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EDITORIAL

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

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

With this thought, we bring forth this journal before you.
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CRIMES AGAINST ANIMALS: HARM TO THE WHOLE WORLD

By Abhishek Vats and Janhvi Mehra
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Abstract: Animal cruelty is understood as harsh treatment towards animals, it's important to understand animal cruelty because it includes very common acts like failure to provide adequate food, shelter, water, or veterinary care and not only physically harming or killing the animal, even though all the countries have acts to prevent cruelty to animals, yet we find that it's a persistent problem, it's popularity is in the black market is next to drugs and arms. This paper aims at providing a sound knowledge of cruelties against animals and their impact on us. Animal cruelty is a threat to efficient governance, our quality of life and development of our nation. It's been proved that animal cruelty is linked to domestic violence and other crimes, smuggling of animal products like ivory or fur is not only harmful to animals but it has effects on human lifestyle, economics and environment too, it's a crime conjoined with various other crimes and hence strong legislation and law enforcement, change in the public propaganda, cultural outlook and deeper study of such offences are imperative to make the much needed difference.

1.0 Introduction: Animal cruelty can be generally explained as simple neglect or omission of a duty to take care of the animal or as an intentional neglect where there's a deliberate and willful attempt to hurt or harm the animal in anyway, but this classification is really general and often overlooks the complexities and technicalities of various offenses in the modern society. Animal cruelty has become a reality of the modern times but it's origin has been traced back to the old times, where it's been often described as a sin, we often find religious texts advocating for a just and equal status for animals mainly because of their importance in the food chain. Animal cruelty includes many acts and omissions like starvation, dehydration, parasite infestations, allowing a collar to grow into an animal's skin, inadequate shelter in extreme weather conditions, and failure to seek veterinary care when necessary. The Prevention of Cruelty to Animals Act, 1960 of the Indian Parliament holds that;

S.11 (1) If any person
(a) beats, kicks, over-rides, over-drives, over-loads, tortures or otherwise treats any animal so as to subject it to unnecessary pain or suffering or causes, or
being the owner permits, any animal to be so treated; or
(b) employs in any work or labour or for any purpose any animal which, by reason of its age or any disease or infirmity; wound, sore or other cause, is unfit to be so employed or, being the owner, permits any such unfit animal to be employed; or
(c) wilfully and unreasonably administers any injurious drug or injurious substance to any animal or wilfully and unreasonably causes or attempts to cause any such drug or substance to be taken by any animal; or

(d) conveys or carries, whether in or upon any vehicle or not, any animal in such a manner or position as to subject it to unnecessary pain or suffering; or

(e) keeps or confines any animal in any cage or other receptacle which does not measure sufficiently in height, length and breadth to permit the animal a reasonable opportunity for movement; or

(f) keeps for an unreasonable time any animal chained or tethered upon an unreasonably short or unreasonably heavy chain or cord; or

(g) being the owner, neglects to exercise or cause to be exercised reasonably any dog habitually chained up or kept in close confinement; or

(h) being the owner of (any animal) fails to provide such animal with sufficient food, drink or shelter; or

(i) without reasonable cause, abandons any animal in circumstances which tender it likely that it will suffer pain by reason of starvation thirst; or

(j) wilfully permits any animal, of which he is the owner, to go at large in any street, while the animal is affected with contagious or infectious disease or, without reasonable excuse permits any diseased or disabled animal, of which he is the owner, to die in any street; or

(k) offers for sale or without reasonable cause, has in his possession any animal which is suffering pain by reason of mutilation, starvation, thirst, overcrowding or other illtreatment; or

(l) mutilates any animal or kills any animal (including stray dogs) by using the method of strychnine injections, in the heart or in any other unnecessarily cruel manner or;

(m) solely with a view to providing entertainment confines or causes to be confined any animal (including tying of an animal as a bait in a tiger or other sanctuary) so as to make it an object or prey for any other animal; or

(n) organises, keeps uses or acts in the management or, any place for animal fighting or for the purpose of baiting any animal or permits or offers any place to be so used or receives money for the admission of any other
person to any place kept or used for any such purposes; or

(p) promotes or takes part in any shooting match or competition wherein animals are released from captivity for the purpose of such shooting:

he shall be punishable.

1.1 Types of animal cruelties:

The types of animal cruelty recognized across the globe today are as followed:

Simple Neglect:

Neglect can be distinguished as passive and active neglect. Passive neglect takes place when there’s an absence of intention or willful action in the illtreatment of the animal. Passive neglect can also be described as simple neglect, simple neglect could simply mean an omission of duty towards the animals and includes everyday incidents like failure to provide adequate food, shelter, water, or veterinary care to one or few animals, usually due to ignorance. This form of animal cruelty is the most common around the world today.

Gross Neglect:

It can also be called wilful, malicious or cruel neglect. It is important to make a distinction between simply failing to take adequate care of animals and intentionally or knowingly withholding food or water needed to prevent dehydration or starvation. Gross neglect is a crime and includes incidents such as people throwing away their sick dogs callously, some leaving their dogs out in the cold or rain.

Intentional Abuse:

Cases of intentional cruelty are the ones of greatest concern to the general public and the ones more likely to involve male juvenile offenders. There is legitimate fear that the individuals involved in violent acts against animals. Intentional abuse can be described plainly as someone who with intentions to cause harm or grievous hurt to the animal, does an act that leads to physical injury and even death. This also includes 'organised abuse' like dog fights, bull fighting etc. It's believed that people involved in intentional abuse may present a danger to the public. Intentional animal abuse is often seen in association with other serious crimes including drug offenses, gang activity, weapons violations, sexual assault and domestic violence and it has been proved via research that people who abuse animals have an entire history of issues related to anger or anti-social / sociopathic behavior. These cases are easier to identify and prosecute as there exists intentionality and evidence or a pattern.

Animal Hoarding:

This is the accumulation of a large number of animals and failing to provide minimal standards of nutrition, sanitation and veterinary care; to act on the deteriorating condition of the animals; and to recognize or correct the negative impact on the health and well-being of the people in the household (Arluke and Lockwood, 1997). Examples of animal hoarding cases are: the transportation of large numbers of animals in an inhumane way, the keeping of birds and other animals in a very poor and un-conducive environment, pigs and other animals kept to starve to death at livestock farms etc.
Organized Abuse

Dog fighting and Cockfighting:

“Blood sports” such as dog fighting and cockfighting have been singled out for special attention in the anticruelty laws of the United States and the United Kingdom since their inception in the 19th century (Lockwood, 2006). These are organised in fighting pits where the animals are forced to fight against each other until one of them is dead, the animals brought into the pit are constantly tortured and starved to induce cannibalistic behavior and anger, often actively punishing and pushing the animal into the pit to fight for the pleasure of the spectators. Organised abuses such as dog fighting and cock fighting are banned in many countries and even declared illegal, however they still persist in the society as a source of entertainment and easy income at the cost of the lives of innocent animals.

Ritualistic Abuse:

The phrase “Occult and ritualistic animal abuse” immediately evokes many disturbing images: a cat nailed to a crucifix and burned, the head of a dog left on the steps of a building with a piece of paper bearing a curse stuck in the animal’s mouth, a goat’s throat slit as part of a ritual sacrifice (Lockwood, 2006). Few other crimes against animals create such intense concern within a community. Most crimes in which animals are killed or mutilated and left where they will be discovered immediately raise fears of “satanic” or cult activity and concern about what other crimes the perpetrators of such acts may have committed or be capable of (Randour and Davidson, 2008).

Animal Sexual Assault (Bestiality):

Bestiality is defined as an affinity, attraction or sexual attraction by a human to non-human animals. This act of using an animal for the purpose of sex as awful and nasty as it sounds and despite the fact that most people believe this to be a sin committed against nature, the issue of bestiality has been raising alarm across the globe. Section 377 of Indian Penal Code, 1860 also declares bestiality as an offence punishable with a sentence upto 10 years and the offender is also liable for a fine. Recently, a group of 8 men raped a pregnant goat in Haryana, India, ultimately leading to her death.

1.2 Wildlife trafficking:

Whenever people sell or exchange wild animal and plant resources, this is wildlife trade. The trade involves hundreds of millions of wild plants and animals from tens of thousands of species. To provide a glimpse of the scale of wildlife trafficking, there are records of over 100 million tonnes of fish, 1.5 million live birds and 440,000 tonnes of medicinal plants in trade in just one year.

When wildlife trade is practised maliciously driven by a demand for rare, protected species which need to be smuggled and/or by a desire to avoid paying duties. In illegal wildlife trade, some species involved are highly endangered, conditions of transport for live animals are likely to be worse and wildlife is more likely to have been obtained in an environmentally damaging way, its a huge business, animal parts are trafficked much like illegal drugs and arms. By its very nature, it is almost impossible to obtain reliable figures for the value of illegal wildlife trade. Experts at TRAFFIC, the
wildlife trade monitoring network, estimate that it runs into hundreds of millions of dollars. Some examples of illegal wildlife trade are well known, such as poaching of elephants for ivory and tigers for their skins and bones. It is estimated that 70,000 species of plant are used for medicinal purposes alone. Additionally, approximately 25% of ‘modern’ pharmacy medicines have been developed based on the medicinal properties of wild species. International trade in species of conservation concern is monitored by CITES. From 2005 - 2009, CITES recorded an annual average of more than 317,000 live birds, just over 2 million live reptiles, 2.5 million crocodilian skins, 1.5 million lizard skins, 2.1 million snake skins, 73 tonnes of caviar, 1.4 million coral pieces and nearly 20,000 hunting trophies. Not all trade is legal of course: between 2005 and 2009 EU enforcement authorities made over 12,000 seizures of illegal wildlife products in the EU.

Wildlife trafficking includes:

**The Ivory trade:**

Elephants are one of the world’s most iconic species, recognised as majestic creatures, they can be found in Africa where we have the Sumatrans elephant, they can also be found in Asia – Indian and Sri Lankan elephants. Elephants across both the continents face similar threats including, habitat loss, confrontations with human life and the ivory trade. The ivory trade is the primary reason that the endangered elephant population world wide is diminishing at an alarming rate. Many other species are captured and killed for their tusks, these include animals like hippopotamus, walrus, narwhal etc. Poachers travel to places where there’s considerably good amount of elephants for an easy prey, obliterating the population wherever they go. There’s an international ban on ivory trade since a long time, yet, there’s a surge in this brutal practice. In a single decade between 1979 and 1989, half of all Africa’s elephants were lost to the ivory trade, according to pan African census conducted by STE’s Iain Douglas-Hamilton. Asian elephants have been recognised as an endangered species and yet their number has declined by about 50%. According to World Wildlife Foundation every year, around 20,000 African elephants are killed so that their tusks can be sold in the black market, this presents an average of one elephant being killed every 25 seconds. The demand for ivory in the far East is the primary driver of the killing. In the four years up to 2014 the wholesale price of raw ivory in China tripled, reaching $2,100 / Kilogram. Back in 2016 over 487 kilograms of Ivory was busted in the black market in India. According to Jose Louies, senior programme manager, Wildlife Trust of India (WTI) most of these items were idols of Gods & goddesses the most popular one being the idol of Ganesha. Ivory products are associated with high status and luxury and hence the most common buyers are high-profile individuals -- politicians, ministers, bureaucrats, celebrities, film stars and royal families -- who can afford these ivory products. According to officials at the World Trade Organization (WTO) 1 Kilogram of Ivory tusk can fetch up to ₹50,000 in the black market. States like Kerala, Karnataka, Tamil Nadu, Odisha, Uttarakhand and West Bengal are responsible for most of the elephant poaching. The elephant is protected under Schedule 1 of the Wildlife Protection
Act, 1972. It lists it as a 'most endangered animal. Killing it or possessing any ivory item calls for a minimum three years in jail punishment and Rs 50,000 fine. Sadly, it hasn't been able to deter the criminals.

The fur farming:

The fur farming industry is horrifically cruel. Animals are caged for their fur, they are beaten, often till their bones break and then they're often skinned alive. Those who survive after being skinned, die within the next ten minutes in much agony. They live their lives crushed in to tiny cages, being driven mad. The animals receive no veterinary attention and are just left to suffer. The "fur farmers" use cheap and brutal methods for slaughtering animals which include: suffocation, electrocution, gas, and poison. Europe and North America are the biggest fur farming hubs with over 500 fur farms in total. In the year 2014, fur trading brought in around $217.1 million into the US economy in the year 2014. A worker was quoted as saying “There is nothing wrong with treating the animals this way. They are going to die anyway. This is a huge industry where millions upon millions of innocent animals are regularly meeting this fate, prevalently in Asian countries, such as China and the Philippines. More than half the fur in the U.S. comes from China, the Chinese fur industry is dirty where they knowingly mislabel the fur to fetch a higher price, hence, there's no way of knowing which animal you're wearing.

The animal experimentation:

Animal experimentation in plain words means the usage of chemically developed material on animals to check for any side effects or undiscovered results. Animal experimentation is done to advance human medical science in modern society, its not only confined to medical science research work but it has also extended to the cosmetic industry, where the chemically beauty products are tried and tested on the animals resembling human DNA. Animals used for testing develop neurotic problems, are physically harmed, often killed during the procedure. Around 100 million animals are die every year in the USA because of experiments on animals. Examples of animal tests include forcing mice and rats to inhale toxic fumes, force-feeding dogs pesticides, and dripping corrosive chemicals into rabbits’ sensitive eyes. Even if a product harms animals, it can still be marketed to consumers. Conversely, just because a product was shown to be safe in animals does not guarantee that it will be safe to use in humans, because humans respond so differently to other animals, using other animals to test on is unreliable at best, and fatally dangerous at worst, for humans. There exist some cheap and animal friendly ways for testing products and experimentation, however, the torturing and sacrificing of animals is what remains to be a cruel reality of the modern society.

Dog fighting:

Dog fighting is a cruel reality where the animals are caged, starved and beaten to induce anger as to prompt them to fight. Dog fighting is illegal in countries including the UK and US. Unfortunately, that does not stop it happening, it just happens in secret. In the fight, the dogs are badly wounded, suffering heavy bleeding, ruptured lungs, broken bones, and other life threatening injuries. Dogs often die due to these injuries or end up eating each other on the field,
there are rare instances where an owner actually cares for the dog, when the dog wins the fight, the cruel act is rewarded with enough food to sustain the animal, only because it's a source of income for the owner. Owners often kill these dogs if they cause them shame during the fight. All this is done with the intention to earn easy money by providing gruesome entertainment to people.

**Traditional Chinese Medicines:**

Many Chinese Medicines contain parts of wild animals, including those of endangered species. Whether endangered or not, poachers illegally kill wild animals in order to sell their valuable body parts to the industry. Sustaining because of false public propaganda that certain animal parts have a favourable impact on the humans, this industry flourishes because many people believe that the traditional medicines are actually more effective, especially in culture oriented Asia. The people invested in this business pay huge amounts of money to the traffickers and poachers to hunt down exotic animals and endangered species. The Chinese traditional medicines are known to use around 36 different animal parts including animals like tiger, sea horse, rhinos and seals. According to World Health Organization around 80% of the world population is inclined towards traditional medicines, however, there’s no scientific proof to show the supremacy of traditionally prepared medicines. Many cultures have their own ways to prepare their own respective traditional medicines and the Chinese Traditional Medicine industry is the biggest one in the world; these include Products like Rhino horns, Tiger bones and bear bile are some grotesque ingredients used in 'traditional chinese medicines'. In a 2015 report, The Guardian mentions an estimated 12,000 bears are held in bile factories across East and South-east Asia. Most of them are locked up in tiny cages, ready for their bile to be tapped via catheders or open tubes.

