoly of airport authority of India as well. airport authority of India has come into force on 1st April 1995 and has been formed by uniting national airport authority and international airport authority. AAI manages 125 airports, which include 18 International Airport, 07 Customs Airports, 78 Domestic Airports and 26 Civil Enclaves at Defence airfields. AAI provides air navigation services over 2.8 million square nautical miles of air space. Apart from this there are five international airports governed by public private ownership under Aircraft Act 1934 and the Aircrafts Rules 1937. And via an amendment in the AAI Act in 2003, private airports are excluded from the ambit of the Act, namely:

1. Indira Gandhi International Airport, Delhi operator Delhi International Airport Limited (DIAL).
2. Chattrapati Shivaji International Airport, Mumbai operator Mumbai International Airport Limited (MIAL)
3. Rajiv Gandhi International Airport, Hyderabad operator GMR Hyderabad International Airport Limited (GHIAL)
4. Kempe Gowda International Airport, Bengaluru operator Bangalore International Airport Limited (BIAL)
5. Cochin International Airport, Kochi operator Cochin International Airport Limited (CIAL)

There is wide spectrum of ownership such as airport which is controlled and owned by government, independent airport authorities, PPP i.e. public private partnership with government majority or private majority ownership. India has started this trend since 2006 following British airport authority who transferred their own airports under privatization. There are other reasons as well such as to improve efficiency, to enhance profitability and improve competitiveness.

STATEMENT OF PROBLEM
Due to the changing mindset of government in order to meet the need of globalization and for liberalization of airline services privatization of airports are the only solution at present left with India. although the first private airport was established in cochin in India to meet the increased number of passengers from India and majority from foreign nations but After it the need was felt for privatization due to the fact that India got responsibility to host commonwealth games in 2010, and after that in 2004, the Brownfield Airports (Mumbai and Delhi)
and in 2008, two Greenfield Airports (Hyderabad and Bangalore) was handed over to the private players. Approximately in all the PPP airports the 75% share belongs to the private entities and the rest are belonging to the state government and AAI. The major reason for privatization of airport in India are as follow:

- A high percentage of aeronautical revenue – This shows the high dependence of AAI on aeronautical revenues and the low level of development of non-aeronautical streams of revenue.
- Low commercial revenue per passenger – This points towards a low level of development of non-aeronautical streams of revenue.
- Very low revenue per employee – AAI, being a government-controlled organization, cannot take tough labour related decisions based on economical considerations. Hence, we see surplus labour at AAI.
  - Low operating profit per passenger – This is mainly because of inefficiencies in the operations of AAI.
  - Low passengers per employee
  - Low staff cost per employee
  - High percentage of staff cost in total cost

However, privatization of airports has been the issue of debate across the country. Although privatization has lot of merits attached with it such as increase efficiency, improved infrastructure, high revenue etc so as to overcome the loopholes of government owned airports such as inefficiency, capital storage but privatization has demerits as well ,say for example in case of public private partnership the major area of concern is control, political problem, agency problem and in case of private owned airports the concern is related to control, conflict of interest, safety concerns, regulation. On the other hand, there are some suggestions given by Naresh Chandra committee regarding management of these loopholes such as separate economic regulation, reduction of airport charges which will be discussed in detail in this paper.

further looking forward and taking a prospective step toward globalization in terms of privatization of airport along with the global norms and practices governing and regulating the same in relation to airports. To understand how privatization of airports would play out in India, given its unique range of socio-economic issues, it is imperative to take them into consideration and evaluate their application to the Indian scenario. Thus, this research shall also examine the compatibility of the same.

RESEARCH QUESTION
The researcher will examine, analyse and seek answers to the following questions through the project work:

1. Why the need of privatization of airports in India emerged?
2. What are the legal and other issues related to privatization of airports?
3. What are the best practices India can adopt from foreign airport of developed countries related to privatization of airport?
4. What are the merits and demerits of privatization of airport?

HYPOTHESIS
The researcher believes that although due to globalization and liberalization we are moving toward privatization but still due to
security issues fully privatization cannot be done and at the end of the day we should have state run carriers and one of the other reason for not making airport fully privatized is to check abuse of dominant position by CCI. However, on the other hand the country like USA has private airports but still India’s condition is not such as to compare the two on the grounds of security and competition issues.

OBJECTIVES
The researcher aims at pursuing the need of privatization in India along with the pros and cons of privatization. the researcher aims to know the need of privatization in India along with the merits and demerits of government owned airport, public-private partnership owned airport, private owned airport. The researcher also aims to acknowledge the best practice to be adopted from foreign nations of developed country for privatisation in India. It is important to see whether the privatization of Indian airport serves the need. In case they are identified the important of privatization of airports then the identification of loopholes become the second most problem. The researcher further, examines the benefit and cost of privatization of airports in India. Thereafter, the researcher aims at studying and analysing the evolution of privatization of airports in the light of privatization of Greenfield and Brownfield airports project in India. The researcher also aims at getting an idea as to what can be the way forward for further privatization of airports or privatization of uneconomical airports in India.

SCOPE
The scope of research is limited to pros and cons of privatization of airport according to Indian scenario i.e. keeping into mind loopholes and expectation of India. however, it will not measure expectation on detailed statistical basis. Moreover, the research will also look after the recommendation enumerated by Naresh Chandra committee. On the other hand, the researcher will also look into the developed foreign nation so as to adopt the recommendations from them regarding privatization of airport but it will not go into the technicalities of developed country private airport. the researcher will focus on the need for privatization of airport in India.

METHODOLOGY
The researcher has adopted doctrinal method of legal research in doing the project. The researcher has adopted historical method of research in knowing the history of airport authority of India i.e. how it emerged, what were the factors for its existence. The researcher has also adopted an analytical approach for determining the need for privatization of airport in India .and also the comparative approach to enlist the pros and cons of privatization of airport in India and to adopt the principles or recommendation from developed nation regarding privatization of airport. The researcher has used analytical and philosophical approach for drawing interpretation and the conclusion. The researcher has used a uniform mode of citation throughout the course of this research paper.

SOURCES
The sources of data are:
Primary sources e.g. the Aircraft Act 1934, Aircraft Rules 1937, and AAI Act 1994
Secondary sources e.g. committee report, agreements, articles, journals, books etc.

TENTATIVE CHAPTERIZATION

1. INTRODUCTION
In this chapter researcher gives the brief history of the airport authority of India i.e. how it emerged and also the researcher gives the brief history relating to the needs of privatization in India according to the need of society.

2. NEED FOR PRIVATISATION OF INDIAN AIRPORTS
In this chapter researcher gives the detailed analysis of need of privatization of airport in India going into details of economic and environmental issues. In this chapter, the researcher will also focus on the behaviour of developers toward government bodies and the long-term project.

3. COMPARITIVE ANALYSIS
In this chapter researcher will look into the technicalities especially related to environmental and economic issues of developed foreign nation regarding privatization of airport. The researcher will also compare the private foreign airports with that of Indian airports and at the end of the chapter will also try to adopt the recommendations from foreign private airport suitable to Indian scenario.

4. LEGAL AND OTHER ISSUES RELATED TO PRIVATISATION OF AIRPORT
Privatisation of airport is not devoid of issues and concerns and it has been attached with various issues which need to be addressed such as issues related to joint venture, PPP, SEZ, safety and security, slot allocation, environmental concerns etc.

5. PROS AND CONS OF PRIVATISATION OF AIRPORT
In this chapter the researcher enumerates the merits and demerits in detail related to privatisation of airport in India. In this chapter, the researcher also discusses the recommendation given by Naresh Chandra committee regarding privatisation of airport.

6. CONCLUSION
At the end researcher will conclude the project either proving or disapproving the hypothesis by going into detail through all the issues concerned.

CHAPTER 2
NEED FOR PRIVATIZATION OF INDIAN AIRPORT PRIVATISATION
Privatization is transferring function and responsibility either whole or in part from government i.e. public to private owner. There are three types of privatization:955

a) Contracting out: it is one of the prevalent form of privatization, in this the government uses private contractor instead of government resources to provide services (government in nature). It involves identifying potential private sources, developing specification i.e. detailed in nature, conducting competition, making award and finally monitoring.

performance of contractors. contracting can be done at task level or on full service bases. Government can let contracting out at task level and can maintain responsibility for overall management of government function. On the other hand, government can let contracting out for full services as well and in this condition, government can maintain the performance of contractor and can ensure that performance is in accordance with terms and condition of government regulation.  

b) **Asset transfer:** in this government can divest itself of all the responsibilities. revenue producing asset of the government are leased out to private players. the major difference between contracting out and asset transfer is in this government retain no more responsibility or management. however, asset transfer can only be done of those areas which are not considered to be proper government function or where the private body can provide better service.

c) **Managed competition:** in this public and private compete to provide services. both the entities i.e. public and private get equal opportunity to provide the proposal for service and the best gets the award for service which is evaluated in accordance with terms of competition.

**WHY PRIVATIZED AIRPORT?**

This is general perception that airport should be owned by government bodies i.e. public sector and thus the case for there privatization needs is to be stated. I am not suggesting that private players are wiser, kinder or more hard working as compared to the people working in government department but the fact is that scarce resources are more likely to be allocated to there most urgent uses if operated by profit seeking owners.

Now the question comes how this preposition applies to privatization of airport?

The public sector which has faced a huge loss and which has been evident to incur losses, is reluctant to make profits surprisingly.

**HISTORY OF AIRPORTS AND AIRLINES**

Earlier there were only two airlines for scheduled air service in India i.e. Indian airlines for domestic purpose and Air India for international purpose. Indian airline acquired monopoly in domestic schedule service via air corporation act of India, 1953. Private commercial airline offering scheduled air services did not emerged until 1994 as elected government eased barrier to private sector participation, foreign trade and foreign direct investment in country economy.

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956 id
957 id
958 id
Deregulation of airlines industry by government was done with passengers of air corporation (transfer of undertaking and repeal) act 1994, which has opened the gate for private domestic commercial airlines to operate scheduled service with in country, eventually leading to expand private domestic commercial airlines. The government has also given permission to certain private domestic commercial airlines to operate services to other countries and also re-negotiating few bilateral existing air service agreement with some countries, which has given rise to new bilateral air service agreement with others.\textsuperscript{961}

Moreover, government has also allowed new ‘ports of call’ for foreign airlines, especially US commercial airlines so that they can expand service to and from India through new open skies agreement.\textsuperscript{962}

Furthermore, government through PPP eased regulation of airports. Some of the example of privatization of airports in our country is Delhi and Mumbai (ministry of civil aviation, government of india, 2008 act). on the other hand, government also formulated favourable policies to attract foreign players along with domestic players.\textsuperscript{963}

Since 1950 civil aviation was regulated in India up until mid-1980s Indian airlines, a\textsuperscript{964} state carrier was having complete monopoly over domestic schedules air services and this was the part of economic policy regime adopted by government. so due to this policy, public sector was having dominant position and private sector was not only subservient to public sector but also public sector has a control over private sector in terms of what kind of goods it can produce and in what quantity. Government policies was characterized by having tariffs on imports and restrictions on foreign investment in order to protect local industry and business. Government adopted import substitution industrialization strategy.\textsuperscript{965}

During independence, after second world war many aircraft surplus was left and many private operators asked for license to operate it and thereafter government decided to give license to 11 airlines. However, airlines increase but passengers were too less, so in an effort to garner maximum number of passengers, airline frequently undercut each other resorting to predatory pricing, due to which several operators became bankrupt as capacity utilization fall and losses occurred. Air transport inquiry was set up by government to look into the matter concerned and it was found that the loss occurred due to the government itself. Later the government planned to nationalize the industry and unify several different airlines, moreover the government was unwilling to share the burden of financial cost as a result of restructuring airlines. On the other hand during the introduction of bill in the parliament for nationalization of airlines the discussion emerged for privatization of airports but government claimed transportation to be public utility and hence out of private enterprises. As a result, air corporation act 1953 was passed which has three major components.\textsuperscript{966}

\textsuperscript{961} id
\textsuperscript{962} id
\textsuperscript{963} id
\textsuperscript{964} id
\textsuperscript{965} id
\textsuperscript{966} id
FACTORS WHICH LED TO PRIVATIZATION

a) **Economic development**: It include developers of:
   1. Air transport infrastructure
   2. Air transport link
   3. Facilitation of trade and commerce
   4. Promotion of tourism
   5. Attracting foreign investment in air service industry

Shortly after independence, government established various private sector enterprises, protected the local private sector and imposed high tariff on imported goods. The ultimate goal was to protect self-sufficiency via indigenous goods and technology development. Industrial policy focussed on import substitution rather than export promotion. However, these policies lead to relatively slow economic growth due to which India share of export and output fell and human development index also declined far behind those of east Asia which lead to diminish international influence over time. In mid-1980 Rajiv Gandhi lead government made some attempt but it hardly made any change.

Reforms was introduced in 1991 under congress government of prime minister P.V. Narasimha Rao and his finance minister Dr. Manmohan Singh (future prime minister of India). Under the 4th report on air corporation (transfer of undertaking and repeal) bill ,1992 by committee on transport and tourism of the parliament of India (Rajya Sabha) pointed out investment in private sector in air transport industry has been permitted and industry dereserved...
from exclusive preview of public sector under new economic policy.971

As a result of rapid liberalization in 1980-90 due to programme undertaken by government, demand for air service has been increased. Reason was need for export promotion which was viewed as an important source of foreign exchange for import of oil, goods and technology that was especially for modernization and liberalization.

For economic development better connectivity was a mandate. the area which is integral part of country economic growth are all dependent on better air transport link such as call centres, business process outsources, medical tourism, software industry and other services .it is also major factor to attract foreign investment in telecommunication, automobile, electronics etc. it also facilitates trade and travel in country in country and hence fulfills social and economic objective of government.

Madharao Scinda, minister of civil aviation and tourism in Rao government also stated benefit of privatization of airports which will result in increased flight frequency and capacity to all corner of the country.972

Above all more liberal bilateral agreement would encourage foreign airlines to expand operation in India.

Adequate capacity and modern air transport infrastructure are essential to attract foreign investment. airport act as an important centre for trade and commerce and tourism which further leads to economic development. only 60 airports out of 400 airports in India are active. I do not hesitate in saying that Indian airports have poor infrastructure, poor landing and take-off facilities, inadequate ground handling system, poor passenger amenities and above all congestion at major airports are major concern.

Balance of payment crises was also one of the major reasons to liberalize its economy. India wanted to promote tourism, as they will bring foreign exchange more in our country. The tourist industry has significant impact on economic development. The linkage between necessity of having good air transport service and tourism is not hard to fathom.973

b) Provision for air services:
One of the another reason for deregulation of airline industry was increase demand of air service in India. This lead to relax entry procedures for private domestic commercial carrier where two national carriers failed to perform. country has observed increased passenger i.e. domestic and international in recent time and it is expected that the number of passenger is going to increase in upcoming decades as well. So, to cate the demand of increased passenger it is an important step i.e. privatization.

Planning commission pointed out in December 1989, that public ownership and government regulation of entry fare, freight and capacity experience of 50 years; cast doubt on the efficiency of public ownership.974

971 id
972 id
973 id
974 id
c) **International trend:** 
Indian air service industry has been affected by deregulation of us civil aviation industry in 1978 and subsequent deregulation of air service industry in Australia, Canada, UK, Japan and several other Western European countries. There has been increased competition among these countries due to deregulation and it has positive impact on these countries as well. This competition has increased efficiency standard of air service and led to consolidation of this industry. The government of India also felt that same benefit or profit can be incurred due to deregulation once it is done in air service industry.

d) **Revenue based factor:**
- High percentage of aeronautical revenue as there is high dependence on aeronautical revenue than that of non-aeronautical revenue
- Low commercial revenue per passenger; this is again due to the fact that is low development of non-aeronautical sources of revenue
- Very low revenue per employee; as due to lack of tuff labour related decision as AAI is government controlled, we have surplus of labour

e) **Profit based factor:**
- Low operating profit per passenger- due to inefficiency of AAI

f) **Intake – output based factor:**
- Low passenger per employee

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- Low staff cost per employee
- High percentage of staff cost in total cost

**GAP ANALYSIS:**
- **Work force rationalization:** efficiency would be increased in airports if it gets privatized. As one can see downward revision of staff cost once the airport are privatized.
- **Increasing contribution on non-aeronautical revenue:** the airport operator would look for new sources for revenue generation once the mindset toward airport shifts from being infrastructure provider to business and non-aeronautical revenue has been good source of revenue generation worldwide.

**CHAPTER 3**

**AIRPORT PRIVATIZATION; GLOBAL CONTEXT: UNITED STATES OF AMERICA**

Commercial airports in the us are mostly owned by local and state government or by airport authority or multipurpose port authorities i.e. public entities. Airport privatization pilot programme (APPP) was established by congress in 1996, so as to explore prospect of privatizing publicly owned airports and using private capitals to develop and improve airports. Furthermore, to make airport more efficient and financially viable, privatization has been promoted. However, the owner of airport choose privatization but they do not proceed for it, the reason being – barrier or lack of incentive to privatize, publicly owned airports have readily available financial sources, satisfaction with publicly

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975 Airport Privatization in India – A Study of Different Modes of Infrastructure Provision, Manuj Ohri 1 Faculty of Management Studies, University of Delhi.
976 id
977 id
owned airport, implication on major stakeholders (i.e. airport owner, air carrier, private investors and operators, federal government)\textsuperscript{978}

\begin{itemize}
  \item \textbf{Airport owner-} they are mostly local government and they will opt for privatization only if they get benefit out of it. On the other hand privatization involves surrender of economic facility which will ultimately lead to loss of public sector jobs. However, there are federal airport privatization pilot programme which is meant to encourage privatization by granting exemption to public sector owner\textsuperscript{979}
  
  \item \textbf{Air carrier-} they are usually cargo airlines and scheduled passenger airline who wish to keep their cost low and they want to have control over airport revenue to ensure that fees paid by them and customers are used for airport related purposes. On the other hand, private owner are more money minded and profit maker. While the air carrier also wants that the airport should be maintained properly with all facility so in this case they may opt for privatization if lower charges be maintained.\textsuperscript{980}
  
  \item \textbf{Private investors and operators-} addition to financial return they also want growth potential by increase flight in order to earn lease revenue by providing facilities such as shopping, dining etc at airport and also to draw more freight traffics by offering lower fees or improved facilities and if in case they increase landing fees or rent they may put themselves into conflict
  
  \item \textbf{Federal government-} as directed by congress and represented by federal aviation administration and department of transportation, has been engaged in private capital in aviation infrastructure development and reduce reliance on federal grants and subsidies. However, FAA has statutory mandate to maintain safety and integrity of air transportation system.
\end{itemize}

\textbf{AIRPORT PRIVATIZATION PILOT PROGRAME:}

APPP has been established by section 149 of federal aviation reauthorization programme act of 1996 to test the concept of increase privatization, especially investment of private capital in airport development and operation.

Initially APPP limited participation of only 5 airports but FAA modernization and reform act of 2012 has changed number from 5 to 10 airports. out of which only one large hub commercial airport may participate in this programme and that airport may only be leased not sold. however only general aviation airport can be sold under APPP.\textsuperscript{981}

\textbf{PRIVATIZATION UNDER APPP WORK UNDER CERTAIN CONDITIONS:}

\begin{itemize}
  \item Department of transport gives approval for using sale/lease proceeds for non-airport purposes on request by airport and for commercial airports 65% consent of airlines is required and for general aviation airport consultation with owners of aircraft is required
\end{itemize}

\textsuperscript{978}Rachel Y. Tang Analyst in Transportation and Industry August 16, 2017\textit{Airport Privatization: Issues and Options for Congress} fas.org/sgp/crs/misc/R43545.pdf

\textsuperscript{979} id

\textsuperscript{980} id

\textsuperscript{981} id

\begin{center}
\underline{www.supremoamicus.org}
\end{center}

\textsuperscript{408}
Other grant assurance obligations must be followed by airports while department of transport may grant exemption from existing repayment obligation

- 65% consent of airlines is required to raise rates than inflation rate on airline

- Imposition, collection use of revenue from passenger facilities charges will be done by private operator

**PARTICIPATION IN APPP:**
Success for increase privately run airports has been limited. Initially only 12 airports have applied to APPP out of which only 2 have been completely privatized and among these 2, one reverted to public ownership. Later on, example of privatized airport is LuisMuñozmarino international airport, SunJunan, PuntoRica; Stewart international airport, Newburg, New York airport privatized in 2000 after FAA approval and reverted to public operator in 2007. There are some more airports whose application have been approved such as Hendry countyair gladesairport, Clewiston, FL etc.

**REASON WHY APPP IS NOT SUCCESSFUL IN PRIVATIZING AIRPORT:**
- APPP application process: too time consuming
- Regulatory conditions and obligation: due to regulatory conditions and obligations private parties are not interested
- Inadequate access to funding: lack of highway and public transportation agencies

**EUROPE**
British airport authority which has been part of British aviation ministry from 1946-66 and then became independent government agency has been privatized by British prime minister Margaret thatcher and thus build the momentum of airport privatization. The transfer of BAA to private sector in 1987 transformed the airport sector in UK and eventually around the world. among the 7-privatizedairport, London Heathrow, London Gatwick, Stansted are also included. Initially British government has its share but later on sold it completely, however, till 2003 it retained the golden share which would block foreign investors to takeover.

Initially economic regulation was done by government agency i.e. civil aviation authority under British approach to privatization. but after 2012 only airports with more than 5 million annual passengers are subjected to government regulation.

Later on, November 12, 2012, name of BAA was dropped and company rebranded a Heathrow airport holding limited (HAH) and ferrovial are largest shareholder in HAH with 25% stake.

However, there were critics against privatization of airport i.e. for transferring public into private property and also not all private airports were successful.

Following British privatization action of 1987, number of government in Europe

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982 id

983 id


985 id
privatized major airports either fully or partially. Some of the private owners or operators then acquired full or partial ownership interest in other airports at the same time some public-sector airports operator expanded by providing management service at other airport. according to 2016 study of airport council international – in Europe approximately 14% of European airports are owned by mixed public – private shareholders and 9% are fully privatized

APPROACHES FOR PRIVATIZATION:
• Offering same tax treatment to private and public airport infrastructure bond
• Liberalizing rules governing fees i.e. allowing private airport to have more flexible charges for passenger facility and also raising landing facilities and rent would attract private investors. However, this may be against privatization which will ultimately lead to higher price of passenger and cargo shipper. However, this may be against privatization which will ultimately lead to higher price of
• Easing limit on use of privatization revenue – local and state government interest in privatization can be increased by reducing obstacles for public sector owner to use privatization revenue for non-airport purposes. however, it will lead to less investment in aviation infrastructure.

CHAPTER 4
LEGAL AND OTHER ISSUES RELATED TO PRIVATIZATION OF AIRPORT

On PPP basis, new and modernized airports are developed by Indian government in-
• Delhi, India- management, development, operation agreement between government of India and Delhi international airport 2006(brownfield)
• Mumbai, India- management, development, operation agreement between government of India and Mumbai international airport 2006(brownfield)
• Hyderabad draft concession agreement - development, construction, operation and maintenance under concession agreement between government of India and Hyderabad international airport 2004 (greenfield)

Legal issues related to joint ventures in airport infrastructure development: airport BOT (build-operate-transfer) and concession agreement include –
• Is concession a contract or lease?
• Who is a grantor and is it duly authorized by: civil aviation authorities, ministry of trade, finance ministry, military, municipality
• Is a grantor a legal entity?
• Ability of grantor to amend agreement unilaterally (is there a concept of balancing contracts implied into the contract by the law in the case of changes/hardship)
• Governing law - is there a potential to choose?
• Dispute resolution - is the court system appropriate or should there be an alternative form of dispute resolution
• Sovereign immunity - is the grantor gets benefit of sovereign benefit, if so is it possible for it to waive such immunity
2. **Issues and concern related to project finance in airport development**: the major issue is related to environmental impact of airport operation, maintenance and expansion—during the current trend process, method to address impact on environment is debatable issues especially for stakeholder whose health, property value and quality of life will be affected. Concern is also toward community member. The major issues are noise issues, water quality issues (especially fuel storage), air quality issue (i.e. emission of criteria pollutants, emission of toxic air pollutants) and other issues such as research funding, mitigation grants and procedural changes to assist environment compliance. There are range of other activities that affect environment:

- operation of aircraft
- operation of airport, passenger, vehicle and airport ground service equipment
- cleaning and maintenance of aircraft, GSE, motor vehicle
- de-icing and anti-icing of airports and airfield
- fuelling and fuel storage of aircraft and vehicles
- airport facility operation and maintenance

Major issue for noise are—amount of AirTraffic which is increasing, number of airlines and corporate jets which are increasing and also airline traffic and noise is concentrated at small number of airports that are also likely to be among the largest airport. there are approaches to address airport noise such as mitigation i.e. including mechanisms for accommodating with existing level of noise by installing sound proof material at home, school etc. and purchasing land buffer around the airport, land use restrictions such as on use of certain runway etc, but there are challenges for its implication

Water quality include fuel storage i.e. operating procedures intended to prevent oil spill such as procedure to inspect tank and associated piping for leaks, controlled measure installed to prevent spill from reaching navigation water such as construction of pit around tank and countermeasures to mitigate the effect of the oil spill that reaches navigable water such as presence of spill clean up kit with sorbent boom or wiper

Air quality issues include both mobile and sanitary sources such as aircraft, motor vehicle (e.g. Car, bus for airport operation), ground service equipment (e.g. Aircraft baggage, beltloader, generator, lawn mower, snow plover etc), sanitary sources (e.g. Boiler, space heater), aircraft engine testing facilities

Mitigation grants—include projects i.e. those designated to reduce or mitigate aviation impacts on noise, air quality or water quality

3. **Cost related issue in airport and air navigation**: it includes aeronautical fees—which refers to sum charged for air navigation services, airport services (landing, lighting, parking etc), aeronautical metrological services and others; aeronautical charges—these refer mainly to the amount charged to passenger in exchange of facilities that the organization provides them, With air terminals concession, this charge is for rental of spare at airport terminals and of infrastructure belonging to the organization
, which it turned over to operator as in the case of hangers, land and other elements.

4. **Issues and concern related to PPP in airport development:**
   - AERA, airport economic regulatory authority, has found larger financial gap between Mumbai and Delhi. However, according to concession agreement, the amount was to recover through levying of airport development fees on passengers.
   - Time delay and change of scope in these airports by 113.4% in case of Mumbai and 49.5% in case of Delhi airport has led to cost over-run.
   - Under the concession agreement, private sector were given the land by government without adding any financial burden to developers. However, developer claimed this amount to be outside regulatory hence not used for subsidizing tariffs determination on aeronautical services.
   - There was change of lead shareholders when original promoters off loaded there share in favour of GVK group in case of Bangalore airports. hence airport valuation raised to rupees 4630 cr in short period of time.
   - JV operators were able to achieve higher service standard rating than stipulated targeted for them. RGA Hyderabad was ranked as best airport by airport council international (ACI) in the airport service quality survey in February 2011 and Delhi was ranked 4th.
   - At recent infrastructure conclave, GMR group chief financial officer (airports) presented his view against bringing PPPA under preview of CAG and he said it will accordingly increase the risk of private sector investors (economic times 2.11.2013).

- The AERA (2011) has mandated that airport operators should form airport user, consultative committee (AUCC) at major airport for the purpose of consultation with users at three different stages. While this support over research stand which seeks to establish consumer centric airport infrastructure development at the same time, it derails the entire process of consumer centric since the user involvement starts after the airport operator is finalized. This implies that the term of reference and project scope is already defined and the user view at this stage would hardly matter.

**Hub and spoke model in Indian scenario:**

Many development methods used by aircraft to which carrier designates one or more strategically located cities as hub to which larger aircraft bring its cargo and passenger and then smaller aircraft further make it deliver to different desired destination. Major hurdles for its failure are inadequate infrastructure and complex taxation and regulation. As India tax system is complex and to avoid this complexity companies have warehouse operation in every state and larger number of small warehouses lack warehousing process and technologies and thus fail to offer economies of such.