**Illegal dog meat trade:**

Southeast Asia’s illegal dog meat trade is on the rise. It is a multi-million dollar industry run by criminals of the worst kind. Thailand is really well known for their mass exportation of Dogs to other Asian countries, where around 30,000 dogs are captured almost every month to export them into Vietnam where dog meat is really popular via Laos traveling through the riverine routes. Thailand has no legal penalty for this brutal act, dogs are caged, segregated and distinguished by size, breed and quality as to determine their merchantability, such a practise reveals the popularity and acceptance of such a trade. Another major player in the world dog meat trade and consumption is China; China is alone responsible for the slaughter of around 10 million dogs and 4 million cats for trade in the name of the local festival popularly known as the "Lychee and Dog Meat Festival", usually referred to as Yulin Dog Meat Festival. Animals Asia has exposed the Asian dog meat trade's false claims that it farms dogs for food on 'dog meat farms'. Most 'meat dogs' are vulnerable strays or pets, stolen from their families, snatched from the streets and forced into tiny cages. Many suffer broken limbs as they are transported vast distances, without food or water. But the truth is, the Yulin dog eating festival is just the tip of the iceberg, with the number of dogs slaughtered at the festival
representing less than 0.01% of the Chinese dog meat trade as a whole.

**Circus animals cruelty:**

Investigations by animal rights charities into circus animal cruelty have found that heartbreaking cruelty is inflicted on the animals. They are continually physically and mentally abused until their spirits are broken and they are too petrified to rebel or disobey their trainers. Bears, elephants and other animals do not voluntarily do tricks such as jump through fire or on trampolines; these animals are broken in a fashion as to frame their mentality by fear in order to get them to perform the tricks for public entertainment, often kept caged and starved to keep them on their toes and completely dependent on their trainers.

**Abuse in animal tourism:**

Many people who consider themselves animal lovers visit animal tourism attractions because they do not realize the suffering they are funding. They are fooled into thinking the animals are happy when they actually live a life of absolute misery. A lot of cruelty is known to go on behind the scenes, away from public view. This can be the torture of wild animals to tame them in order to comply, or the killing of surplus animals in other attractions. Animal tourism can include attractions near to your home, or in other countries. When animals are used for profit, profit is the main priority of the business, not animal welfare. There are also animal tourism places that pretend to be sanctuaries, or contributing to conservation, when their main objective is to profit through exploiting animals.

After a thorough reading of the acts passed by The Indian Parliament like The Prevention of Cruelty to Animals Act in 1960 (came into force on 1st April, 1972) and Wildlife Protection Act, 1972 which also came into force on 1st April, 1972, coupled with the Directive Principles of State Policy contained in part IV of the Indian Constitution we derive that;

1. It is the fundamental duty of every citizen of India to have compassion for all living creatures. Article 51A(g) To kill or maim any animal, including stray animals, is a punishable offence. IPC Sections 428 and 429.

2. To kill or maim any animal, including stray animals, is a punishable offence. IPC Sections 428 and 429.

3. Abandoning any animal for any reason can land you in prison for up to three months. Section 11(1)(i) and Section 11(1)(j), PCA Act, 1960.

4. No animal (including chickens) can be slaughtered in any place other than a slaughterhouse. Sick or pregnant animals shall not be slaughtered. Rule 3, of Prevention of Cruelty to Animals, (Slaughterhouse) Rules, 2001 and Chapter 4, Food Safety and Standards Regulations, 2011.

5. Stray dogs that have been operated for birth control cannot be captured or relocated by anybody including any authority. ABC Rules, 2001.

6. Neglecting an animal by denying her sufficient food, water, shelter and exercise or by keeping him chained/confined for long hours is punishable by a fine or
imprisonment of up to 3 months or both. Section 11(1)(h), PCA Act, 1960.

7. Monkeys are protected under the Wildlife (Protection) Act, 1972 and cannot be displayed or owned.

8. Bears, monkeys, tigers, panthers, lions and bulls are prohibited from being trained and used for entertainment purposes, either in circuses or streets. Section 22(ii), PCA Act, 1960


10. Organizing of or participating in or inciting any animal fight is a cognizable offence. Section 11(1)(m)(ii) and Section 11(1)(n), PCA Act, 1960

11. Per 48, the Constitution requires the State to “take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves in other milch and draught cattle.”

12. Per 48A, the Constitution places a duty on the State to “endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.”

13. Per List III, Both Parliament and the legislature have the authority to make laws on the following: “prevention of cruelty to animals,” “protection of wild animals and birds,” “prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.”

1.3 Impacts

Impact on human beings:

Animal abuse and cruelty has lasting effects on the human behavior, both witnessing and performing the abuse have a deep impact on the human psyche. Animal cruelty affects people is an old idea. As early as the seventeenth century, the philosopher John Locke (1693) suggested that harming animals has a destructive effect on those who inflict it. In later centuries, the psychologist Anna Freud (1981) and the anthropologist Margaret Mead (1964) argued that cruelty can be a symptom of character disorder. There have been numerous mentions about the correlation between violence against women and children and violence against animals. Child and animal protection professionals have recognised this link as well, where animal abuse is seen as means to feed the hunger for power and dominion over others by an individual. It is proposed that witnessing, being threatened with, or forced to commit animal abuse constitutes an important form of abuse. Similar to the impact of other forms of abuse, comparable short- and long-term effects could exist for both the human and nonhuman survivors of animal abuse. Similarly, children who witness animal abuse or domestic abuse grow into believing that it's normal to mistreat people/animals and hence develop such negative traits. Other times, children have long lasting effects when witnessing such an abuse which has causes anxiety, PTSD etc. Abusers kill, hurt or threaten animals to exert power over the human victims and to show them what could happen to them. Often people abuse other humans or animals so as to displace their for their abuser.

Impact on Economy and Governance:
Global trade in illegal wildlife is potentially a huge illegal economy, it's worth billions of dollars. Wildlife smuggling may pose a transnational security threat as well as an environmental one. It often involves organized criminal syndicates, insurgent groups, and foreign military, wildlife trafficking can therefore threaten the stability of countries, foster corruption, and encourage violence to protect the trade.

High prices for illegal wildlife, combined with often lax law enforcement and security measures, have motivated the involvement of such actors, to whom trafficking is an opportunity for large profits with a low risk of detection. Development of a country is endangered since the wildlife is inappropriately appropriated, hence wastage of the limited resources, another important impact on the social and economic development of a country is the corruption that is associated with illicit wildlife trafficking. Corruption weakens macroeconomic and fiscal stability, deters investment and hinders growth. It reduces the effectiveness of government, deters civil engagement and distorts public expenditure decisions. It erodes the rule of law and harms the reputation of and trust in the state. In short, corruption increases wealth for a few at the expense of society.

The valuable products from such exploited animals include traditional medicine, clothing, and exotic pet foods, jewellery prepared from animals' fins, skins, shells, horns, tusks and internal organs. According to an estimate, the countries like China, US, and the European Union are the places where these smuggled products have huge market demand. In addition, these demands benefit the goods of the criminal groups involved to delay the development of legitimate businesses such as tourism. It affects the performance of legitimate local businesses and hence trade and revenue generation falls. Trade is important in every country because it helps in generates for the national economy. As mentioned before, animal trafficking is an illegal trade of animal, which definitely affect the economic resources and development of the country. Illegal wildlife trade in Southeast Asia is an $8—$10 billion per year industry worldwide, wildlife trade is the second largest form of black market commerce, behind drug smuggling and before arms.

**Impact on environment:**

Animal cruelty also affects the ecological balance of Earth. All animal species survive because of their interdependence on each other, the food chain clearly brings about the importance of a proper ecological balance between species for survival. Killing animals, taking them away from their habitat, experimentation and forced breeding of different species lead to an ecological imbalance and thus a tussle between animals and humans to survive.

Thus, we can infer that animal cruelty threatens the very basis of our survival and the grounds of humanity and social behavior.

**Conclusion:** Animal Cruelty should be taken seriously because it is a form of violence and violence rarely exists in a vacuum; the study of Animal Cruelty can give insights to other forms of social vices. Acts like Animal cruelty are linked to a variety of crimes, including violence against other people, property crimes, and drug or disorderly conduct offenses. Reporting, investigating, and prosecuting animal
cruelty can help take dangerous criminals off the street. The evidence of a link between animal cruelty and violence to other people – including child abuse, spousal battery, and other types of criminal violence is compelling. Animal cruelty is a threat to efficient governance, our quality of life and development of our nation, its a crime conjoined with various other crimes and hence strong legislation and law enforcement, change in the public propaganda, cultural outlook and deeper study of such offences are imperative to make the much needed difference.
ABSTRACT

The developments in the field of Information and technology have brought a new platform for traders and businesses. Information technology has rapidly increased their presence in the online markets to attract consumers with the help of the trademark. Therefore, trademarks play a very important role and it is crucial to protect the trademarks. The domain names and Cybersquatting’s are also a part of the trademark and they need protection too. The domain names represent the purpose of trademarks for online trade and businesses. The registration of domain names is granted on a first come – first serve basis, so this becomes a loophole this leads to reserving of the trade names, company names etc., with a view of ill-will to the genuine buyers which is called Cybersquatting. The protection of which is not given by the Indian Trademark law. It can be only protected by passing off. And the consequences to which will be further explained in this paper.

Keywords: Cybersquatting, Domain names, Intellectual property, Trademarks
name same as of their company or business.\textsuperscript{6} Domain names are easy to remember and are often coined to reflect the trademark of an organization. Cyber Squatting has come to be with an association with the registration of domain names without the bonafide intention or without the intention of using them, in the names of popular brands only for the purpose of making money. It is where a domain name is registered, sold or used with the intent of profiting from the goodwill from someone else’s trademark.\textsuperscript{7} The remedy for it is not explained in Indian Trademark Law, so the only remedies available to it are cancellation of offending domain name or transfer of domain names to the other party. \textsuperscript{8} Accordingly, the world is in process of searching for a better solution to address the issues of domain names and Cybersquatting.

**FUNDAMENTALS OF DOMAINS**

Internet Protocol (IP) addresses which is a chain of numbers and which are separated by periods is used to identify the Internet Websites to which a domain name provides a corresponding address.\textsuperscript{9}

For example, www.icann.org is ICANN’s website. Domain names serve the purpose of identifying the goods and the services like promotion of business and building up of customer base online, advertising on the web, establishment of credibility. There is no international treaty regulating the domain names like the other domains of Intellectual property Rights. The Domain Name system, with its flexibility, was developed to deal with the issues related to the ARPANET name and addressing system.\textsuperscript{10} If someone wants to send a letter to someone physically, and for that the house address needs to be distinctive, similarly, there needs to be a distinctive address for for Internet as well, which are dealt through IP protocol.\textsuperscript{11} In order to send and receive information on a proper address, there needs to be 2 addresses, one of receiver and other of sender.

In *Satyam Infoway v. Siffynet Solutions* \textsuperscript{12}, the appellant registered several domain names likes www.sifynt.com, www.sifymall.com, etc in June 1999 through WIPO and ICANN, based on the word “Sify”, devised using elements of its corporate name, satyam Infoway, which by that time had earned a wide amount of goodwill and reputation. Whereas, the respondent had registered www.siffynet.net and www.siffynet.com with ICANN in 2001 and 2002 as it

\textsuperscript{6} Dr. sreenivasulu N.S., Intellectual Property Rights, Regal Publications, New Delhi, 2nd revised, 2011.p.152.
\textsuperscript{7} Christopher Varas, Sealing the cracks: A Proposal to Update the Anti-Cybersquatting Regime to Combat Advertising-based Cybersquatting, 3 J. of Intellectual Property Law 246, 246-261(2008).
\textsuperscript{8} Paragraph 4(i) of the UDRP rules
\textsuperscript{10} Adam Dunn, “The Relationship between Domain Names and Trademark Law”, Central European University.
\textsuperscript{12} AIR 2004 SC 3540
carried on business of Internet Marketing. On denying to the respondent’s demand to the appellant or transferring the domain name, the city civil court granted an injunction against the respondent on the ground that the appellant was using the trade name “sify” which had built up a strong goodwill and reputation.

On appeal to the High Court, it held that the balance of convenience between both parties should be considered and the respondent had invested huge sum of money in business. According to High Court, customers would not be misled or confused between 2 parties as the business were different and the services were also different. It also held that there was an overlap or identical or similar services by both parties and confusion was likely, unlike claimed by the defendant. As for the balance of convenience issue, the court was convinced of the appellant’s evidence of being the prior user and having a reputation with the public with regard to “sify”. The respondent would not suffer much loss and could carry on its business under a different name.

The Supreme Court ignored the finding’s of the High Court, saying this would be important only if the case was one where the right to use as a co-equal to both parties. The respondent’s adoption of the appellant’s trade name was dishonest and so the High Court’s decision was set aside while that of the Civil Court was affirmed.\(^{13}\)

In The Hon’ble Supreme Court explained the importance of domain names as “The original role of a domain name was no doubt to provide an address for computers on the Internet. But the internet has developed from a mere means of communication to a mode of carrying on commercial activity. With the increase of commercial activity on the internet, a domain name is also used as a business identifier. Therefore, the domain name not only serves as an address for internet communication, but also identifies the specific internet site.

In the field of commercialization, each domain name owner provides information/services which are associated with such domain name. Thus, a domain name may pertain to the provision of services within the meaning of section 2(z). A domain name is easy to remember and use, and is chosen as an instrument of commercial enterprise, not only because it facilitates the ability of consumers to navigate the Internet to find websites they are looking for, but also at the same time, serves to identify and distinguish the business itself, or its goods or services, and to specify a corresponding online Internet location. Consequently a domain name as an address must, of necessity, be peculiar and unique and where a domain name is used in connection with a business, the value of maintaining an exclusive identity becomes critical.” In Rediff Communication Limited Vs Cyberbooth\(^{14}\) the court held that “the internet domain names are of importance and are a valuable corporate asset. A domain name is more

\(^{13}\) Jagadish.A.T., “A Critical study on menace of cyber squatting and the Regulatory Mechanism”, ISSN 2321-4171

\(^{14}\) AIR 2000 Bombay 27
than an internet address and is entitled to protection as a trademark”.

One of the 2 addresses is an IP address and the other one is the one assigned to each host computer connected to Internet, which is a human-readable name and known as a domain name.\(^1\)

The main purpose of the Domain Name System is to link domain names to IP addresses to make internet more of user friendly. For example, http://www.amity.edu/ is easier to remember than 55.66.187.102\(^2\). The IP number and the equivalent linked name of the domain both identify each website; as no 2 organizations can have exactly the same domain name.\(^3\)

The Domain Name System (DNS), helps people to search websites on the Internet. Just like each house has a different address and no address can be same, similarly each and every computer has a unique IP address or even like the telephone numbers which is a string of different numbers, which can be well explained as similar to what is called an IP (Internet Protocol) address.

A typical domain name consists of several segments. Examining the domain name www.amity.edu; the letters “www.” Describe the location of a website on the World Wide Web and the “amity.edu” or the URL are known as its top-level domain. The well-known top-level domain names include .com, .org, .edu, .Gov. which indicates a business site, non-profit and charity, educational purpose, or a governmental website respectively. There are other top-level domains like .US for United States of America or .au for Australia etc.\(^4\)

There are 2 type of Top level domains: First is Generic Top Level Domain – gTLDs which include .com, .edu, .int, .mil, .gov, .net, .org, .biz, .info, .name, .pro etc. Second is Country Code Top Level Domain – CCTLD which includes .uk for United Kingdom, .de for Germany etc. which correspond to a country, territory etc. A domain name acquires the features of a trademark or a trade name, as it is a means of individualization of a business entity. Existing companies having a value of trademark tries its best to transpose itself and get its trademark extended to internet zones. It also happens that the value of trademark is grown on the internet from starting. A survey in United States and United Kingdom shows that there is rapid increase in domain name infringement is the major cause of online abuse.

### CYBERSQUATTING

There are always a large number of registrations of domain names on “First come-first serve basis” and is easy to get and is also considered as cheap. Through this people who are not the real owners


\(^{16}\) The IP number is of the Amity University website

\(^{17}\) Caroline Wilson, “Internationalized Domain Name Problem and Opportunities” C.T.L.R. 2004,10(7), 174-181

\(^{18}\) Available at https://definitions.uslegal.com/i/internet-domain-names/ (accessed on 29th october’17)
of the trademark register many well-known trade names, company names, etc. with a view of bad faith and trafficking. The practice of procuring the registration of the domain name, with the intention to sell the name to the real owner is called “Cybersquatting”. After that, the cyber squatters sell these names to other non-related entities which enable dilution of the well-known trademarks. They pose a threat to the companies who have trademarked. In case of Yahoo Inc. V/s Akash Arora\(^1\), the plaintiff was a registered owner of the domain name “yahoo.com”, succeeded in obtaining an interim order restraining the defendants and agents from dealing in goods and services on the se also under the domain name “yahooindia.com” or any other name which is deceptively similar to that of plaintiff’s trademark “yahoo”. Till now NSI (Network Solutions, Inc.) distributed all, of the domain names to the registrants purely on a first come, first serve basis\(^2\) as it only checked for the uniqueness, many individuals were able to claim domain names those of the famous trademarks with the bad faith of reselling the domain names to the original owners\(^3\) and receive a good amount of royalty. Competitors also register the domain name of their competitor’s trademark in order to sell their own goods in the name of their competitors. This also constitutes to be an infringement.

On the other hand, there also exist come concurrent and innocent registrants, who register trade mark as domain names for some unrelated interest and not to harm the trademark owner. These types of people are not liable as Cybersquatters. There are 3 largest organizations which that are present for the victims of cybersquatting and explains ways to protect your business against cybersquatters. These organizations are WIPO- World Intellectual Property Organizations, ICANN- Internet Corporation for Assigned Names and Numbers, and ACPA— Anti-cybersquatting consumer protection act’1999.

The WIPO\(^2\) is “the leading institution in the resolution of Internet domain name disputes.” The WIPO has formed an arbitration and mediation center to give alternative resolution options to the private parties. It deals in both contractual and non-contractual disputed matters.

The ACPA’1999\(^3\) makes the cyber squatters liable to court’s action if brought under a claim. The act provides many provisions for the protection, but to file a claim, the trademark holder must determine that firstly, the mark of the trademark owner is distinctive, secondly, the domain name and trademark are either identical or has a

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\(^1\) 1999 (2) AD (Del)229

\(^2\) Available at http://www.wipo.int/portal/en/index.html (Available at 29th October' 17)

\(^3\) Available at https://jux.law/the-anti-cybersquatting-consumer-protection-act-acpa/(Available at 29th October' 17)
confusing nature, lastly, the domain name owner acted in a bad faith. The ICANN’s policies require that trademark based disputes be resolved by agreement, court action. If the dispute arises from an abusive registration, then the proceedings can be expedited. The trademark holder must file a complaint in the actual jurisdiction against the domain holder name.

UNIFORM DISPUTE RESOLUTION POLICY (UDRP)

ICANN (through UDRP) offers expedited dispute resolution proceedings for holders of trademarks to contest abusive registrations of domain names.

Elements to prove under UDRP

- Domain name is identical or confusingly similar to trademark or service mark in which the complainant has rights;
- Have no rights or legitimate interests in respect of the domain name; and
- Domain name has been registered and is being used in bad faith

The following circumstances will be considered as bad faith:

- If done for valuable consideration by the trademark owner;
- In order to prevent trademark owners from reflecting the mark in a corresponding domain name;
- Registered for the purpose of disrupting the business competitor; or
- Purposefully creating a likelihood of confusion.

UDRP procedure:

The burden of proof is on complainant who actually needs to prove all 3 elements. The elements would be proved if the complainant establishes that the evidences were more likely than not. With respect to the 2nd rule, UDRP requires that complainant need to prove that he has no legal interest or right over that domain name.

UDRP Defenses:

- Before any notice to the defendant of dispute, his use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or
- The person have been commonly known by the domain name, even if he have acquired no trademark or service mark right; or
- He is making a legitimate non-commercial for fair use of the domain name, without intent for commercial gain to mislead consumers.

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24 Available at [https://www.icann.org](https://www.icann.org)((Available at 29th October’ 17)


Trademark and Cybersquatting laws in India

Trademark laws in India are formulated by the Trademark act’1999. And as far as domain name dispute resolution, there is no legislation which explicitly refers to dispute resolution. Butt since, trade Marks Act’1999 itself is not territorial, so, it may not allow for adequate protection of domain names. However, this does not mean that domain names are not to be legally protected to the las relating to passing off. The information Technology act’ 2000 of India along with 2008 IT Amendment act addresses many cybercrimes and has also set up cyber crime cell. However, the act ignores the problem of domain name disputes and cyber squatting. In case of, cyber squatting, domain names may be considered as trademarks based on use and brand reputation, so they fall under the Trade Marks act 1999. Other than that, According to section 13 of the Indian trademarks act’ 1999, legal remedies for the suit of infringement includes Injunction, Damage or Accounts of profit or delivery up of infringement of goods or destruction of infringing goods. Section 103 imposes penalty for applying false trademarks and Section 104 imposes penalty for selling goods or services bearing a false trademark, which is punishable with imprisonment for a term not less than 6 months which may extend to 3 years along with fine not less than Rs. 50,000 which may be extended to Rs. 2 lakh. The copyright Act’ 1957, is also invoked at times and raids conducted. However, still, domain name offences are still struggling for legislative clarity. The common law remedy of passing off is available to the owner of the trademark but in case his mark is registered, he can file an action for infringement of trademark.

Trademark and Cybersquatting laws in UK

There were demands of the legal protection of trademarks as plaintiff’s demanded injunction. Therefore, a more updated approach was needed, thus, in 1875, The United Kingdom introduced Trademarks Registration act. The act of 1875 became the ancestor of Trademark act’ 1934 and of 1994. Since, UK is a part of the European Union and the scope of 1994 act was expanded to fall within European Union Directive.

The Trade Mark Act of 1994 defines “Trademark” as:

“Any Sign capable of being represented graphically which is capable of distinguishing good or services of one undertaking from those of other undertaking. A Trademark may, in particular, consist of words (including personal names), designs,
letters, numerals or the shape of goods or their packaging”.

The elements which are necessary for trademark infringement actions according to trademark act are:

- A person is infringing a trademark if he is using a sign which is identical with the trademark in relation to goods or services which are identical with those for which it is registered in the *use in the course of trade*.

- A sign is identical with the trademark and is used in relation to goods or services similar to those for which the trademark is registered; or

- The sign is similar to the trademark and is used in relation to goods and services identical with or similar to those for which the trademark is registered.

- There exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the trademark.

Since, the phrase “*use in the course of trade*” is an essential part of the section, Trademarks act provides a non-exhaustive list of instances for it such as:

- Affixing the sign to goods or its packaging;
- Offering or exposing goods for sale, putting them on the market, or stocking them for those purposes under the sign, or offering or supplying services under the sign;
- Importing or exporting goods under the sign;
- Using the sign on business paper or in advertising.

**Defenses for the Infringement as provided by Trademark act '1994 are:**

- Use of the registered trademark is not infringed by the use of the another UK registered trademark in relation to the goods or services for which the another one is registered.

- Use of Person’s own name or address with honest practices.

- Suggestions concerning the kind, quantity, intended purpose, quality or other characteristics.

- Use of an earlier right in a locality.

English courts too had struggled to get into the concept of the domain name infringement into traditional trademark laws as in like does registering the domain name that is a registered trademark of another constitute the “*use in the course of trade*”.

**United Kingdom Cybersquatting laws:**

The UK has not enacted a law for Cybersquatting. They were only dealing with the cybersquatting cases through the trademark act of 1994 and through precedents. It approached to dealing with

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32 Trademarks act 1994 (UK) s 1(1)
33 Trademarks act 1994 (UK) s 10(1)
34 Trademarks act 1994 (UK) s 10(2)
35 Trademarks act 1994 (UK) s 10(4)
the Cybersquatting was introduced through the English Case on Cybersquatting is British Telecommunications PLC Vs. One in a million Ltd.  

In the present case, the defendants registered the following domain names: Ladbrokes.com, Sainsbury.com, sainsburys.com, marksandspencer.com, cellnet.net, bt.org, virgin.org, marksandspencer.co.uk, britishtelecom.co.uk, britishtelecom.com, and britishtelecom.net. The court then, came to know that there was no central authority for the Internet and therefore, it struggled for how to decide the case dealing with Cybersquatting within the trademark law framework. However, the issue was the defendants had not used the domain names in the course of trade in connect with goods or services but had registered it.

Then, the courts conducted a ‘passing off’ trade mark infringement analysis under 10(3) stating:

“The appellants seek to sell the domain names which confusingly similar to registered marks. The domain names indicate origin. That is the purpose for which they were registered. Further, they will be used in relation to the services provided by the registrant who trades in domain names”. The Court also stated that there would be only one possible reason to why would a person register a domain name, who is not linked to the specific domain name, and that would be to pass himself off as part of that group or his products of as theirs.

Consequently, it can be seen that in UK, if it is proved that one is registering domain names just for the purpose of restraining the true owners, i.e. the cybersquatters practicing cybersquatting, a remedy under ‘passing off’ is available. The court would not entertain any argument that says registering a domain name and parking it for the purpose to be used in the course of trade for buying and selling. Registering a domain name and then parking it would not seem to be used in the course of trade as one is selling or buying. Therefore, the cybersquatting would be squeezed into traditional trademark laws. Therefore, this is how cybersquatting laws are dealt with.

UDRP in UK

The remedies available in UK are Trademarks act 1994, and the precedents. But, one may also file the claim through UDRP. UDRP is less expensive an saves time. Litigating through the national courts provides more remedy, but are more expensive and time consuming.

Trademark and cybersquatting laws in US

US trademark law is separated under a dual system of states ad federal protection. A registered trademark offers greater protection for its holder. The need for trademark law was recognized and therefore, the act of 1870 was introduced as the first federal trademark law. However, the law was held unconstitutional. And then, it further took another 76 years for a comprehensive, constitutional federal trademark law could be enacted. In the year 1946, Lanham Act was enacted to specifically deal with the trademark laws. The Lanham Act defines the trademark as:

“A trademark is any word, name, design or symbol, or any combination thereof, used in commerce to identify and distinguish the goods of one manufacturer or seller from those of another and to indicate the source of the goods. 

39 United States Lanham Act’1840

www.supremoamicus.org
Elements for a trademark Infringement under the Lanham Act are:

- A protectable interest is a valid trademark.
- The defendant’s use of that mark in commerce; and
- The likelihood of consumer confusion.  

This is a 3 step analysis, to ascertain whether a trademark infringement has occurred.

Other factors considered by the US courts are:
- Similarity of Marks
- Competitive proximity
- Strength of plaintiff’s mark
- Consumer sophistication
- Actual confusion; and
- Defendant’s good faith

Here, also the courts had problems initially with domain names and whether the use of them was a trademark infringement issue and the reason behind this was because domain name is actually an address and the trademark law was not developed to give protection and remedies to addresses.

Defenses to a trademark Infringement as per Lanham act are:

- Valid License
- Statute of Limitation
- Laches
- Unclean hands
- Fair use
- First sale doctrine
- Others

US found a need to enact a law to deal with Cybersquatting due to increasing importance of Trade through Internet and therefore, protection of domain names were needed. ACPA defined Cybersquatting as the registration or use of a trademark as a domain name in bad faith with an intention to profit from mark.

Elements of Cyber Squatting Claims:

The ACPA (Anti – Cyber Squatting Consumer protection act 1999) gives the right to the trademark owner to sue the one who registers a mark in bad faith with the intent to profit when a domain name is:

- Identical or confusingly similar to a mark that was distinctive at the time the defendant’s domain name was registered; or
- Identical or confusingly similar to, or dilutive of, a mark that was famous at the time he defendant’s domain name was registered.

But in order to prove a claim under ACPA, an owner must prove:

- It has a valid trademark entitled to protection;
- Its mark is distinctive or famous;
- The defendant’s domain is identical or confusingly similar, or in the case

43 15 U.S.C 1125(d)
44 Mary LaFrance, Understanding Trademark law 6 (Lexis nexis 2009)
of famous marks, dilutive of, the owner’s mark; and

- The defendants used, registered, or trafficked in the domain name;
- With a bad faith intent to profit.\textsuperscript{45}

The phrase ‘Confusingly similar’ of the act is analyzed differently from the phrase ‘likelihood of confusion’ trademark analysis.\textsuperscript{46} To examine the phrase ‘bad faith intent to profit’, the ACPA offers the following factors to be considered:

- “The trade mark or any other Intellectual property rights of a person, if any in the domain name;
- The extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that persons;
- The person’s prior use, if any, of the domain name in connection with the bona fide offering of any goods or services;
- The person’s bona fide non-commercial or fair use of the mark in a sit accessible under the domain name;
- The person’s intent to divert consumers from the mark owner’s online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site;
- The person’s offer the transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services, or the person’s prior conduct indicating a pattern of such conduct;
- The person’s provision of material and misleading false contact information when applying for the registration of the domain name, the person’s intentional failure to maintain accurate contact information, or the person’s prior conduct indicating a pattern of such conduct;
- The person’s registration or acquisition of multiple domain names which the person knows are identical or confusingly similar to marks of others that are distinctive at the time of registration of such domain names, or dilutive of famous marks of others that are famous at the time of registration of such domain names, without regards to the goods or services of the parties; and
- The extent to which the mark incorporated in the person’s domain name registration is or is not distinctive and famous within the subsection (c)(1) of the section.”\textsuperscript{47}

Defenses to a Cybersquatting Claim:

\textsuperscript{45}Mary LaFrance, Understanding Trademark law 6 (Lexis nexis 2009)
\textsuperscript{46}Mary LaFrance, Understanding Trademark law 6 (Lexis nexis 2009)
\textsuperscript{47}United States Lanham Act’1840
The act states that the bad faith shall not be found in, ‘Any case in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful’.

The courts were still confused with how to treat domain cases. It was because of the duty to protect right to free trade and freedom of expression, while also needing to protect the rights of trademark owners.

**UDRP in US:**

In US, one can file claim through the UDRP process or through the state or federal system. Under the UDRP process, one is limited to the remedy of cancellation or transfer of the offending domain name. However, US court system offers more remedies that UDRP such as injunction and monetary damages in addition to UDRP.

**CONCLUSION**

Protection of Domain names and cybersquatting is a very complex subject, and it needs to be understood minutely. Trademark laws play an important role in India in regard to Intellectual Property Rights, but when it comes to domain names and cybersquating, it is a challenge. Due to constantly changing environment of Internet changes in law for protected is required. However, UDRP can be considered to be the best solution right now for India. The domain name disputed can be addressed by the local courts, but people find the process of litigation to be expensive and time consuming. UDRP is cheap as well as less time consuming. United States and United Kingdom have also adopted the remedies by the UDRP. Although, both the countries have given the option to choose the remedy either of UDRP or litigating in the local courts, thus option can be considered.

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48 United States Lanham Act’1840
LEGISLATIVE POWER OF THE EXECUTIVE: AN OVERVIEW

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Abstract
This paper aims to provide a thematic analysis of jurisprudence regarding Ordinances in India. Whereas the power to promulgate Ordinance is an extraordinary legislative power of the executive, it needs to be ensured that the same is placed before the Legislative which through its democratic process may approve or disapprove of the same. The executive cannot create rights in favour of the citizens which the Legislative itself could not. The author first highlights the procedural aspect i.e. the relationship between the Legislature and Ordinance making power of the Executive and whether the Ordinance needs to be mandatorily be laid before the Parliament. Further, the author seeks to trace the development of case law regarding the justiciability of the same and the extent to which the court can look into whether the immediate conditions for the promulgation of such Ordinance existed. Lastly, the effects of lapsing of Ordinance as well as validity of re-promulgation of Ordinance are analysed in terms of the democratic set up of the Country.