6. **Slot allocation:** it is time period for an aircraft to take off and land at airport. When the slot demand exceeds the supply that airport is considered to be capacity constraint and at this time slot allocation process is implemented. It can happen on any particular day, particular period or particular season. The slot allocation issue is directly proportional to airport situation and it impact market access and

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international air service operation. as due to increase our traffic which is due to increase passenger and hub and spoke operation demand for slot allocation increase. the issues of slot allocation were discussed in sixth meeting of worldwide air transport conference (ACTONF) by ICAO on 18 to 22 March 2013.AAI and DGCA a lot slots in accordance with ATA worldwide slot guidelines in India. according to section 7.1.1 (e) and (f) of ATA principle of slot allotment, an incumbent airline is entitled to retain a group of slots based on historic precedence, if the slot in question has been allotted by slot ordinance to a passenger carrier and have been utilized at least 80% of time in preceding season, only 50% access to the slots can be given to new entrants on the basis of availability of slots. however, this rule are barriers for new entrants and thus limit the range and number of air carrier service provider.

7. Issues and challenges in India related to airport safety and security: There is a apprehension of handling security matter to private owners which would deteriorate safety and security standard of aircraft and airport. the government has responsibility to ensure that such situation does not occur. the government should make such policies which would be acceptable to everyone as interest of various parties are involved. Safety and security in aviation is of primary importance. in past terrorist have targeted aircraft and airport and it is possible that in near future they can take advantage of any lax in security. there can be loss of livers of thousand and considerable damage to property by mere negligence. American government have adopted comprehensive security structure after 9/11 attack and India is also the victim of terrorist attacks and it is desirable to have proper safety and security plan in India to ensure a safe travel.

8. Special economic zones and airport: It is a Geographic area with liberal economic laws than as compared to country’s economic laws. SEZ covers free trade zone, export processing zone, free zone, industrial estates, freeports, urban enterprise zones and others. SEZ is basically meant for the purpose of trade operation, duties and tariffs for investors as it is duty free area. in this area manufacturing and services operators are allowed and it is viewed as investment for enhancing the credibility of transformation policies, acceptability and also for attracting domestic and foreign Investment. but the major concern is that there are many critics who were arguing with it as Indian peasants are getting robbed as they are losing their farmland to industrial zones. moreover, farmer activist has gone to Supreme Court for stopping all this, as India cannot act as Dictator as China does and cannot rail down through policies. the way China communities does. but it is ashamed that India in a need to generate jobs for people out of IT service boom from poor rural area can’t figure out the way to SEZ right.

9. A need for separate regulatory regime and issues and trend in airport regime- as suggested by Naresh Chandra committee

10. Key features of construction and engineering contract in airport

11. Land acquisition and allied issues in airport construction
12. Proposed airport economic regulatory authority: review of investor concern and consumer right
13. Aero contractual claims – choosing, articulating and presenting them (special mechanism on ADR)
14. Need for due diligence, know-how for aviation investment
15. Issues related to re-fuelling infrastructure – ownership and investment

CHAPTER 5
MERITS AND DEMERIS OF PRIVATIZATION

Government owned:
- **Inefficiency** – there is no doubt that public owned airport in India are insufficient and further lack of maintenance has lead to deterioration of infrastructure.
- **Capital storage** – central mechanism has the responsibility for allocation which avoid ground realities and has been inefficient in the past. Lack of resources for maintaining and upgrading facilities is also one of the factor. In India AAI is responsible for number of airports in India
- **Control** – the major problem with PPP is that of control. Government can have control either directly on board of companies or indirectly via regulation
- **Political problem** – history of public sector unit depicts the political problem and so can be carried forward to airports as well. However, one can see that employee union and left front have opposed for privatization but still JV have proceeded for Delhi and Mumbai airport formation. Another issue has been the allegation of foul play in selection of JV partners and one of the loosing bidder i.e. reliance has also approached court for the same. However high court has dismissed the plea and efforts for airport privatization has continued.
- **Agency problem** – the government is in learning mode of privatization. As on can see the proposed change regarding concession agreement for future process of airport privatization, this will change revenue sharing to tariff based from revenue based and hence problem to cast padding can be prevented as it will artificially increase cost to depress revenue and hence will reduce payment of government privatized.
- **Conflict of interest** – the intention of CIAL to foray into airline sector has been point of concern. This has raised conflict of interest between airport infrastructure and airline and possibility of airport allocating slot favourable to its own airline
- **Regulation** – economic regulation for airports suggested by Naresh Chandra committee has been government agenda for some time now.
- **Safety concern** – private player may be more interested in short time profitability rather than long-term sustainability which lead to think over safety issues.
- **Naresh Chandra committee report**
- **Separate economic regulation** – to ensure active regulation and check malpractice of air service sector this is one of the approach. Similar approach has been carried by area of telecommunication via telecom regulation authority of India i.e.
TRAI and it has been successful in resolving conflict as well.

- **Reduction of airport charges** – non-aeronautical revenue can be of great help in reducing airport charges as one can see that though Mumbai airport rank 49 in the list of most expensive airports bit it still stand no where in terms of infrastructure.

**CHAPTER 6**

**CONCLUSION**

India has taken initiative toward globalization via privatisation of airport i.e. five international airports are under PPP programme, but in near future India’s most of the airport will be privatised. although future growth will be governed by political will and ability of the government to garner support for ongoing initiative. Privatization of airport will ultimately increase the air travel and eventually will be lucrative market in near future. On the other hand, one should also remember that private players are just profit-making people and the concern will be toward safety and security issues which has to be managed by the state in efficient manner. However, by looking toward the losses incurred by the public airports it is suggested to privatize the Indian airports by incorporating the recommendation suggested by Naresh Chandra committee.

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DEATH BEFORE BIRTH - A GROWING CONCERN FOR FEMALE FOETICIDE

By Shana Sara Varughese & Vandana Jain
From School Of Excellence in Law, TNDALU

ABSTRACT:
“We aren’t made to die in wombs
But live a life of honour
Not to embellish the tombs
Or be put down just as goners” - AmbicaGovind

Having a child, especially a boy, is a dream come true for many families. Ours being a patriarchal society, a great deal of emphasis is laid upon extending a family’s lineage. In India, this can be achieved only with a male child. Families wait for the announcement that the child conceived is a boy. If the child conceived is a girl, she is seen as a liability rather than an asset to the family. To escape from bearing such a liability, the family may resort to prenatal diagnostic tests to confirm the gender of the baby. If the result of this test is not in their favour, they may force the mother to abort the child or even kill the child inside the womb.

Since 1994, prenatal sex determination was banned in India under the Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act. However, this act has not been implemented properly. Even in the 21st century, despite the progressive development that has taken place in our nation, the social evil of female foeticide is still prevalent.

This article aims to shed light upon the current scenario of female foeticide in India and how it compares in the international sphere. It also gives an insight into the current Acts and schemes enacted on female foeticide and provides suggestions for better implementation of their provisions. It also provides suggestions for a decrease in foeticide throughout India.

Keywords: Female, Foeticide, Prenatal, Child, Protection

INTRODUCTION:
Marriages are considered sacred in our country. A marriage is deemed to be successful only after its consummation. A woman is considered to be pure only if she is able to conceive and deliver a baby. If she is not able to, then she is disrespected by her conjugal family and society. It is a societal belief that it is the male heirs who run the family and therefore, it is important to have a male child to carry on further generations. Women are given secondary importance in the society. This preference for a male child over a female child led to the emergence of the concept of sex determination.

There is a huge disparity in the male – female ratio. The main reason behind this is the preference for a male child over a female child. New born female babies are killed because of their gender. This inhumane practice has been in existence for decades and even after the development that has taken place, it has not been curtailed. Instead, it has taken a new form. In the past, expectant parents had no means to test the gender of the foetus, so they had to wait till the baby was born. If the child was a girl, she was killed brutally and only the male
child would survive. Later in the 1990s, with the institution of ultrasounds and other reproductive technologies, the concept of infanticide changed into foeticide. 988 The practice of ‘Female Foeticide’ is the killing of a girl in the womb itself. Here, the girl is killed before she has the opportunity of being born. This practice had made things easy for the families who were keen to have a male child. This created a huge disparity in the male-female sex ratio which had a grave impact on the functioning of the society.

In spite of the widespread knowledge of a woman’s right to equality, the patriarchal social structure continues to thrive. Women derive value and status only as mothers of sons; their happiness and social status in their conjugal homes is dependent on producing sons. Women have internalised these roles and values. Though they say that daughters take better care of parents or are more emotionally attached, the desire to have sons remain. In the pursuit, of sons, they have become consumers of the new technology of ultrasound, which allows them to choose and bear sons.

It is quite evident that the sex ratio is a powerful indicator of the social health of the nation. Since the 1980s, India has witnessed a sharp decline in the number of females and the reason is the preference given to the boy child. An in-depth analysis of the 2001 Census, shows that there are only 933 females for every 1000 males. 989 When we question ourselves whether this decline is due to the unfortunate attitude towards having a female child, we come to a conclusion that even today, the birth of a son is considered to be a prestigious addition to a family.

It is legally valid to abort a child within 12 weeks of pregnancy due to medical complications. 990 But it is unlawful to abort the child because of their gender. It is important that the Government and other institutions take an initiative towards this mind set of people so that we eradicate the practice of female foeticide.

THE HISTORY OF FEMALE FOETICIDE:
Discrimination between men and women has always been a part of society throughout history. Women have always been prone to unjust treatment. They were treated as commodities that were required to please male members of the family and bound by the duty to serve them. The men enjoyed a very dominant position as they were the ones earning the livelihood. This dominance of males over females paved the way for female infanticide being common in the society. Since boys were preferred over girls, girls were killed as soon as they were born. They were buried alive or were killed by rubbing poison on the mother’s breast. They were made to drink milk of the Errukam flower which was dangerous for their health. They were even subject to inhumane practices such as being sold without their wish and severe injuries were marked on their body. They were even force fed sleeping tablets. 991

988 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5441446/ Last accessed on 15/05/2018
989 http://censusindia.gov.in/Census_And_You/gender_composition.aspx Last accessed on 15/05/2018
990 Section 3(2)(b), Medical Termination of Pregnancy Act, 1971
The newest form of assault is the act of killing the foetus inside womb i.e., female foeticide. The development in the field of medicine and technology made it easy for medical practitioners to determine the sex of the foetus with various tests like amniocentesis, Chorion Villus biopsy and most popularly, ultrasonography.\(^992\)

These sex-determination tests were designed to detect gender related hereditary abnormalities in the unborn child. It is unfortunate that it is abused largely in India and other Asian countries to abort the child if it is detected that the child to be born is female. With the introduction of the concept of family planning, the need to have a male child increased. With a limited number of children, they preferred boys more than girls and this led to an alarming increase in female foeticide rates.

**PRE-NATAL SEX DETERMINATION TESTS:**

- In early days, Amniocentesis was used as a means to determine the sex of the foetus. Amniocentesis (also referred to as Amniotic Fluid Test or AFT) is a medical procedure used in prenatal diagnosis of chromosomal abnormalities and foetal infections,\(^993\) and also for sex determination, in which a small amount of amniotic fluid, which contains foetal tissues, is sampled from the amniotic sac surrounding a developing foetus, and then the foetal DNA is examined for genetic abnormalities. It is used during 14-18 weeks of pregnancy. If it is done before, it might harm the tissues of the foetus in the body. This result had a great impact on society, because these tests were used to detect genetic disorders and kinship.\(^994\)

- The second kind type of test is **Chorionic Villus Sampling (CVS)**. It determines chromosomal or genetic disorders in the foetus. It involves sampling of the chorionic villus (placental tissue) and testing it for chromosomal abnormalities, usually taking place at 10–12 weeks' gestation.\(^995\)

  One of the newer methods employed to fulfil the desires of expectant parents to have a male child is the **Ericsson Method**. It is a device to separate the X and Y chromosomes from the sperm and then inject back only Y chromosomes into the womb to ensure a male foetus.\(^996\)

- With the advancement in medical technology, now **ultrasonography** is used to determine the sex of the baby. During 12-40 weeks of pregnancy, this test is done to determine the gender of the baby. A gel is applied over the pelvic and abdominal area and then a transducer is used to scan the part. It is not illegal to conduct an ultrasound for pregnant women. But it is illegal to reveal the gender of the child in the process. The

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992 Bahais View Point, PUCL Bulletin September 2001
995 https://www.healthline.com/health/chorionic-villus-sampling Last accessed on 15/05/2018
996 http://www.ingender.com/Gender-Selection/Ericsson/Ericsson.aspx Last accessed on 15/05/2018
results of the test decide the fate of the foetus in the womb.\footnote{http://www.sensiblesurrogacy.com/gender-determination-in-india/ Last accessed on 15/05/2018}

These tests were introduced to have a healthy pregnancy and to check the complications during pregnancy so that the health of the mother and child are both safe and sound. But, this has taken a few form of business where the tests are used to satisfy the inhumane practices of the uncivilised part of the society. In India, these tests have been in practice ever since the 1980s. Now it has become more or less a business to satisfy the ego and patriarchal nature of the society.

**WHY DOES FEMALE FOETICIDE OCCUR?**

While the causes of female foeticide are many, it mainly attributes to the desire for a male heir who is seen as an asset when compared to a female, who is seen as a burden. The other causes of female foeticide are;

- **SOCIETAL AND CULTURAL PRESSURES:**
  Whenever a woman is pregnant, there is a pressure upon her to conceive a male child rather than a female. This is because of the patriarchal society that we live in and its pressure. Further, girls are considered as a liability that must be constantly taken care of. The dowry system is one example where a girl child is considered as a liability because when the girl gets married, she will have to provide a huge sum of money to her husband’s family.

- **TECHNOLOGICAL ADVANCEMENTS:**
  With advancements in technology, such as the conception of ultrasound, female foeticide has become more widespread and easily accessible. Expectant parents can simply approach a doctor and request an ultrasound to determine the gender of the child. While this practice has been prohibited, it is still carried out illegal in certain areas.

- **INEQUALITY OF GENDER:**
  Despite the guarantee of equality as given under Article 14, women still do not have a status equal to men. Men are still seen as the superior gender compared to women. Therefore there is a preference for a male heir rather than a female. Males are considered to be the breadwinners of the family who will eventually repay the money spent on them. The status of women must be uplifted in order to prevent such an inequality.

- **SOCIAL SECURITY SYSTEM:**
  As previously explained, men are seen as an economic benefit while daughters are seen as a mere loss to the parents. India does not have a regularized social security system and therefore the elderly rely upon their sons to look after them financially. Females are not considered as contributors to the family wealth. Therefore, expectant parents prefer a male heir.

- **PATRIARCHAL STRUCTURE OF FAMILY:**
  It is always believed that boys are more beneficial as compared to girls. He heads
the family and takes up all the responsibilities of the family. In Hinduism, birth of boy is essential as he has to perform the last rites of the father.

The causes stated above create pressure over society and parents are pressured to adopt female foeticide in some cases. The fact is that they lack courage to face the societal tantrums of not having a male child and having more than two children might disturb their family cycle.

**IMPACT ON SOCIETY:**

A society is a combination of both males and females. A proper balance between these two components is essential to have a smooth working in the society. But because of female foeticide, there is an imbalance in the structure of society and has a great impact over the society.

- **LOW FEMALE-SEX RATIO:** With a preference being given to male heirs, female foeticide takes place. This in turn reduces the number of females in society. This leads to a skewed sex ratio where there is an abundance of males and a drastic difference in the number of females. According to the 2011 Census, the male-female sex ratio is 940 females for every 1000 males.998

- **WOMEN TRAFFICKING:** When there is a disparity between the male-female ratio, females are forced to enter the trafficking industry. When there are not enough women, they are trafficked and sold as goods with a price. Since there are less women compared to men, they are even treated as a commodity of marriage and there are high possibilities of re-trafficking. Thus female foeticide can lead to a direct increase in women involved in the trafficking industry.

- **INCREASE IN RAPE AND ASSAULT:** The loss in the number of women in society and a greater amount of testosterone, can indirectly lead to an increase in rape and assault of the few remaining women. Women are subjected to unnecessary harassment as an indirect result of female foeticide.

- **POPULATION DECLINE:** The most obvious effect of female foeticide is a huge decline in the level of population. The number of people in the country reduces as a whole when females are killed before they are even brought into existence.

- **DECLINE IN STATUS OF WOMEN:** when female foeticide takes place for a prolonged period of time, this changes the whole mindset of the society. They may come to think of female foeticide as an act that is acceptable in the sight of their society and this lowers their respect for women. This in turn leads to an overall decline in the status of women, where she is neither granted equality nor seen as a contributor to society. Women should be able to refuse risky interventions during pregnancy, such as those technological medications which will put her health and her foetus into danger.999

**ROLE OF LEGISLATURE IN CONTROLLING FEMALE FOETICIDE**


999 In re Baby Boy Doe , 260 III.App.3d 392
Female foeticide possesses a great threat to humanity and mankind. It results in an imbalance in the society. It is important that the legislatures frame certain laws which might help in curtailing this evil practice. Article 21 of the Constitution of India guarantees the Right to life which is one of the important fundamental and human rights, violation of which would result in high scrutiny. Right to life is one of the basic human rights and not even the state can violate this right. It also provides for a declaration of deep faith and belief in human rights which ensures that there is no discrimination on the ground of caste, creed, race and gender. This implies that both male and female are to be treated equally and the concept of female foeticide is unconstitutional and has to be eradicated.

The punishment for the crime of female foeticide is clearly enshrined in Sections 312-316 of the Indian Penal Code, 1860. Section 315 ensures protection to the life of the unborn child. It makes the perpetrator liable to punishment if he does any act which may prevent the child in the womb from being born.

Section 3-5 of the Medical Termination of Pregnancy Act, 1971, restricts a pregnant woman’s right to abort. The Act lays down that the woman is not allowed to destroy the foetus in the womb unless it is done in good faith for saving the life of the mother. This makes female foeticide a crime. This act was not effective in its operation. Hence, the legislature enacted the Preconception and Pre Diagnostic Techniques (Prohibition of Sex Selection Act), 1994 also prohibits the sex-selective abortion. This Act also restricts the determination of sex for any purpose before or after conception. This shows that the legislature has done a very good work of providing rights to unborn child and preventing of female foeticide.

The Indian Judiciary declared 2007 as the Year of Awareness for Female Foeticide and dealt with perpetrators in a strict manner. The former Chief Justice Y.K. Sabharwal, in his presidential address on Eradication of Female Foeticide, opined that law can play an important role in checking the menace of female foeticide. The judiciary has played a major role in checking upon this practice.

In this landmark case—light of the alarming decline in sex ratios in the country to the disadvantage of women, this petition was filed seeking directions from the Supreme Court for the implementation of the Pre-Natal Diagnostic Techniques Act. The Court took on the unique role of

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1000 Bugdaycay v. Secretary of State, (1987) 1 All ER 940
1002-315. Act done with intent to prevent child being born alive or to cause it to die after birth.—Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

1003 Section 3-A of the PNDT Act, 1994
1004 Section 6 of the PNDT Act, 1994
1005 2001 (8) SCALE 325, 2003 8 SCC 410
actually monitoring the implementation of the law. The Supreme Court of India also directed all the State Governments/Union Territory administrations to create public awareness against the practice of pre-natal determination of sex and female foeticide through advertisements in the print and electronic media by hoardings and other appropriate means. The Governments has to furnish quarterly returns to the central supervisory board giving a report on the implementation of PNDT Act, 1994.

In the case of **Kharak Singh Vs. State of U.P. and others**\(^{1006}\), the Supreme Court has recognized that a person has complete rights of control over his body organs and his ‘person’ under Article 21. It can also said to be including the complete right of a woman over her reproductive organs.

**Vijay Sharma and Another Vs Union of India**\(^{1007}\)

In this case, the validity of the Pre Conception and Pre Nataal Diagnostic Tests Act (PCPNDT) Act, 2001 which bans sex determination was challenged. The judges in their verdict, pronounced that sex selection would be as good as female foeticide. Thus, sex determination was banned.

**Qualified Private Medical Practitioners and Hospitals Association Vs State of Kerala**

It was declared that laboratories and clinics which do not conduct pre-natal diagnostic test using ultrasonography will not come within the purview of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 and a direction to the respondents not to insist for registration of all ultrasound scanning centres irrespective of the fact as to whether they are conducting ultrasonography, under the Act, 1994. A similar view was taken in the case of **Malpani Infertility Clinic Pvt. Ltd. and Others Vs Appropriate Authority, PNDT Act and Others.**\(^{1008}\)

**Dr. Varsha Gautam W/O Dr. Rajesh Gautam vs State Of U.P**\(^{1009}\)

A pregnant woman wanted to abort as she was carrying a girl child in her womb. She approached the petitioner hospital, who agreed to perform the abortion although it was an offence to perform such an operation and even determination of the sex by doctors using ultrasound technique was illegal. The petitioner is said to have engaged in getting abortions done in her hospital in collusion with doctors, who determined the sex of the foetus by conducting ultrasound tests. Her clinic was not even registered under the Act and she was not entitled to conduct pre-natal diagnostic procedures therein.

**Vinod Soni and Another Vs Union of India**\(^{1010}\)


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\(^{1006}\) 1963 AIR 1295

\(^{1007}\) AIR 2008 Bom 29

\(^{1008}\) AIR 2005 Bom 26, 2005

\(^{1009}\) Writ Petition No. 192 of 2006,

\(^{1010}\) 2005 Cri.L.J 3408
was held that the right to bring into existence a life in future with a choice to determine the sex of that life cannot in itself to be a right. Reliance is placed on a Supreme Court Judgment and two earlier decisions whereby the Supreme Court has explained Article 21 and the rights bestowed thereby include right to food, clothing, decent environment, and even protection of cultural heritage. These rights even if further expanded to the extremes of the possible elasticity of the provisions of Article 21 cannot include right to selection of sex whether preconception or post conception thus, not unconstitutional.

FEMALE FOETICIDE- A GLOBAL VIEW:

Even in the international sphere, the foeticide rate in India is much higher when compared to other nations. Two of the most populated nations, China and India have the highest foeticide rates internationally.¹⁰¹¹ This can be attributed to the strong desire for a male child and bias towards males in the society. The current scenario of female foeticide in certain nations has been explained below.

CHINA:

China established its ‘One Child’ policy in 1979 as a temporary measure to control its ever expanding population.¹⁰¹² If the policy was complied with, it guaranteed financial incentives as well as preferential economic opportunities. However, if the conditions of the policy were violated, it led to economic sanctions, forced abortions and sterilization by the Government.¹⁰¹³ An unforeseen side effect of this policy was that it led to a number of abortions as they have a strong preference for a male heir. This also led to a huge increase in female foeticide rates and also brought a gender gap in China.¹⁰¹⁴ However the policy was scrapped in 2015, leading to a decrease in the number of female foeticides in China. China has also enforced laws for the protection of women and laws for prevention of determination of the gender of the foetus.¹⁰¹⁵

AFGHANISTAN:

Female foeticide is practiced in Afghanistan. Due to this reason, Afghanistan has been deemed the most dangerous country for a woman to live in.

EUROPE:

The occurrence of female foeticide is mainly in underdeveloped or developing countries. But this does not mean that the practice is not present in developed nations such as European countries. The fact that female foeticide was happening in countries which previously had no history of such practices, such as Albania, Kosovo and Macedonia, indicated that gender discrimination was an epidemic.¹⁰¹⁷

¹⁰¹¹ http://www.bbc.co.uk/ethics/abortion/medical/infanticide_1.shtml Last accessed on 15/05/2018
¹⁰¹² https://www.thoughtco.com/chinas-one-child-policy-1435466 Last accessed on 15/05/2018
¹⁰¹³ https://www.investopedia.com/terms/o/one-child-policy.asp Last accessed on 15/05/2018
¹⁰¹⁴ http://shodhganga.inflibnet.ac.in/bitstream/10603/123356/9/09_chapter3.pdf
¹⁰¹⁵ The Law on the Health Care for Mothers and Infants of the People's Republic of China,1995
¹⁰¹⁶ https://www.telegraph.co.uk/news/worldnews/asia/afghanistan/8576474/Afghanistan-named-most-dangerous-country-for-women.html Last accessed on 15/05/2018
¹⁰¹⁷ http://news.trust.org/item/20141110202729-p565o
The United Nations Population Fund (UNFPA) estimates that in countries such as Armenia, nearly 93,000 women will be missing by 2060 if the country's high pre-natal sex selection rate remains unchanged. Gender experts say the patriarchal structure is one of main reasons for the skewed sex ratio. An "abortion culture" inherited from the Soviet period and easy access to technology allowing parents to know the sex of their child before birth are other important factors for an increase in female foeticide.\textsuperscript{1018}

According to the United Nations, rigorous efforts for striking strongly against female foeticide can be made only if collective strategies are adopted. Additionally, the Charter of United Nations, 1947, Universal Declaration of Human Rights, 1948, International Covenant On Civil And Political Rights, 1966, International Covenant on Economic, Social and Cultural Rights 1966, Convention on the Elimination of all Forms of Discrimination against Women, 1979, Convention on the Right of the Child, 1989 and its optional Protocol, 2000, provide for the protection of women, the right to be treated equally, the protection of children and the right to live.\textsuperscript{1019} Further, Article 2 of the European Convention on Human Rights says that “everyone’s life shall be protected”. In Paton’s case\textsuperscript{1020}, it was stated that life begins from the moment of conception. A similar view was taken by courts in the Abortion Reform Law case.\textsuperscript{1021} Additionally, it was also held that the state has a duty to protect ‘developing life’. However all courts have not taken such a liberal view. The Austrian constitutional courts have refused to recognise the right to life of an unborn child.\textsuperscript{1022}

In the United States of America, the Supreme Court upheld the right to privacy and ended the ban on birth control back in 1965, in the case of \textit{Griswold v. Connecticut}.\textsuperscript{1023} Eight years later, the Supreme Court ruled the right to privacy included abortions in the landmark case of \textit{Roe v. Wade}.\textsuperscript{1024} In 1976, Planned Parenthood of Central Missouri v. Danforth\textsuperscript{1025}, ruled that requiring consent by the husband and the consent from a parent if a person was under 18 was unconstitutional. This case supported a woman’s control over her own body and reproductive system. William Brennan, J. stated:

"If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child."

\textbf{CONCLUSION:} Female foeticide is one of the worst forms of violence prevailing against women today. It has an impact not only upon the concerned

\textsuperscript{1018}http://eeca.unfpa.org/en/news/93000-women-be-missing-armenia-2060-if-high-pre-natal-sex-selection-rate-remains-unchanged\n
\textsuperscript{1019}Article 6, Convention on the Right of the Child (1989) & Article 3, Universal Declaration of Human Rights (1948)

\textsuperscript{1020}Paton v UK, (1980) 3 EHRR 408

\textsuperscript{1021}Abortion Reform Law Case, (1975) 39 B Verf GE 1

\textsuperscript{1022}Journal of Indian Law Institute, Volume 37, (1995), p.293

\textsuperscript{1023}381 U.S. 479 (1965)

\textsuperscript{1024}410 U.S. 113

\textsuperscript{1025}428 U.S. 52 (1976)
family but also upon the society as a whole. If it is continued to be practiced again and again, it slowly becomes an evil which is acceptable in the eyes of society in the name of ‘custom’. Thus the practice of female foeticide must be eradicated.

The government has provided schemes such as the National Plan action, Balika Samriddhi Yojana, DhanLaxmi Scheme, Kanya Jagriti Jyoti Scheme and Beti Bachao, Beti Padhao Yojana. These schemes have discouraged foeticide by providing incentives to the members of the family of a girl child. These incentives include Cash transfers to family after meeting conditions of immunization and insurance, Cash transfers based on educational attainment etc. These schemes have been effective only to a certain extent.

Sex selective abortion is a huge crime and punishments must be awarded accordingly. The PNDT Act must provide for better implementation of its provisions by appointing proper authorities who are responsible and answerable to a higher authority.