Keywords: Ordinance, President, Governor, Legislature, Parliament.

Introduction
The President and Governors have the extraordinary legislative power under Article 123 and 213 of the Constitution of India respectively, to pass an Ordinance. Such a power can be exercised on the satisfaction of 3 conditions, namely, both the houses of Parliament/ State Legislature are not in session, The President/ Governor is satisfied that there exists a situation which requires immediate action, the ordinance would be laid before the Parliament/ Legislature once the session commences. The satisfaction of the President/Governor in the present case is not the personal satisfaction but must be taken based on the advice of the Council of Ministers. A report has revealed that at least 34% of the ordinances were promulgated 15 days before the session was to commence and a similar percentage for 15 days after the session was to end. Many Ordinances are not even introduced as bills in the Parliament. The largest number of Ordinances up to the year 2008 have been promulgated in the area of Finance i.e. 129 followed by Home Affairs (102). The latest Supreme Court judgment in the case of Krishna Kumar Singh vs. State of Bihar can be considered a breakthrough in the area of Ordinance promulgation power of the Executive as it seems to give an answer to most of the questions regarding the same.

49 Constitution of India. Art. 123 and 213.
50 Amartya Bag, Ordinance making power of the President of India: A critical outlook. _(July 27, 2018, 10:00 PM)_ ,https://blog.ipleaders.in/ordinance-making-power-critical-outlook/.
51(2017) 3 SCC 1.
Analysis
This section represents a thematic analysis of the various aspects related to Ordinances through the development of Case laws as well as the problems which still remain to be addressed.

A. Legislature and Ordinance
The court in the case of R.K. Garg and Ors. vs. Union of India and Ors held that “this power to promulgate an Ordinance conferred on the President is co-extensive with the power of Parliament to make laws and the President cannot issue an Ordinance which Parliament cannot enact into a law.” Since the Legislature has the primary responsibility to pass legislation, there is a possibility of control and limitation by disapproval of the Ordinance by this organ of the State. The case concerned The Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981 which was succeeded by an Act and allowed the same to be valid with retrospective effect. The objective behind the Act was to curb black money and proper economic planning, it allowed for persons in possession of black money to invest it in the Special Bonds and provided immunities to them. The petitioners argued that since the Ordinance was in nature of a Money Bill it could only be passed by the Lok Sabha and hence the Ordinance was invalid. The court held that when a provision of retrospectivity is there in an Act, actions taken under Ordinance are judged in reference to the Act and wherever the Parliament has the power to amend a tax law, the President too has similar powers. Therefore, the Executive has the power to pass Ordinances in case of Tax matters. Article 21 assumes that the procedure which has been established is permanent but an Ordinance doesn’t fulfill this requirement as there is no way to ensure that the due process has been followed. Therefore, its effect cannot be permanent and should not automatically have the same effect as a legislative Act until it has been approved when the Parliament/ Legislature is in session.

B. Laying before the Parliament
Cases of Pre-Independence Ordinances, those which have not been repealed by the Parliament later, it continues to operate and the fact that it was not laid before the Parliament doesn’t invalidate it. For example, the Criminal Law Amendment Ordinance, 1944 continues to operate by virtue of The India Burma Emergency Act. As far as Post Independence Ordinances are concerned, Justice Madan Lokur, held that Article 213(2) doesn’t lay down that Ordinance must be necessarily laid down before the Legislature and is simply directory. If we look into the Article it merely talks about a resolution disapproving the Ordinance unlike Article 352 which has a positive obligation to approve in order for the Proclamation to continue. The only result of not placing an Ordinance is that it will cease to operate after 6 weeks of commencement of the session. The Ordinance can either have same effect of law or no effect at all. Justice Lokur laid too much burden on the Legislature saying that Legislature is not helpless as it can question it on its own initiative as it is available in the

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53 M.M. Sales and Exports (India) vs. The State of Uttar Pradesh, AIR 1974 All 263
Only when an Ordinance is laid, the constitutional fiction that it has same effect as an Act will come into place.\textsuperscript{55}

\section*{C. Justiciability of Ordinances}

One of the first cases where the adequacy of condition for promulgation of ordinance was held to be justiciable was where the Banking Ordinance, 1969 was struck down, thereby invalidating a similar provision in the succeeding Act too. The President/Governor’s power to promulgate Ordinance has been constitutionally limited and can be passed only on two conditions being satisfied i.e. existence of circumstances and necessity to take immediate action. The decision is not always final and can be struck down.

Though the court agreed it cannot sit down in policy argument,\textsuperscript{56} though the dissenting opinion of Justice Ray suggested that by virtue of Article 74(1), this power is exercised based on the advice of the ministers which cannot be questioned in the court. Moreover, that under Article 361(1) the president is not answerable to the court and no objective test for satisfaction cannot be implied. The grounds to question the same are limited to mala fide and bad faith.\textsuperscript{57}

The position was later altered by the Supreme Court in the SKG case where it said that in passing an ordinance the governor is the sole judge of existence of emergent situations and his satisfaction is not justiciable. In this case the ordinances were continually promulgated to validate all the changes or actions to be brought in the

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\textsuperscript{54}Krishna Kumar Singh and Ors. vs. State of Bihar and Ors., (2017) 3 SCC 1.

\textsuperscript{55}Id.

\textsuperscript{56}R.C. Cooper v. Union of India, AIR 1970 SC 564.

\textsuperscript{57}Id.
Bihar Sugar Factories Control Act, 1963. But the situation was reverted back where in a case the Supreme Court agreed that satisfaction was not a purely political question, for example, the case concerned the National Security ordinance subsumed into an Act. The necessity of power to issue Ordinance is for the peace and good government. It agreed to the fact that legislative procedure is very long and time taking. Though after only three years court held in Venkata Reddy, where it was held that the satisfaction was political and could not be questioned.

We need to take into consideration the Bommai case where it was held that fact of satisfaction can be enquired into by the court. The present position after the Krishna Kumar case is that power should be exercised when there existed an actual necessity where no delay due to non-commencement of session of Legislature/Parliament could be allowed, this is because a state of constitutional vacuum cannot be allowed to exist. The supremacy of Parliament need to be emphasised as it is elected body of the citizens are responsible to them and it is their prerogative, hence after the starting of a session, power should be transferred to Legislature to sit on to decide upon the Ordinance. The primary difference being that Ordinance does not allow for open debates which is required for a law affecting people which happens in case of Legislature/Parliament made laws. The decision in Bommai and deletion of the provision that judicial review is barred in case of ordinances introduced by the 38th Amendment, it becomes clear that the satisfaction of the President/Governor is not immune from judicial review and it can be seen whether there existed relevant material.

This was also recognised by the Allahabad High Court in an early case of 1956 that the court can enquire into the fact of satisfaction of the governor in promulgating the Ordinance though not the reasons. It may be argued that there existed no necessity as there was already communication between the two levels of government regarding the same. But even though the situation can be handled by making the amended act apply retrospectively but there would be other practical difficulties to be suffered by the assesses in that case.

D. Existence of conditions for immediate action

Based on the pattern of judgements in regard of existence of conditions, the Court has consistently presumed circumstances leading to an immediate action by the President to have existed based on Separation of Powers doctrine i.e. deference to the executive. There has been a high degree of burden placed on the petitioners to prove the non-existence of any immediate circumstances which required the President to pass Ordinances. In case the petitioner is unable to prove the same, the condition is presumed to have been present. This makes it hard for the Petitioners because the Statement of Object and Reasons in the Ordinances may mention the reasons for such promulgation which is generally taken

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60 T. Venkata Reddy and Ors. vs. State of Andhra Pradesh, 1985 SCR (3) 509.
61 Supra note 4.
to be immediate by the court. For example, the case concerned the Lotteries (Regulation) Ordinance, 1997 where the state government was given the power to regulate the conduct and organisation of lotteries. The court rejected the argument of the petitioners on the basis that they were unable to present any acceptable foundation based on which they could claim that no circumstances existed which necessitated the President to pass the Ordinance immediately. But there was no burden on the Government to prove that the circumstances existed. Should we shift the burden to prove that there exists a prima facie case to pass the ordinance without waiting for the legislative session to commence on the Government instead of putting the sole responsibility on the Petitioners who may not have any tangible or legally acceptable documents to substantiate their argument.

Through the Ordinance the President sought to levy special duty on the import of liquor into Delhi state by amending the Punjab Excise (Delhi Amendment) Ordinance, 1979. The petitioners contended that this was a colourable device to make law on a subject which was not within the competence of the Parliament more so because the liquor was not manufactured in Delhi. But it was held that the objective behind the passing of the Ordinance was to impose special duty on goods which could not have been included in the Act as it sought to ensure public health. It therefore held that the measure was valid. Another aspect to be looked into here is whether in cases of Tax laws the burden is higher because it directly affects the financial stakes of the people and this should only come from the Legislature and not the executive, moreover in this case it was imposing a new kind of duty not present in the original act.

E. Malice in case of Ordinances
With regard to malice and other grounds, the Supreme Court in a case where the state government decided that in order to increase employment of youth they reduced the superannuation age from 58 to 55 except for last grade employees. The court held that Ordinance would be valid if the basis of such ordinance is ordinarily acceptable, in public interest and not against competence or that which affects fundamental rights but cannot be invalid on the ground that there was no application of mind. It also held that the Legislature as a body cannot be subject to allegations that it was for extraneous purpose. It was contended by the appellant that malice in promulgation of an ordinance is where Ordinance is an abuse of the legislative power and process amounting to a fraudulent use thereof and thus the malice. It held that the separation of powers doctrine was the guiding principle of our constitution. But says that judiciary cannot be so deferent to the Legislature so as to not recognise manifestly unauthorised power. But it is interesting to note that this case did not discuss the Bommai case where it said that mala fide could be enquired into as well as the fact of satisfaction.

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64Sat Pal & Co. v. Lt. Governor of Delhi, AIR 1979 SC 1550.
F. Effects on lapse of Ordinance

Now the question remains whether the rights created on the lapse of the Ordinance survive or they are reverted back to the status quo before the Ordinance was promulgated. Long before the Krishna Kumar case which is the most recent and authoritative precedent on the issue, the Guwahati High Court in 1998 had held that Section 6 of the General Clauses Act may not be applicable in case of Ordinances because what it deals with are temporary statutes which can be validated using a savings clause. In this case the petitioners were declared Scheduled Tribe and Hill Tribe by passing of four ordinances. Since no act has been passed by the Parliament for continuation of such a status, the Ordinance has lapsed, and until an Act is passed it cannot be said that the right conferred continue to operate. Even the Delhi High Court held that where the position of a party was changed under an ordinance and the ordinance failed to be revived because it was not put up in the assembly, the status before the ordinance continues to exist.

While the State of Orissa v Bhupendra Kumar Bose said that enduring rights were created while the Ordinance was in operation, this was extended subsequently in a case which concerned the Andhra Pradesh Abolition of Post of Part-time Village Officers Ordinance, 1984. The Ordinance had failed to be converted into an Act by state Legislature, on the other hand continued with similar ordinances being passed four times. The question was whether on lapsing of such ordinance, the posts which were abolished will be revived. The court reasoned that Article 213 does not provide that once an Ordinance has been disapproved, it shall be void ab initio but only that it will cease to operate from such date. This was widened in the case of Venkata Reddy which held that the same could not have revived or reverted back to the situation before the ordinance was promulgated in case of closed transactions i.e. irreversible rights. Therefore, the posts were not revived.

This has been overruled by the court in Krishna Kumar Singh where it was held that the dicta in Bhupendra Kumar Bose and Venkata Reddy was based on misconceived ideas and therefore needs to be overruled. The court didn’t look into the distinction between a temporary statute enacted by Legislature and Ordinance by the Executive. Contrary to what was said in Venkata, an ordinance cannot create an irreversible right on its own as it cannot be deemed to have been contemplated because it will be like introducing the Section 90 of 1935 Act back. Thus Justice Lokur held that if the situation is reversible, then the status quo ante should be revived on expiry of the Ordinance. But holds that since the first three of the 8 ordinances passed were never challenged, the benefit accrued to employees through these Ordinances are to be retained. Justice Chandrachud additionally said that rather than using the enduring right or irreversible right test, the public interest and necessity test should be used. As held in Bommai, in case a proclamation is disapproved, the proclamation cannot continue any longer and the status quo ante

69 AIR 1962 SC 945.

70 Supra note 3.
71 Supra note 4.
would revive. If this does not happen then the Legislature is deprived of its supremacy in law making. It will be required to see whether the consequence of the Ordinance is such that it is irreversible and if so the court can give the required relief but not as a blanket relief to all. Since the power given to the Governor/ President is limited, the completed events need not be declared permanent or validated always unless they have a permanent effect.  

G. Re-promulgation of Ordinance

Re-promulgation was a major pattern seen in Legislatures where the Ordinance was passed again without presenting it before the Legislature. The same is problematic as it does not allow for discussions in the Legislature/ Parliament where the elected representatives in a democratic set up deliberate upon the issue. Ordinances were being re-promulgated by the Governor without them being replaced by the Acts of Legislature. The pattern was such that after the session of Legislature were prorogued the Ordinances which had ceased to operate would be re-promulgated with the same provisions. The court termed this as an “Ordinance Raj” and a fraud on the constitution. Though it was held that the satisfaction of the Governor could not be questioned.  

This position has been slightly altered by the decision of Supreme Court in 2017 in Krishna Kumar Singh which stated that the satisfaction could be questioned, especially after the decision in Bommai which stated that the same is not beyond judicial review.

The Wadhwa case had mentioned an exception to no re-promulgation of Ordinance i.e. situations where the Legislature could not have debated upon the issue due to a lot of work in that session but was stretched in another case where it was held that since the case allows for re-promulgation of Ordinance in certain circumstances, in this case in order to ensure continuance of proceedings under the earlier Ordinance, an Ordinance can repeal an earlier Ordinance. This is problematic because in case the Ordinance was to be declared unconstitutional or not passed by the Parliament/ Legislature, the same was not an option anymore as the proceedings would still continue and affect the rights of the people affected by the same.

Conclusion

Thus, we can see that the 2017 decision of the Supreme Court can be considered a breakthrough where it has reduced the possibility of misuse of the power of the legislative power by the executive. AnOrdinance doesn’t acquire force and effect an Act of Parliament automatically and cannot create enduring rights in all situations as it does not go through the process of public and Parliamentary debate which is essential for the democratic working of the country. It needs to be ensured that the Parliament has the final say in enacting the laws governing the country as they have the primary responsibility of the same and this legislative power of the Executive is exercised in only immediate circumstances. The laying before the

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72 Id.
73 Dr D.C. Wadhwa and Ors. vs. State of Bihar and Ors., (1987) 1 SCC 378.
Parliament/ Legislature is mandatory otherwise it may be considered overreach. The three organs of the government i.e. Executive, Legislative and Judiciary are a part of horizontal power sharing structure and should act as a check and balance for each other.

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Indian companies, throughout the previous centuries, have been a family run business following a practice of effective ‘management’ rather than effective ‘governance’. As companies in India and abroad have grown leaps and bounds, the topic of corporate governance has been predominantly pressing the need to shift from the ‘raja’ model of governance to the ‘custodian’ model of governance where the stakeholder’s interests are held to be supreme. Various such needs were met in the amended Companies Act, 2013, but want for a more operative regulation were felt. As a result, the Uday Kotak Committee was set up by SEBI which aimed at improving the governing standards for listed companies in the country. A spectrum of changes was recommended in the report to SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, some of which were recently accepted by SEBI vide notification dated May 9, 2018. The aim of this paper is to discuss whether these changes pave a better route towards a more operative corporate governance regime for listed companies in India and yield more power to the stakeholders while eliminating the so-called prevailing ‘promoter’s rule’.

**Keywords:** Corporate governance, stakeholders, SEBI, Uday Kotak Committee

**Introduction**

India recently climbed up the ladder in the World Bank ranking for ‘ease of doing business’. It jumped up 30 places from 130 to 100 and credit can be given to various economic changes introduced in the country in the past couple of years like demonetization, introduction of GST and amendment of the FDI Policy. In an attempt to climb up the ladder further and attract foreign investments, substantial changes in the corporate governance and company compliance structures are underway. The CII Committee on Desirable Corporate Governance in India, 1998 defines corporate governance as:

‘Corporate governance deals with laws, procedures, practices and implicit rules that determine a company’s ability to take managerial decisions vis-à-vis its claimants - in particular its shareholders, creditors, customers, the State and the employees’. 

Accordingly, corporate governance is that arena of management of a company that deals with regulation of management, management’s discipline, shareholder’s rights and investors protection, business ethics, related party transactions, corporate social responsibility and stakeholder participation in decision making. A competent corporate governance structure facilitates sustainable economic growth, boosts the investor’s confidence, develops

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the financial markets and sets corporate democracy in pace. This makes corporate governance not a pure legal concept, but an amalgamation of law, economics, politics, finance, ethics and other fields of management.

SEBI (LODR) Regulations, 2015, the legislation that gravely impacts the listed companies in India, was majorly discussed in the high-powered committee set up by SEBI under the Chairmanship of Mr. Uday Kotak. The aim of the Uday Kotak Committee was to improve the governance standards in the listed companies in India so as to match the international standards. Various recommendations were given by the Committee out of which 40 were accepted without modifications, 15 were accepted with modifications and 18 were rejected completely. All these changes are to be put into effect from April 1, 2019.  

76 Some of these recommendations relate to improving the role and composition of its committees and boards, ensuring the independence of independent directors, ensuring transparency and monitoring, safeguards from related party transactions etc.

The current corporate governance structure in India, which is extensively promoter-led, is on the verge of an evolution with these amendments in the SEBI LODR Regulations. The amendments bring in better structures, more rigorous checks and balances and greater independence to key personnel including the Board and auditors, in order to match the globally followed trends. It is providing a mechanism to the listed companies to create a long-term value and protect the shareholder’s interest while consistently applying proper skill and care. The amendment provides for a phased timeline from October 1, 2018, to April 1, 2020, for most of the amendments so that the listed companies can adapt to the changes and overcome any challenges faced during implementation. Also, various such amendments are to be adhered to by the top listed companies which are decided on the basis of their market capitalisation. Therefore, it is necessary to look into the amendments and see what effects it can have on paving a better path for corporate governance in India, diverting it from benefiting the promotors to benefitting the shareholders.

Institutionalizing True Democracy in Listed Companies
Reshaping the Board of Directors: Roles and Composition

The SEBI (LODR) (Amendment) Regulations, 2018 has introduced certain new changes that are to be made in the Board of the listed Companies. The minimum number of directors on the Board has been increased from 3 to 6.  

77 Emphasis was again given on the appointment of a women director on the Board who can either be an independent or a non-independent director.  

78 In order to ensure that the directors of a company are skilled and have knowledge in their field, the amendment


77 SEBI (LODR) (Amendment) Regulations, 2018, Para 3(d)(i)(2).

78 SEBI (LODR) (Amendment) Regulations, 2018, Para 3(d)(i)(1).
now requires the directors to disclose their skills in a list of core skills/expertise/competencies identified by the Board as required in their business and sector without disclosing their names. This ensures that the appointment of the directors is actually based on their dexterity rather than a bias based on who they are. Further, the members already on the board of directors are also required to provide a list of their proficiencies. The Companies Act, 2013 allows a director to be appointed as a managing director, whole-time director or managers beyond the age of 70 years if shareholder’s approval is taken. A similar recommendation has been incorporated in the 2018 amendment which allows the appointment of a non-executive director on attaining the age of 75 if a shareholder’s approval under special resolution is achieved with proper justification in the explanatory notes annexed with it. This is an indication of the fact that age is no determinant for determining the abilities and capabilities of a person, nor is it a criterion for disqualification. If the shareholder’s endorsement is given, it is evident enough that the person is capable and should continue with their contributions to the company, thus giving an important power to the shareholders.

The quorum for Board meetings has been increased to 1/3 of its total strength or 3 directors, whichever is higher, including one independent director as opposed to the requirement in the Companies Act of 1/3 of the total strength or 2 directors, whichever is higher. In order to introduce a more balanced corporate governance structure, the amendment introduced a requirement for the chairperson of the board to be a nonexecutive director who shall not be related to the managing director or CEO of the Company. This change was made to avoid concentration of power in the hands of one individual and dividing it responsibly between the CEO/MD and the Chairperson in respect to the day to day operations and long-term actions. The Amendment also restricted the maximum number of directorship to 7 directorships from 1 April 2020. As for independent directors, the number is restricted to seven entities, but where such a person is a whole-time director/managing director in a listed company, the number of independent directorships shall not be more than 3 in listed entities. Lastly, to make effective board evaluations, the amendment required disclosures of the performance of the board, individual directors and the committees. SEBI’s circular also specifies that every listed entity may consider observations of the Board for the year, previous years observations and proposed actions based on current year observations as a part of its disclosures on Board evaluation. The Board of Directors is responsible and answerable to the stakeholders of the company for meeting the corporate

79 SEBI (LODR) (Amendment) Regulations, 2018, Para 3(x)(c)(i) (2).
80 SEBI (LODR) (Amendment) Regulations, 2018, Para 3(d)(ii).
81 SEBI (LODR) (Amendment) Regulations, 2018, Para 3(d)(iv).
82 SEBI (LODR) (Amendment) Regulations, 2018, Para 3(d)(iii) and Para 3(u)(c).
83 SEBI (LODR) (Amendment) Regulations, 2018, Para 3(e).
governance standards. They are also in charge of overseeing the management and governance of the company while taking important business decisions. Thus, the amendments ensure that there is gender diversity on the Board which brings in a new perspective for decision making. The increase in the quorum of the Board with the requirement of at least one independent director will result in better corporate governance and balance of powers as their independent directors would be responsible for voicing the opinions of the non-promoter group issues and point out red flags in the actions of the board. The reduction in the number of directorships can help the directors in giving sufficient time to all the companies and not hinder their role in playing an effective part. Lastly, all the disclosures and listing of skills would make sure that there is an appointment of directors who can actually add value to the governance process of the Company.

**The role of independent directors**

The SEBI 2018 Amendment seeks to exclude the possibilities of “board interlocks” that arise due to common non-independent directors on the boards of listed entities. The definition was amended and would now exclude persons who are non-independent directors of another company on the board of which any non-independent director of the listed entity is an independent director. The criteria for evaluation of Independent Directors have also been modified requiring an evaluation of their performance and fulfillment of a criteria of independence. The Independent directors are needed to file a declaration stating that they fulfill the independence criteria and have no knowledge of any impairment to the same. Such a declaration would need to be filed in the first board meeting that they participate in. They should also inform the board in case there is a change in circumstances changing their independence status. Also, there is a prohibition on the appointment of an alternate director for an independent director.

Independent directors act as an impartial guide for the companies and bring with them expertise which might be lacking in the Board. They keep the activities and decisions of the Board in check while pointing out mismanagement, inefficient use of resources and unaccountability of decisions. They act as a harbinger of peace between the board and the non-promoter groups striking the right balance between individual, corporation and social interests. Thus, the amendments have turned independent directors into a cornerstone of the global corporate governance movement and eased the burden of ensuring independence in the Company and its decisions.

**An Enhanced Character of Board Committees**

The Board Committees help the Board, which is responsible for acting on behalf of the interest of the stakeholders, to effectively govern and take decisions. The 2018 amendment has enhanced the role that

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86 SEBI (LODR) (Amendment) Regulations, 2018, Para 3(d)(l)(i).
the Board Committees play, indicating an optimistic move towards an effective governance regime. As per the amendment, the Audit Committee is responsible for reviewing the utilization of loans and other advances given by the holding company to the subsidiary companies exceeding 100 crores or 10% of the asset size of the subsidiary, whichever is lower. The Nomination and Remuneration Committee shall now, along with their previous duties, have to identify and recommend to the board, the appointment, renewal and remuneration of persons for the positions/offices a level below the chief executive director/ managing director/whole time director/ manager, specifically counting the position of the company secretary and the chief financial officer and such positions shall now be considered to be a part of the ‘senior management’. The Shareholders Relationship Committee shall now compose of at least 3 directors with one independent director and shall have an enhanced role to play. Also, the function of the Risk Management Committee shall specifically include cyber security as well.

The amendment ensures that the audit committee is justifying the risk to the Group by scrutinizing the purpose of lending funds, performance analysis, a sufficiency of internal cash with the subsidiaries etc. Widening the roles and responsibilities of the SRC is a thrust towards providing the investors with prompt and high-quality services, especially to those who hold a non-controlling interest or are other security holders. The inclusion of an independent director as a part of this committee and presence of the Chairperson of the Committee would help in building an effective Corporate Governance practice. Lastly, with the increasing speed of technological advancement, the role and responsibility of the RMC is to oversee the integrity of the network, programs, data and software from unauthorized use and access. All in all, these changes would ensure that there is healthier surveillance and governance of the decisions taken by the Board.

Increase in Disclosure Requirements: Enhanced Transparency
The underpin of a good corporate governance structure is transparency and disclosures. Timely and accurate disclosure of all the materials matters of the Company ensures efficient functioning, management, performance and governance of a Company. The SEBI (LODR) Regulations have brought in newer and stringent requirement for disclosures like a set timeline for submission of reports to the stock exchange and publishing on the website, allowance to submit the report in an electronic mode, credit rating disclosure, a particular format for the disclosures, utilization of funds from qualified institutional placement (QIP)/preferential issues, disclosures for directors and disclosures in the view of the committee not accepted by the Board.

Thus, the submission of annual accounts in soft copy would contribute to the green initiatives of the Ministry of Corporate Affairs. Credit rating disclosure will help in

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Para 3(h)(a) and Para 3(h)(b).
evolving a credit risk market pricing system and develop credit spread across various bonds in the future, further enhancing transparency in credit risk across instruments and sectors. It will become easier for the investors to get information about the Company and its filings by submitting the disclosures in searchable formats which are easily available online. Disclosures by the directors in the name of the Company would enable the investors to make an informed decision as to whether the director is involved in any competing business or not. The disclosure related to the disqualification of the directors would further help in gaining the confidence of the investors who will be ensured that the directors will act in good faith and towards the achievement of the Company’s objectives. Therefore, it would be safe to conclude that these amendments would not only push the listed entities towards a more transparent system of disclosures, it would be the harbinger of the best corporate governance practice in India.

Trickling down of governance to the subsidiaries

Most of the businesses now operate through a web of subsidiaries in their country and abroad and now have a complex corporate structure. The legal, financial and structural complexities increase with the increase in sales, size and increasing global flow of capital. In order to ensure effective governance of the Group, it is important to take up good governance practices at the holding level, which would trickle down to the subsidiary levels and to the entire structure. In this view, the obligations of listed companies in respect to their subsidiaries have been enhanced. One independent director from the board of directors of a listed entity should also be a director on the board of directors of its unlisted foreign material subsidiary. Additionally, the board of all listed entities will now have to be assessed of significant transactions involving all unlisted subsidiaries. Also, the definition of ‘material subsidy’ has been amended to define subsidiary as a subsidiary whose income or net worth exceeds 10% of consolidated income or net worth of the listed entity and its subsidiaries in the immediately preceding year. Along with this, the subsidiaries and their listed companies are required to maintain secretarial audit with their annual reports.

This will ensure that the companies are placing monitoring mechanisms on its subsidiaries to get timely information about all its transactions. The company will also have to ensure that the corporate governance policy of the subsidiaries is at par with the parent listed company to get the same value of ethics, policies, processes and controls and appointing an independent director in the subsidiary is a step towards the same. Disclosure as to the accounts of the subsidiary will help to get an overview of the Group as a whole. With the increasing complexity of transactions, the responsibility of the directors have increased to get all significant transactions under their purview to prevent financial and reputational damage, ensuring a strong group corporate governance framework. Thus, the corporate governance practice of the subsidiaries should be such that it recognizes the different kinds of risk i.e

90 SEBI (LODR) (Amendment) Regulations, 2018, Para 3(c)(ii), Para 3(j)(a) and Para 3(j)(b).
legal, tax, societal etc, be it in India or abroad.

**Related Party Transaction and Controlling shareholder**

One of the most crucial topics under corporate governance is the relationship between the listed entity and the promoters. Since, a majority of the listed companies in India is still promoter-driven, following the ‘Raja’ system of governance, it is important to create a system of checks and balances in order to shift it to the ‘Praja’ form of governance. The interest of the shareholders, being the Praja or the public on whose investments the companies run, should be given more importance than filling the pockets of the promoters and promoter groups.

The SEBI (LODR) (Amendment) 2018 has amended the definition of ‘related party’ to include any person or entity belonging to the promoter or promoter group of the listed entity and holding 20% or more shareholding in the listed entity.\(^{91}\) The amendment requires a consolidated statement of the related party transactions within 30 days from the date of publication of stand alone and consolidated financial results for the half year.\(^{92}\) Further, disclosures of transactions of the listed entity with any person or entity belonging to the promoter or promoter group of the listed entity which holds 10% or more shareholding in the listed entity\(^{93}\), is to be made in the annual report. The Amendments in the clauses pertaining to the approval of related party transaction allows related parties to cast a negative vote, as such voting cannot be considered to be in conflict of interest.\(^{94}\) Lastly, SEBI has now considered to include payments made to a related party with respect to brand usage or royalty as 'material related party transactions' if such transactions exceed 2% of the annual consolidated turnover of the listed entity as per the entity’s last audited financial statements.\(^{95}\) This will make sure that the company does not make excessive payments to its controlling shareholder and do not bleed out payments before giving out dividend. The widening of the definition of related party and introducing such disclosure would make sure that the transactions with the promoter/promoter group is at arm’s length. The negative voting on related party transactions by the related party allow them to give their dissenting opinion when they do not favour a transaction, thus providing more commercial substance to it. Therefore, these amendments are a means to curb the challenge to corporate governance relating to the transactions between the firm and its promoters.

**Accounting and Audit**

A good quality financial statement is a document primarily used by most of the

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\(^{91}\) SEBI (LODR) (Amendment) Regulations, 2018, Para 3(a).
\(^{92}\) SEBI (LODR) (Amendment) Regulations, 2018, Para 3(i)(e).
\(^{93}\) SEBI (LODR) (Amendment) Regulations, 2018, Para 3(x)(a).
\(^{94}\) SEBI (LODR) (Amendment) Regulations, 2018, Para 3(i)(c) and Para 3(i)(d).
stakeholders to measure the role that the management has played in earning returns on the capital provided by the shareholders and employed by them. This statement gives an idea of the financial position of the company, its earnings prospects and earning generation for a particular period of time. It is therefore extremely necessary to meticulously structure the accounting statements and carry out audits. The SEBI LODR amendments seek to improve the disclosure quality and enhance the effectiveness of financial statements and audits.