Female foeticide is not just a crime. It is a social, medical and moral evil. Prevention of such a crime can only take place if there is proper awareness about it and its consequences upon society. Female foeticide is a crime which affects not just the family in the short run but also the entire society in the long run as it skews the gender ratio. In order to transform such a social norm, change must begin with us. Even though the act of gender determination has been banned, it is still in practice. This is because, we, as a society prefer the male child to the female child. The patriarchal structure must be changed in a way that grants the same status to women as well. Most of all, women must be treated equally and given the same opportunities that a man takes for granted. However, it is an uphill task and every action and every group that can address this would contribute to improving the status of women in our society.

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DHARAMDAS V. STATE OF HIMACHAL PRADESH

By Shiralee Kinariwala
From Indore Institute of Law

INTRODUCTION-
This case mainly deals under section 497 of Indian penal code, 1860 which defines adultery as “whoever has sexual intercourse with a person who is and whom he knows or has reason 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 imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.” In this case a joint petition has been filed by husband and wife on the ground of adultery, rape and abduction against an accused under section 497, 376 and 366 of Indian penal code 1860. Thus the petition was accepted by the trial court. This was further appealed by respondent in additional court, where the court supported the above judgement. Both the trial court gave the decision against the accused man so he decided to file an appeal under Supreme Court, the apex body where the judge accepted the appeal and held the appellant innocent on the grounds that section 497 does not covers the petition filed jointly by the husband and wife.

FACTS OF THE CASE-
There were mainly two complainant i.e., Bal krishan (husband) and Smt. Prem dassi (his wife). The husband used to work at the borders of the country and the wife used to live in Karsog district with her three children for the last five years. And after some time of loneliness of the women a man (accused) used to frequently come to her home and he used to tell her that his husband works at the border and he can die anytime so he convinced her that she can make a relationship with that accused man. That man has also promised her that he will also marry her and will also take care of her three children. They also had a sexual intercourse. After few months when her husband returned home from the border on his holiday he got to know from the neighbour that his wife had an extra-marital affair on his back and the behaviour his wife was also utterly indifferent towards him. So he asked from her wife about that man. She confessed infront of her husband that yes this is true she was having an extra marital affair with another man and she also had a sexual intercourse with him. So both husband and wife had filled a case against that accused man under section 366, 376 and 497 of Indian penal code, 1860.

ISSUES-
• Whether the accused has committed adultery?
• Whether he should be punished under the crime of adultery under section 497 of Indian penal code?
• Whether he has committed rape under section 376 of Indian penal code?
• Whether section 366 has been committed or not?
• Whether the complaint can be filled jointly by the husband and wife or not?
JUDGMENT:
The complaint was initially filed under section 366, 376 and 497 of IPC. The trial court rejected the complaint made under section 366 and 376 and only the complaint made under section 497 was taken into consideration. The complaint under section 366 was rejected on the grounds that section 366 of IPC only talks about inducing a woman to compel her marriage or forced illicit relation but in this case there was no force involved. If the act was done forcefully, the wife must have shouted or cried but no voice was heard by any of the neighbour and witnesses. The complaint made under section 376 was also rejected on the grounds that section 376 only talks about punishment for rape which is done without consent. There were no such evidences available to proof that the wife has been raped. Also, the wife has changed her decision on cross examination. At first, she said that she has been compelled to have a sexual intercourse by an accused. The accused promised to marry her and said that her husband remains on border and can die at any time. Later on she changed her statement and said that she has been compelled to have a sexual intercourse on the point of knife. Both the courts held that the accused was not guilty under section 366 and 376 of IPC but was held guilty under section 497 of IPC and sentenced him with the fine of rupees 3000 or in case of default, imprisonment of 1 month.

The Supreme Court passed the judgment in favour of the accused man as the person can only be convicted of the offense of adultery only when husband alone files a case against the accused man as mentioned under section 497 of IPC but in this case the petition was filed jointly by husband and wife, it will not come under the purview of section 497 of IPC. If it is filed jointly it will violate the basic principle mentioned in section 198(2) of Code of criminal procedure and cannot be taken into consideration. Thus, the judgment of both the trial courts was quashed and accused was acquitted of the charges. Hence, the accused man was proven not guilty by the Supreme Court. The entire punishable amount was refunded to him and his bail bonds were also discharged.
FOURTEENTH FINANCE COMMISSION: A STEP TOWARD FEDERALISM OR NOT

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ABSTRACT

The Finance Commission is a body of Constitution which recommends on the distribution of revenue generated between federal government and state government. But a federal country like India, principle of equality demands that the citizens living in different geographical territories to raise their own revenues should be capable of enjoying minimum amount of services and revenues. The diversity is the main reason behind the concept of fiscal transfer to the states rather than the centre. The traditional principles of federal finance are rationale behind constitutional provisions for Finance Commission and criteria for devolution for funds. The Constitution of India provides for the complete separation of taxing power between both level of government that is state government and centre government. With the passage of time the framers realized that the position of the states can be enhanced only by providing a mechanism for the transfer of central resources to the states so finance commission was created. The most important feature of it is that it can be reviewed periodically and it worked automatically without any inter governmental friction. Finance Commission is set up under Article 280 of the Constitution. It also laid down the principles for providing grant in aid to states besides its main function. In the case of 14th Commission, the principles laid out by them will apply for a five-year period beginning April 1, 2015. It has recommended an increase in the share of states in the centre’s tax revenue from 32 per cent to 42 per cent which is indeed the single largest increase ever recommended by a Finance Commission. So the working of Finance Commission has been reviewed in this research paper to maintain the fiscal federalism in India over the period of time.

Key Words: Federalism, Finance Commission, Grant-in-aids, Transfer of Resources

INTRODUCTION:

One of the complex area of our economic system is to formulate and implement an intergovernmental plans & policies. So if we look into India’s federal system, the financial or fiscal transfer to states is regulated by three body which consists of Planning Commission, Finance Commission and Central Ministeries. There exist vertical imbalance and horizontal financial imbalance in India which can be addressed by Finance Commission and that’s the reason why they are that much significant to our country. Now, the measurement of financial imbalance exist between central and State Government is called vertical imbalance while measuring imbalance between Government at the same level is called horizontal imbalance. Now, the state gets its largest share only through the
Finance Commission. Now, the main question is What is Finance Commission?

According to Article 280 of the Indian Constitution, it is stated that a body namely Finance Commission must be established by the President of India to determine what would be the financial relation between central and state government. So first Finance Commission was established in 1951. Now to regulate that commission one act was passed called as Finance Commission (Miscellaneous Provision) Act, 1951 which clearly describes qualification required, disqualification, powers of Finance Commission. If one look into its composition there is one chairman and five other members. Also, this commission is appointed every 5 years. But the main rationale behind constituting Finance Commission under Constitution of India is vast regional diversity that existed in India and that’s why there was need of some authority which provides recommendation relating to measures and methods of revenue distribution between state and centre.

HISTORY:-

At the time of framing of constitution, the huge expenditure which will be needed by the states had been recognized by the framers. The drafting Committee rejected the recommendation given by the then Expert Committee on Financial Provision but accepted the creation of the Finance Commission. Then provision for Grants-in-aid was created under Article 275 and Finance Commission under Article 280. Also Article 282 also remained in controversy because this article provides that State or Union may make grant for any public purposes which was objected by various scholars because they hold the view that this particular provision was created for meeting contingencies like expenses that can be arises for refugee relief.

**COMPOSITION OF FINANCE COMMISSION:-**

The composition of Finance Commission is provided by Article 280 of the Constitution of India. According to it, there must be a Chairman and four other members who must be appointed by the President of India and they are eligible for re appointment. Also Parliament is authorised to make provisions related to qualifications, conditions of service of members and also the powers of the Finance Commission.

So qualification required to be a chairman of Finance Commission that he must have vast experience in Public affairs and other four members shall be selected among persons who

a) have qualification as par with a judge of High Court

b) must possess knowledge of Accounts and Finance of government,

c) have vast experience in matters of Finance and

d) have knowledge of economics

A member or chairman is become disqualified if he

a) is of unsound mind,
b) is an undischarged solvent(bankrupt),
c) is convicted of an offence and
d) has such financial or other interest which
is likely to affect prejudicially his functions
as a member of the commission.

FUNCTION OF FINANCE COMMISSION:-

As a quasi judicial body, the primary
functions of Finance Commission to make
recommendations to President on following
matters:1026,-

1. On the basis of their respective
contribution in tax, the distribution of funds
between the Centre and States.

2. Principles are formulated which govern
Grants-in-Aid to the States by Central
Government.

3. For augmentation of Consolidated Fund of
a state, it will recommend measures in order
to supplement the resources of the
Panchayats and Municipalities in the States
based on the recommendations of the State
Finance Commission.

4. It involves any matter referred by the
President to the Commission.

FOURTEENTH FINANCE COMMISSION:-

On 2 January, 2013, the Fourteenth Finance
Commission was constituted by the
President of India to make recommendations
for the period 2015-2020. The chairman
appointed for the commission was Dr. Y.V.
Reddy. Also Ms. Sushama Nath, Dr. Sudipto
Mundle were appointed full time members.
Prof. Abhijit Sen was appointed as a part
time member. Shri Ajay Narayan Jha was
appointed as Secretary to the Commission.

RECOMMENDATIONS MADE BY
THE 14TH FINANCE COMMISSION OF
INDIA:-

The major recommendations given by
Dr. Y.V. Reddy in 14th Finance Commission
are given below:-

1. DEVOLUTION OF TAX

VERTICAL DEVOLUTION:-

The 14th Finance Commission recommend
that share of states in the net proceeds of
sharable Central taxes should be 42% against
32% which was 10% higher than the
recommendation of 13th Finance Commission.

HORIZONTAL DEVOLUTION:-

The criteria for horizontal sharing, i.e. the
distribution of the taxes between States was
changed by 14th Finance Commission. The
most significant changes are the 10% weight
assigned to the 2011 population, and the

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1026 Article 280, The Constitution of India
7.5% weight assigned to forest cover. (Table 1 below)\textsuperscript{1027}

Performance grants are being provided to address the following issues:

(i) reliable data on local bodies' receipt and expenditure must be available through audited accounts; and

(ii) There must be improvement in own revenues.

For Gram Panchayats, 10% will be the performance grant 90% of grant will be the basic grant. In case of Municipalities the ratio of division between basic and performance grant will be 80:20.\textsuperscript{1028}

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<tr>
<th>CRITERIA</th>
<th>WEIGHTAGE</th>
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<tr>
<td>1971 population</td>
<td>17.5%</td>
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<tr>
<td>2011 population</td>
<td>10%</td>
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<tr>
<td>Income distance</td>
<td>50%</td>
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<tr>
<td>Area</td>
<td>15%</td>
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<tr>
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GRANTS-IN-AID:-

It is recommended that must be discontinuance of State and sector specific grants-in-aid and Grants-in-aid are only awarded for removing deficits, for local governments and disaster management and for this the sum has been increased from Rs.3.19 lakh crore to Rs.5.37 lakh crore.

LOCAL GOVERNMENT:-

Under the relevant legislations, there is requirement of local bodies to spend the grants on the basic services for the functions assigned to them.

Also it was recommended that there should be division of grants into two parts- a basic grant and other one is performance grant for gram panchayats and municipalities.

A weight of 17.5% to the 1971 population and a 10% weight to the 2011 population was recommended by the 14th Finance Commission. These 1971 and 2011 population figures, if we look into, considered as factor in demographic changes since 1971.

A measure to determine the economic backwardness of a state is called Fiscal capacity. Its main purpose to find out how backward a state is as more backward the state, the more fund allocation of fund for it.

The 14th FC has calculated the income distance following the method adopted by

\textsuperscript{1027}https://www.indiabudgetgov.in

\textsuperscript{1028}https://www.doe.gov.in
the 12th FC. A three-year average (2010-11 to 2012-13) per capita comparable Gross State Domestic Product (GSDP) has been taken for all the twenty-nine States, Goa has the highest per capita GSDP, followed by Sikkim. Haryana, the next highest GSDP State, has been considered as the reference State to arrive at the Income Distance of all the States.

FISCAL DISCIPLINE:-

Fiscal Discipline is a measure of the State’s handling of its finances was one of the components in horizontal distribution formula till 12th Finance Commission, although the 14th Finance Commission has done away with it as a horizontal distribution component saying it as an inaccurate method.

DISASTER RELIEF:-

During 2015-2020, the Government of Odisha will receive Rs.4130 crore out of which the state’s share will be Rs.413 crore and centre’s share is Rs.3717 crore. If we look into fund devolution to State Disaster Response Funds of the states, Odisha can be ranked as 4th in the number. Maharashtra will get the highest i.e Rs.8195 crore followed by Rajasthan and Madhya Pradesh.

TAX EFFORT:-

The measurement of State’s ability and initiatives undertaken by it in order to improve its tax base is called tax effort. This practice was also discontinued by the 13th Finance Commission as well as by 14th Finance Commission which was a double blow for states generating higher tax revenues as well as to states which manages its finances with prudence.

LAND AREA & FOREST COVER:-

One of the parameters in the horizontal devolution split since the 12th Finance Commission is the ‘Land Area’ which was based on the concept that the greater the land area of a state, higher will be its public expenditure and administrative expenses. According to 14th Finance Commission recommendation, this concept is retained and its weightage increased from 10% to 15% although it is debatable. Forest Cover is also included as a parameter for measuring horizontal devolution.

GST(GOODS AND SERVICES TAX):-

GST is the combination of all the state and central taxes. The min taxes include is Union’s Excise & Service Tax, and States’s VAT & CST. This will get into the Centre’s divisible pool and thus would reach the states as per the horizontal devolution formula and at same time lose control over its largest revenue pools VAT and CST which will then be subsumed under SGST.
COMPARISON WITH 13TH FINANCE COMMISSION:-

1. The recommendation of 14th Finance Commission increase the share of the states in the divisible pool from 32% (by 13th FC) to 42% which is the biggest ever increase in vertical tax devolution.

2. Unlike 13th Finance, the 14th Finance Commission has not made any recommendation concerning sector specific grants.

HORIZONTAL DEVILOUTION FORMULA IN 13TH AND 14TH FINANCE COMMISSIONS

Survey 2014-15

<table>
<thead>
<tr>
<th>Variable Weights Accorded</th>
<th>(14th FC)</th>
<th>(13th FC)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Population (1971)</td>
<td>25.0</td>
<td>17.5</td>
</tr>
<tr>
<td>Population (2011)</td>
<td>0.0</td>
<td>10.0</td>
</tr>
<tr>
<td>Fiscal capacity/ Income distance</td>
<td>47.5</td>
<td>50.0</td>
</tr>
<tr>
<td>Area</td>
<td>10.0</td>
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<tr>
<td>Forest Cover</td>
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</tr>
<tr>
<td>Fiscal Discipline</td>
<td>17.5</td>
<td>0.0</td>
</tr>
<tr>
<td>Total</td>
<td>100</td>
<td>100</td>
</tr>
</tbody>
</table>

RECOMMENDATION WHICH PROMOTES FEDERALISM:-

1. The State and Centre are now seen as equal partners in development.

2. The recommendation of 14th Finance Commission make a record increase in the devolution of divisible pool of resources to States which as a result leaves far less money with the Central Government.

3. This 10% devolution of the divisible pool can also provide freedom to the states to change their course of their development.

4. Not only development but higher tax devolution will allow great autonomy for finance and design and without it local development needs cannot be met and a marginalised communities and backward regions cannot be brought into the mainstream of life.

5. With the objective of lowering down the compliance cost and distortions to the economy, GST is designed which is a very good tax system with broad base, low rate and minimal rate differentiation.

6. Allocation of autonomous and independent GST compensation fund can be beneficial to the states.

7. The replacement of the Planning Commission with NITI Aayog to ensure a common forum for forging a national vision...

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on development and at the same time help in developing a strategy and its execution also involves states in discussing and planning priorities which promotes federalism.

**RECOMMENDATIONS WHICH DEMOTE FEDERALISM**:

1. Some States have given access to the resources while other states have to come up with their own share of funds which clearly shows that certain states had provided with priority over the others.

2. It is true that if larger amount of devolution is provided then there will be more clarity of flow but at the same time there is no sanction if there is default of funds to local bodies.

3. One of the problem is that the states have to make up with the type of grants that are provided to them.

4. The 14th Finance Commission recommendation wound up the Backward Regions Grants Fund (BRGF). The result is that Bihar which got weightage for funding through this criterion will be the one which will be most badly affected. Also being the least developed state, it is more likely to affect its Gross Domestic Product adversely.

5. Transforming Planning Commission into NITI Aaog has led to loss of plan grants to states which are well performing. One of the best example is Karnataka which lose plan grants. As a result extra funds have to be mobilized by the Government of India and for this reason states can ask for higher untied grants.

6. The 42% unconditional grants will provide a free hand to states to operate the finances and inequities with freedom to states are what could be expected.

7. Moreover if we carefully observe there is sacrifice of equity principle in process of providing the unconditional grants of 42% to the states which may result into federal chaos instead of cooperative federalism unless strong and additional arrangement is made to guard the objective of present government.

**CONCLUSION**:

After observing the merits as well as demerits of the recommendations we can say that Finance Commission helped in strengthening the Centre-State fiscal relationship which is a critical element must be present in federal country like India.

This relationship can be strengthened by providing the scheme for tax sharing in the divisible pool and as well through fiscal grants to the needy states. So the Finance Commission has pivotal role in a federal
system because it increases economic position or status of the weaker states on par with richer states. It has also played a momentous role in eradicating regional disparities in India by making due weightage to backwardness of a State an important criterion. But there are certain difficulties in their exercise such as they are very much sensitive to the issues like underlying GDP growth, revenue and expenditure estimations, CAS amounts etc. assumptions. Also there are estimates which have only been presented for year 2015-16. But even after such complications the additional factors such as GST implementation and next Pay Commission will affect projections in upcoming year and along with the tax devolution will move the country towards greater fiscal federalism by conferring financial autonomy to states. With the creation of NITI Aayog, it will ultimately help in the achieving cooperative and competitive federalism vision of Government.

However if we look into recommendations we can observe that there are some discomfort that has arisen in some quarters like the horizontal distribution of resources allocated can lead to the classification of gainers and losers among the states. Also the recommendation added forest cover as a criteria for devolution of tax, states can lose their share in devolution.  

To sum it all, we can say that this new arrangement can brought a big change in governance because it provides a big responsibility in the hands of government due to which it cannot be remain as only a spectator and waiting for centre to give its direction rather it can take its own decision and initiate policies and help in bringing the development of states into the new direction. But at the same time, to act more independently in implementing the economic policies, it is going to be more tough and challenging task for the state government. If we look into the view of other analysts, they are more cynical about the smaller states that whether the tax devolve would result in the growth which must be progressive. But it is expected that they will prove their capability by achieving this target by taking adequate measure.

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1029 www.conference.com/FinanceCommission
TRIPLE TALAQ- A COMPLETE PARDAH ON RIGHTS OF MUSLIM WOMEN

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ABSTRACT

God Intended Islam to be a religion and verdict of Allah, but men have attempted to turn it into politics. Region is general, universal, and holistic; whereas politics is partial, tribal, limited to a specific community. The oppression of women in the name of Islam, especially the abuses connected with divorce and polygamy were among the basic realms of uncodified law that had contributed to the stagnation of Muslim societies across the globe.

This practice of talaq has deleterious effect on women; breaking of a marriage contract has emotional and financial concerns. Often it is not the interests of women, which are at stake, but those of their children as well the trauma of Triple Talaq which serves as the rife in the reality of women.

Through this essay, entitled as “Triple Talaq- Islamisation of women and Global outlook” tends to extract the fossilised thought of the bias yet unique practice of divorce exercised by masculine class of muslim community. This paper has utilised the essay form in the best of worlds, to put forth the idea and attract the menaces involved in the practice of Triple talak at global level. The Author has divided her paper into four cavets, highlighting the essence of Islamisation of women and their plight; archaic vs. reformist view; global perspective and suggestions chronologically.

I.

Muslimness is an elusive state of being. There are watertight structures of the theological identity defined by men interpreted as Sharia on one hand and the broad political and cultural sense of the self on the other. Majority of Muslim population work as per the Sharia law.

Identity in any case is a messy affair, shifting, shifting and eventually
As of 2010, Islam is the second largest community, contributing to 1.6 billion adherents across the globe. Where Indonesia is the country with largest muslim population, Pakistan being the second largest, India on the other hand acquires world's third-largest Muslim population which is governed by the Sharia or Islamic jurisprudence which has been the case since British colonial rule. Ninety million out of which, India's Muslim women face the threat of a sudden, oral, and out-of-court divorce. According to the Census 2011 data, out of all married Muslim women, 13.5 per cent were married even before the age of 15 and 49 per cent were married between 14 and 19 years of age. Marriage at such an early age, in most cases, decreases the possibility of acquiring education or being financially sound. A survey by Bharatiya Muslim Mahila Andolan revealed that 95 per cent of divorced women received no maintenance from their husbands. And out of all divorced women, 65.9 per cent were divorced orally. To understand more closely, Triple-Talaq is a form of “talaq-ul-bid-at”, derived from an Arabic word “Mugallazah”, in which the husband may pronounce the three formulae at one time, irrespective of the fact that whether the wife is in state of *tuhr* or not.

There is a great controversy regarding the effect of triple pronouncement of the divorce at one and the same time. The difference in the opinion of jurists is due to the difference in their interpretation and application of the law. Those scholars who accept *triple-talaq* on a single connotation as one quote following the long practised tradition and archaic norms in its favour.

Through triple talaq, men feel they can threaten women at the drop of a hat, who categorise them as a homogenous entity. So long as they have the power to use triple talaq as a weapon, it's like they're

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constantly threatening the muslim women at the notch of freeing themselves from the marital clutches. Muslim men make the threat loosely because they don’t understand the obligations of marriage. This victimised burka clad of muslim women live with the mental agony that years of their sacred marital bond can be ended with mere utterance of three words. That's exactly how the plight of Muslim women shifts from heaven into hell on the pitch of masculine hegemony. To understand this prolonged plight of victimised muslim women, the conceptualistic ideas of real Quranic verses need to be read with the origin of this debate which now has attained a political fervour. To begin with, the movement against triple talaq was started by Muslim women’s organisations and women who felt wronged by the practice. But during the course of the year, politicians, clerics and the All India Muslim Personal Law Board, an NGO that claims to represent the community, and is regared as one of the main influential body in Muslim community guarding Muslim Personal law, rejected the proposal to reform the personal law mainly due to patriarchal predominance and the rallying belief that it will infringe the basic principles of Islam.

Personal laws in India and especially Muslim personal law has been a major political and controversial issue, for not only Muslim organisations, but also for Hindu community, which has now assumed a political fervour. After the 1986 Shah Bano Case, and the enactment of the Muslim Women (protection of Rights on Divorce) Act thereafter, the debate has assumed a central position, and majority identity politics has gained mileage. Moreover, the board has vociferously taken over the debate, in the name of protecting oppressed Muslim women after the majority verdict in the recent judgment decided to outlaw the practice of instant triple talaq as “un-Islamic” and violative of Constitutional Articles of 14 and 15. The judgment itself was the result of widespread prevalent discourse that Muslim religious community and its religious leadership in the country is the most frivolous amongst other socio-religious communities. These dominant religious-conservative voices among Muslim communities — represented by Jammat Ulema Hind (JUH) and All India Muslim Personal Law Board (AIMPLB) — considered the practice of instant triple talaq as “sinful but lawful” and kept the door open for social-religious reform from within but without the inference of the law. Their response to the judgment has been mixed one. While JUH and AIMPLB welcomed the SC verdict treating personal laws as equivalent to Fundamental Rights, they also urged the Supreme Court not to meddle with their personal laws as the issue fell completely out the judicial purview.

But how are individual Muslim women — those who have received triple talaq and have been the real victims at the hands of the gender-specific divorce practice — engaging with this high-pitched debate? It therefore, becomes pertinent to note that this practice of talaq has deleterious effect on women; breaking of a marriage contract has emotional and financial concerns. Often it is not interest of women, which are at stake, but those of their children as well the trauma of Triple Talaq is rife in the reality of women. In the absence of the proper codified law in Muslim personal law women are at much Disadvantageous position.
Muslim women always remain the most economically and socially depressed section in Muslim community itself. The process of masculinisation has long favoured the religious traditions, negating the scriptural experiences of women, and led to their voicelessness in the history of Muslim societies.\(^{1031}\) The problem of inequality is a box within a box, within another box, with no single answer. Adding fuel to the fire was One such recent case of Shagufta Shah who was thrown out of the house for showing her discontentment for abortion. Moreover, there have been plethora of judgements which have established Triple Talaq as invalid and have set some definite requirements for its validity in the recent years.

In *Riaz Fatima v .Mohd. Sharif* ([2007] *DMC* 26), the court held that evidence must be given by the husband of the reasons that has compelled him to seek divorce. A proof that talaq was proclaimed thrice in the presence of witnesses or in the letter must be provided and an attempt of reconciliation has been made. There has to be proof of payment of meher (dowry) amount and observance of iddat (the period of waiting by a woman after divorce or the spouse’s death before she can marry again).

### II. Global perspective and Universalism of Islam

In Arabic, Right is pronounced as Haqq which also means truth; the truths which were deep rooted in the holy book, the Quran, which regarded God/Allah as the final arbiter of justice. The Quran discusses freedom of religion(Q 2:256), justice and equality(Q 5:8), the right to basic standard of life(Q 51:19), the right of inheritance(Q 4:7-9), among others. It should be noted that interpretations of these verses is not fixed the public discussion of human rights in Islam has traditionally taken the form of legalistic debates between Ulema as literal meaning of the Quran. While all these rights continued in 20th century; Right to education, equality before law and marriage fall within the sharia through universal Islamic declaration of human rights issue in 1981 and the Cairo Declaration on Human Rights in Islam adopted in 1990\(^{1032}\).

One of the most controversial theories pertaining to international human rights has been put forward by Calloway, who gave intersecting views on “*Universal rights v. Cultural-Specific Human rights*\(^ {1033}\)”. We have observed that according to universalism, human rights are imbibed in all individuals irrespective of their nationality, ethnicity or socioeconomic standing.

In all Muslim countries there has been pressure to introduce reform which will safeguard the wife’s right, and enable a proper opportunity to be made to attempt to reconciliation. The first of major reforms were in Egypt in 1920. In no other country except Iraq, women have equal rights with men in the matter of divorce. Moreover, the issue of women’s participation in the Islamic context has to be given special emphasis due


\(^{1032}\) Judith miller, ‘Challenge of Radical Islam,’ Foreign Affairs, Vol 43, Spring 1993, pp.50-4

\(^{1033}\) Upendra Baxi, Future of human rights(Oxford University Press, NewDelhi, 2008).
to the negative coverage it has attained in the international press.

III.

CONSERVATISM VS. REFORMISM.

Several Islamic philosophers assume that Islamic moral norms are superior to Western standards of human rights and therefore refuse to apply those standards to the Muslim people. Hence, these conservative Islamic thinkers rejected universal norms of human rights and brought their own version of Islamic rights. They also directed that Islam is the religion which is against global capitalism, westernisation and secularism and hence, they exclusively imbibed within their community, the textual interpretations of Islamic norms and traditions. Various such Islamic groups, including these conservative thinkers, believed that freedom of individuals, nationalism, democracy and human rights is not compatible with Islamic norms. All these concepts are in conflict with the universalism of Islam. Moreover, the entire class of conservative Islamic thinkers, instead of emphasising human rights on the same pedestal for men and women, stress on the duties of individual towards his or her community, immaterial of gender binarism. The archaic connotation of these thinkers, regarding the superiority of men is based on the fact that men are better than women for certain tasks.\footnote{Barbara Stowosser, ‘Gender Issues and Contemporary Qur,an Interpretation,’ in Yvonne Yazbeck Haddad and John L. Esposito, Islam, Gender and Social Change, New York; Oxford University Press, 1998, p.33.} That is the reason why, the scholars with conservative thought argue, Prophethood and other important positions of leadership were exclusively reserved for men and hence segregation of the sexes becomes imperative for the preservation of the traditional order of Islam. Whereas, the essence of Islamic modernist thought, on the other hand, was the creation of positive links between the principles of Quran and modern thought. Reformists and modern scholars have emphasised understanding holistically the motive and intent of Quranic verses.