In the SEBI (LODR) Regulations currently, if the management is not able to make an estimate as to any audit qualifications, it needs to provide reasons and these reasons shall then be reviewed by the auditor and reported accordingly. The amendment modifies this requirement and says that in cases where the audit qualifications are not quantifiable, the management has to mandatorily make an estimate which shall be reviewed and reported by the auditors. In case the management does not make an estimate in matters like sub-judice or going concern, the management has to provide the reasons and the auditor has to review the same. 96

The amendment has reviewed the financial disclosure requirements and has made significant changes in the same like making it mandatory to submit consolidated financial results on a quarterly / year-to-date basis, relaxing the requirement of getting the financial results of the last quarter audited, changes in the submission of cash flow statements and necessary requirement to take a limited review of the audit of all companies/subsidiaries whose accounts are consolidated. 97 Thus, organizations and companies ought to begin their arrangement right on time for making a comparative financial statement. SEBI needs to define the scope of limited review of the subsidiaries and whether it shall apply to the foreign subsidiaries as well and issue direction for limited review of the audit of various other components. Therefore, the listed entity is required to disclose all the relevant information of its subsidiaries on time to the statutory auditor to perform the limited review.

96 SEBI (LODR) (Amendment) Regulations, 2018, Para 3(w).
97 SEBI (LODR) (Amendment) Regulations, 2018, Para 3(o).
98 SEBI (LODR) (Amendment) Regulations, 2018, Para 3(v).
100 SEBI (LODR) (Amendment) Regulations, 2018, Para 3(r)(ii).

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corporate governance practice in the listed entities.

**Shareholders participation**

Shareholders are the most important stakeholder in the company and it is for their primary benefit that corporate governance requires effective communication between them and the Board. There will be an increase in shareholder participation and involvement with the new amendment. AGM is to be held within 5 months from the end of the financial year 2018-19\(^{101}\) and there shall be mandatory web-cast\(^{102}\) of the same. Also, an approval from the shareholders would be required for brand royalty payments.\(^{103}\) Thus, aligning the timing of the AGM with the global trends will reduce the possibilities of a clash of AGM of different companies resulting in higher participation from the shareholders. The constraints of physical presence have been overcome by introducing web-cast of the meetings in the Company allowing remote participation from shareholders who can’t physically attend the meeting. The outcome shall be a skilful leadership for endorsement of audit accounts, the election of executives, the arrangement of auditors and different activities, consequently encouraging achievement of business objectives and key targets. To conclude, it can be said that shareholders participation and approvals are empirical to a useful governance mechanism to move away from promoter supremacy and towards shareholder sovereignty.

**Conclusion**

The recent changes in the industry and economy called for a need to redefine the corporate governance standards and the Uday Kotak Committee has responded to that need to improve the situation. The changes approved by SEBI aims to align the corporate governance standards to the best global practices. The firmly rooted business reality, where listed entities are promoter-led, increasing the risk of promoter-raj at the expense of minority shareholder, has been addressed to in the approved recommendations.

Prima facie, all these changes seem promising but the real test lies in the implementation of these changes. Some may argue that the precluding of the smaller listed entities from complying with the amended recommendations is contrary to the essence of the amendment. Some may also claim that the added compliance will have an effect of increasing the burden of the listed companies and increase their transactional costs. On the other hand, some analysts believe that the enhanced disclosures requirements will reduce the information asymmetry between the company and the shareholders, benefiting even the smallest shareholders.

Needless to say, the approved recommendations incorporated by SEBI in the LODR regulations is a welcomed change and is expected to extol corporate India. It will bundle recommendation on the structure of corporate governance and leadership

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\(^{101}\) SEBI (LODR) (Amendment) Regulations, 2018, Para 3(s)(ii).

\(^{102}\) SEBI (LODR) (Amendment) Regulations, 2018, Para 3(s)(ii).

positions. All in all, a rugged governance will augment the integrity of the public markets, attract foreign and domestic investors for the long term thus building a ladder for India to climb up the World Bank Ranking for ‘ease of doing business’ and becoming a hub of globally acclaimed corporate governance practices.

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THE IMBALANCED EDIFICE OF SECTION 497 IPC

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This article has been written by considering the heated issue of adultery which is still being heard by the Hon’ble Supreme Court in Joseph Shine case. The article covers the history as to why the concept of adultery was introduced as an offence and the earlier objective of the law makers behind this offence. The scope and ingredients of Section 497 IPC have been discussed in detail. The authors have tried to explain how the flaws in this section have disrupted the balance created by the concept of marriage. The article also questions the constitutional validity of this section on the grounds of Article 14, 15 and 21. The article enlists numerous cases wherein adultery has been challenged and the observations given by the Courts. The current status of the law of adultery in other countries has also been discussed. Lastly the need to amend this section as per the societal needs of 21st century and inculcating the concept of equality and personal liberty have been encapsulated.

“Adultery.—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 offense of rape, is guilty of the offense 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.”

S. 497 of Indian Penal Code read along with S. 198 (2) of CrPC can be said to be bound by the shackles of the archaic law. Adultery is an invasion on the right of the husband over his wife. In other words, it is an offence against the sanctity of the matrimonial home and an act which is committed by a man. It is an anti-social and illegal act. It consists in having carnal knowledge of a married woman with knowledge of that fact, without the consent or connivance of her husband. To constitute adultery, sexual intercourse is a necessary ingredient. The laws made dates back to 18th C or more and reasoning behind the incorporation of such laws were the customary practices and traditions prevalent at that time. As we know that women cannot be prosecuted under this section, because when this law came into being polygamy was deep rooted in the society and women shared the attention of their husbands with several other wives and extramarital relations. Women were treated as victims of the offence of adultery as they were often

104 For the purposes of sub- section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under section 497 or section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed, may, with the leave of the Court, make a complaint on his behalf.

105 Olga Thelma Gomes V. Mark Gomes, AIR 1965 Cal 451
106 Dalip Singh V. Rex AIR 1959 Cal 451
107 M’Clarance V. M.Raicheal AIR 1964 Mys 67
108 Munir V. Emperor AIR 1947 Nag 121
starved of love and affection from their husbands and could easily give in to any person who offered it. The provision was therefore made to restrict men from having sexual relations with the wives of other men.

Since then the society has transformed a lot and women are now given equal status with men. As well in the present scenario polygamy is illegal and monogamy is practiced. The object of the making adultery an offence and restricting it to men alone was to deter them from taking advantage of women starved of love and affection. The scope of the offence under the section is limited to adultery committed with a married woman, and the male offender alone has been made liable to be punished with imprisonment which may extend up to five years, or fine or with both. The consent or the willingness of the woman is no excuse to the crime of adultery. 109

But still this part of the section is retained and justified by the courts again and again as in Yusuf Abdul Aziz case 110, Justice Vivian Bose said that exempting women from being punished is in tune with Article 15(3) of The Constitution of India, which allows legislature to make such ‘special provisions’ which are ‘beneficial to women’. This has never been the intention of the constitutional makers to bring in the criminal exemption under the purview of Article15(3) 111.

The assumption that women are incapable of committing adultery is irrational and perverse. This kind of institutional discrimination was strongly repelled by courts in Charu Khanna & Ors. V. Union of India and Ors. 112 When men and women are on equal footing, discrimination against a particular sex would offend Article 14 and 15 of the Constitution of India.

S. 497 suffers from the vies of irrationality, arbitrariness and perversity. This section shows the existence of male chauvinism and the patriarchal society. Earlier women were treated as chattels of men and hence the provision portrays their helpless situation wherein if the husband consents to the intercourse of wife with another man it’s no more an offence of adultery as well as the women cannot register complaint against their husband as this section is confined to a single situation of adultery and generally can be said as an offence against man. Wives of those men committing adultery are also equally aggrieved by the adulterous act. Excluding her from the purview of initiating criminal prosecution has no rhyme or reason. She is situated in the same position as an aggrieved husband whose wife has committed adultery. Such an exclusion is unjust, illegal and arbitrary and violative of Ar. 14, 15 and 21 of Constitution of India.

Sexual intercourse with married women with the consent of her husband is exempted from the ambit of the provision. The essential premise of the provision is that women are property of men and every married women is lookout of her husband. The provision conceives a marriage between woman and man as a master servant relationship.

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109 Gul Mohammad V. Emperor AIR 1947 Nag 121
111 Article 15 (3) Nothing in this article shall prevent the State from making any special provision for women and children.
112 2015(1) SCC 192
The very significant case to be discussed in detail is *Sowmitri Vishnu V. Union of India*\(^{113}\)* whose brief facts were Sowmithri and Vishnu were the wife and husband. Disputes arose between them. She went away from the matrimonial home, and had been living with one Dharma Ebenezer. She filed a divorce petition before the District Judge on the grounds of desertion.

While the proceedings were pending, the husband filed a criminal case under Section 497 against Dharma Ebenezer for adultery with his wife. The trial Court gave the divorce on the ground of desertion. The husband appealed to the High Court contending that the divorce was granted on the ground of desertion but it should be on the ground of adultery.

If the divorce is granted on the ground of adultery, Dharma Ebenezer should have been punished under the offence of adultery. Wife appealed to the Supreme Court challenging the validity of Section 497.

While appreciating the arguments of the petitioner-appellant, the Supreme Court upheld the retention of Section 497. It observed that the Section 497 does not show any discrepancy between male and female. In fact, it protects the wrong-doer-wife, who is also accomplice with adultery. Section 497 clearly exempts the wife. The framers of the Code, and Law Commission observed the social and economical structure of the society and family institution. In our society, when a wife of a person enters into sexual intercourse with a third person, it is a civil death to the husband. Hence this peculiar right is given to the husband. Moreover the Section imposes the liability upon the third person, who has sexual intercourse with another’s wife, not upon the wife. The framers of Code strongly believe that it is the man to seduce the woman, but not woman. If the Section 497 is re-defined the right of action to the third person’s wife, several Sections of the Code shall have to be re-structured. If a married man enters sexual relations with any unmarried girl or widow, there are several other remedies available to the wife of that husband. Section 497 does not infringe the provisions of Articles 14 or 15 of the Constitution. The Supreme Court stating the above dismissed the Writ Petition and also quashed the complaint under Section 497 of the husband, opining that as there was no use to inquire into the matters of adultery, as the trial Court already granted divorce.

The offence of adultery as defined is gender biased not only to men or women but both of them equally. Only men can be punished for this offence and women cannot file complaint against the husband or against his paramour due to legal restrictions. The existing law glorifies gender bias and this is something that women and men find distasteful. Thus there’s the only way they can punish each other is by opting out of the marriage that is by divorce, they cannot prosecute each other because as courts annexed in 1988, *V. Revathi V. Union of India*\(^{114}\), a two-judge Bench, denied gender discrimination in the fact that only the adulterer-man is punished and not the wife who consensually entered into the adulterous relationship.

\(^{113}\) AIR 1985 SC 1618: (1985) Cr LJ 1302

\(^{114}\) AIR 1988 SC 835

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“The community punishes the “outsider” who breaks into the matrimonial home and violates the sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses. The erring man alone can be punished and not the erring woman. It does not arm the two spouses to hit each other with the weapon of criminal law. That is why neither the husband can prosecute the wife and send her to jail nor can the wife prosecute the husband and send him to jail,” Justice M.P. Thakkar wrote.

As well The National Commission for women recommends that adultery should be made merely a civil wrong and the Supreme Court impliedly agrees that husband and a wife should not strike each other with the weapon of criminal law. Making provisions in Penal law to regulate civil contracts and particularly the contract of marriage, which is private and personal, is unwarranted. But the parties to the marriage themselves have ruined its sanctity by having relationship with 3rd person thus when they themselves do not wish to be together in bond of marriage with each other why are courts bound to maintain the sacrosanctity of marriage when both of the parties are consenting adults to the act.

When the law was written 150 years ago, women were seen as an oppressed class in need of protection. But what kind of protection in this which regards them as man’s property? If women can become the Prime Minister and Chief Ministers, why can they be held equally responsible for their actions in the same way men are? Let both the partners to the crime share the blame equally as in the case of Germany, France and Jammu and Kashmir under the Ranbir Penal Code. In this regard the Jammu and Kashmir State Ranbir Penal Code, 1932, Section 497115 is more progressive. It makes the errant wife punishable along with her paramour.

In the year 1971, the 42nd Law Commission Report analyzed various provisions of Indian Penal Code and made several important recommendations. One of them was to remove the exemption provided for women from being prosecuted and to reduce the punishment for the offence from 5 years to 2 years. The Indian Penal Code (Amndment) Bill, 1972 suggested that the special privileges granted to women under M. 497 of the Code be done away with.

In the year 2003, a Committee headed by Justice V. S. Malimath was constituted to consider measures for Bar & Bench revamping the Criminal Justice System. In the report submitted by the Committee, in the Chapter “Offense against Women” under the subhead “Adultery: Section 497 IPC” it is stated: The society abhors marital infidelity. Therefore there is no good reason for not meeting out similar treatment to wife who has sexual intercourse with a married man. The Committee therefore suggests that Section 497 of the I.P.C should be suitably amended to the effect that “whosoever has sexual intercourse with the spouse of any

115 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 a case the wife shall be punished as an abettor.
other person is guilty of adultery”. However, the amendment of the section could not be carried out and the law remains as it was when enacted in 1860.

It is for the legislature to consider whether section 497, IPC should be amended appropriately so as to take note of the transformation which the society has undergone. Both the married man and the woman in a matrimonial wedlock are the sufferers here. The wife cannot be prosecuted for the wrong she committed and on the other hand a wife cannot prosecute her husband for this offence. The misbalance and a narrow minded approach is clearly reflected in the current law on adultery.

The constitutional validity of Section 497 IPC has been challenged many times and is still being heard by the Hon’ble Supreme Court in Joseph shine V. Union of India, this case is still under the consideration of constitutional bench of Supreme Court. Herein a writ petition is filed challenging the constitutional validity of S. 497, IPC and 198(2) CrPC, are prima facie unconstitutional on the ground that it discriminates against men and violates Article 14, 15 and 21 of the Constitution of India.

The entire essence and meaning of this section revolves around come certain facts that –

1) Wife is the property of the husband who does or does not want anyone to trespass into this property. If the husband permits any outsider to encroach upon this property then the offence is not committed. The motive of the section to protect women is sadly recommending that women were and still are weak, have no conscious and mind of their own and thus need men to protect them.

2) The section only punished the man who has had sexual intercourse with the married woman. The sexual intercourse in the case of adultery is an act not amounting to rape and is generally a consensual act by both the partners. This is unjustified both logically and legally as a married woman can take responsibility of her actions and has the knowledge and consequences of her act. It is discriminatory towards the man who took consent of the woman who participated in the sexual act. This section though was thought of as a woman-centric section to protect the helpless and wives who as assumed earlier were influenced very easily however, the current scenario is completely different and now woman can misuse this. This section is offending the very concept of equality as enshrined in Article 14 and 15.

3) Article 21 confers the right to life and personal liberty to every citizen irrespective of their caste, sex, race, religion, place of birth etc and it is pertinent to mention that it applies irrespective to the status of marriage i.e. every wife and every husband has the right to live according to their choices and have the right to take their own decisions. Section 497 restricts a married woman’s liberty to take decision of her body and if the husband consents on her behalf even if she does not consent to the same, she has

116 5 January, 2018. WP(Crl.) 194/17
no remedy. It restricts her personal liberty\textsuperscript{117} of choice and taking independent decisions and leaves her no less than a property of her husband. This indicates that the question of constitutional validity of S.497 does hold some water and can be challenged on the grounds of Article 14, 15 and 21 which weaves and runs as a golden thread to the Constitution of India.

When the sexual intercourse takes place with the consent of both the parties, there is no good reason for excluding one party from the liability. Before being the referred to a larger bench the court was of the opinion that the provision seems quiet archaic and especially when there is societal progress. It was as well annexed that the previous land mark cases like Sowmithri Vishnu, Yusuf Abdul Aziz case etc need to be reconsidered regard being had to societal progression, perceptual shift, gender equality and gender sensitivity.

The criminal law of adultery varies from country to country. It differs according to the religious norms and attitudes of the people and many other factors. The law relating to criminal adultery in United States reveal three major formulations viz. the Common law view; the canon (a law or body of laws of a church); the hybrid view. According to the common law view, adultery takes place only when the woman is married and both husband and wife are liable. Under the canon law, adultery is a voluntary sexual intercourse of a married person with a person other than the offender’s husband or wife and only the married person is held guilty. According to the hybrid rule, followed in twenty states in the United states, if either spouse has sexual intercourse with a third party, both transgressors are guilty of adultery. Finally, eight states held both transgressors guilty, if the woman is married but if the woman is single only the man is guilty. Six states do not punish adultery at all.\textsuperscript{118} Adultery is not a criminal offence in the United Kingdom. It is punishable, though mildly, in some European countries for instance in France where wife guilty of adultery is punished for a period ranging from 3 months to 2 years however the husband may put an end to her sentence by agreeing to take her back. The adulterer is punishable similarly. In Pakistan, adultery is viewed as a heinous offence and both the man and the woman are subjected to punishment which may extend to death sentence.

While keeping in mind the present scenario of 21\textsuperscript{st} century where equality and gender neutrality has been prevalent and also looking at the socio-economic conditions of men and women which are reaching on equal level, it is essential to re-consider towards the amendment of this section and make it gender-neutral and make ‘persons’ liable for their actions per se and not in the capacity of husband or wife. Also since marriage is wedlock of both the spouses which have equal rights and liabilities towards each other therefore both of them should have the right to prosecute the other in case of a wrong which is ‘adultery’.

\textsuperscript{117} Simone Weil, “Liberty, taking the word in its concrete sense consists in the ability to choose”\textsuperscript{118} Law Commission of India, 42\textsuperscript{nd} Report (1971) 323-328
MENS REA: OBJECTIVE AND SUBJECTIVE TEST

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Introduction

Dr. Glanville Williams states\(^{119}\), “Mens rea refers to the mental element required for many crimes. It must not be read in its literal senses requiring moral wrong or dishonest intent or conscious guilt. It means an intent to do the forbidden act (whether you know it is forbidden or not), or (generally) recklessness as to it, intention includes knowledge”.

Mens rea or criminal intent is an essential element of every crime. To constitute any criminal act there must be a faulty mind. It is the combination of an act and an evil intent that differentiates criminal and civil liability. Mens rea is an essential element or ingredient of crime, though a universally accepted principle is not without its limitations. The definition of mens rea differs from case to case.

Concept Analysis

Mens rea means a state of guilty mind or a mental state, in which a person deliberately violates a law. Thus in simple way it is the intention to do any prohibited act. It is the motive force behind the criminal act. Mens rea is the culpable guilty mind. An act itself is no crime, unless it is coupled with an evil / criminal intent. Intent and act, both must concur to constitute a crime. In other words we can say that no one can be convicted of a crime unless their criminal conduct (actus reus) was accompanied by a criminal mental element known as mens rea.

The essence of criminal law has been said to lie in the Latin maxim- "Actus non facit reum nisi mens sit rea", which means the act does not make one guilty unless the mind is also guilty. There can be no crime large or small, without an evil mind. It is not an artificial principle grafted on any particular system of laws, but is a doctrine of universal application based on man’s moral sense. Mens rea is further subdivided into three categories – intent, recklessness, or wilful blindness.

Case laws

To felicitate further understanding and detailed knowledge a combination of foreign and Indian cases are being referred.

**Nathulal vs State Of Madhya Pradesh**\(^{120}\)
In this case the appellant was a dealer in food grains at Dhar in Madhya Pradesh. He was prosecuted in the Court of the Additional District Magistrate, Dhar, for having in stock 2 1/4 seers of wheat and 885 maunds for the purpose of sale without a licence. Thus the appellant committed an offence under S. 7 of the Essential Commodities Act, 1955. In his defence the appellant pleaded that he stored the said grains only after applying for a licence and was in the belief that it would be issued soon and intentionally he didn’t infringe the provisions of the said section. Although he made continuous

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\(^{119}\)Glanville Williams, Text Book of Criminal Law p.49.

\(^{120}\)AIR 1966 SC 43, 1966 CriLJ 71
effort to get the licence for 2 months. The court of Additional District Magistrate, Dhar, acquitted him on the basis of the evidence that there was an absence of guilty mind. The order of acquittal was set aside on appeal by a division bench of the Madhya Pradesh High Court. The appellant was sentenced to rigorous imprisonment for one year and a fine of Rs. 2,000.

Later Nathulal appealed to the Supreme Court. Mr. Pathak, learned counsel for the appellant, mainly contended that mens rea was a necessary ingredient of the offence under Section 7 of the Act. The bona-fide intention of the accused can be well established from the facts of the case. Hence, the appellant was acquitted of the offence.

➤ State of Maharashtra v Mayor Hans George 121
This case is a major exception to the Nathulal vs State Of Madhya Pradesh 122 case, where the same principle was reiterated.

Here, it was questioned whether mens rea was necessary for an offence under the Foreign Exchange Regulation Act. As according to a notification which was given out by the Reserve bank of India on 24th November 1962, it was mandatory to disclose all the information about valuables that were carried by passengers on the flights in the territory of India. This was particularly a measure to try and control the illegal smuggling of valuables across borders through air travel. On 27th November 1962 George was on a flight from Zurich to Manila. The flight landed in Mumbai, it being one of the in-transit destinations. The customs officials in India had certain information about the attempt to smuggle gold by the respondent. Since it was noted that he didn’t get off to the airport lounge, customs inspector entered the plane and saw him seated in the flight itself. On his inspection, they found that from 19 compartments, out of the 28 compartments in total, 34 blocks of gold. For the violation of sections 8, 24 and 23(1A) of the Foreign Exchange Regulation Act, the respondent was prosecuted. It was contended by the respondent, before the magistrate that he was not aware about the change in policies with the notification published by the Reserve bank on 24th November and his means illegal under the same. Indirectly, he tried to convince the court that mens rea was a necessary element for the particular offence that he was charged with. The magistrate, however, rejected the defence put forth by the respondent and he was sentenced for imprisonment of one year. It was discussed by the Supreme court that the actions of the respondent were conscious acts itself, need no more proof for the presence of guilty mind.

➤ The Queen v. Tolson 123

Decided in 1889, it dealt with the disappearance of the husband, in the year 1881, a year after getting married. Till 1885, wife had no information about her husband, except for the fact that he was last seen on a ship, which was later believed to have met with an accident. It took a lot of efforts for the wife to find

121 AIR 1965 SC 722
122 AIR 1966 SC 43, 1966 CriLJ 71
123 (1889) 23 Q.B.D. 168
even this little piece of information, and since she could find nothing else, she gave up and considered that her husband was dead. She gets remarried in 1885, while in 1886, her husband returns. The person, to whom the wife had remarried, knew well about everything that had happened, an indicative that she did not have any malicious intention in mind. The court held the wife liable for bigamy, not giving due importance to all the efforts she put in to find out about the husband before actually marrying anyone else.

R v Moloney\textsuperscript{124}

In this case the defendant and his stepfather in a dinner party drank a large quantity of alcohol. Later on they had a discussion about fireman, and decided to have a shooting contest to see who can load and fire a shotgun faster. The defendant won, and was challenged by his stepfather to fire a live bullet. In the drunken state the defendant was not aware of the fact that the gun aimed at the stepfather and instantly killed his stepfather. The defendant was charged with murder and convicted. The trial judge directed the jury that the defendant had the necessary mens rea for murder if he foresaw death or real serious injury as a probable consequence of his actions, even if he did not desire it; and he was convicted. On appeal the House of Lords substituted a verdict of manslaughter and quashed the murder conviction, as there was no intentionally killing sufficient mens rea for murder.

Kartar Singh v State of Punjab\textsuperscript{125}

In this case, the appellant along with two others were charged under ss. 302\textsuperscript{126} and 307\textsuperscript{127} read with s. 149\textsuperscript{128} of the Indian Penal Code. The prosecution case against them was that they along with ten others had taken part in a free fight resulting in

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\textsuperscript{125}1994 (3) SCC 569
\textsuperscript{126}Punishment for murder. —Whoever commits murder shall be punished with death, or 1\textsuperscript{imprisonment for life}, and shall also be liable to fine.
\textsuperscript{127}307. Attempt to murder.—Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to 1\textsuperscript{imprisonment for life}, or to such punishment as is hereinbefore mentioned. Attempts by life convicts.—2\textsuperscript{[When any person offending under this section is under sentence of 1\textsuperscript{imprisonment for life}, he may, if hurt is caused, be punished with death.}
\textsuperscript{128}149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.—If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.}

\textsuperscript{124}[1985] 1 AC 905
the death of one belonging to the other side. The Sessions judge held that the accused was present at the time of incident along with nine or ten people but couldn’t recognise who they were. Therefore, given the benefit of the doubt and hence acquitted them. The High Court on appeal affirmed that decision. On the behalf of the appellant it was urged in the Court that there was no offence of unlawful assembly. The appellant present at the time of the incident had no malicious intention and in a free fight each participant was liable for his own act. The conviction of the appellant, who had caused no injury to the deceased, was untenable under ss. 302 and 307 of the Indian Penal Code. Held that the contentions must fail.

Critical analysis

➢ Nathulal vs State Of Madhya Pradesh

The issues which were raised in this case were that will it amount to an offence even if there was no mens rea on the appellant part but only factual non-compliance of Section 7. A person can be convicted of a crime if there’s a presence of both criminal mental intent (mens rea) and criminal conduct (actus reus). On the basis of the present facts, mens rea, which is an integral part of the definition of crime, is absent. Hence, he cannot be held liable. The second issue was that can we eliminate the element of guilty mind from an offence just to fulfil the main objective of statute i.e. to promote trade welfare activities. The Supreme Court invariably ruled that mens rea would be a necessary ingredient of crime unless it is either expressly or by necessary implication, ruled out. It is implied from the statute that the element of guilty mind can be excluded where it is absolutely clear that the act is done for public welfare. The doctrine of mens rea would be applied with great vigour in those cases which carry corporal punishment of severe nature. A person would commit an offence under Section 7 of the Act if he intentionally contravenes any order made under Section 3 of the Act. So construed the object of the

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129 AIR 1966 SC 43, 1966 CriLJ 71
130 The Essential Commodities Act, 1955
132 (1) If any person contravenes any order made under section 3, —
   (a) he shall be punishable,—
   (b) in the case of an order made with reference to clause (h) or clause (i) of sub-section (2) of that section, with imprisonment for a term which may extend to one year and shall also be liable to fine, and
   (ii) in the case of any other order, with imprisonment for a term which shall not be less than three months but which may extend to seven years and shall also be liable to fine:
133 The Madhya Pradesh food grains dealers licensing order ,1958

Section 3: (1) No person shall carry on business as a dealer except under and in accordance with the terms and conditions of a licence issued in the behalf by the licensing authority.
Act will be best served and innocent persons will also be protected from harassment.\textsuperscript{134} For any criminal offence mens rea can be considered as an essential element. We cannot eliminate the element of mens rea from any offence by the mere fact that the statute is to eradicate grave social evil and for general public interest. In \textit{Srinivas Mall Bairoliya &Another v Emperor} \textsuperscript{135} the Privy Council observed that the element of mens rea cannot be excluded from any offence just for the sake of public welfare. If in any case mental element of any conduct alleged to be a crime is absent in that case it can be said that the crime so defined is not committed. Hence it can be presumed from the above facts that guilty mind is a vital ingredient of any statutory offence unless it is expressly or by necessary implications excluded.

Secondly, according to the subjective test of mens rea, the court must be satisfied at the time of commission of any act the accused actually had the requisite mental element present in his or her mind at the relevant time. In the present case the act of the appellant doesn’t follow the subjective test of mens rea as it was proved that he did the trade activity with the bonafide intention.

\textbullet\textsuperscript{ } \textit{State of Maharashtra v. M. Hans George}\textsuperscript{136}

On the basis of the facts, the appellant can be said blameworthy as had the actual knowledge that he possesses illegal drugs still he carried out the proscribed conduct. The evil intent which was present by smuggling the drugs through unauthorized and informal ways expressly contributes towards the commission of the crime. Although he wasn’t aware of the laws prevalent in India still he will be held liable because ignorance of the law is not an excuse (Ignorantia legis neminem excusat). A person cannot escape from any liability for infringing any law merely because he or she was unaware of a law.

Also as per the levels of mens rea (intention, knowledge, recklessness and negligence) it can be proved that he had a wrongful intention and full knowledge that he is carrying illegal drug and can be held liable for his wrongful act. As per the objective test of mens rea, it can be said that the requisite \textit{mens rea} element was imputed to the accused, on the basis that a reasonable person would have had the same mental element in doing the wrongful act of smuggling.

\textbullet\textsuperscript{ } \textit{Queen v. Tolson}\textsuperscript{137} In this case the wife had an honest belief that her husband is dead. The decision which was taken by her to get married again was done with a bonafide intention. She didn’t have any guilty mind. Hence, negates the element of mens rea. Also it can be considered as a good defence to the charge of bigamy. Considering another case, \textit{R v Wheat and Stocks} \textsuperscript{138}, where a man with

\textsuperscript{134}https://www.academia.edu/29747036/CASE_COMMENT_on_NATHULAL_v_STATE_OF_MADHYA_PRADESH_1966_Cri_LJ_71
\textsuperscript{135}AIR 1966 SC44
\textsuperscript{136}1965 AIR 722
\textsuperscript{137}23 Q.B.D. 168, 172 (1889)
\textsuperscript{138}1921 2 King's Bench 119
low, relatively negligible educational foundation filed a divorce case. Since he wanted to marry another woman. He went to the solicitor and clarified his case. After a couple of days when he visited his legal advisor’s place, there he was asked to sign certain papers, which he considered were the legal documents, however they truly weren't. In the belief that divorce has been granted, he got married to another woman. He was held liable for committing the offence of bigamy. Although he believed in good faith that documents he signed were divorce documents and he had no bad intention or guilty mind.

The two cases, i.e. Tolson’s case and Wheat & Stocks case are quite distinct from each other. In former it was mistake of fact and in later was mistake of law. The mistake of fact can be taken as a defence in any offence but mistake of law cannot be taken as a defence. Hence, Wheat was held guilty because of the mistake of law.

Talking about the Indian Law, no such defence on reasonable grounds and in good belief is available. For example in the case of Siraj Mian v. A. Majid139 where an accused married with another woman in the belief that his first marriage has been dissolved by divorce deed. Though he did the second marriage in the bonafide belief, he was held liable for bigamy.

Later on, the relation between mens rea and bigamy was defined in the case, Sankaran Sukumaran v Krishnan Saraswati140, where Kerala High Court came to the conclusion that mens rea i.e. guilty mind is an essential element of the offence under section 494141 of the Indian Penal Code.

R v Moloney142
The foundation of Mens rea, is based on the assumption that a person has the capacity to control his conduct. In the present case the accused committed the crime in a drunken state i.e. he was not in his senses. He didn’t have any control on his mind during the commission of the crime. The Particular form of subjective mens rea includes intention, knowledge and recklessness. In the present case the appellant didn’t have any bad intention. It is the intent to cause death, in the absence of intention no act can be committed. Since the appellant had no intention to kill his stepfather, so we can say that he didn’t commit the offence of murder.

If seen from the subjective test of mens rea, the accused never had the requisite mental element present in his or her mind at the relevant time for purposely, knowingly killing his stepfather. Hence, he was not charged for the offence of murder.