The modern scholars suggest that the major problem is the hostile nature of Muslim countries towards western attitudes, who implemented sharia law as a “battering ram” especially for women. There is a need to reconcile Islamic norms with modern principles of human rights. However it does not mean to render Islamic personal law as completely incompatible, but to reconcile religion and human rights which is essential for the protection of people from the abusive state and political fervour.

The Islamic sharia law is the supreme. It regulates the social political and cultural aspects of life and elevates mankind to higher spiritual level, which all Muslims ought to follow. The source of all human rights as per Sharia is based on “divine revelations” and not man-made law. The Quran demands in definitive terms, from its followers, that they rise to fight against all kinds of oppression and injustice, free from any arbitrary prepollence and gender binarism. Similarly, many Islamic feminist scholars have successfully attempted to argue against the interpretative relativism,
which views all readings as equally correct. On the grounds that not all readings can be accepted as contextually legitimate and theologically sound, especially those that read various forms of Zulms (injustice) into the Quran.

In the social and economic context of the 20th century, in which many women are economically independent and contributing to the financial needs of the family, the aforesaid connotation becomes an important subject of change. Some eminent modern scholars believe that removing the looming spectre of triple talaq can help women feel more secure and confident, since one needs security and belonging in a marriage, unlike triple talaq which is like having a Damocles sword over your head all the time. They also argue that if the law does not reflect the intent of the text, the law must be changed.

**Conclusion and suggestions:**
Polygamy may not be abolished completely but strictly regulated as directed by the Quran may be practised as to uproot the malice born out of Triple Talak or Talak-ul-bidat. In fact both the verses on polygamy i.e 4:3 and 4:129 should be read together to understand the real Quran intent. Even the first verse, i.e, 4:3 requires rigorous justice to all wives by warning that “if you cannot do equal justice then marry only one. The second verse, i.e, 4:129 makes it clear that equal justice is humanly impossible. With such warning polygamy should not be practised unregulated. Other Muslim countries except Saudi Arabia and Kuwait have introduced strict measures to regulate it. Thus a draft law should introduce such regulatory measures and specify circumstances in which one could practice polygamy. Those circumstances could be when the first wife is terminally ill or medically proved to be infertile or barren and that too with the permission of the first wife and the court of law.

Further, Quran permitted polygamy to help women in distress like widows and orphans, not to do injustice to them.

It is to be noted that Quran is the only unanimous divine source for Muslims and it remains most progressive in respect of women’s rights. Ideally it grants equality between man and woman and should be the main source of legislation about women’s right. The past interpretation of the Quran was constrained by socio economic condition and should not be binding on the present and the future generation of Muslims. All great Islamic thinkers have repeatedly made this point and have accepted the central role of ‘Ijthad (creative interpretation). It is the only our social conservatism, not lack of theological sanction, which prevents our ulama from exercising it. While this was seen by the conservative sections in the Muslim community as interference in their personal laws, the liberal voices pointed to a very significant aspect that the more liberal Islamic schools of shariat like the Shafi, Malik and Hanafi have been overlooked by the board.

Islamic law is so progressive that it can become basis for a Uniform Civil Code. However, conservative Muslim society dragged the Quran pronouncement to its own level and introduced, through human
reasoning many measure, which curbed women’s rights.

The oppression of women in the name of Islam, especially the abuses connected with divorce and polygamy that had contributed to the stagnation of Muslim societies across the globe.

Women’s status and role, as well as the patriarchal structure and gender relations in Muslim societies, are a function of multiple factors, most of which have nothing to do with Doctrinal position of the Quran and the Hadith. The orthodox’s fear that the freedom for women will cost society to degenerate into licentious promiscuity has created a situation in which the basic rights of women have been forsaken and the fundamentals of equality, fairness and justice as enshrined in the Quran have been completely overlooked. There is no doubt that to a large extent the community itself is to be blamed for constructing a “non-reformist image”, given, its history of opposition and a very slow adaptation to modernisation, particularly to secular education, within and outside India. Moreover, the difference between the Islamic conservatives and modernist, when put together is very wide. Their concern to “preserve Islam in sterile form” first by denying education to Muslim girls and secluding them from “outside influence”, and later by reluctantly allowing them to have access to secular education within the “Muslim environment” — led to wide public perception across the globe that Islamic traditions are the most inherently inimical and discriminatory to the women. The JUH and AIMPLB’s stringent opposition to past Government’s attempt to bring “legislative reform” in the field of “Muslim personal law”, which has increased in recent years to the extent of opposing to SC’s right to interpret the Shariat Law as witnessed during Shah Bano case (1984-1985) has only reinforced the “non-reformist, non-progressive Muslim image” in the public domain.

However, it may be emphasised that Islamic provisions concerning marriage, divorce and inheritance is far more gender friendly, liberal and modern, compared to other religious traditions. Unlike other religious traditions that treat marriage sacramental and deny the option of exit, Islamic traditions duly recognise the “principle of individual autonomy and consent” for contracting and breaking up the conjugal life.

Equality is the essence of Islamic value system, and therefore social transformation would be possible only when the status of the traditionally disadvantaged half of the society, i.e., women, was ameliorated.

Further, the issue of compulsory marriage registration is a one of the other step toward reformation in Muslim personal law. In the year of 2006, the Supreme Court directed all states and union territories to notify rules for compulsory marriage registration.

Other such hurdle is that, Muslim women are still unsure of how efficiently the law will protect their rights. In triple talaq, a man

1036 Flavia agnes, “Muslim Women’s Rights and Media Coverage” 15 EPW 22 (2016).
has to return to the wife’s family the expenses they paid on the wedding. If a woman takes *khula*, she doesn’t have the right to claim any money or maintenance back. In many cases, women don’t take the option of *khula* and wait for triple talaq because they know that they won’t get their money if they take that route.”

Also, it is fallacy on the part of those who understand that polygamy is a fundamental right of a Muslim Male. Polygamy is exception, but not a rule. The relevant Quranic provision on polygamy institution itself considers monogamous marriage as an ideal one.

Today, the issues of women rights in Muslim personal law is highly controversial.

Indian Constitution has guaranteed equality and freedom from discrimination based on gender or religion, but still there are various practices which are based on heartless conservative culture, turning Article 44 a mere dead letter.

The central debate on interpretation of Muslim personal laws has both positive as well as negative aspects. Some authors has supported that, Muslim personal laws has given various rights to Muslim women such as choice in marriage, inheritance etc. Whereas, some are of the opinion that, there are various practices which is against the spirit of Indian Constitution. Therefore, certain anomalies need to eradicate by giving a true essence of Holy Quaran for the benefit of the Muslim women’s rights. When Islamic Countries like Pakistan, Bangladesh banned it in 1961, and other countries like Tunisia, morocco, Afganastion, Jordan, Kuwait, Algeria do not recognise divorce outside the courts, then why is India lagging, is the question. Other religious and political leaders have argue that in order to be guided into favouring such liberal judgments and certain uniform codified laws which help to nullify to some extent the infructuous personal Muslim laws, there is need to launch an awareness campaign against the misuse of various Muslim women rights relating to marriage, divorce, property rights etc.

The response of the judiciary on the status of women under the Muslim personal law has been ambivalent. Many of the cases give the impression that the role of our judiciary has been healthy and satisfactory. In many cases Supreme Court has tested personal laws on the touchstone of fundamental rights and to make them consistent with fundamental rights.

Whereas in some of the case court held the validity of the personal laws cannot be challenged on the ground that they are in violation of fundamental rights because of the fact parties in personal law is not susceptible to fundamental rights.

The Indian judicial system is so profused with legal precedents, declaring practice of triple talaq as null and void, that among the plethora of cases both in the Supreme Court as well as High Court, the one assuming grave importance are those of Shayara Bano1037, Daniel Latifi1038, Shamim Ara1039

1037 Writ Petition (C) No. 118 of 2016
1038 Writ Petition (civil) 868 of 1986
1039 Appeal (crl.) 465 of 1996
and Shah Bano\textsuperscript{1040}. The court while upholding the rights of Muslim rights, righteously remarked the intent of section 125 of CrPc in Shah Bano’s case to invoke Uniform Civil Code, and to serve the secularist form of the country, as guarded in the preamble of the constitution per se. However, the question remains that whether declaring the practice of triple triple talaq unconstitutional, would ameliorate the condition of Muslim women more than the invalidation has done. It is pertinent to note that identity crisis is a complex phenomenon and therefore instead of a blanket ban, the Supreme Court can delegitimise polygyny in India for not being in consonance with the Quranic procedure.

Putting together, it can be concluded that the Muslims are required to follow the teachings of Holy Quran and Hadith rather than the class of hegemonic men who turned the intend of Quran to the masculine preponderance. There is need to apply all the holy verses of Quran in letter and spirit. They should remember that the Prophet himself invalidated the marital alliances which were contracted against the consent of women in contemporary era, thus touching the base to voice against injustice suffered by women. Therefore, Muslims are ought not allow this arbitrary and unjust practice to plague their community and disrupt the society at large. Rather, the Muslim intellectuals are to initiate measures for drafting a comprehensive law duly codified, which is the crying need of the hour.

\textsuperscript{1040} 1985 AIR 945
RIGHT TO BE FORGOTTEN: A STEP FORWARD IN THE IMPLEMENTATION OF PRIVACY LAWS IN INDIA

By Simran Chandok & Laksh Manocha
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Abstract

Right to be forgotten is simple in its essence. The right to be forgotten basically means the right to have irrelevant and damaging records published on the internet through search engines (such as India Kanoon in India) to be stubbed out in those cases where the complaint was either withdrawn or the matter dismissed by the Court after initial hearing. It is a relatively new concept that has sparked debate among the various sections of the public ever since the landmark Karnataka High Court judgment was given by Justice Anand Byrareddy passing an order in a writ petition, directing its Registry to make sure that an internet search made in the public domain would not reflect the woman’s name in a previous criminal case decided by the same court and has managed to create quite a stir in February 2017.

Deriving it’s essence from the laws of the European Union, it is an interesting new concept that throws light on the absence privacy laws in India and the subsequent need to create one. The spirit of increased transparency has made court records available to the masses, free of cost, by a simple google search. This has proved to affect the reputation of the person concerned; especially in those cases where the matters have become irrelevant or where women have been victims of sexual abuse as mentioned previously.

In stark contrast to India and EU, USA has gone a step further by allowing the ‘sealing of court records’- which allows even convicted criminals, in limited cases, to have their records sealed by the Court access to which will be granted only with prior Court permission.

If USA has introduced such laws for convicts allowing them an opportunity to start over, then surely the demand for introducing the ‘right to be forgotten’ in India is not steep or unreasonable.

This paper will aim to focus on the inception and growth of acceptance of right to be forgotten through Court decisions in India, analyse the evolution and impact of right to be forgotten in EU countries and compare this right with the practise of sealing court records recognized in USA.

Keywords: Right to be forgotten, Victims of abuse, Karnataka High Court, European Union, USA, Sealing Court Records

Introduction

The present accord is that data, once on the web, is there for eternity. Content permanence has driven numerous European nations, the European Union, and even the United States to give legal recognition to the right to be forgotten to shield subjects from the shackles of the past introduced by the Internet.

In this paper, the authors explain the evolution of right to be forgotten in the European Union at length. It also elucidates
the evolution of right to be forgotten in India stemming not just from the 2017 Karnataka High Court judgement, but in fact from previous Supreme Court judgements dating back to as early as 1996. The paper then aims to compare the differences and similarities in the manner in which right to be forgotten has been recognized and exercised in India and the European Union.

This comparison is important from the perspective that the readers can understand how the same right has been interpreted and utilised so differently in the different countries. This comparison illuminates the difference in legal analysis and jurisprudence of the two countries and is an integral aspect of the ensuing commentary.

Finally, the authors analyse sealing of court records- the US counterpart of right to be forgotten and contrast it to right to be forgotten as used in the EU and European countries.

This paper will provide a complete overview and comprehensive understanding to the reader about the right to be forgotten.

Development of Right to be forgotten in EU and European Countries

Right to be forgotten is often interchangeably used with a similar term Right to Forget. How much ever the two terms sound similar they are not identical. Right to forget refers to the already intensively reflected situation that a historical event should no longer be restored due to the longevity of the time elapsed since the occurrence of the event. On the other hand, Right to be forgotten speaks of an individual’s claim to have certain data or information deleted so that third person can no longer trace them.1041

The right to be forgotten has gained traction in Europe as a legal mechanism for handling information issues and has been named a top priority by the European Commission as it redrafts the 1995 E.U. Data Protection Directive (E.U. Directive)1042. Much of the E.U. Directive must be completely reconsidered and lines redrawn. It has been conceived as a legal right and as a value or interest worthy of legal protection1043, as well as a virtue1044, social value1045, and ethical principle1046. The right has been categorised as a privacy claim even though it applies to information that is, at least to some degree, public.

The E.U. Charter of Fundamental Rights of the European Union grants that "everyone has the right to the protection of personal data concerning him or her" and that "such


1043 Ibid.
1044 See VIKTOR MAYER-SCHONBERGER, DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE (2009)
data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law." 1047 and finally adds that "everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified." 1048 The practice of erasing data finds further detailed note in the 1995 EU Directive in Article 14 which grants the data subject a general right to object on compelling legitimate grounds to the processing of his data, with limitations 1049 and in Art. 6(1)(e) which requires personally identifiable data be kept no longer than necessary for the purposes it was collected 1050.

Legal action to force forgetfulness is not novel; in fact, European Commissioner Viviane Reding stated that the E.U. Regulation would clarify the right to be forgotten in 2010. Legal system of Germany 1051 and Switzerland 1052 have already embraced the Right to be forgotten under which the individual may preclude another from identifying him in relation to his criminal past. Other countries include:

- France, where digital oblivion was introduced as a legislative project in 2010 and the intention behind the same was to force third parties to delete information after a period of time or upon request of the user. The charter was signed by a number of actors which did not include Google and Facebook 1053.
- Article 11 of the Data Protection Legislation, Italy had similar legal obligations 1054.

In Spain, the Data Protection Agency has received quite a lot of attention from US by bringing suit against Google to remove URLs from index that point to personal information the agency has determined appropriately forgotten 1055.

1048 ibid.
1051 The German right to personality protects individual privacy from true, nondefamatory statements found in Art. 2.1 of the Basic Law of Germany. Beyond the offense details and prosecution of the case, the right limits coverage of the individual in relation to the crime after time has passed. See Judgment of June 5, 1973 (Lebach I), Bundesverfassungsgericht [BVerfG], Entscheidungen des Bundesverfassungsgerichts[BVerfG] (decisions of the federal constitutional court) 35, 202, English synopsis available at http://www.law.ed.ac.uk/ahrc/personality/gercases.asp#Lebach. Last accessed on 17th August, 2017 at 04:00 p.m.
The language proposed regarding right to be forgotten in the E.U. Regulation has been through a series of changes since 2010. Although the formulation was controversial, it was declared to be a pillar of the E.U. Regulations by Reding. Today, as it is written into the proposed E.U. Regulation, the right to be forgotten means a data subject has the right that their personal data are erased and no longer processed, where:

a) the data are no longer necessary in relation to the purposes for which the data are collected or otherwise processed,

b) where data subjects have withdrawn their consent for processing or when the storage period consented to has expired, and there is no other legal ground for processing the data;

c) the data subject objects to the processing of personal data where they object to the processing of personal data concerning them or the processing of the data does not comply with the Regulation for other reasons. ¹⁰⁵⁶

This right is imposed against a data controller, defined as "the natural or legal person, public authority, agency or any other body which, determines the purposes, conditions and means of the processing of personal data." ¹⁰⁵⁷. The definition means that everyone is potentially a data controller, including the site operator (whether it's Facebook or your personal blog), users that post on sites, and intermediaries. ¹⁰⁵⁸

Exceptions to the right to be forgotten include:

a) exercising the right of freedom of expression;

b) reasons of public interest in the area of public health;

c) historical, statistical and scientific research purposes;

d) compliance with legal obligation to retain personal data; and

e) restricting the processing of personal data where the accuracy is contested, the purposes of proof, processing is unlawful and the data subject requests restriction instead of erasure, or the data subject requests the data be transmitted into another automated processing system. ¹⁰⁵⁹

Paragraph 2 of art. 17 also explains that personal data made public can be erased and that the data controller will be responsible for communicating erasure requests to downstream processors. ¹⁰⁶⁰

Jeffrey Rosen has pointed out that this right does not necessarily apply only to information produced by the subject, because personal data is defined as "any information relating to a data subject." ¹⁰⁶¹

¹⁰⁵⁷ Id. art. 5(5), at 41.
¹⁰⁶⁰ Id. art. 17(2), at 51.
Development of Right to be forgotten in India

The origin of right to be forgotten or right to be erased can be traced back to the French jurisprudence. With an onslaught of privacy cases in the last few years and right to be forgotten gaining prominence, it was believed that right to be forgotten has been introduced in India only recently. However, this is far from the reality.

Right to be forgotten has been included in the fabric of Indian jurisprudence since the 20th century itself. While right to be forgotten may not have existed in the form that it is being adopted by the judiciary today, it existed nevertheless.

The earliest known Indian case that made a reference to right to be forgotten is State of Punjab v. Gurmit Singh. In the case, a minor had been raped by 3 men and was repeatedly asked to explain the details of the rape before the Trial Court. This was extremely harassing and traumatizing for the minor. Further, the manner in which the cross examination was carried out was insensitive and brutal. The Court gave a two-fold ratio decidendi. Firstly, the Supreme Court had held that the identities of rape victims should remain anonymous to the greatest extent possible through the course of the proceedings and secondly, the proceedings with respect to rape should be in-camera and not before an open court.

In this case, even though right to be forgotten was not explicitly referred to, the fact that the Supreme Court recognized the need to keep the name of the victim anonymous was a step towards how right to be forgotten has been envisioned in today’s times.

Another Indian case where there has been further development of right to be forgotten is State of Karnataka v. Puttaraja. In this case, the Hon’ble Supreme Court made reference to Section 228-A of the Indian Penal Code, 1860. The essence of

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1062 AIR 1996 SC 1393m
1063 AIR 2003 SCW 6429
1064 Disclosure of identity of the victim of certain offences etc.—
(1) Whoever prints or publishes the name or any matter in relation to the victim of any offence against whom an offence under section 376, section 376A, section 376B, section 376C or section 376D is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is—
(a) by or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or
(b) by, or with the authorisation in writing of, the victim;

(c) where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim: Provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organisation. Explanation.—for the purposes of this sub-section, “recognised welfare institution or organisation” means a social welfare institution or organisation recognised in this behalf by the Central or State Government.

(3) Whoever prints or publishes any matter in relation to any proceeding before a court with respect to an offence referred to in sub-section (1) without the

www.supremoamicus.org

449
Section 228- A of the Indian Penal Code, 1860 is that the identity of the victim against whom an offence has been committed under Section 376\textsuperscript{1065} , 376-A\textsuperscript{1066} , 376-B\textsuperscript{1067} , 376-C\textsuperscript{1068} and 376-D\textsuperscript{1069} shall not be printed or published. In this case, the Supreme Court applying Section 228- A, referred to the petitioner as the “victim” in the case. While right to be forgotten was not recognized verbatim in the case, the principle on the basis of which right to be forgotten was developed was recognized by the Supreme Court. The spirit of the protection of the identity of the victim to protect the victim’s reputation and prevent social ostracism prompted the Supreme Court to apply Section 228-A in the given case.

From this case, the authors deduce a conclusion- the intent of the legislation and the intent of the Courts leaned towards including the right to be forgotten for the protection of the victim.

There is however, a flip side of protecting the identity of the victim. In the case of Mr. X v. Hospital Z\textsuperscript{1070} , an alternative perspective of the right to be forgotten was brought to light. In this case, the hospital handed over medical records of Mr. X to his fiancé. Mr. X was HIV + and had not disclosed this fact to his fiancé. She found out about his illness from Mr. X’s medical records and had broken the engagement. Mr. X sued Hospital Z for handing over his medical records to his fiancé without his consent. However, in this case, the Supreme Court held that the fiancé had a right to live a healthy life. Hiding the fact about the illness from her was obstructing the fiancé’s right to life as envisioned within the ambit of Article\textsuperscript{21}. Therefore, in this case, it was held that the hospital had not breached the privacy of Mr. X by handing over his medical records to his fiancé and here, the right to life would trump the breach of privacy.

From the above judgments, what becomes clear is that even though right to be forgotten has not been given statutory recognition in the eyes of law, it was always an accepted principle of law that where disclosing the identity of the victim could be harmful to the reputation of the victim, his/her name should be redacted from all public documents related to the case matter. If not redacted, then the Courts should take the initiative to ensure that the name of the victim is not disclosed in the text of the judgement at any cost.

**Current Status of Right to be forgotten in India**

\textsuperscript{1065} Section 376 of the Indian Penal Code, 1860 deals with punishment for rape.
\textsuperscript{1066} Section 376- A of the Indian Penal Code, 1860 deals with intercourse by a man with his wife during separation
\textsuperscript{1067} Section 376- B of the Indian Penal Code, 1860 deals with intercourse by public servant with woman in his custody
\textsuperscript{1068} Section 376- C of the Indian Penal Code, 1860 deals with intercourse by superintendent of jail, remand home, etc.
\textsuperscript{1069} Section 376- D of the Indian Penal Code, 1860 deals with Intercourse by any member of the management or staff of a hospital with any woman in that hospital.

\textsuperscript{1070} AIR 1999 SC 495
In February, 2017 the debate with respect to right to be forgotten sparked majorly in India after a Karnataka High Court judgement given by Justice Anand Bypareddy. In the judgement, the Indian judiciary took a huge step forward in accepting the right to be forgotten and recommending its inclusion as a statutory right in the country.

In the case of Vasunathan v. The Registrar General, High Court of Karnataka &Ors. 1071, the petitioner filed an application before the Karnataka High Court asking for the removal of his daughter’s name from all documents related to a criminal case filed by the daughter against her husband. The daughter had filed a case against her husband under Sections 463, 468, 469, 471, 366, 387 and 120B read with Section 34 of the Indian Penal Code, 1860. However, she withdrew the complaint and the matter was accordingly dismissed by the Court. The petitioner was, however, concerned that the fact that the case records are available in public domain would be a cause for concern for the daughter and her husband and it might cause problems for them in society. Justice AnandBypareddy took the view that since the matter had been dismissed by the Court, letting the case records remain in the public domain would be more damaging than beneficial for the parties involved. There was no charge that was proved against the husband and thus, it would not be detrimental to the spirit of public knowledge if the names of the parties were redacted from the case records available on the public domain.

Accordingly, the Registry was directed by the Karnataka High Court to make all reasonable efforts to ensure that party names were redacted from case records available on public domain. However, the Karnataka High Court website will not be regarded as public domain. Thus, any party approaching the Court to procure a certified copy of the Court order would be given an un-redacted version of the Court order with party names clearly displayed.

Justice Anand Bypareddy further stated that there was a need for right to be forgotten to be adopted into the privacy laws of the country. This would be in line with the trend in the Western countries where they follow ‘right to be forgotten’ as a matter of rule in sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned.1073

In the case of Dharmraj Bhanushankar Dave v. State of Gujarat1074, the petitioner entered a plea for “permanent restraint on free public exhibition of the judgment and order.” The judgment in question concerned proceeding against the petitioner for a number of offences, including culpable homicide amounting to murder.

The petitioner was acquitted by the Sessions Court and the Gujarat High Court. The petitioner’s primary contention was that despite the judgment being classified as ‘unreportable’, it was published by an online repository of judgments and was also indexed by Google search.

1071 Vasunathan v. The Registrar General, High Court of Karnataka &Ors., Writ Petition No. 62038 of 2016 (GM-RES)
1072 Criminal Case No. 376/2014
1073 Special Civil Application No. 1854 of 2015
The Gujarat High Court dismissed the petition on the basis of the following factors: a) failure on the part of the petitioner to show any provisions in law which are attracted, or threat to the constitutional right to life and liberty, b) publication on a website does not amount to ‘reporting’, as reporting only refers to that by law reports.

While the second point of reasoning made by the courts is problematic in terms of the function of precedent served by the reported judgments, and the basis for reducing the scope of ‘reporting’ to only law reports, the first point is of direct relevance to our current discussion. The lack of available legal provisions points to the absence of data protection legislation in India. Had there been a privacy legislation which addressed the issues of how personal information may be dealt with, it is possible that it may have had instructive provisions to address situation like these.

In the absence of such law, the only recourse that an individual has is to seek constitutional protection under one of the fundamental rights, most notably Article 21, which over the years, has emerged as the infinite repository of un-enumerated rights. However, typically rights under Article 21 are of a vertical nature, i.e., available only against the state. Their application in cases where a private party is involved remains questionable, at best.

There is a similar case pending before the Delhi High Court. In the case of Laksh Vir Singh Yadav v. Union of India &Ors,\(^{1075}\) the petitioner requested the Delhi High Court for the removal of a judgment involving his mother and wife from an online case database. The petitioner claimed that the appearance of his name in the judgment was causing prejudice to him and affecting his employment opportunities. The last hearing in the matter was on 24 April, 2017 where the Delhi High Court directed the petitioner to file a rejoinder within 4 weeks from 24 April, 2017 and the matter is to be reheard on 7 September, 2017. The judgement of the Delhi High Court given in this matter is going to be extremely relevant for the debate surrounding right to be forgotten and giving the right statutory recognition.

**Comparison of right to be forgotten as envisioned in India and as in force in EU**

As already discussed previously, India is still in the progressive stages with respect to the development of “Right to be forgotten”. From Gurmit Singh’s case in 1996 to the case of Laksh Vir Singh Yadav which is still pending before the Delhi High Court, right to be forgotten has been evolving in India, although at a slower rate. From understanding the importance of removing data records which are objectionable for the data subject, India has gone a step further in strengthening its privacy laws.

However, the concept of Right to be forgotten in the EU, with stark contrast to India, is completely evolved and has been identified as a fundamental right. Recent cases in various countries in EU show how Right to be forgotten has been identified as a fundamental right. In Germany two brothers who murdered a Bavarian actor after being convicted and released on custody sued Wikimedia Foundation asking them to

\(^{1075}\) W.P.(C) 1021/2016
remove their names from the website as it would affect their reputation.1076

There is another French case along the same lines of the appeal filed by Google in the CostejaGardozo case, where the issue is about the jurisdiction of the right to be forgotten. Basically the issue that has been raised in the French case was that CNIL (France’s Data Protection Agency) had asked Google to take down some twenty one links, and Google did so but only from the Google websites that CNIL had Jurisdiction over. Its claim was that the content is still available in the Google websites of another countries. The principle laid down in the Costeja case in 2014 by the Court of Justice of the European Union (CJEU) states that the scope and meaning of the right to be forgotten has been interpreted in vastly different manners by national courts. A right to be forgotten claim therefore does not provide sufficient legal basis for the data protection authority of one country to determine the accessibility of online content in another.1077

In the light of these cases the authors deduce a stark contrast between the statuses of the right to be forgotten in India versus the right as it exists in the EU. In India where we are still striving to get statutory recognition for the right, the EU has already recognized and applied the same in the cases of the respective countries of the Union.

Additionally, after the perusal of the cases that have been heard in India, it is clear that the scope of Right to be Forgotten in India is used in a very constricted sense and is only limited to cases regarding women modesty, sexual harassment, or crimes which more or less affect the character of women, whereas in EU the Right has a wider ambit and can be availed of by parties in any case where the data or information is against the party or is just irrelevant or does not require to be within public view such that it does not affect the right of the public at large, naturally with certain exceptions. EU has gone a further step forward and is now contesting establishment of jurisdiction of Right to be forgotten.

Sealing of Court Records – U.S.A. Perspective

Under the Federal System in the United States of America, there exists a concept called sealing of court records. While fundamentally different, the genesis of both sealing of court records and right to be forgotten recognized in the European Union is similar.

Sealing of Court records is a tool given to the US Courts by way of which they can put a seal on certain court records that would have otherwise been public records and make them inaccessible to the public at large. In certain instances sealed court records are either permanently destroyed or simply, placed under a seal. Sealed court

1077 The French Court Case That Threatens to Bring the “Right to be Forgotten” Everywhere – Nani Jansen Reventlow available at https://www.cfr.org/blog/french-court-case-threatens-bring-right-be-forgotten-everywhere last accessed on 19 August, 2017 at 10:48 p.m.
records, not permanently destroyed, may be procured from the Court by way of an order. In such instances, the seal will be removed and a copy of the original Court order provided to the concerned party.

Sealing of court records has the same purpose as the right to be forgotten. Both legal tools aim at delinking involved parties from cases that they may have been involved in for the purpose of protecting their social standing in society and for providing them better employment opportunities. The only difference between right to be forgotten and sealing of court records is that a seal is placed on the entire court records of the case at hand, whereas in right to be forgotten only the names of the parties are redacted from the public court records of the case at hand. All other case files will still be available on the public domain.

Sealing of court records is a more advanced legal remedy as compared to exercising the right to be forgotten. When a case has been sealed by the Court, the involved parties are given the legal right to deny or not acknowledge their involvement in the sealed case. Once a record is sealed, in some states, the contents are legally considered never to have occurred and are not acknowledged by the state either. Sealing court records for a case is similar to a situation where in the case never happened.1078

There are primarily four categories of cases in the American District Courts - civil, criminal, miscellaneous and magistrate judge cases. United States of America, being a federal nation, every state has adopted its own rules in order to determine the grounds on which cases may be sealed and the manner in which cases may be sealed by the respective courts.

The most commonly accepted grounds for sealing of court records are if the cases involve matters of national security, company secrets, medical records which if publicly accessed could be detrimental to the interest of the patients, family court cases depending upon the nature of the case for the sake of sensitivity, cases that divulge the tax information of parties involved, communications between the judges and his assistants that need not be made public or records of any case in which the judge has issued a gag order (a judge's directive forbidding the public disclosure of information on a particular matter).

Since United States of America does not have one common procedure followed by all states with respect to the grounds on which sealing of court records maybe carried out and the subsequent procedure followed therewith, it results in widening the scope of sealing of court records and varied interpretations. This widening of scope and arbitrary interpretation has resulted in the problem of over-sealing.

A major scandal had erupted in the United States of America in the year 2003 when over-sealing was first recognized as a problem the Judiciary needs to grapple with. In 2003, the secret docket maintained by the Connecticut Court were revealed to show that the Courts had sealed courts records without application of any sound, legal principles. Instead personal gains and vested interests were taken into

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1078 Paul J. Adras, Esq. "Why seal your record?"
consideration while determining whether case records should be sealed or not.

It was found that the Courts had undertaken sealing of court records to further vested interests of the rich and famous. Cases against actors, athletes, sportsmen, singers, politicians or any other famous public figures were categorically be sealed by the Court whether there was a need for sealing of the Court records or not and the grounds for sealing of Court records were satisfied or not. Further, paternity tests or family disputes of fellow judges were also sealed by the Courts for the protection of the reputation and social standing of the judges.

A more recent example to prove how the problem of over-sealing still has the United States of America’s judiciary in its clutches is a 2013 case where a Syracuse woman filed a lawsuit against a Drug Enforcement Administration (DEA) agent who created a fake Facebook account using photos taken from her cell phone, which the DEA had earlier seized. The agent used the fake account to impersonate her online, communicating with her contacts under false pretences. Her lawsuit raised the question: “Whether a government official can violates the Constitution (or any other law) by impersonating a private citizen online without her consent to further his investigation?”

The court issued a ruling almost three years ago, apparently finding that tactic may indeed have been illegal. The reason for the authors using the word “apparently” in the previous statement is because while the public was made aware of the final ruling, the substantive reasoning considered by the Court before making the final ruling has been sealed by the Court, away from public access. In fact, the public does not even know the reason for sealing the judgement delivered by the Court as the petitioner’s application asking for the sealing of the court records has also been sealed by the Courts.

The problem of over-sealing is contradictory to the First Amendment of the United States of America which prohibits the making of any law abridging the freedom of speech, infringing on the freedom of the press, or prohibiting the petitioning for a governmental redress of grievances. Thus, in 2017, the Civil Liberties & Transparency Clinic at the University at Buffalo School of Law (of which we are members), the New York Civil Liberties Union, and the Knight First Amendment Institute worked together to create more judicial transparency with respect to sealing of court records by proposing a common standard that may be incorporated by the various Courts for the purpose of establishing uniform grounds and procedure for sealing court records. The Model Rules created are currently submitted to the Northern District of New York and is pending approval.

Suggestions

In the light of the various aspects of the right to be forgotten that have been previously stated the authors are of the opinion that this concept needs further evolution and development in India. For the same, the authors suggest that right to be forgotten should be made a statutory right in India.

Very recently, a bill was introduced in the Parliament which dealt with Privacy laws in India. However, it did not include within its ambit, the right to be forgotten elucidating
that the right has not been given as much importance as was hoped.

There are several cases in the European Union such as a case where Caitlin Davis was fired and Stacy Snyder was not allowed to graduate for images found on Facebook that offered very little context or truth of their character.\(^{1079}\) In another case, John Venables and Robert Thompson viciously murdered a 2 year old, becoming the youngest convicts to be incarcerated for murder in English history. Both these cases are damaging to the reputation of the parties involved and are capable of severely affecting their reputation and employability. However, it was only the two murderers, John Venables and Robert Thompson who were given the opportunity to take on new identities after they were released from juvenile incarceration thereby allowing them to start over.\(^{1080}\) On the other hand, Stacy Snyder and Caitlin Davis were not given any respite and ended up losing their jobs and degrees over Facebook photos that are not indicative or reflective of a person’s true character.

From the above, it becomes clear that had right to be forgotten been given legal recognition in the above cases, persons like Stacy Snyder and Caitlin Davis would not have to suffer.

Further, in India, there are innumerable cases where women who are victims of sexual assault or outrage of modesty do not come forward for the fear of their names being permanently associated to the case such that anyone could easily google their names and find out about their past.

Further cases where the Court has dismissed the matter or the complainant has withdrawn the complaint, the name of the defendant gets permanently attached to the court records easily available on the public domain.

The authors understand that giving right to be forgotten the status of being a fundamental right is implausible for the mere fact that the public has a right to be aware if a particular party has been involved in the commission of a serious offense and has been punished accordingly. However, it could be introduced in the form of a legal right to be made applicable on a case to case basis after due consideration of the Court.

For all these reasons, right to be forgotten, not in the form of a fundamental right but in the form of a legal right, needs to be recognized as law in India.

**Conclusion**

Recently, in India, legislator, Jay Panda introduced the Data (Privacy and Protection) Bill, 2017 in the LokSabha suggesting elevating the right to privacy as a fundamental right for the citizens of India. There have been past attempts made by various legislators to introduce such bills, the most notable one being The Prevention of Unsolicited Telephonic Calls and Protection of Privacy Bill, 2009 introduced by legislator Jay Panda which aimed at


prohibiting unsolicited telephone calls by business promoters or individuals to persons who didn’t want to receive such calls. However, the bill lapsed.

In the new 2017 Privacy Bill tabled before the LokSabha, there are several features in the bill making it a rational and useful proposal which would create a sensible law. Some of the characteristics of this Bill that set it apart from its predecessors are Bill has defined terminologies as well as “processes” like data processing, and profiling of individuals. The bill follows a rights-based approach and mandates the consent of an individual for collection and processing of personal data. The tabled bill expresses that the last appropriate to alter or expel individual information from any database, regardless of whether public or private, rests exclusively with the person. More importantly, the “exceptions” against this right are defined narrowly, providing for a case-by-case consideration. The bill accommodates the production of an end client confronting position of information assurance officer for grievance redressal with an arrangement for offer to the Data Privacy and Protection Authority (DPPA).

While there are several characteristics that make this bill unique, it still does not include the right to be forgotten within its ambit. Right to be forgotten or right to be erased has been given fundamental legal recognition in the European Union and USA recognizes an extended interpretation of right to be forgotten in the form of sealing of court records. However, India does not seem to be following the footsteps of its EU and American counterparts.

The paper has elucidated the importance of right to be forgotten. The authors understand that giving right to be forgotten the status of being a fundamental right is not plausible since the right cannot be given universally to all citizens of India. It has to be a qualified right which may be rendered on a case to case basis and restricted mostly to those instances where cases involve outraging the modesty of a woman, rape, sexual assault, a marital dispute or any other highly sensitive manner. The authors understand that the right can become a statutory or a legal right and hope that the future legislators and decision makers give the right to be forgotten its due importance.

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HUMAN TRAFFICKING: A CRIME THAT SHAMES ALL

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Abstract

“People were created to be loved. Things were created to be used. The reason why the world is in chaos is because things are being loved and people are being used.”

Human trafficking has been a crime for centuries around the world. It is presently the 3rd largest global organized crime after drugs and armed forces, which is growing at an alarming rate. It has become one of the major issues of the twenty first century that has grown at a rapid pace with the advent of free movement and free trade between the countries around the world under the shadow of globalisation. The present paper highlights the forms and magnitude of the problem. It further focuses on the various laws enacted to overcome this growing menace. The present article further focuses on the loopholes in the proper implementation of the enacted laws along with suggestions for improvement.

What Exactly Is Human Trafficking?

The term human means a person and trafficking means the trade or sell or purchase of human beings for the purposes forbidden by law like sexual slavery, bonded labor and forced labor or any other kind of sexual misuse and prostitution.

According to United Nations’ Palermo Protocol,
(a) “Trafficking in persons can be defined as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation should include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organ;
(b) The consent of the victim of trafficking in persons to the intended exploitation set forth in the subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
(c) The recruitment, transportation, transfer, harbouring, or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth; and
(d) Child means any person under the age of 18.”

FORMS OF HUMAN TRAFFICKING

There are several broad categories of exploitation linked to Human Trafficking which include:

**Sexual exploitation**
Sexual exploitation entails any non-consensual or abusive sexual act performed without victim’s consent. This includes prostitution, escort work and pornography. Women, men and children of both sexes can be victims. Most of the victims are often deceived with the promise of a better life and then controlled through violence.

“There is a culture of silence not because women are okay to put up with it but because women do not draw enough confidence from the way the issue is going to be dealt with, because those in power continue to be men.”

-NISHTHA SATYAM, Deputy Chief of UN Women in India

**Forced labour**
Forced labour generally involves victims being compelled to work very long hours. These workers often work in inhuman working conditions without relevant training and equipments. They are also compelled to work beyond their physical and mental capacities. Forced labour vitally implies to the use of coercion for getting the work done. The workers further lack freedom of choice to work. These victims are frequently subjected to verbal threats or violence to achieve compliance.

**Bonded labour**
Bonded labour is a practice in which the employers give loans at high rates of interest to the labour who intern work at low wage rates to pay off their debts. The services and the duration of the services required to repay the debt are often undefined. Such bonded labour practices have a tendency of being passed on from generation to generation until the debts are finally paid off.

**Domestic servitude**
Domestic servitude refers to situations where the victims are forced to work in private households. Their movement is often restricted and they are forced to perform house-keeping tasks over long hours and meagre salaries. Such victims lead very isolated lives and have little or no freedom. They often work in inhuman conditions and are also subjected to physical violence.

**Organ harvesting**
Organ harvesting basically refers trafficking of functional organs of individuals for transplant on high payments. The illegal trade is dominated by demand for kidneys and liver. These organs can be partly/wholly transplanted with relatively few risks to the life of the donor.

**Child exploitation**
Persons under the age of 18 are classified as children in most of the countries across the world. It is not astonishing to see young people getting caught up in criminal exploitation. Children are vulnerable to exploitation by traffickers and organised

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crime groups. They are deliberately targeted by criminals, or ruthlessly exploited by the people who should protect them.

CAUSES OF HUMAN TRAFFICKING IN INDIA -
There are numerous of social economic and political causes responsible for human trafficking in India which are as follows –

1) POVERTY AND SEARCH FOR A BETTER LIFE:
Poverty is one of the major causes of human trafficking. Poor people lead a vulnerable and deprived life. They are often unable to fulfill the basic needs of life. Thus in search of these basic needs they fall prays of the traffickers. Traffickers exploit their vulnerability, make false promises and show them the better side of life. The one who believes them, in hope of a better future, accept their offers and do everything that the traffickers ask them to do.

2) FAMILY PROBLEMS
“Being unwanted, unloved, uncared or forgotten by everybody- I think is a much greater hunger, a much greater poverty than the person who has nothing to eat.”

Mother Teresa
The gravity of family problems has another detrimental impact on the sensibilities of an individual. Family problems often compels the individual to find love and affection outside the family. Traffickers easily misrepresent themselves and convince these innocent people struggling to find love and acceptance within their families to adhere to the demands of the traffickers.

3) DEBT LABOR:
The vicious circle of Debt often targets and is capable of destroying the generation of a family together. High level of indebtedness and the persistent urge to overcome this vicious circle of continuing debts makes these families easy prey of the traffickers.

4) HUGE AMOUNT OF MONEY:
The traffickers lure the innocent humans in the trafficking business by showing and giving them huge amounts of money. The lucrative earning tempt individuals to fall easy prays of traffickers.

5) MIGRATION
Migration is another factor which responsible for increased human trafficking. People isolated from their family try to satisfy their sexual desires for which they require sex workers. The growing demand of sex workers is another contributing factor of human trafficking.

6) URBANIZATION:
It is a process where a gradual increase in the population of urban area takes place. Whenever the families of rural area or underdeveloped area moves to an urban city or developed cities, urbanization takes place and the females of the families are not much aware of the urban area in which they are moving. The innocent women of those families are then the target of the traffickers as they drag those women into the sexual exploitation business by manipulating them. This again pushes women into the trafficking rackets.
7) ILLITERACY: Illiteracy is one of the most common causes that give rise to most of the crimes in a country. Less the people are educated, less they are aware of their rights and legal system. Less awareness intern means more probability of exploitation. Thus illiterate people are the most trouble-free prays of traffickers.

8) COMMERCIALIZATION OF SEX: The sex is now commercialized as the women are treated as a commodity and the act if sell and purchase of women for sexual exploitation is done by the traffickers and his clients to satisfy their greed of money and sexual desire respectively.

9) CORRUPTION: Corruption is another compelling factor of increased human trafficking. Some corrupt, law enforcement officers protect and help the suspected traffickers and further ensure that they never exposed or caught in police raids. They do all this because they get money in return of their favors. Thus the traffickers remain unharmed and easily prosper in their trafficking business.

MAGNITUDE OF THE PROBLEM IN INDIA
National Crime Record Bureau (NCRB) released that in 2016, a total of 8,137 cases of human trafficking were reported from across the country and in 2015, 6877 cases were reported, an increase of 18% in cases can be noticed here. The motive behind 7670 cases was sexual exploitation and 162 relates to child pornography. If we talk about states:

- West Bengal shares 3579 cases, over 44.01% of the total cases.
- Rajasthan with 1422 reported cases accounts for 17.49% of the total cases.
- Gujarat, Maharashtra and Tamil Nadu were net in the queue with 548,517 and 434 number of cases respectively.

In 2015 number of cases reported by west Bengal were 1255(18.2%) and the state was ranked second to Assam with 1494cases accounted to 21.7% of total cases.

With 10,50 cases of total 15379 cases the victims being women, they accounts to 65% of the victims, and the men victim being 5229. In 2016, over 9034 victims were below 18 years of age with 4911 of women victims and 4123 men victim.

In 2016, over 23117 victims which include 182 foreign victims were rescued from this crime across the country. Out of the victims who were rescued, 55% or 12780 victims were women. During the year, total 10815 people were arrested in the cases of human trafficking.

RECENT TRAFFICKING INCIDENTS IN INDIA

TELUGU FILM PRODUCER AND HIS WIFE ARRESTED IN US FOR SEX TRAFFICKING OF ACTRESSES

Mr. Kishan Modugumudi alias Sreeraj Chennupati, a Telgu film producer and his wife were arrested in the United States for sex trafficking of actresses.

wife Mrs. Chandrakala were arrested by US federal agents in Chicago in April 2018. It was further reported that the couple ran a high end prostitution racket of actresses from Tollywood to United States. The couple alleged to have charged up to $3000 from one client. The actresses were forced to live in a 2 story apartment in Chicago and wait for their next date and meet the clients in different hotels and states of US. The alleged producer use to threaten the actresses and their family members if the actresses told to seek law protection. The alleged couple was arrested by the investigators after one of the victims wrote to the investigators asking them for help. The federal police had filed the case against the accused couple and the couple is on the run before they were arrested by the police.1085

5 ANTI-TRAFFICKING ACTIVISTS
GANG-RAPE IN INDIA, POLICE SAY

Five female anti-trafficking activists were gang-raped in the eastern Indian state of Jharkhand, police said Friday, the same region where two teens were raped and then set on fire last month. This incident took place in Kochang village in Khunti district, a tribal area in the state of Jharkhand. Five women and three men were performing a street play on the issue of human trafficking when a group of armed men on bikes disrupted the performance. They were taken to a nearby forest where the women were raped and the men were beaten up. They were released around three hours later. This is the latest high-profile rape case in India, a country grappling with the scourge of sexual violence.1086

Child trafficking racket busted; 2 arrested, 6 minors rescued

ARARIA: The Sashastra Seema Bal (SSB) on Friday claimed to have busted a child-trafficking racket in Araria district with the arrest of two persons and rescued six boys. The rescued boys were in the age-group of 10-16 years, a SSB officer said.

"Acting on a tip-off, we conducted a search operation yesterday evening, along with a number of child rights bodies, close to the Indo-Nepal border. At about 7 pm, we noticed two middle-aged men moving towards the Jogbani police station along with the six children", Sanjit Samajhdar, Sub-Inspector SSB, said.

Both the persons were detained. During interrogation they revealed that the children were being taken to Delhi where they were to be employed as workers in a toy factory, Samajhdar said.

The duo was subsequently taken to Jogbani police station where a case was registered against them under the Child Labour Act, the sub-inspector said adding that all the six children have been handed over to Child Line, Araria.1087


1087 Child trafficking racket busted 2 arrested 6 minors rescued “The Times of India” (22 June, 2018) <https://timesofindia.indiatimes.com/city/patna/child-
HUMAN TRAFFICKING LAWS IN INDIA:

1) CONSTITUTION OF INDIA:
In India there is no provision which provides for the definition of the trafficking or any law under which the whole concept of human trafficking is covered. Provisions that deal with Trafficking in the Constitution of India – Article 23 of the Constitution deals with: Prohibition of Traffic in Human Beings and Forced Labor. It reads as follows:-

(1) Traffic in human beings and beggar and other similar forms of forced labor are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds, only of religion, race, caste or class or any of them.

In the case of Gaurav Jain v. Union of India 1088 the Supreme Court stated in its order dated 15-11-1989 that “segregating children of prostitutes by locating separate schools and providing separate hostels would not be in the interest of the children and the society at large”. While the plea for separate hostels for children of prostitutes was not accepted by Supreme Court, it believes that "accommodation in hostels and other reformatory homes should be adequately available to help segregation of these children from their mothers living in prostitute homes as soon as they are identified". Supreme Court ordered to constitute Committee to make an in-depth study into these problems and evolve such suitable schemes for Rehabilitation of trafficked women and children. Further Supreme Court stated that three Cs, viz., Counseling, Cajoling and Coercion were necessary to effectively enforce the provisions of various statutes. The role of NGOs in rehabilitating and educating the children of the fallen women was emphasized. Detailed orders were given by Supreme Court for rescue, rehabilitation of prostitutes and children of prostitutes. 1089

In the case of Vishal Jeet vs Union of India And Ors 1090 Supreme Court held that the malady of prostitution is not only a social but also a socio economic problem and, therefore, the measures to be taken in that regard should be more preventive rather than punitive. This devastating malady can be suppressed and eradicated only if the law enforcing authorities in that regard take very severe and speedy action against all the erring persons such as pimps, brokers and brothel keepers. All the State Governments and the Governments of Union Territories should direct their concerned law enforcing authorities to take appropriate and speedy action under the existing laws in eradicating child prostitution without giving room for any complaint of remissness or culpable indifference.

trafficking-racket-busted-2-arrested-6-minors-rescued/articleshow/64701659.cms>
1088 [1998] 4 SCC 270
1090 [1990] 3 SCC 318
In the case of Geeta Kancha Tamang vs State of Maharshtra\textsuperscript{1091} while refusing the discharge of a women trafficker, who had served 14 months of imprisonment the Supreme Court stated that the first aspect that the Court has to consider for such a heinous crime is that trafficking in persons is prohibited under Article 23 of the Constitution of India. As Article 23 is the fundamental right of the citizen therefore it cannot be trafficked. Such act comprises the disgusting violence of the Human Rights.

2) IMMORAL TRAFFICKING PREVENTION ACT, 1956:
India being a signatory to the International Convention for the Prevention of Immoral Traffic (1950), it made a specific act against trafficking and named it “The Immoral Trafficking Prevention Act” (ITP), 1956. This act deals with trafficking in terms of commercial sexual exploitation of women and children and this was considered as one of the drawback of the Act. Through the ITP act, 1956 the central government penalizes trafficking of women for commercial sexual exploitation and the punishment extends to 7 years or life imprisonment or fine of 2000 rupees. The Act is criticized as the definition of trafficking deals particularly with sexual exploitation.\textsuperscript{1092} The definition of brothels under Section 2 is also vague. Section 2 of the act defines brothel as “any house, room, [conveyance] or place or any portion of any house, room, [conveyance] or place, which is used for purposes [of sexual exploitation or abuse] for the gain of another person or for the mutual gain of two or more prostitutes.”\textsuperscript{1093} This definition not only defines premises but also switches the voluntarily working sex workers into criminals and they have to be penalized.

As a result, the Immoral Traffic (Prevention) Amendment Bill, 2006, Section 5C was added to the Act. This Section punishes clients of the prostitute. It penalizes, with imprisonment of 3 months or fine 20,000 or both, ‘the person who visits or is found in a brothel for the purpose of sexual exploitation of any victim of trafficking in persons’. The section also penalizes the repeated offenders with the imprisonment of 6 months or fine of 50,000 or both.

In the case of Budhadev Karmaskar v. State of West Bengal\textsuperscript{1094} The Court observed that a woman is compelled to indulge in prostitution not for pleasure but because of abject poverty. If such a woman is granted opportunity to avail some technical or vocational training, she would be able to earn her livelihood by such vocational training and skill instead of by selling her body. The Court directed the Central and the State Governments to prepare schemes for giving technical/vocational training to sex workers and sexually abused women in all cities in India. The schemes should mention in detail who will give the technical/vocational training and in what manner they can be rehabilitated and settled by offering them employment.

3) INDIAN PENAL CODE (IPC):
IPC also provides various provisions to prevent trafficking of women for sexual

\textsuperscript{1091} Criminal Appeal No. 858 of 2009
\textsuperscript{1092} Immoral Trafficking Prevention Act, 1956, Section 5
\textsuperscript{1093} Immoral Trafficking Prevention Act, 1956, Section 2
\textsuperscript{1094} [2011] 11 SCC 538

www.supremoamicus.org
exploitation. These provisions are as follows:

**Section 373: Buying of minor for prostitution**\(^{1095}\):
This section makes buying or hiring or obtaining the possession of a minor for the purpose of prostitution, punishable with imprisonment up to 10 years and fine.

**Section 372: Selling of minor for prostitution**\(^{1096}\):
According to this Section whosoever sells or lets to hire or otherwise disposes of any minor for the purpose of prostitution, should be punished with imprisonment up to 10 years and fine.

**Section 366-A: Procuration of minor girls**\(^{1097}\):
Whoever induces any minor girl to move to a place where that girl is likely to get abused sexually that person shall be punished with imprisonment up to 10 years and fine.

**Section 366-B: Importation of girls from foreign country**\(^{1098}\):
Whoever imports a girl under the age of 21 years from foreign country knowing that the girl will be forced to sexual intercourse; such person shall be punished with imprisonment up to 10 years and fine.

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1095 Indian Penal Code, 1860, Chapter 16, Section 373
1096 Indian Penal Code, 1860, Chapter 16, Section 372
1097 Indian Penal Code, 1860, Chapter 16, Section 366-A
1098 Indian Penal Code, 1860, Chapter 16, Section 366-B

**Criminal Law Amendment Act 2013:**
With this amendment Section 370\(^{1099}\) and Section 370-A\(^{1100}\) has been substituted in Indian Penal Code which provides provisions for comprehensive actions to oppose the threat of human trafficking. The provisions includes measures for the trafficking in children for exploitation in any form including bodily exploitation or any other way of exploiting sexually, slavery, servitude, or removal of organs forcefully. The provisions also provide punishment from 7 years to life imprisonment and fine. The measures of section 370 do not deal with the provisions relating to prostitution of the person above the age of 18 years.

**In the case of Radhiya Khatoon @ Usia vs State Of Bihar decided on 19 June, 2012 by HONOURABLE JUSTICE SMT. SHEEMA ALI KHAN ORAL JUDGMENT** stated that these two appeals arise out of a judgment and order dated 20.12.1999 whereby Radhiya Khatoon and Shibu Kumhar (Pandit) have been convicted by the Trial Court. Shibu Kumhar (Pandit) has been convicted under Section 365, 366, 368, 373 and 120B of the Indian Penal Code to undergo rigorous imprisonment for 7 years under Sections 365, 366 and 368 of the Indian Penal Code and rigorous imprisonment for 10 years under Section 373 of 2 Patna High Court CR. APP (SJ) No.4 of 2000 dt.19-

1099 Indian Penal Code, 1860, Chapter 16, Section 370
1100 Indian Penal Code, 1860, Chapter 16, Section 370-A
06-2012 2 / 11 the Indian Penal Code. Radhiya Khatoon has been convicted for 7 years rigorous imprisonment under Section 368 and rigorous imprisonment for 10 years under Section 373 of the Indian Penal Code. The sentences have been ordered to run concurrently.1101

4) Protection of children from Sexual Offences (POCSO) Act, 2012, that came into force November 12th, 2012. It is a Law to protect children from sexual exploitation and abuse. The act defines a child as any person below the age of 18 years. It provides various provisions and precise definition of different forms of sexual abuse that includes penetrative1102 and non penetrative sexual assault, sexual harassment1103 and pornography1104 and deems sexual offence to be “aggravated” under certain circumstances, such as when the abused child is mentally ill or when the abuse is committed by a person, in a position of trust or authority vis-à-vis the child, like a family member, police officer, teacher, or doctor. The act also provides for the punishment of the people who are trafficking children for sexual purpose, under the provisions relating to abetment in the Act. The punishments differ according to the gravity of the offence, with a maximum term of rigorous imprisonment for life and fine.

CASE: Unknown vs. Mangali yadagiri on April 8, 20151105
According to the facts of the case, an offence under POCSO Act was committed against a child, who was a member of Scheduled Caste/Scheduled Tribe. In such a case, the issue that stems out for consideration is whether the said case should be tried by a Special Court constituted under SC/ST Act by a Special Court constituted under POCSO Act. It was held by the Andhra High Court that the provisions of POCSO Act have to be followed for trying cases where the accused is charged for the offences under both the enactments.

5) Specific Legislations:
There are some other specific legislation enacted to curb the human trafficking relating to women and children. These legislations are:

- Prohibition of Child Marriage Act, 2006,
- Bonded Labor System (Abolition) Act, 1976,
- Child Labor (Prohibition and Regulation) Act, 1986,
- Transplantation of Human Organs Act, 1994

DRAFT BILL ON TRAFFICKING OF PERSONS (PREVENTION, PROTECTION & REHABILITATION) BILL, 2016
In May 2016, Minister of Women & Child Development, Smt. Maneka Gandhi released a draft bill namely Trafficking of Persons (Prevention, Protection & Rehabilitation) Bill, 2016. The aim of the Bill is to create a

1101 Criminal Appeal (SJ) No.4 of 2000
1102 Protection Of Children from Sexual Offences Act, 2012, Chapter 2, Section 3
1103 Protection Of Children from Sexual Offences Act, 2012, Chapter 2, Section 11
1104 Protection Of Children from Sexual Offences Act, 2012, Chapter 3, Section 13
1105 Criminal Revision Case No.1596 of 2014
strong legal, economic, social and political environment against human trafficking. The bill look forward to create a comprehensive legislation against all the facets of trafficking of persons as well as it is victim oriented. The Bill covers all the matters relating to trafficking and its punishments. The bill also throws a light on the 2 terms namely trafficker and trafficked. Bill further discusses about the provisions for funds for rehabilitation centers for trafficking victims. Smt. Maneka Gandhi makes it clear that the bill is dealing with the victims of trafficking. The bill was designed to call suggestions and criticism from the experts. The bill was made to cover the loopholes existing in the present legal system regarding the concerned issue.

**HIGHLIGHTS OF THE BILL**

The above bill is deals with various offences of trafficking which have not been dealt earlier under any Act or Law.

- This bill suggests various penal provisions, regarding the trafficking acts such as revealing the identity of the trafficking victim and the witnesses, use of chemical material or hormones for the purpose of exploitation, utilization of narcotic drug or alcohol or psychotropic substance to the accomplish the trafficking.

- The bill treats survivor of the trafficking as victims and provide them care. Further the bill throws a light on providing protection homes and special homes for short term and long term rehabilitation maintenance to the victims. The homes will be in charge of Welfare Officer who will supervise and monitor the management of the homes and will plan for individual care of the trafficking victims in the home.

- For the purpose of availing speedy trial to the victims and evade delay in trial, the bill proposes to establish Special courts in each district which shall be created by state government in consultation with chief justice of respective High Court.

- Bill seeks to provide compensation to the trafficked victims. Bill further talks about creation of a fund for effectual execution of the bill and welfare and rehabilitation of trafficking victims.

- The bill, for the purpose of conducting cases under Section 370 to Section 373 of Indian Penal Code, 1860, specifies a Special Public Prosecutor. The Special Public Prosecutor should be the person having 10 years practice as an advocate before a court of session and having good record of prosecution.

- A special agency for investigation of offences shall be constituted by the Union Government under this bill.

- The State Government should designate a police officer of the rank of Gazette officer. Such officer should be an investigating officer for the offences under this bill and under section 370 to 373 of Indian Penal Code, 1860.

- For effective execution of Bill, it provides for the establishment of an institutional mechanism by appropriate Government at state centre and district level. There will be a Central Anti-trafficking advisory Board at Central Level. There will be a State Anti-trafficking advisory Board at State Level. At District level the execution of the provision of the bill will be supervised by District Anti-Trafficking Committee.

- **Section 16** of the bill punishes the person who uses narcotic drugs or psychotropic substance or alcohol for the purpose of
trafficking, with imprisonment of & years and may extend to 10 years and liable to fine of not less than 1lakh rupees.

- **Section 17** also prescribes same punishment as Section 16 for the person who uses chemicals or hormones on trafficked women or children for sexual exploitation.

CRITICISM OF THE BILL:
The bill was criticized by many experts on the bases that the bill is just an addition to the legislation of the country with those provisions which already exist in Indian Legal System and nothing more. Whatever is proposed in the bill already exists in the Indian Penal Code, 1860. The bill did not define the term trafficking but only includes the definition of the term which already exist in the explanation of section 370 of IPC, 1860. The new bill provides for the provisions which are also similar to Immoral Trafficking (prevention) Act. The bill provides for the provision of the funds, but how to utilize them and manage them is not stated properly. And there are many other loopholes in the above bill.

Trafficking of Persons (Prevention, Protection & Rehabilitation) Bill, 2018 was approved by the Union Cabinet chaired by Prime Minister Shri Narendra Modi for introduction in the parliament on 28th February 2018.\(^\text{1106}\)

ONLINE SEXUAL EXPLOITATION: A SHOCKING TREND

New technologies lead to the development of a country but what if these technologies increase crime rates instead of development? New technologies have made the life easy as we can get almost everything easily on internet even the means to fulfill the sexual desire. New technologies are facilitating the online sexual exploitation of both children and women to earn profit. By using cell phones, web cameras online sites and other mobile devices that provides for new and evolving technology, traffickers abuse the children and women sexually by engaging them in illegal sexual acts. The offenders or the traffickers may also force the women or girls or children to involve in illegal acts of sex and make their videos to viral it on internet and earn more and more profit on internet also. This is also known as pornography. The experts believe that tens of thousands of victims are exploited online and the number appears to be growing. These kinds of offences also need to address by the Indian Legal System to prevent the increase in number of online sexual exploitation.

LOOPHOLES IN THE PRESENT TRAFFICKING LAWS:
The Indian Legal system needs to improve its laws for trafficking. The Lawmakers’ further need to focus on the creating awareness of the laws among its citizen needs to be promoted. This is to be done because of the following loopholes:

1) Immoral Trafficking Prevention Act, 1956 needs amendment as this Act have various drawbacks as we have discussed earlier that it only focuses on the sexual trafficking of people and rest other types of trafficking are ignored. Indian legal system needs a comprehensive Law for the prevention of trafficking. Moreover it contains vague definitions and the Act

does not focus on the victim’s situation after their rescue. The punishment for the offenders is also very less. Further there is no scope of rehabilitation of the victims of sex trafficking.

2) Indian Penal Code, 1860 focuses only on minor girls. All the provisions in the IPC relating the sexual exploitation relates or talks either about foreign persons or about minors. There is no mention of the provision which penalizes the sexual exploitation of the women above 18 years by the traffickers.

3) The available laws are not implemented in there strict sense and this creates favorable grounds for the traffickers to continue their illegal activities. Corruption is another sensitive and contributing factor which is a hurdle in the proper implementation of the trafficking laws.

4) No protection is provided to the victims and the witness to keep them out of reach the traffickers. The witnesses and the victims stay quiet because of the threats received by them from the traffickers. Traffickers often threaten them to cause personal injury, injury to their property or injury to their family member. So they keep their mouth shut even after the rescue and this helps the traffickers to escape from the penalty of law.

5) No post rescue provisions are there for the victims. The ones who are rescued from the traffickers can easily get re-trafficked by them because they threaten the victims about the victim’s unacceptability in the society. This all occurs because of no provision of post rescue and counseling of victims of trafficking.

SUGGESTIONS FOR THE IMPROVEMENTS:

1) Legislation should focus on improving the existing laws by overcoming its present loopholes. Moreover a comprehensive Act for Human Trafficking should be worked on.

2) Indian Penal Code should be amended to provide protection not only to the minor girls but also for girls who are above 18 years and victim of sexual abuse.

3) Present laws should be implemented in there strict sense without any deviation. Not only has this, all the legislations made to prevent the trafficking should account for a strict punishment for the offenders.

4) Education and awareness should be promoted among the citizen of a country. So that all the reason or the causes of the sexual exploitation come to an end. Such activities can be brought to an end only by educating the people and making them understand the evil affects of human trafficking on individuals, families, and society.

5) Corruption needs to be flushed out of our economy. It will automatically make the law implementing officers more sincere and strict in the implementation of the present laws.

6) If any police officer is found to be corrupt and is seen taking or asking for sexual favors from the victims of trafficking, such officers should be unsympathetically punished for manipulating the legal system and should be also treated as one of the offender in the crime of sexual trafficking.

7) The victims and the witness should be given extra protection to encourage them to speak up against the traffickers. If victims will take a stand and speak against the traffickers then they cannot escape from legal punishments. Thus the witness and victims should be protected along with
their family members in order to reach the traffickers.
8) There should be proper facility for the protection and recovery of victims in the police station whenever the girls or the women are rescued from the brothels at night.
9) Post rescue provisions should be to ensure proper mental and physical recovery of the victims. The victims of such trafficking face a lot of trauma and abuse in their sexual exploitation so there is a need not only to rescue the victims but also to counsel them so that they can get back to the normal life and they can walk away from their pasts.
10) There must be provision of Compensation to such victims by the respective state governments. Further the trafficker should also be compelled to pay compensation to such victims from their profits for causing injury to the victim’s health, mind, life and family. This will enable the victims to start with a happy and a healthy life till the society finally accepts them back.
11) In case of a debt bondage the money lenders must be prosecuted for the offences covered in the Money Lending Act.
12) Women should not easily trust anybody. Instead of trusting the traffickers the women should make inquiry in to the promises made by the offenders and if she believes and has proof that promise is not false then only she should listen to the offender.
13) All the rescued women who are in the protection home should not be treated as criminals there. The victims should not be kept within the 4 walls of the protection and special homes instead they shall be allowed to interact with the society to get back to a normal life. They should be taught how to fight back against those criminals or traffickers and how they can protect themselves from becoming the victim of sexual exploitation.
14) There is need that a high power supervising committee should be established, to scrutinize the strict and proper implementation of anti trafficking legislation, at centre and state level.
15) The government needs to create 24*7 helplines for Human Trafficking. This will help the citizens witnessing such crimes or anticipating such crimes report the matters anonymously without threatening his/her individual safety along with safety of the victim. It will further ensure timely action on part of the law implementing agencies without fail.
16) Creation of adequate number of protection homes in each state in order to stop overcrowding in these homes.

CONCLUSION:
Human trafficking endangers the dignity and security of trafficked individuals, and adversely affects their individuality and identity. The Constitutions of India guarantees equal protection to all its citizens, but these laws are often merely enshrined in the constitution when it comes to the question of grass root level implementation. The need of the hour requires stronger laws to combat the increasing number of trafficking crimes. They further require stricter implementation at the grass root level. Thus we can say any crime which is used to mint money and is perused as business in the economy eventually poses greater social and economic threat to the existence of the society. Timely enactment and
implementation of stricter and stringent laws can not only minimise the evil effects of this social evil but is also capable of totally eradication the menace.

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MULTIPLE PERSONALITY DISORDER AS A LEGAL DEFENCE

By Sofiya Mhaisale
From Symbiosis Law School, Pune

INTRODUCTION:
“I did not do this, I don’t even remember committing this act.” This is heard often in cases of a illness named Multiple Personality Disorder, clinically termed as Dissociative Identity Disorder. It is a complex psychological condition, a mental process which produces lack of connection or relativity in a person’s thoughts, feelings or sense of identity. It is caused by many factors, including trauma in childhood, which could be physical, sexual or emotional abuse.

Criteria for DID include the presence of ≥2 distinctive identities or personality states that recurrently take control of an individual’s behavior. This is accompanied by an inability to recall important personal information to an extent that cannot be explained by ordinary forgetfulness.¹¹⁰⁷

What decision can a court taken when a person says that it was not him who committed the act, rather an alternate personality? Can such a person be believed? And if he is believed, can he be acquitted for the act he committed due to this personality? People suffering from this illness today are struggling through their litigations to prove that they were innocent.

This illness, which is believed to have no cure, also understood to be unidentifiable and having its reality and diagnosis in question, has raised an important question over the years as to whether it should be accepted as a legal defense in any country.

WHAT IS A MULTIPLE PERSONALITY:
A multiple personality is defined as the existence of an alternate personality in a person, which switches from time to time. The acts committed by this personality are not known to the original personality of the person. The people of various countries refuse to believe that a disease like dissociative personality disorder exists, since the understanding of such a disease is difficult even for trained experts.

Often, it is also confused with other diseases like Amnesia, Schizophrenia etc. Since such an illness cannot be diagnosed 100% even by the best physiatrists, it is believed that this defense is used by criminals to easily escape liability, saying that the mental intent was not theirs, rather of that personality who committed the crime. Although diagnosis of such diseases may not completely be possible, but patients of such illness do respond to hypnosis, which makes it possible for the Psychologists to speak and examine with the inner personalities.

SYMPTOMS AND CHANGES:

It is seen that when the other personality takes over the body of the person, there are distinct changes visible. Each personality has a different age, sex, or even race. They have distinct gestures, postures or even ways of talking. Clear changes in the facial expressions are observed in the split. For example, if one personality is reclusive and shy, another may be boisterous and rowdy. Although the vast majority of multiples are female, the personalities need not be the same gender: they may not even be the same age or race, nor will they necessarily wear the same eyeglasses prescription or have the same handwriting. The average number of personalities is eight. The split personality may speak languages which the origin personality has not even learnt.

Personality traits that may predispose patients to develop a dissociative disorder include mental absorption, suggestibility, ability to be easily hypnotized, and tendency to fantasize. 1108 Another important way to diagnose the existence of such a disease may be through prolonged symptoms, which have been existing for a minimum of six months, including depression, headache, mood swings, suicidal tendencies, anxiety and sleep disorders. They are also a victim of amnesia, since they often are incapable of retrieving information of whatever happened when the other personality was in control.

Historically, courts have applied several different forms of the insanity test. In the eighteenth century, the standard for insanity was whether the defendant could distinguish between good and evil and whether he knew the difference between right and wrong. 1109 In 1843, Daniel M’Naghten was found not guilty because of insanity after shooting and killing the private secretary of the Prime Minister of England.

The most expected cause of this illness is a sudden break in trust from a person immensely relied on in life, hence leading the victim to form a shell around him/herself, forcing the child to shun itself away from this awareness. Because this process happens repeatedly, the patient develops multiple personalities; each has different memories and performs different functions, which may be helpful or destructive.

The purpose of bringing an alternate personality in existence is generally to escape from situations which the victim’s personality is incapable of handling, which ultimately leads the victim to create another alter within himself to deal with those situations. The distinct personalities may serve diverse roles in helping the individual cope with life's dilemmas.

People who have suffered from unforgettable painful childhood experiences often build up such alters to give themselves an internal security, or make themselves feel fine even if their surroundings do not portray so. The


moment they feel they are unsafe, or any act takes place which tries to scratch this wall of security, it does not even take 10 seconds for the other personality to take over, and the person, in a way loses consciousness of whatever is happening around him. However this in no way means that the victim has any intention of purposely building up such a personality.

It is believed that on immediate diagnosis, about 5 to 6 personalities may be found, but on further diagnosis, about 20 personalities may exist in the person. Cases of 100 personalities have also been reported in some patients.

LEGAL DEFENCE

Accepting the fact that since such diseases have no clear ways of being identified and diagnosed, question remains unanswered, as to whether it should be accepted a legal defense.

When dealing with victims who have MPD, the interest in protecting the victim must be balanced with the interest in providing the defendant with a fair trial. The interest of a victim with MPD in protection and privacy, however, is essentially the same as any other victim's interest. Although the ramifications for others may be different from those involving multiples, 99 any victim may suffer emotional and physical stress during a trial, compounded by its accompanying publicity. In essence, the law treats the victim with multiple personalities no differently than it does the victim who does not have multiple personalities, in spite of the many potential problems with such an approach. The concept of acquittal by reason of insanity lies in the fundamental belief that a civilized society does not punish those who are incapable of controlling their behavior.

There would be cases of people faking their identities to escape legislation, but statistics reveal that the people suffering for such an illness range from 0.1 to 1% of the population, hence raising an important need to protect the real victims of such an illness from the strict legislation and punishments which they do not deserve.

It is used as a temporary insanity defense, saying that the body of the person committed the crime but the mind that committed the crime is not the mind on trial, hence mens rea being absent. However, if we define insanity as a stage where a human is incapable of controlling his or her actions, so a question arises of whether anyone suffering from Multiple Personality Disorder is capable of even slightly controlling the actions of the alters within. Answering this question on the basis of statistics shows that the person is incapable of controlling the actions of its alters, but the alters can control the actions of the original personality.

As mentioned above, there may be as many as 100 personalities in the same person. Each personality would have its own distinct characteristics. One personality may be allergic to a substance, and the other may not have any reaction to that substance. The IQ levels of these alters may be different, their gender, orientation, species may also vary. The person may not have any enmity against someone, but an alter can hate someone enough to commit an unlawful act. There are cases in which a personality is an animal, or an insect too. The original personality may be 25 years old, but the alter may be just 9 years old.
It is believed that these different personalities have different physical strengths and mental capacities. Some may be strong physically, capable of not even doing what the original personality could do. Some could be weak mentally, not capable of tolerating even the slightest harm to the body.

All these alters are said to have suffered through different experiences. The experiences of one alter are not known to the other, but the identities are known. Every alter knows the existence of other alters generally, but the original personality would have no idea about them till diagnosis.

There are cases in which the original personality has not shown till months, and alters have constantly been ruling over the body of the individual. In a way they all have a specific time to take over the person, and pass on to the next alter after the given time. In any situation where there is believed to be any danger to the original personality or any weak alter, the dominant one would take over to protect the rest. For any person who has believed to suffered from sexual abuse in childhood tends to develop an alter within to deal with that situation if help isn’t provided, and ultimately, whenever in life the person comes across any incident where she/he feels that they are in danger, either emotionally or physically, this alter would take over to protect the person. This alter would generally be much stronger, capable of doing everything which the original person could not do.

**BALANCING THE GOODS AND EVILS:**

Speaking about the positive impact, there is at least 1% of the population today suffering from such an illness, and imposing the blame of any crime on any such individual, who at the moment of the crime scene was incapable of controlling the actions of the body and mind would not do justice. The concept of Mens Rea which is well established today, with the literal meaning, “mental intent” cannot be said to be present in any such circumstance, since the body doing the crime and the mind doing the crime do not belong to the same personality. As long as the original personality was incapable of stopping the alter from committing any crime, the mental intent cannot be said to belong to the person.

However, the negative aspects of Dissociative Identity Disorder as a legal defense are many. For starters, there is no 100% accurate method of finding out whether DID patients actually are suffering from that illness or are faking it. A person with a strong mind may trick the psychiatrist during diagnosis. Hence such an illness could be counted as an excellent excuse for uncontrolled rage, planned murders, or even sudden provocative action.

Any person, whether a criminal or not, is considered as a legal entity. So far as we can determine that one of the identities has committed a crime, the guilt of other personalities cannot prevent the law from taking action against the person holding the notion that the guilt of the other personalities cannot be taken into consideration. Multiple personality disorder, as mentioned above does not have any reliable method of diagnosis hence making it
more difficult for the law to help the victims of this illness.

Also, if there does exist an alter which has committed the crime, the person cannot be released by the courts, since the alter may commit the same crime again. If sent to medical help, even after years of diagnosis and treatment, there is no guarantee that the alters would let go of the personality. Actual diagnosis as to which alter committed the crime is very tough. Getting the alter to surface during diagnosis is itself an impossible task sometimes since such alters only take over the mind of the person in circumstances which require the person to be protected.

Most courts around the world have one belief - One reason for incarcerating or detaining the perpetrator is to protect society. Although the innocent personalities would also be burdened, one could argue that the duty to protect society - and hence free it from the burden of potential danger to an innocent victim - from the dangerous personality is greater than the duty to keep the innocent personalities from being burdened by incarceration or detention. When comparing the rights of the many in society who are at risk from the dangerous aspect with the injustice of imprisoning an innocent aspect, the danger to the group at large is apparently greater than the unfairness to the few personalities. This is however not true. Giving mental treatment at the right time can save the the person and help him/her to let go of these personalities. There is no reason for the protection of the society to come at the cost of sending an innocent person to jail in this case.

CASE OF THOMAS HUSKEY:
One of the most famous cases of Multiple Personality Disorder was that of Thomas Huskey. He swore another man killed four women - another man with a different personality who lured them with the same voice and strangled them with the same hands. The case began in February 1992, months before a single prostitute died, when a woman came to Knoxville police with a lie that led them to a rapist in the act. He never denied the crimes but blamed them on "Kyle," an alternate personality, in an insanity defense unprecedented in East Tennessee's legal annals.  

Criminal Court Judge Richard Baumgartner finally dismissed the murder charges in October 2005 after prosecutors gave up that case.

CONCLUSION:
A new development needs to be made. All over the countries we have laws for no imprisonment or punishment to the people committing acts in a state of Insanity. Multiple Personality Disorder is more than just insanity. It is the complete control of another personality over the body of a person, and in no way can this person be in his own state of mind to make a decision. The illness, although not 100% detectable in humans, is not a myth. It does exist and has destroyed the lives of all these people who have been prosecuted by their states for the acts that they did not intend to commit.

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Almost every country follows the principle of No Guilty act without a Guilty Mind. In this case, there exists no guilty mind. It is acceptable that these people cannot be acquitted since they would harm others again. But even if there a long drawn one, there exists a cure. They can be sent to trained experts and psychologists for their mental treatment. Even if it would take time, the result would be much better than an imprisonment and death sentence awarded out to them. US made its development is Thomas Huskey’s case, and a lot of cases after that as well. A lot of novels like “Tell Me Your Dreams” by Sidney Sheldon and movies like “Split” have portrayed this illness as well. Every nation needs to take a step forward and include this in the ambit of insanity in their countries.
The Supreme Court of India, in a catena of cases, has held that the right to life includes the right to die. In a catena of cases, an attempt to terminate natural life is held to be an offence, punishable with imprisonment.

It has been upheld by the court Right to ‘die’ is inherently inconsistent with the ‘right to life’, since it leads to the right to commit suicide. Any aspect of life which makes it dignified may be read into it, but not that which extinguishes it. Right to Life is also considered to be a duty to live. When a man commits suicide, he has to undertake certain positive overt acts and the genesis of those acts cannot be traced to or be included within the protection of “right to life” under Art. 21. The negative aspect of Right to live would mean the end or extinction of the positive aspect

The court did not take into consideration, that just as Freedom of speech includes freedom not to speak, the same way right to life includes right to not live. What is true of one fundamental right is also true of another fundamental right, and they have both positive and negative aspects. The negative aspect of Right to Life, therefore includes the right to terminate natural life. Every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity in the fundamental right of every citizen of every Indian citizen. Life means something more than just mere animal existence.

By criminalizing attempt to suicide, the court failed to take into consideration that whether...

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**References:**

1111 P. Ratinam v. Union of India, 1994 AIR 1844.
1115 Supra 76.
1117 R.C Cooper v. Union of India.
1118 Vikram Deo Singh Tomar v. State of Bihar (Supp) SCC 734.
to live or not, is the right which is acquired by man when he is born.

There are various other flaws in the judgment as well. Taking into consideration that the court held that there is no violation of right to equality, the court failed to realize the immense arbitrariness in the law since section does not make any room for understanding the circumstances under which an act has been committed. Which act or acts in series of acts will constitute attempt to suicide, where to draw the line, is not known some attempts may be serious while others non-serious. Section 309 treats all attempts to commit suicide by the same measure without referring to the circumstances in which attempts are made. As held in the case of Maneka Gandhi, arbitrariness is the antithesis of equality, therefore making this section violative of right to equality.

The court has also overlooked on the need for psychological care when it comes to a person who attempts to commit suicide. No person of sane mind and normal circumstances would make such an attempt. People who generally make such an attempt are in depression and need help. It has been laid down that Suicide is a psychological problem, and not a manifestation of criminal instinct. After such an attempt, and failure to die, they can still start a new life if they are given the right psychological care. However, sending them to the jail to stay with other criminals only worsens the scenario. In no way does deterrence against an act always help in preventing it, since if this was true, capital punishment should have reduced the number of homicides in India. According to the latest American Position, Eighteen States had no laws against either suicide or suicide attempts.\footnote{\textit{Maneka Gandhi v. Union of India} 1978 AIR 597}

The Medical Health Care Bill, 2016 has altogether decriminalized the attempt to suicide, since Section 115(1) of the Act states, “\textit{Notwithstanding anything contained in section 309 of the Indian Penal code any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code}”

Henceforth there will always be a presumption of insanity, and the person shall not be prosecuted. But still, the law on this point stays ambiguous. The right to die has been recognized by the court so far as Passive Euthanasia is concerned, but when it comes to suicide, the court has still not laid an affirmative.

It is time for a new development to be made. It is time for the court to over-rule this erroneous judgment and accept the various segments of Right to Life with a broader view. In the recent Puttuswamy judgment, the court recognized the Right to Privacy to be included in Right to Life. Therefore, the constitution being an organic document can be interpreted in various ways, and Right to Die is should be recognized as under the ambit of Right to Life.

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\footnote{\textit{P. Ratinam v. Union of India}, 1994 AIR 1844.}
RIGHT TO PRIVACY AND DATA PROTECTION: INDIAN PERSPECTIVE

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The manipulation of digitalized storages and transactions in this technological and cashless economy has been rapidly increasing which has instigated India to scrutinize the protection of data and privacy rules by enacting disparate pieces of legislation. Though these laws are not defined exclusively for the data protection, however the courts on several occasions have interpreted ‘data protection’ with the ambit of ‘right to privacy’. As we celebrate the Supreme Court’s unanimous verdict on privacy being a fundamental right, it is worth exploring the changing technological landscape within which this right will play out. Now India is waging towards the future call of Robust Regime. While a constitutional right to privacy will undoubtedly limit the state’s intrusive power over individuals, the full potential of this right will only be realized by data protection laws that will tyrannize how private companies collect and use data.

This paper would focus on the lack of genuinely independent data protection system of regulators and the needs for implementation of legal structure like those followed in other countries and other exhortations that would actually result in the increase of surveillance of individuals, so the trust of public can be maintained.

Keyword: data protection, technology, implementations

Privacy is not an option, and it shouldn’t be the price we accept for just getting on internet.
-Gary Kovaus

Introduction
Privacy is a valuable aspect of personality. In modern society, right to privacy has been recognized both in eyes of law and in common parlance. The right to privacy refers to specific right of an individual to control the collection, use and disclosure of personal information. Personal information could be in the form of personal interests, family records, communication records, medical records, and financial records to name a few. The global use of interest for electronic communication and e-commerce over the past few years has become a common phenomenon of modern life. No doubt that it has fascinated our life, but the convergence of innovative technology paves way for easy access and communication, which abuses the privacy rights and increase cybercrimes to a peak.

The immense concern about the privacy and data protection has increased worldwide as a consequence of expansion in technology and online environment. So the surveillance potential of powerful computer systems prompt demands for specific rules governing the collection and handling of personal information. The protection of personal data is the key object of data protection which is the security of information and privacy in the computerized society.
So, the privacy is a right whilst data protection is the legislation which implements that right. Countries around the world have enacted different laws to protect the privacy of individuals. But in India, the right to privacy has been interpreted as an unarticulated fundamental right under the Constitution of India. The specific regulatory bodies seem to be lagging in aligning their policies to evolving security and privacy challenges. The Indian judiciary is in urgent need to take a pro-active role in protecting this right.

This paper proposed policy recommendations to the key entities that are in a position to make a difference in current state of the privacy and protection of data.

History
World’s first computer specific statute was enacted in the form of a Data Protection Act, in the German state of Hesse, in 1970.
1) The misuse of records under the Nazi regime had raised concerns among the public about the use of computers to store and process large amounts of personal data.
2) The Data Protection Act sought to heal such memories of misuse of information. A different rationale for the introduction of data protection legislation can be seen in the case of Sweden which introduced the first national statute in 1973.
3) Here, data protection was seen as fitting naturally into a two hundred year old system of freedom of information with the concept of subject access (such a right allows an individual to find out what information is held about him) being identified as one of the most important aspects of the legislation.
4) In 1995, the European Union adopted its Directive (95/46/EC) of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter, the Directive), establishing a detailed privacy regulatory structure.
5) The Directive is specific on the requirements for the transfer of data. It sets down the principles regarding the transfer of data to third countries and states that personal data of EU nationals cannot be sent to countries that do not meet the EU “adequacy” standards with respect to privacy.
6) In order to meet the EU “adequacy” standards, US developed a ‘Safe Harbour’. Framework, according to which the US Department of Commerce would maintain a list of US companies that have self-certified to the safe harbor framework. An EU organization can ensure that it is sending information to a U.S. organization participating in the safe harbor by viewing the public list of safe harbor organizations posted on the official website.
7) Framework, according to which the US Department of Commerce would maintain a list of US companies that have self-certified to the safe harbor framework. An EU organization can ensure that it is sending information to a U.S. organization participating in the safe harbor by viewing the public list of safe harbor organizations posted on the official website.

Laws in India (Present Status)
Data Protection law in India is included in the Act [17] under specific provisions. Both civil and criminal liabilities are imposed for violation of data protection.
1) Section 43 deals with penalties for damage to computer, computer system etc.
2) Section 65 deals with tampering with computer source documents.
3) Section 66 deals with hacking with computer system.
4) Section 72 deals with penalty for breach of confidentiality and privacy. Call centers can be included in the definition of ‘intermediary’ and a ‘network service provider’ and can be penalized under this section.

These developments have put the Indian government under pressure to enact more stringent data protection laws in the country in order to protect the lucrative Indian outsourcing industry. In order to use IT as a tool for socio-economic development, employment generation and to consolidate India’s position as a major player in the IT sector, amendments to the IT Act, 2000 have been approved by the cabinet and are due to be tabled in the winter session of the Parliament.

A landmark judgment with respect to this issue is Kharak Singh v. State of U.P. The Supreme Court held that the right of privacy falls within the scope of Article 21 of the Constitution and therefore concluded that an unauthorized intrusion in to a persons’ home and disturbance caused to him is in violation of personal liberty of the individual.

However, in Gobind v. State of Madhya Pradesh, the Supreme Court qualified the right to privacy and held that a violation of privacy could be possible under the sanction of law.

The scope and ambit of the right of privacy or right to be left alone came up for consideration before the Supreme Court in R. Rajagopal v. State of T.N. during 1994. In this case the right of privacy of a condemned prisoner was in issue. By interpreting the Constitution in light of case law from the United Kingdom (“UK”) and United States (“US”), Justice B.P. Jeevan Reddy held that though the right to privacy was not enumerated as a fundamental right, it could certainly be inferred from Article 21 of the Constitution.

Another significant case related to the right of privacy was the People's Union of Civil Liberties v. the Union of India. The case was primarily involved with the issue of 'telephone tapping' and held that tapping a person’s telephone line violated his right to privacy unless it was required in the gravest of grave circumstances such as public emergency.

While it may seem that the right to privacy is adequately protected as a fundamental right, it is essential to keep in mind that barring a few exceptions, fundamental fights secured to the individual are limitations only on State action. Thus, such an interpretation will not protect an individual against the actions of private parties.

The nine-judge bench of the Supreme Court has unanimously delivered its judgment in Justice K.S. Puttaswamy (Retd.) v. Union of India holding that privacy is a constitutionally protected right which not only emerges from the guarantee of life and personal liberty in Article 21 of the constitution, but also arises in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III of the Indian constitution.
The right to privacy judgment is one of the most landmark judgments of independent India. It not only learns from the past, but also sets the wheel of liberty and freedom for future. The Supreme Court of India has once again emerged as the sole guardian of the Indian constitution.

**Issues Concerning Data Protection**

1. **Indian Economy Transforming to E-economy:** While India is leading in providing IT services to businesses across the globe; the domestic sector has emerged as a key IT investor. Leading the pack, Government agencies are spending more than $10 billion in several of e-Governance Internet penetration, although currently low, at about 7.1%, is rising exponentially. According to the Celnet report, ‘Payments in India is going e-way’, E-transaction currently account for 30% of the total transactions, 75% of the total payment value is found in the electronic form. Indian IT and IT Services industry is growing multifold. According to Mckinsey-NASSCOM study, outsourcing industry currently at $60 billion, will reach to $225 billion by 2020. This transformation will increasingly bring Indian citizens under its fold, exposing them to the new age threats that not only have the potential to damage their financial interest, but also infringe their personal rights.

2. **Privacy in New Age Transactions and Service Deliveries:** Increasing commercialization in India that involves identifying potential customers, marketing products and services, promotional activities, and cross-selling is seen to be relying on the personal information. It has been observed that the data gathered while providing services and selling products is increasingly used for the purpose not intended. This has been more visibly observed in the telecom sector, which later resulted in the implementation of National Do Not Call Registry (NDNC). However, implementation of it on the ground remained abysmal, leading to irritation, frustration and worries of the end users. Privacy is slowly graduating into discussion landscape of India. However, in comparison to the advanced countries, the privacy initiatives both by individual companies and the respective regulatory bodies have remained at the surface.

3. **Cyber Crime and Warfare:** Crime syndicates, including terrorists are increasingly visible. New age cybercrimes increasingly attack the end users; increasing digitization of the end users’ information aggravates this problem multifold. E-Governance applications are obvious targets of these attacks that come from cyber criminals or nation states, indulged into cyber warfare capabilities. Critical sectors like banking also offers lucrative target to them. This poses a great challenge to an individual, who is willingly or unwillingly, become a part of the cyber space. This lead to an unprecedented scene, where the significant section of population is exposed to grave threats that are international in nature.

4. **National Security and Privacy:** The proposed NATGRID -- a world-class integrated national security database -- will facilitate quick access to information on an individual -- like details of his/her banking, insurance, immigration, income tax, telephone and Internet usage. In the interest of sovereignty and integrity of India,
security of the State, the IT(Amendment) Act, 2008 authorized the designated agencies of Government to assume a power to issue directions for interception or monitoring or decryption of any information through any computer resource. This has a major bearing on privacy of an individual. Rising terrorism threats that India is witnessing in the recent years justifies a need for such monitoring of traffic, the implementation of ambitious projects such as NATGRID or Lawful Interceptions as allowed by amended IT Act may lead to infringement of the privacy of individuals.

5. Security and Privacy Challenges in a Centralized UID Database: Government of India has launched a massive project to issue unique identification numbers (UID Nos.) to all the residents of the country – close to 1.2 billion – by capturing their personal particulars along with biometrics such as fingerprints, iris scan and facial image. This has thrown up several privacy challenges. Data will be captured by thousands of registrars and sub-registrars throughout the country, sent over networks for storage centrally. Central data will be accessed for de-duplication whenever a new entry of UID is to be created. This poses privacy challenges at all stages of collection, processing and storage. These have been analyzed in detail in a paper prepared by Data Security Council of India (DSCI), ‘Security and Privacy Challenges in the UID project’.

6. Outsourcing: Data Protection has emerged as a major challenge in cross-border data flows. Clients are demanding more security as their worries about the cybercrimes, privacy and identity theft grow. Regulatory and law-enforcement agencies of countries where clients are located require a proof of compliance by the IT/ITeS service providers (SPs) with their security and privacy regulations. Different countries have different laws to deal with data security and data privacy. While the European Union views privacy of personal information as a fundamental right, the United States has sector specific laws on privacy of the customer data. Processing of personal information of citizens of these countries by service providers (IT/BPO companies) in India and in other countries through outsourcing raises concerns about the regulatory compliance. In view of the multiplicity of privacy legislations worldwide, the service providers in India are faced with a major challenge of demonstrating compliance with the laws of countries where the data originate.

7. Arbitrary and unlawful interference: by the Government and private parties– The legislation must ensure that an individual’s right to privacy is not interfered with in an arbitrary and unlawful fashion. Presently, judicial precedents prohibit violation of the right to privacy of an individual by Government agencies. A comprehensive law must provide for protection from intrusion by the Government as well as private parties.

It must also try and prohibit/curtail the use of cutting-edge technology to trespass upon privacy rights and personal data. Presently, the right to privacy on the Internet is being threatened due to several elements such as web cookies, unsafe electronic payment systems, Internet service forms, browsers and spam mail.
8. Medical records: Historically, medical records were used largely by physicians and medical insurers. However, with the creation of electronic records and large databases of medical information, the number of health care professionals and organizations with access to medical records has increased. It is essential that such data is not collected and sold to researchers in the field biomedical science, without the consent of the patients. With the advent of the internet, it has become increasingly difficult to track such data and not only does it amount to an invasion of privacy, but it also amounts to breach of the duty of confidentiality that medical professionals owe their patients.

9. Financial records: Financial records of individuals must also be protected from being distributed and circulated among banks and financial companies as it may also result in the misuse of such information.

International Standards

European Union (EU)
The European parliament and the Council of the EU passed the Data Protection Directive in 1995. Distinct from all other major human rights, document protection of people’s data has been included as one of the fundamental rights of the EU under Article 8 of the charter of the Fundamental Rights of the European Union. The EU directives are mainly aimed at facilitating the development of electronic commerce by fostering consumer confidence and minimizing differences between member state’s data protection rules. The core data protection principle is the fair and lawful processing of personal information.

The United States (US)
The United States has about 20 sector specific or medium-specific national privacy or data security laws and hundreds of such laws among its 50 states and its territories. California alone has more than 25 state privacy and data security laws. In addition, the large range of companies regulated by the Federal Trade Commission (FTC) are subject to enforcement if they engage in materially unfair or deceptive trade practices. The FTC has used this authority to pursue companies that fail to implement reasonable minimal data security measures fail to live up to promises in privacy policies or frustrate
consumer choices about processing or disclosure of personal data. The FTC now considers information that can reasonably be used to contact or distinguish a person, including IP addresses and device identifiers, as personal data. The FTC has jurisdiction over most commercial entities and has authority to issue and enforce privacy regulations in specific areas (Ex. For telemarketing, commercial email and children’s privacy).

Option rules apply in special cases involving information that is considered sensitive under US law, such as for health information, use of credit reports, student data, personal information collected online from children under 13, video viewing choices, precise geo location data, and telecommunication usage information.

The US also regulates marketing communications extensively, including telemarketing, text message marketing, fax marketing and email marketing. The first three types of marketing are frequent targets of class action lawsuits for significant statutory damages.

A few states have enacted laws imposing more specific security requirements for data elements that trigger security breach notice requirements. Both Nevada and Massachusetts laws impose encryption requirements on the transmission of sensitive personal information across wireless networks or beyond the logical or physical controls of an organization, as well as on sensitive personal data stored on laptops and portable storage devices.

HIPAA security regulations apply to so-called ‘covered entities’ such as doctors, hospitals, insurers, pharmacies and other health-care providers, as well as their ‘business associates’ which include service providers who have access to, process, store or maintain any protected health information on behalf of a covered entity. ‘Protected health information’ under HIPAA generally includes any personally identifiable information collected by or on behalf of the covered entity during the course of providing its services to individuals. An important step taken in the US towards the protection of privacy on the Internet was the enactment of Children’s Online Privacy Protection Act (COPPA). Under the rule, commercial websites and online services directed to children under 13 or that knowingly collect information from them must inform parents of their information practices and obtain verifiable parental consent before collecting, using, or disclosing personal information from children.

After European Union, Japan introduced a separate central legislation for protection of data as the Act on the Protection of Personal Information(APPI). The Act took partial effect in 2016 and has been enforceable from May 30, 2017. The law defines the scope of the legislation and states on whom the law is applicable under Article 2-4 of the APPI. As per the Act, it is applicable to four entities- state institutions, local public bodies, independent administrative agencies and an entity not having over 5,000 individuals’ personal information for more than six months. Similar to the EU law, consent of a data subject forms the essence of the legislation and has been stated as
mandatory in case of transmitting data to a third party or for any use beyond communication purposes.

**International Safe Harbour Principles**

There was need to diminish the divide between the United States and the European Community who adopted different approaches to privacy protection to their citizens. Following extensive discussions, the EU Working Party and the US Department of commerce agreed that the department would compile a publicly accessible list of companies that provide adequate protection for personal data. Companies and individuals that subscribe to certain safe harbour principles will be able to secure protection against future data blockages.

The agreement between the European Union and the United States rests on seven safe harbour principles: notice, choice, onward transfer, security, data integrity, access and enforcement. India could incorporate these principles while formulating legislation in this behalf.

**Notice** - The data subject must be given notice in clear language, when first asked for personal data, of the purpose of data collection, the identity of the data controller, the kinds of third parties with whom the data will be shared, how to contact the organization collecting or processing the data, and the choices available for limiting use or disclosure of the information.

**Choice** - The data subject must be given clear, affordable mechanisms by which he or she can opt out of having personal information used in any way that is inconsistent with the stated purposes of collection.

**Onward transfer** - Where the data controller has adhered to the principles of notice and choice, it may transfer personal data if it ascertains that the receiving party also complies with the safe harbor principles, or if it enters into a contractual agreement that the receiving party will guarantee at least the same level of data protection as the transmitting party. When disclosure is made to a third party that will perform under instructions of the data controller, it is not necessary to again provide notice or choice, but the onward transfer principle continues to apply.

**Security** - The data controller must take reasonable precautions to protect data from loss or misuse, and from unauthorized access, disclosure, alteration or destruction.

**Data integrity** - The data controller must take reasonable steps to ensure that data are accurate, complete and current.

**Access** - Data subjects must have reasonable access to their personal data and an opportunity to correct inaccurate information.

**Enforcement** - At a minimum, enforcement mechanisms must include readily available and affordable recourse for the investigation of complaints and disputes, damages awarded where applicable, procedures for verifying the truthfulness of statements made by the data controller regarding its privacy practices, obligations of the data controller.
controller to remedy problems arising out of noncompliance, and sanctions sufficiently rigorous to ensure compliance.

Recommendations
1) For the success of policy initiatives that can really create an impact, entities, including
2) Government and private, need to work in tandem. Each of these entities, in their respective
3) Capacity can bring the necessary change that promotes a culture of privacy.
4) Privacy by design is a trilogy model which could extend the encompassing application through
   i. IT systems;
   ii. Accountable business practices;
   iii. Physical design and infrastructure. It advocates a proactive approach, which relies on preventive measures of an organization to gain confidence to the end users. Data Security Council of India has come up with a privacy framework known as DSCI.
5) Privacy Framework which helps the organizations establish a privacy function that is based on visibility of information, intelligence over regulatory compliance, and privacy principles, policies and processes. Different frameworks, practices, technology measures and processes that embed into an organization’s culture lead to a situation where privacy is treated as a hygiene factor in its operations.
6) End user education among the various measures that are advocated to build a privacy culture in India, education of end users is particularly important. Majority of them would be the first time users of the IT systems. With technology being seen as a means to achieve financial inclusion, there has been increased investment in the e-Governance projects. Simultaneously, growing private investment in the technology will bring the entire population of the country under the fold of cyber age. This is being done irrespective of how equipped the end users are to understand the dangers of the cyber space. End user’s awareness of how his or her personal information is being collected, used, processed, shared and stored and how organizations and individuals can misuse this information will go a long way in creating a privacy culture. End user’s awareness of the legal protection available to guard his or her personal rights, in case of any breach pertaining to the personal information, will definitely serve as an effective check on organizational practices in respect of processing the personal information. High level end user awareness will also help deploy trust mechanisms.
   The role of Self-regulation in data protection increasingly has been established as an effective step. Self-regulation reduces administrative bureaucracy and promises to bring efficiency in the data protection processes. A self-regulatory initiative has become now a useful instrument that not only supplements a legislative framework of an organization but also brings a required dynamism in the protection. United States has a long tradition of self-regulation. The best practices approach as a practical and realistic way to enhance global adherence to the data security standards.
8) Harmonize the legal framework which regulate communications surveillance in India to ensure that the law is accessible
and clear, and meets India’s international human rights obligations;

9) Establish an independent and effective oversight mechanism with a mandate to monitor all stages of interceptions of communications to ensure they are compliant with India’s domestic and international obligations to respect and protect the right to privacy and other human rights;

10) Establish independent accountability mechanisms and clear standards for India’s security and intelligence agencies to ensure they are subject to independent oversight mechanisms and guarantee transparency of their mandate and operations in accordance with international human rights standards;

11) Review and reform the regulations regarding export and import of surveillance technologies to and from India and review all licensing agreements which impose obligations on the private sector to facilitate and/or conduct communication surveillance, and take the necessary measures to ensure that the private sector – in both policy and practice – comply with international human rights law and standards;

12) Review the proportionality of data retention requirements placed on telecommunications companies also adopt and enforce a comprehensive data protection legal framework that meets international standards, applies to both the private and public sector, and establish an independent data protection authority that is appropriately resourced and has the power to investigate data protection breaches and order redress.

13) Government of India, under the amended IT act, which is under progress, should set guiding principles for privacy in line with the globally recognized privacy principles. They can establish a national ecosystem that is continuously engaged for the data protection cause, issue guidelines and standards that provide practical guide to government departments, e-Governance projects and private sectors and establish a mechanism for data breach notifications that mandates organizations to report the data breaches.

14) Attributes of humanity and democracy principles change with technology. Civil societies should proactively take data privacy in their agenda and vigilant review of monitoring of private organization’s practices that processes personal information.

15) Augment skills to deal with technology matters that impact the end users under cyber security concepts and how cybercrimes are perpetrated, and develop investigative techniques for such crimes.

16) Issue specific and more granular set of guidelines and standards that control industry practices pertaining to processing of personal information.

17) Build a Risk and Compliance Intelligence mechanism that closely tracks global data protection regimes, and their impact on trans-border data flows.

**Conclusion**

The threat of privacy is also an obstacle towards facilitating a secure environment for communication over the Internet. Unless these issues are addressed India cannot take full advantage of the tremendous opportunities and benefits that e-commerce presents to developing nations such as ours. With the passage of time the ‘global village’ is being surrounded by and thickly
populated by these advancements and technology related developments where skies are the limit, therefore, every forthcoming minute is a challenge. Since it is always difficult to predict what is going to happen in future but keeping in the view the desires of mankind and speed of technological innovation it can be said that the future is going to be more demanding and threats to our privacy and personal information are high which requires much effective data protection mechanism.

A legal framework needs to be established setting specific standards relating to the methods and purpose of assimilation of personal data offline and over the Internet. Consumers must be made aware of voluntarily sharing information and no data should be collected without express consent. India could also follow the regimes like those followed in other countries in order to overcome the data protection insecurities. The future of India’s trade depends on striking an effective balance between personal liberties and secure means of commerce.

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BIOPIRACY AND THE ECLIPSE OF TRADITIONAL KNOWLEDGE IN INDIA

By Vrinda Singh & Vishal Singh Thakur

ABSTRACT

Traditional knowledge is a valued concept that has been carried on for generations for the benefit of the indigenous society. Such knowledge pertains to various natural resources and is utilized towards a sustainable living. One such element of traditional knowledge includes its usage for medicinal purposes. India is the hub of such medicinal knowledge considering it is the birth place of Ayurveda. The issue arises when such traditional knowledge is illegally procured by outside agencies and is utilized for their own advantage, often patented without giving due credit to the indigenous people and places which led to the development of such resources. This mode of misappropriating cultural and traditional knowledge is known as Biopiracy.

This paper aims to delve into the concept of biopiracy in India. It analyses various case studies of biopiracy and international conventions and national laws formed to control them. In the end, it suggests a way forward to control the vice of biopiracy.

INTRODUCTION

Indigenous people belonging to certain communities are gifted with traditional knowledge allowing them to make use of natural resources for a sustainable living. Some of these indigenous communities are known to have used biological diversity for generations. Such constant use of the resources has also passed on the knowledge to generations through ages. In this way, this arrangement works for the benefit of the society as a whole.

MEANING AND SCOPE OF TRADITIONAL KNOWLEDGE

UNESCO defines Traditional Knowledge as the “the cumulative and dynamic body of knowledge, knowhow and representations possessed by peoples with long histories of interaction with their natural milieu. It is intimately tied to language, social relations, spirituality and worldview, and is generally held collectively.”  

World Intellectual Property Organization (WIPO) defines as “it is knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity”

Using this valued traditional knowledge, the indigenous communities have been able to use it for survival and sustainable living. The knowledge may pertain to food crops, biologically important and lifesaving medicinal plants and herbs etc. However, this traditional knowledge and developments
pertaining to these resources are facing threat from what may be called, bio piracy.

WHAT IS BIO-PIRACY?
In simple terms, Bio-piracy is unauthorized use of traditional knowledge pertaining to biological resources for profit motives. It is defined as “the misappropriation and commercialization of genetic resources and traditional knowledge of rural and indigenous people”\textsuperscript{1124} In Kiss Catalog v. Passport International, the action of piracy was defined as “any unauthorized duplication of any matter protected by Intellectual Property.”\textsuperscript{1125} A person involved in the act of piracy takes advantage of someone else’s work without taking any prior approval or permission from the original author of the work. Similarly, Biopiracy is the appropriation of someone’s knowledge of use relating to biological resources.

The major issue with this process is gross violation of rights of indigenous communities resulting out of it. Since the indigenous communities have not gone through the process of patenting their innovation on the biological resources, big corporations often take the opportunity of utilizing such knowledge in their own name. Some of them get the traditional scientific knowledge patented in their own names. The patent is granted to even minor modifications in the traditional knowledge even though a strict requirement of ‘novelty’ in a patented invention may not be satisfied. Further, it often paying less or, in most cases, no compensation to the indigenous communities for the knowledge used for their own personal interests. It has been found out that even when the firms provide employment or hires these indigenous people, the growth prospective of these indigenous people are not stronger as they are minimized to menial level jobs. They are also not given the opportunity to learn about their own product and develop them subsequently. They are not provided with any information related to the research and development which is being carried.\textsuperscript{1126}

Another problem is that negotiations relating to profit sharing can result in clash within communities. Biological resources, most of the times, are equitably distributed within the entire country or region and are within the utility and access of these local communities. Now, if several communities are commonly using a particular type of plant, it might result in a clash between the communities in accessing the profit sharing benefits as several indigenous communities’ claims that they share a command over the traditional knowledge associated with the product. These clashes between different indigenous communities most of the times end up in court litigations as the companies

\textsuperscript{1124} Understanding, resisting and acting against biopiracy, The (French) Biopiracy Collective. Available online at: http://www.biopiraterie.org/sites/default/files/études/Livret_Uk_010612.pdf (last assessed on: Apr. 18, 2017)

\textsuperscript{1125} Kiss Catalog v. Passport Intern Productions, 405 F. Supp.2d 1169.

apart from providing employment also provides monetary benefits.

Once patented, the use of the knowledge becomes limited only to the big corporations, thus snatching the indigenous communities of their labor and living by use of the biological resources according to their traditional knowledge.

Since a lot of indigenous communities reside in developing or underdeveloped countries, the economies of these countries are threatened by the acts of biopiracy since due credit any revenue is not annotated to them. At international level, the act of biopiracy also intrudes with the sovereignty of the nations since their resources and knowledge are acquired without their knowledge. Thus, biopiracy violates states sovereign right as well as the common heritage of mankind.

Unlike some countries and conventions, biopiracy is not considered a crime in India. Article 1(1) of its International Undertaking on Plant Genetic Resource for Food and Agriculture (1983) states that the undertaking is based on the premise that “plant genetic resources are common heritage of mankind and consequently should be available without restriction”. This implies that no individual or corporation can exercise sovereignty over the natural resources or restrict their use to others. But the field of biotechnology and especially patent in biotechnology runs against such principles.

Following from the above, the main onus falls on the developed countries, which are incidentally also the home to these biotechnology patent owning big corporations, to draft norms so that the rights of the indigenous communities are not compromised.

**BIOPIRACY CASES ON INDIA’S AND OTHER COUNTRIES TRADITIONAL KNOWLEDGE**

In India, such traditional knowledge especially with regard to medicines through Ayurveda is recognized worldwide. Developed by Charak in the treatise Charaka Samhita, Ayurveda is one of the oldest traditional healthcare systems in the world. Historically, India is seen as a hotspot of traditional knowledge as the indigenous communities and tribal groups residing in naturally rich forests possesses an immense understanding and knowledge of the environment they belong to. They tend to play a major role in enhancing the value derived from the environment.

In this area also, the cure of various diseased through the use of codified traditional knowledge has been exploited by these pharmaceuticals who obtain various leads for development of biologically active molecules by the technology rich countries. Since the traditional knowledge are codified, if any, in regional languages, the information about their being is not easily accessible to international patent offices. Some of the examples of biopiracy of traditional Indian knowledge include –

1. **NEEM**
Neem is a traditional Indian tree known for its medicinal value. It has been used as bio-pesticide for centuries. Ayurveda, an ancient Indian text, as far back as in 5000 BC had recognized neem tree and its medicinal value.
However, US Department of Agriculture issued a patent in the year 1994 to W.R. Grace, which is a US based company, for fungicide which is made from oil extracted through neem. This patent was later opposed by many of Non-governmental Organizations (NGO’s) and various environmental organizations. The arguments raised by these organizations were that the act amounts to biopiracy as there is no ‘novelty’ in it and the multinational corporation has stolen the idea from these communities and ancient texts. After proper evidence was adduced, the European Patent Office withdrew the patent in May, 2000 after confirming that “there is no invention” and that indigenous communities were using neem since many decades. They also stated that the use of neem is widespread in India and there was prior use.1127

2. TURMERIC
The US Patent and Trademark Organization (US PTO) in the year 1993 granted the patent rights to the University of Mississippi Medical Center over the use of turmeric as a healing wound. This university registered a patent after it administering turmeric to a patient who was afflicted with a wound. After the administering of turmeric, the wound healed. In India, turmeric has been used for centuries towards healing of wounds. Indians have knowledge and awareness of turmeric’s medicinal wonders. After India came to know of the fact that University of Mississippi Medical Center is using turmeric to cure or heal the wounds of the patient, it filed a case against this University claiming that the Indians have been traditionally aware of the fact that turmeric can also be used for curing wounds and that the University copied this concept and the claim over patent was wrong.

After evidence was deduced where India relied on ancient texts which shows the medicinal use of haldi, the patent was eventually cancelled in the year 1998. But, this case is another example where India and other indigenous communities got this fact revealed that how easy is it to falsely patent centuries old traditional knowledge.1128

3. BASMATI RICE
In 1997, the US Patent Office granted patent to RiceTec Inc., a Texas based company to call the aromatic rice grown in India and Pakistan as ‘Basmati’. As a result of this patent, the said company started dealing in the said ‘Basmati’ rice in US as well as exporting it to other countries like India on a higher price.

This resulted in great loss to both India and Pakistan as the patent not only cost India the US market but also other international markets in Asia, UK and Europe etc. India, aggrieved with the patent being granted to US Company, took the matter before the World Trade Organization (WTO) for a clear violation of the TRIPs agreement as according to TRIPS, “geographical


indication products cannot be patented". Ultimately, the patent was rejected against RiceTec Inc.

4. KARELA, JAMUN AND BRINJAL
The US Company, Cromak Research Inc. was granted a Patent on edible herbal compositions which was made by compromising the mixtures of karela, Jamun and Brinjal. After these mixtures were prepared, the product so formed helped in reducing sugar level. These are vegetables and fruits which are traditionally found in India and the practice of compromising the mixture were widely followed by the Indigenous societies and groups to reduce sugar level and cure diseases. Later, India filed an objection to the patent granted to Cromak Research Inc. The application was accepted and the patent was rejected accordingly as the compromising of mixture which was formed with the Karella, Jamun and Brinjal was traditionally known to the indigenous communities.

5. YOGA PATENT
A recent case of copyright on Yoga can also be considered as an act of Bio-piracy. Bikram Choudhary, who is a US-based Non-resident India, filed for an application of copyright over his style of teaching Yoga. Apart from copyright, he also filed a patent over Yoga as well. According to various Yoga teachers and enthusiasts, this seems to be an unjustified move because Yoga is something which has been traditionally known to Indians and it is for the entire human race and should accordingly fall within the public domain.

It also came to the notice that United States Patent and Trade Office (USPTO) has granted around 150 copyrights related to yoga, 134 trademarks on yoga and 2,315 patents were assigned on Yoga. This step by USPTO was widely criticized and opposed by India. India has also taken a strong move against USPTO granting patents and copyrights over Yoga techniques and postures. They have also opposed for patent revocation. The verdict is yet to come.

6. ‘NAP HAL’ WHEAT
India has also raised its concern after one of the Indian varieties of wheat also known as “Nap Hal” was patented to MONSANTO, an American Multinational Corporation (MNC) under the category of ‘plants’. Later this patent was challenged by Research Foundation for Science and Technology along with Greenpeace and Bharat Krishak Samaj. They jointly filed a petition on January 27th, 2004 against MONSANTO over the grant of patent rights. After adducing proper evidence, it came to notice that Indian societies and indigenous groups have traditional knowledge of this type of wheat and that they have been using it for centuries. Since, there was a prior use and no ‘novelty’ or

‘invention’, the patent was resultantly revoked in the year 2004 in October.\textsuperscript{1132}

7. COLGATE CASE
The American company Colgate was accused of stealing recipe of India’s 1000-year-old toothpaste. Colgate was granted a US patent over the tooth powder composition which comprises of rust-like red iron oxide, camphor, spearmint, black pepper and clove oil. When this patent was granted, activists from India accused Colgate of ‘biopiracy’ for the theft of traditional knowledge of 1000 year old toothpaste recipe. It was evidentiary produced that the ingredients which were used in making this toothpaste dated back to antiquity and that Indians were using it since thousands of years.\textsuperscript{1133}

8. ASWAGANDHA
Relive International Inc. was granted a patent called as ‘Aswagandha’ which acts as a supplement for healthy joints. USPTO, granted dozens of patents over Aswagandha. Indians filed an objection regarding the grant of Patent to Relive International. Indian government relied on ancient texts where it was shown that it was traditionally known to the indigenous Indian groups that Aswagandha can be used as a supplement for healthy joints. This case is still going and the decision is yet to come.\textsuperscript{1134}

9. HERBAL PRODUCTS
Natreon Inc. which is a US based company headquartered in New Jersey is engaged in ayurvedic extracts. Natreon Inc. was issued patents for 13 claims of Amla by the US patent office. The application was also filed with the Patent Office of Europe. Later it was discovered that the product is widely popular and is commonly used by the people of India. Since, there was prior use, the patent was rejected.\textsuperscript{1135}

10. RICE
Chattisgarh, which is also known as the rice bowl of India, is a home to 22,972 varieties of Paddy. The US Company Syngenta which is a biotech company also tried to grab and steal the precious collections of 22,972 paddy varieties. Syngenta also signed a memorandum of understanding with the Indira Gandhi Agricultural University (IGAU). The memorandum was signed to get an access to Dr. Richharia. He is the ex-director of Central Rice Research Institute (CRI) which is situated in Cuttack and is also considered as the pioneer of rice sage of India who is known for his pioneering and instrumental work in the field of agriculture particularly rice. The Company was looking for getting an access to Dr. Richharia’s priceless collection of rice fields which was so diverse.

After getting access to Dr. Richharia’s farms, the Company stole the idea and got the patents on 22,972 varieties of rice which later, after the objection by India, was rejected.\textsuperscript{1136}

ANALYSIS
After looking at these case studies, it becomes evident that Intellectual Property laws contain a loophole so that the big

\textsuperscript{1132}\textit{Ibid.}
\textsuperscript{1133}\textit{Pandey (n 10).}
\textsuperscript{1134}\textit{Rao, Guru (n 9).}
\textsuperscript{1135}\textit{Ibid.}
\textsuperscript{1136} Biopiracy Related Issues. Available Online at http://www.simplydecoded.com/2013/07/14/biopiracy-related-issues/ (Last assessed on: 24.06.2018)
The Supreme Court in Novartis v. UOI dismissed the application of the grant of patent to the Swiss drug maker Novartis over Glivec which the anti-cancer drug in India was. In this case, Supreme Court also accepted the existence of imatinib mesylate as prior art by looking into Zimmerman patent and thus declared it not to be a ‘invention’ under section 2(1)(j) and section 2(1) (ja) of the Patents Act, 1970.

INTERNATIONAL TREATIES DEALING WITH BIOPIRACY

It is important to understand that because biopiracy includes a very difficult and complex subject matter, it relates to numerous branches of law. This subject on one hand deals protects the right of the patent owner and on the other hand violates the right of those indigenous communities who are already well versed with these biological resources as they have traditional knowledge over the product which is being patented.

Henceforth, there are several legal texts, declarations and provisions under the International law, Intellectual Property Rights and Environment law which provides measures in regulating Biopiracy. However, it is also important to understand that because of the prevailing differences in relation to the object and subject matter, these provisions tend to differ and contradict each other from time to time.

On one hand, there are one set of laws in relation to IPR or International Trade or any Commercial matters whose main focus is profit maximization and there are other sets

1139 Ibid.
of law on the other hand which deals with protection of environment and respect and protect the rights of the indigenous groups. The differences in these laws time again has led to ‘clash of interest’ between these two sets of groups i.e., the Corporation and the Indigenous groups.

1. TRIPs AGREEMENT
World Trade Organization in order to provide an international framework for the protection of Intellectual Property Rights came up with TRIPs Agreement in 1995. TRIPs, better known as Trade Related Aspects of IPR Agreement, allowing patenting the life forms has resulted in the widespread encouragement of Biopiracy.

TRIPs also recognize geographical indications. It helps in identifying the territory where a particular product belongs to. According to Article 22.3 of the TRIPs agreement, if the registration of trademark which uses a geographical indicator in a misleading manner or which confuses the user of the good must be refused or invalidated ex officio. This was what was held in the case study of Basmati.

3. DOCTRINE OF COMMON HERITAGE OF HUMANKIND
Article 1(1) of FAO’s International undertaking on Plant Genetic Resources for Food and Agriculture, 1983, states that the undertaking was based on “the universally accepted principle that plant genetic resources are a common heritage of mankind and consequently should be available without restriction.” This in plain words means that no one can claim the right of sovereignty over such resources.

4. CONVENTION ON BIOLOGICAL DIVERSITY
The Convention on Biological Diversity not only recognizes the dependency of indigenous people on biodiversity but also their unique role in conserving life in earth. This is the reason why the Biological Diversity Convention provides that the parties have undertaken to preserve, protect and maintain the traditional practices, innovations and knowledge of these local and indigenous communities which seems relevant for the protection and conservation of biodiversity. Article 8 provides and emphasizes to promote their wider application with the approval of knowledge holders and to encourage

1141 Article 22.3, TRIPs Agreement, 1995.
1142 Ibid.
1144 Article 22.3, TRIPs Agreement, 1995.
1145 Article 1(1), Food and Agriculture Organisation’s International undertaking on Plant Genetic Resources for food and agriculture, 1983.
equitable sharing of benefits arising out of the use of biodiversity.\textsuperscript{1147}

This Act also recognizes the principle of state sovereignty which means that the state can exercise the right of sovereignty over its resources. Thus, they can be benefitted from these resources with a prior approval from the state.

5. THE NAGOYA PROTOCOL

The Nagoya Protocol which was ratified in the year 2010 specifies and provides the means through which the Convention of Biological Diversity can be applied. This protocol majorly deals with access and benefit sharing. The Nagoya Protocol aims at ensuring better regulation of access towards genetic or biological resources and also encourages the State to set up an agency to which researchers and firms can seek request for operating licenses. States should also ensure the setting up and running of an equitable mechanism of sharing any benefits, arising from the use of resources.\textsuperscript{1148}

INDIA’S FIGHT AGAINST BIOPIRACY LAWS

India is one of the 17 mega-biodiversity countries with 2.4 per cent of the global land area and accounts for 7 to 8 per cent of the recorded species of the world, making it more prone to biopiracy.\textsuperscript{1149} As mentioned above, India has successfully overturned the patent which was granted to the US Company by various patent offices over its resources and knowledge. This has led to a way towards a pathway to fight against biopiracy. Also, it is important to understand that this was the first time when a third world country succeeded against the developed countries and powerful corporations by objecting to the patent so granted as it was based on the India’s traditional knowledge for generations.

To stop ‘pirates’ from exercising the practice of Biopiracy and through its own bitter experiences, government of India has come up with the Biological Diversity Act, 2002. The Act seeks to perform several functions which include regulatory access to these resources without leading to unfair commercial exploitation. The main purpose is securing equitable share in benefits which arises out of any use over the biological resource so obtained. It aims to protect, conserve and recognize the traditional knowledge of these local or indigenous communities by sharing equitable profits with them. Further the Patent Act, 1970 requires “mandatory disclosure of source and geographical origin of the biological material in the specification when used in an invention.”\textsuperscript{1150} It is relevant to note that if there is a failure in disclosure or participation in wrongful disclosure of such information, then the amendment may result in opposition or revocation of the patent.\textsuperscript{1151} The protection of plant varieties and farmers right act, 2001 also acknowledges the exploration, conservation, characterization, collection and evaluation of plant genetic resources for agriculture and food which is essential to meet nations demand by

\textsuperscript{1147} Article 8(j), Convention on Biological Diversity, 1992.
\textsuperscript{1150} Section 4(D) of Patent Act, 1970.
\textsuperscript{1151} Section 64 of Patent Act, 1970.
fulfilling the goal of nutritional security and national food which is also for the sustainable development of the present and future generations. The Geographical Indication of goods (Registration and Protection) Act 2003 characterizes certain products according to the areas where they are found. It also advance product standards, provide cataloguing and categorization and enforces regulation. Darjeeling tea became the first GI tagged product in India, in 2004–05, since then 193 goods had been added to the list as of March 2013.  

In order to prevent acts of bio piracy the Indian government also launched the traditional knowledge and digital library (TKDL) in 2001. This project opened a digital library which identifies India’s indigenous resources. Through this digital library, sourcing form different books in local languages were translated into five different languages so that it is accessible to the masses. It aims to identify the usages, characteristics and bibliographic sources of different plants and then translates it. The ulterior motive of establishing this digital library is to set up a competent and rigorous mechanism to establish anteriority of traditional knowledge in cases of biopiracy. To fight biopiracy and unethical patents, the library is set up as repository of 1200 formulations of various systems of Indian medicine, such as Ayurveda, unani and Siddha. The library also has 50 traditional Ayurveda books digitized and available online.  

CONCLUSION  
During these times of war on patents when someone who doesn't belong to this nation contends that a particular resource belongs to them and alleges even a miniscule piece form the territory of India, the country goes into tailspin. Indian government shows pride in its heritage and is showing sincere efforts to combat this problem of Biopiracy. This becomes evident through the efforts made by the government to claim its heritage and avoid its piracy. Even though various efforts are being made by the government and individual stakeholders, it is important to consider whether such efforts will be sufficient to control bio piracy at an international level.  

According to me, there is still a need of making an ‘umbrella’ legislation which governs the entire landscape of these local or indigenous groups and their traditional knowledge. Also, indigenous people should have the access to information related to the protection of their traditional knowledge using various international or national laws.
of the land. Both the principles of justice and morality demands that these million-dollar corporations belonging to developed nations should treat indigenous people of developing countries with respect. If soft law is not able to bring that effect, then a well thought of enforceable legislation should be brought into place to bring effect to the same.

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RIVER DIVERSION & ETHNIC CONTESTATION

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ABSTRACT

The paper is written for the development of international water law & its principles. We also focused on the water based politics between the South-Asian countries like India, Nepal, Pakistan & Bangladesh. We also focused on the treaties made by India, Pakistan, India-Nepal, India-Bangladesh. Everything is described in detail. Specific attention is given to the main treaties & the disputes with the Indus & Ganges. In the Final Part, we reviewed the treaty experience & focused on the bilateralism & multilateralism of the country. And finally, we concluded by stressing the importance of cooperation through the treaty making process.

Tran’s boundary Water Conflicts in South Asia: Towards Water for Peace:

River diversion & ethnic contestation:

According to Justice Oliver Wendell Holmes “A river is more than an amenity; it is a treasure. It offers a necessity of life that must be rationed among those who have power over it.” During the primitive era, the civilization were all nourished around rivers. For growing food and for domestic needs, this was the main reason to live on the bank of the rivers. In recent history sheared rivers have become sources of conflict, as well as catalyst for cooperation. This is the exact scenario about the South Asian subcontinent and some vital rivers run through it and the three largest basins, those of the Indus, the Ganges, and the Brahmaputra affect not only the countries of the subcontinent but China as well. Freshwater is increasingly in short supply throughout the world and the main reason is population growth and the resulting competition for this scarce water gives rise to complex international problems as states that share the water of international drainage basins seek to satisfy their pressing needs. The concerned states of that region are Bangladesh, Bhutan, India, Nepal and Pakistan are the countries of the Himalayan block that occupy some twenty major rivers and the three of them being of the particular international legal importance, namely the Indus, the Ganges and the Brahmaputra. The dispute between India and Pakistan concerning the waters of the Indus Rivers have brought the parties to the brink of war at the outset, was eventually resolved by the Indus water treaty of 1960, which was breached only through the intervention of the World Bank and the financial aid of the other states. The lawyers for the parties disagreed strongly about the applicable principles of International law governing international water resources.  

The relations of India and Nepal are then discussed and then India and Nepal entered

See World Bank, World Development Report 2000/2001, Attacking Poverty (2000), at 4. The report defines poverty as living on less than $1 a day, and indicates, under this definition, that 1.2 billion people worldwide live in poverty. About 2.8 billion people, alarmist half the world's population, live on less than $2 a day; see id., at 3. All "$" and "dollars" refer to US$.
into small agreements, the results have not always been happy. Nepal, a small, land-locked, and poor upstream state, finds the development of its abundant water resources, for economic if no other reasons, dependent on the agreement with its larger neighbor downstream. Even when agreement is reached, as in the Mahakali treaty of 1996, implementation is hampered by differences of interpretation about its terms.

The relations of India and Bangladesh concerning the Ganges River emphasize the difficulties in discerning, the general principles of international law applicable to the waters of international drainage basins and applying them to the complex facts of a particular case.

The South Asian Subcontinent

On the fact that water is a scarce resource, characterized by its special and seasonal variations with no substitutes international rivers have worldwide being a source of conflict as well as a catalyst for cooperation. The South Asian subcontinent includes Bangladesh, Bhutan, India and Pakistan. It is the one of the most densely populated parts of the world, and includes in large number of poor people. Nearly 1.3 billion people live in the countries of the subcontinents which represents more than twenty percent of the world population of more than six billion. The GNP per capita for the four countries (Bangladesh, India, Nepal and Pakistan) ranges between $220 to $470, placing them at the bottom of the list of poor countries of the world.\footnote{\textsuperscript{1160} See Frontline.}

The river systems of the Himalayan region can be divided into three sub regions. The Western Himalayan sub region includes the Indus system to which the Jhelum, Chenab, Ravi, Beas and Sutlej rivers belong. The Central Himalayan sub region includes the Ganges system of which the Yamuna, Râmgangâ, Mahakali, Karnali, Gandaki and Kosi rivers are part. The Ganges basin is shared by India, Bangladesh, Nepal and China. The Easter sub Himalayan sub regions includes the Brahmaputra system to which the Teesta, Raidak and Manas rivers belong. The Brahmaputra system is shared by India, Bangladesh, Bhutan and China. Several other tributaries of those rivers also flow into more than one country, thus falling into the category of international rivers as well. Despite the large number of rivers, and the significant importance of water resources for the basic livelihood of its people, the South Asian subcontinent has not been successful in designing and establishing treaty regimes for several of its shared rivers. The Indus water treaty has been entered into between India and Pakistan, and a series of successive treaties on the Ganges River has been entered into between India and Bangladesh. Nepal and India have established treaty relations on three international rivers: the Kosi agreement (in connection with Kosi River), The Gandak agreement (in connection with the Gandaki River) and the Mahakali treaty (in connection with the Mahakali River).\footnote{\textsuperscript{1161} Interactional Law Association, Report of the Forty-Seventh Conference.}

The United Nations Convention on the law of the non-navigational uses of International water courses (The UN Convention), which was adopted by the United Nations General
Assembly on May 21, 1997, after more than twenty five years of preparatory work by the international law commission and extensive deliberations by the Sixth Committee of the General Assembly, has yet to enter into force and effect. On the other hand, regulation of the navigational uses of international watercourses predated the efforts of the institute of international law and international law association. The process commenced with the adoption of the act of the Congress of Vienna on June 9, 1815.In it non navigational uses such as irrigation, hydropower and industry where only in the early stage of development. The act of Congress of Vienna included interalia, ten articles on navigation on international rivers. Article 108 stated that the powers whose territories were separated or crossed by the same navigable river undertook to regulate by common agreement all that related to navigation of such rivers, and for that purpose they would name commissioners who would adopt the principles established in the pertinent articles of the act. Article 109 established the principle of freedom of navigation on such a river, for all riparian, on a reciprocal basis. The Rest of the articles dealt with the issues such as system for collection of dues and regulation of tariff. On the South Asian subcontinent, international water law rules have been interpreted and used differently. The countries have, in their disputes and negotiations, often invoked the principle of equitable utilization as well as the obligation are not to cause significant harm, the concepts were understood by countries to include different sets of rights and obligations and were interpreted differently. The international norms and rules related to international water courses have had a relatively paced evolution. Even now, the bulk of the rights and obligation that are applicable still eminent from customary international water law.

INDIA PAKISTAN TREATY

The conclusion in 1960 of the Indus water treaty between India and Pakistan was, no doubt a remarkable achievement. After a long period of negotiations carried out under the auspices and mediation of the World Bank, the Indus water treaty brought to an end the longstanding dispute between India and Pakistan on the use of waters of the Indus river system for irrigation and hydropower. The land is located in Northwest India and Pakistan and is one of the most important rivers in the world. The main river Indus is about 2,000 miles long. Its two principal tributaries from the West, the Kabul River and the Kura River, together are more than 700 miles long. The stalemate in negotiations was reversed by the visit of David Lilienthal, former Chairman of the Tennessee Valley Authority, and of the United States Atomic Energy Commission, to India and Pakistan in February 1951. Following his visit, Lilienthal wrote an article in which he made a series of recommendations pertaining to the Indus system of rivers. Among others, the recommendations included that the Indus Basin be treated, exploited, and developed as a single unit; that financing be provided by India, Pakistan and the World Bank; and that the Indus be administered by an Indo-Pakistan mixed body or a multinational body. In fact, Lilienthal's proposal was based on a return to a pre-partition premise for the Indus Basin irrigation system. At that time Mar. Lilienthal believed that the waters from the
basin were sufficient to support the needs of the two countries, a belief that would not be confirmed by later studies. In the meetings in Karachi in November 1952 and in Delhi in January 1953, the two countries could not agree on a common approach to developing the waters of the Indus system. The World Bank suggested that both countries prepare their own plans. The two countries' water use and allocation plans were submitted to the World Bank on October 6, 1953.34 they differed significantly. According to the Indian plan, of the 119 million acre-feet (MAF) of total usable water, 29 MAF would be allocated to India and 90 MAF to Pakistan. But according to the Pakistan plan, which estimated 118 MAF of total usable water, 15.5 MAF would be allocated to India and 102.5 MAF to Pakistan. The World Bank on February 5, 1954,1162 was in principle endorsed, albeit with a few reservations.39 In fact, India accepted the proposal on March 25, 1954, but Pakistan questioned the proposal's premise that there was enough surplus water in the Western Rivers to replace its irrigation uses on the Eastern Rivers. Pakistan contended that a system of link canals would not be adequate to meet all uses without including storage reservoirs in the replacement works. The Bank agreed to examine Pakistan's contention, and carried out its own independent studies to examine the issues in dispute and to prepare an adequate system of works to replace Pakistan's uses on the Eastern Rivers.40 The studies confirmed that there was not enough surplus water in the Western Rivers, particularly in the critical crop periods, to replace Pakistan's uses and that storage reservoirs were necessary to meet the shortages. At this juncture, the Bank issued an aide memoire on May 21, 1956 that modified its original proposal and included storage dams in the system of replacement works.41 Pakistan accepted the modified proposal in 1958, but India disputed the need for storage dams and insisted that its liability should be limited to the original Bank proposal. Recognizing the impossibility of resolving the dispute without additional financing for the huge cost of replacement works, and the fact that neither India nor Pakistan were in a position to bear the costs of the replacement works, the Bank decided to mobilize funds from bilateral donors. At this point, the issue mending in the dispute was practically resolved. The Governments of India and Pakistan desired the most complete and satisfactory utilization of the waters of the Indus system of rivers. The primary objective was to fix and delimit the rights and obligations of each country's use of the waters in relation to the other. With its preamble, followed by 12 articles and eight annexures (including appendices), the Indus Treaty attempts comprehensively to deal with the issues of water allocation and the flow of water. Crafted by technicians and engineers rather than lawyers and diplomats, the Indus Treaty, is complex and prolix, despite its apparent brevity. The complexity was perhaps inevitable, but some articles are of unusual length. The Commission comprises the two commissioners who are the representatives of their governments, the decision on a matter can only be taken by agreement. There is no voting involved as the two commissioners have to agree or disagree in regard to a particular matter after discussion. The two Commissioners are assisted by their advisers. There is no restriction on the number of advisers

1162 See Article 8 and 9 of the Convention
required to assist a Commissioner in a meeting. No participation by the public at any phase of the decision-making is envisaged in the Treaty. The Treaty also does not provide for any contact of the Commission as a body with governmental authorities, agencies or departments of member countries at the national, regional or local level. The parties were to endeavour to put together a Standing Panel of Umpires, from whom the selections might be made. The constitution and procedure of the Court of Arbitration were spelled out in an Annexure to the Treaty. It is noteworthy that the applicable law includes the Treaty, and for purposes of the interpretation and application of the Treaty, and in order, (i) the international conventions establishing the rules explicitly recognized by India and Pakistan, and (ii) the customary international law.

CONCLUSION

The Indus Treaty is an excellent example of the settlement of riparian issues and one of the few examples of a successful settlement of a major international river basin conflict. Also it is the first dispute regarding water use in which an international organization played a successful mediating role in resolution. Even if it was far from an optimum economic solution and failed to cover vital drainage issues, the Treaty is regarded as a major achievement as it has been able to divide the Indus and its tributaries unambiguously between the riparian’s. The fact that there were six rivers in the system offered the simple solution of the three Western Rivers (the Indus, Jhelum and Chenab) being reserved for consumptive use by Pakistan, and the three Eastern Rivers (the Ravi, Beas and Sutlej), being reserved for consumptive use by India. The Treaty's originality has contributed importantly to its success. The allocation of the waters of the three rivers to India and three to Pakistan is in the nature of a territorial division. Since the Treaty was signed, the two parties have not had to deal jointly with water administration other than to enforce the Treaty's terms and iron out some practical difficulties. The Treaty has also set an optimistic tone. The Treaty, in accordance with Article 12, was deemed to have entered into force retroactively on April 1, 1960. This was, it should be emphasized, not only prior to the date of exchange of instruments of ratification (which occurred on January 12, 1961) but prior to the date of the execution of the Treaty. This element should indeed be noted because it is a practice rarely found in conventional international law. The solution proposed in the Indus Treaty recognizes the notion of compensation. In 1947, India had claimed an amount of Rest. 150,00,000 from Pakistan to compensate for the loss of water due to the canals built under the British rule.13 a year later, India accepted the principle of payment of compensation in favour of Pakistan for the deviation of water in the Indian Territory. Finally the Treaty provides for a financial contribution of India, for the development of the Indus Basin, which was essentially meant to be for carrying out works in Pakistan territory.

INDIA-NEPAL TREATIES

Various agreements had been signed in the twentieth century between India and Nepal: This include THE SARADA AGREEMENT (1920) on the Mahakali River
• Out of the annual flow of approximately 650 cumees of water during dry season and 13 in the wet season, which could be further increased to 28.34 cumees if water was available.
• Formed the basis of the Sarada barrage built to irrigate United Provinces.

THE KOSI PROJECT AGREEMENT (1954)
• Nepal is allowed to withdraw water from Kosi and its tributaries for irrigation and other purpose.
• With the”Kosi sell-out” furor in Nepal, the Kosi agreement was revised in 1966.
• Recently, the two countries have agreed to jointly investigate the Kosi multipurpose project which includes the High-dam in upstream Nepal near Barakshatra, the details of which are to be prepared under the Indo-Nepal Mahakali Treaty.

THE GANDAK AGREEMENT (1959)
• This agreement allowed India to build a barrage on the Gandak at its own cost at the India-Nepal border, near bhaisalotal village.

THE MAHAKALI INTEGRATED TREATY (1996)
• Signed between India and Nepal in 1996, the Mahakali –Integrated Treaty looks at the integrated development of the Mahakali River, including the Sarda barrage, Tanakpur barrage and Pancheshwar project, and tries to develop principle of sharing cost and benefits, and recognizes Nepal’s prior water ride.

INDIA BANGLADESH AND THE GANGA TREATY
The Ganga treaty is the only water sharing treaty in South Asia signed on 12th December 1996. The treaty addresses the issue of water allocation between India and Bangladesh which post Farrakhan, had strained relations between the two countries.
• If the Ganga has more than 75,000 cusecs of water, India can divert 40,000 cusec into the Hooghly and allow the rest to flow to Bangladesh.
• The treaty guarantees Bangladesh and minimum of 35,000 cusecs in lean season.

Both sides have also agreed to enter into treaty or agreement regarding other common rivers.

CONFLICTS OF APPROACHES TO WATER
In trying to understand the various actors and their approaches on the issue of Tran’s boundary water, it is important to recognize at the outset that there are plurality of actors in the water sector-the state which includes governments, bureaucracy and the state missionary.
• State/strategic approach: The state or the government departments have long been the major actors when it came to water issues. With regard to Trans Boundary Rivers, the State approach has been one of the strategic and centralized control.
• Market/economic growth approach: The market approach is based on the understanding that given the problems that nation states have had in sharing their water resources, the mechanisms for governance of water must be left to the market and the
economic instruments. It includes wide range of actors who argue for water markets, privatization of water, tradable water rights, and accounting for the economic, value of water/public private partnership.

- Alternative approach/water as social group and basic human right: Water is essential for life, livelihood and survival the combination of safe drinking water and hygienic sanitation facilities is a pre-condition for health, to success and fight against poverty, hunger, child deaths and gender inequality; protection of the rights of the displaced people and their culture that is caused by environment and ecological concepts.\(^{1163}\)

**GENERAL CONCLUSION**

- Despite the culture and geographical similarities among the countries of the south Asiansub-continent, each of its shared rivers faced its own kinds of problems, and has generated the system of rules of management adapted to manage such problems. The Mahakali treaty even includes the provision for allocating water for preserving the ecosystem. The treaties has all been entered into the past 50 years, starting with the 1950’s and ending in 1990’s.

- The Indus water treaty between India and Pakistan, forinstance, expressly provided that nothing contain in the treaty must to be construed as in anyway establish the general principle of law or any president.

- A similar provision is included in the preamble to the 1977 Ganges agreement between India and Bangladesh, and was again reiterated in the preamble to the 1996 Ganges treaty between those countries.

Bilateralism can be justified because negotiations are simpler more often than necessary it has been used as a shield to avoid opposing co-alition and preserving bargaining power. This perception gives the negotiator a particular charge. The discrepancy in the political situations and choices of the countries of the South Asian sub-continent the parties attempt through the treaties, to develop water resources for common economic growth, to fix and limit rights of use by the parties, and to confirm amounts of water to be used by the parties on the sheared rivers. The administrative powers includes supervision of construction and administration of relative rights under the treaty.

**Future Prospects:** Any country in conflict owes its vitality to its ability to strike a balance between its aspirations and what it can realistically achieve. SAARC can facilitate the process of negotiations on several political issues, either water related or not. Indeed although the charter of the SAARC does not include specific reference to cooperation over sheared water resources, it does not stress the need for the joint action and enhanced the cooperation among the respective political and economic systems of its members. And although treaties and other legal instruments over international rivers will not, by themselves, solve all the problems in such rivers, it is equally true that there can be no resolution of water disputes and conflicts without them. Such instruments are indeed the only means for translating cooperative political will into applicable and enforceable action.

\(^{1163}\) C. K. Sharma, A Treatise on Water Resources