Kartar Singh v State of Punjab143
In the present case, the individuals who were involved in the fight never had any common

139 1953 CrLR 1504.
140 1984 CriJL 317
141 S 494 of IPC- Marrying again during lifetime of husband or wife.—Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
142 [1985] 1 AC 905
143 1994 (3) SCC 569
intention. Kartar Singh and his two other friends didn't have any malicious intention. Hence, it can be said that there was no mens rea on their part. For the commission of any crime the two requisites i.e. criminal act (actus reus) and criminal mind (mens rea) should be present. The element of mens rea was absent in this case.

Secondly, they were charged on the grounds of unlawful assembly. Under the Indian Penal Code, unlawful assembly can be defined as an assembly of five or more individuals having a common intention for the commission of any crime or doing any lawful act through unlawful means so as to hamper the tranquillity and peace of the surrounding. In the present case the persons involved in the incident were less than five. Hence cannot be said that there was unlawful assembly.

Conclusion
To define any particular crime, under common law or in statute, the elements of actus reus and mens rea are necessary for the offence. From the perspective of Indian law, all people are presumed innocent until proven guilty. There are certain presumptions which a Court takes into account while interpreting the statutes. One of the relevant presumptions is that generally a criminal act requires the presence of some blameworthy state of mind i.e. mens rea. Most of the crimes independent of any statute require a blameworthy state of mind on the part of the actor. In other words, we can say that no crime can be committed unless there is mens rea.

Today, the kinds of offences are multiplied by various regulations and orders to such an extent that that it is difficult for most of the law abiding subjects to avoid offending against the law at all times. Some law, out of many, could be violated by chance without a guilty intention at some point of time. In these circumstances, it seems to be more important than ever to adhere to this principle. But, there is more to it. In the past, it also seemed that the importance of this presumption of mens rea was declining in importance. Cases of Ranjit D Udeshi v State of Maharashtra 144 and State of Maharashtra vs M H George145 are some important examples where the exception to the presumption requiring mens rea has been applied. In these cases without the element of mens rea on the part of the accused, punishment was given for statutory offences. The element of mens Rea was eliminated because the matter was linked with public welfare and national interest.

To conclude it can be said that rules in court regarding how and where to use the presumption requiring mens Rea have been developing since quite a long time. Various Courts have framed various rules regarding the application of presumption in statutory offences and in normal cases. Although the conflicts of thoughts do appear whether to apply it or not. As in the case of Nathu Lal vs State of Madhya Pradesh146 the court said that “Mens rea is an essential ingredient of a criminal offence unless the statute by necessary implications or by expressed statutes excludes it”.

Every offence defined In Indian Penal laws and in any others, includes evil intent, so...

144 1965 AIR 881, 1965 SCR (1) 65
146 AIR 1966 SC 43, 1966 CriLJ 71
mens rea can be considered as an essence of any offence. It is the state of mind which gives the meaning to any act. The law needs to be changed and the mental intention element needs to be explicitly mentioned in the laws so as the court to not get confused and commit as it had committed in the past.

Hence, through the means of analysis of various pronouncements, we come to a conclusion that mens Rea is one of the most important element for the commission of a crime.

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LIFTING THE CORPORATE VEIL: A HISTORICAL AND JURISPRUDENTIAL ANALYSIS

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ABSTRACT
This paper primarily deals with the doctrine of corporate veil, and the circumstances within which it can be lifted or pierced. The paper also briefly discusses the development of the company law, and how this doctrine came into being in the first place in the English Law. Furthermore, it also discusses how the courts arrived at the conclusion that this veil ought not to be permanent in nature, and instead, must be scrutinised by law in order to determine whether such a principle is being wrongfully exploited. It discusses the evolution of this principle from the sixteenth century till the present day. Additionally, it focuses on landmark judgments and their impact on the decisions, principles and framework in today’s company law. It also maps the development of this principle, its jurisprudence and critique across several nations to analyse its overall impact.

KEYWORDS: Corporate veil, lifting, precedents, company law, impact.

1. INTRODUCTION
One of the most essential principles of company law - “The Principle of Separate Legal Personality”, has been developed over centuries to create a distinction between a person or a group of people, and the company that they are a part of. The process of forming it is called “incorporation”, which grants it the identity of its own. This is a feature unique to this business model. Therefore, in the eyes of law, a company is separate from its members (in India, any company incorporated under the Companies Act 2013, or any other preceding act of such nature, is a company). It incurs separate liabilities, assets, profits etc. Therefore, it is like an individual with a separate identity of its own in the eyes of law, but not a ‘natural person’. Therefore the law recognises the fact that it cannot commit crimes as it has no mens rea, neither can it commit torts, vote, hold a public office etc. which only a natural person born in this world can.

The principle of a corporation being a separate legal entity was legally established in the case of Salomon v. Salomon & Co Ltd., wherein the House of Lords overturned the decision of the Court of Appeal stating that the company had been duly incorporated, and thus, Mr. Solomon was distinct from his company, even though he was the majority shareholder of the company, the other shareholders were his family members. Despite observing this fact, the House of Lords held that the company’s identity was separate from that of Mr. Solomon, and thus, he could not be treated as though he was equivalent to the company, and could not be held liable to the creditors. Thus, the court, in its reasoning, introduced the concept of a ‘corporate veil’, or a

149 UKHL 1, AC 22.
distinction that separates the identity of a company from its shareholders, and Lord Halsbury stated that the company should be treated like an independent person with rights and liabilities. Therefore, this set a precedent for all the cases to come after 1897.150

However, this judgment received a lot of criticism for reasons that shall be discussed later in this paper. Nonetheless, it created a debate of whether a corporate body which had no mind of its own, and was merely a mechanism to execute the will of its owners/promoters/shareholders, could be exempted from the actions of such aforementioned persons, or vice versa. This debate has evoked an argument of whether a company with a separate legal personality could be equated with its owners. The “fraud exception” in which such a veil can be lifted or “pierced”, has been deliberated upon. However, it’s a tightrope walk that has been a point of deliberation and conflict for several jurists, as observed in one of Creasey v. Breachwood Motors Ltd.151 where the veil was lifted because it was presumed that it would be necessary to lift the veil, but caused a conflict in the opinion of several jurists as to whether justice had been delivered or not.152

The notion of the veil is abstract, and is therefore highly volatile, subject to its use. To understand whether the veil is to be pierced, it is essential to understand the reason behind the formation of the corporation itself. There have been several case laws, which discuss whether such a distinction between a person and his corporation, the natural and the legal or artificial person, exists in the first place. To understand the logic behind the institution of this principle, it is essential to understand its history.

2. HISTORY OF THE CONCEPT OF A CORPORATE VEIL

To understand the distinction between a company and its shareholders, it is essential to understand the difference between a natural person and an ‘artificial’ person, and why the need to incorporate an artificial person and recognize it by law existed in the first place.

2.1. ORIGIN OF AN ARTIFICIAL PERSON

The corporate origins have been traced back to primitive and ancient times. Often, ‘ties’ were used to refer to bonds that formed between human beings. This included blood relations majorly. However, over time, such relationships came to be equated with bonds formed not because of consanguinity, but because of mutual associations. Primitive persons were occasionally allowed into kinship associations. Other bonds of different sorts led to the formation of bonds outside of kins, leading to the formation of artificially connected groups. Although Henry Maine, in his book- “Ancient Law”153 perceived these corporate groups to be congruent to kinships, the juristic personalities we call “companies” today, are far from that juristic perception.

150 Jane Bourne, Lifting the Corporate Veil, 10 JUTA’S BUS. L. 114, 116 (2002).
These bonds grew slowly and eventually, and acquired a professional aspect to them. It evolved from more basic forms of associations, like partnerships, to joint stock companies. Companies were perhaps first formulated in their identifiable form in Italy before the 14th Century, by people who aimed at defraying the requisite expenses for conquering Greek islands. The (i) holders of 100 lire shares were provided dominium utile, or absolute dominion or (ii) ownership. From Italy, this system spread to France, England, and Netherlands, after (iii) which it spread through trade routes and colonization.\(^{154}\)

2.2. **IDENTITY AS A SEPARATE LEGAL PERSONALITY**

Until 6th century, the term “person” only denoted a man, or a natural person. However, after that, it became associated with any entity which had acquired any rights or liabilities. Thereafter, as law identified “natural” as well as “artificial” (i) persons, both of which had rights and (ii) duties, widening the definition of “person” (iii) or “personality” with respect to legal (iv) connotations. In simple terms, it is the identity of a formal organization as a whole, metaphorically analogised with a natural person.

Salmond has presented his observation, stating that law, in creating a legal entity, always personifies something real. Therefore, the attributes contained by an artificial person are often associated with the real rights and duties vested in beings, as attributed by law.\(^{155}\) Therefore, corporations came to be identified as artificial persons with a separate legal personality. This concept became conventional through its Anglican adaptation, which had primarily been borrowed from the Romans. It developed over a period and recognised that-Corporations and its members are separate entities.

Their properties were separate from each other; and
Neither of the properties were sizeable for the repayment of the debt of the other.

It developed primarily from trade and craft guilds that were recognized by charters from town authorities as corporations. The identity of such guilds as “separate legal personalities” came to be recognised as consisting of the following rights that became their identity by virtue of the Royal Charter of 1567.\(^{156}\)

A body corporate
Political in perpetuity
Empowered to plead and implead
Hold/receive/dispose lands, herediments etc.

Therefore, these guilds were created as per a framework that eventually led to the formation of the modern corporations. In the aforementioned characteristics it is clearly observed that firstly, the guild had a power to initiate proceedings in its own name; secondly, to exist in perpetuity irrespective of its members’ life-span, unlike business models like a partnership, which is renewed every time a member


\(^{156}\) *Supra* note 7.
dies/leaves; and lastly, it could hold resources in its own name, differing from what its members owned.

The identity of a body corporate is separated from its members by the virtue of the very fact that it differs in terms of its “life-span”, its lack of self-reasoning capacity, but most importantly, due to its affiliation of ownership with multiple people. Therefore, its personality is not congruous to its members. But how can an inanimate entity have any rights?

Salmond and Gray have offered their jurisprudential analysis with respect to the same. According to Salmond, anything that can have its interests hindered upon by the acts of others, has a right. Similarly, anything that can act in a manner which may affect the interests of others, has a duty. Clearly, corporations fall within the ambit of this definition. Gray, on the other hand, correlates any “interest”, “duty” or “action” with legal attribution, without which a right cannot exist. Once these rights, such as to sue and be sued, have a will and a name, capacity to contract and employ personnel etc. is acquired, by virtue of the ascribed interests, it can be deemed to be a legal personality, as stated by Justice Brown in Tucker v. Alexandroff. Despite being an abstract entity, it thus assumes a separate legal identity of its own.

3. Implications of a Separate Legal Identity

The principle of a company being a separate legal entity is one of the most essential principles of company law, and is perhaps one of the oldest principles as well. But what are the implications of this principle being in place? To understand that, what exactly is implied by this is a subject matter that must be dealt with in detail.

In simple terms, it embodies the rights and duties of a natural person in a manner that allows collective membership and ownership. Firstly, it provides the company with the right to freedom of speech and expression, as provided under Art. 10 of the European Convention on Human Rights. However, a company cannot defame a person, as it does not express for itself, and any such expression or speech comes from its members. Therefore, a member of the company can be sued for defamation, but not the company itself. However, a company can sue for defamation, including criminal defamation in India. However, the question of the statements made to and by the representatives of the company still pose a conflicting ground. In such cases, if the statements are made with respect to the organisation, it has the right to seek damages on behalf of the entire corporation. A joint stock company also has the right to sue for defamation, even if the person defaming them is their shareholder, who has published

159 183 U.S. 424 (1902).
161 PriyaParameshwaran Pillai v. Union of India and Ors., WP(C) 774/2015 (India).
an article alleging mismanagement, and impropriety in carrying out affairs, which consequentially led to the fall in its share prices. Additionally, in India, Section 499 of the Indian Penal Code, in its explanation states that making false imputations against a company or an association does amount to defamation. However, since a company does not have a mensrea of itself, it cannot defame someone, and any such statement made is deemed to be made in an individual capacity. Each shareholder gets one vote per share. Therefore, multiple owners have multiple interests, and thus, they cannot be held accountable individually for the acts of one or a specific few.

Furthermore, another distinction arises between the rights and duties of a company and its members. Its revenues, assets, liabilities, taxes, etc. shall be distinct from its owners. The company may choose to distribute dividends from its profits or reserves, but the profits shall not be attributed to a person. The liability of the shareholders is limited up to the value of investment in that particular company, or, if they have guaranteed a sum in case a liability arises, their liability would extend to that sum. In such a case, the floating charge cannot extend to the personal assets of such shareholders, such as the case may be in partnerships and sole proprietorship, wherein the liability is unlimited.

The identity of a company cannot be associated with one person, as it exists in perpetuity. It remains in existence until it is officially wound up, or the purpose for which it was incorporated is fulfilled. New shareholders acquire the shares and the rights of the transferor. Therefore, its shares and organisational positions keep getting transferred. Thus, the members may change, but the company stays in perpetuity. Therefore, the identity of the company in its entirety becomes different from its shareholders, and even promotes and directors. Although the hoi polloi might associate the company with its chairman or CEO, in the eyes of the law, there is a distinction, a corporate veil drawn between them which results in all the aforementioned distinctions.

4. LIFTING THE CORPORATE VEIL
We have discussed how the rights and liabilities, and the legal identity of a company is distinct from that of its members. We have also discussed how a company has no mensrea of its own, and thus is operating on the will of the persons exercising actions and making decisions and statements in its name. Therefore, the acts of the members become the acts of the company. Occasionally, this forces the courts to ‘lift’ or ‘pierce’ the veil in order to hold the persons accountable, although it may prima facie appear to be an act of the

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company. This equating of rights and duties of a company with the rights and duties of its members, is known as lifting or piercing the corporate veil.

The question arises, when should the corporate veil be lifted? This has been an interesting, albeit controversial question of law that has been answered differently through various case laws and juristic publications across the world. Some were so against the haphazard applications and interpretations of the Solomon case, that they advocated the principle itself to be abrogated through legislation. Professor Kahn-Freund was one of such proponents, who called the Solomon case “calamitous”. Therefore, it was felt that there needed to be specific criteria in case a veil was needed to be lifted, to introduce some objectivity to the principle, instead of its arbitrary application.

The objective was to formulate a method with which justice can be promoted and frauds which use the corporate veil as a shield, can be curbed. Some universal grounds that can be evoked to lift the corporate veil are as follows-

(a) Fraud/inappropriate conduct-
This ground can be evoked if it is shown that the veil is merely being used to prevent a fraud from being exposed, and is deceiving the people that the company is dealing with, causing grave injustice to them and skirting laws in the name of a separate legal identity. In Jones v. Lipman a man entered a contract to transfer his property, but later, upon changing his mind transferred it to a company. Here, the court held that Mr.Lipman was merely using the veil to avoid the performance of said contract, and could not use the corporate veil to evade his responsibility.

(b) Enemy Character-
In cases where a country as at war with another, it is in the best interests of the companies and the nation to not enter into business-relations with corporations from the other nation in question. For instance, in Daimler Co.Ltd V. Mainland Tire And Rubber Co. Ltd a company in UK with a German shareholding majority, was held as an enemy organisation in World War I due to the nationality of the persons holding the shares and the control of the corporation. This was because the persons in authority, and a majority of the shareholders were German, and since Britain was at war with Germany, the House of Lords, upon overruling the decision made by the Court of Appeal, held that the character and actions of the company were susceptible to acquire an enemy character.

(c) Intention behind formation of a company-
The courts can analyse the intention with which the company was formed in the first place. If it was sincerely to conduct business, and from observing its business, it appears that it did engage in genuine transactions and carrying out regular activities, the doctrine of corporate veil remains in place. But if it engages in suspicious behaviour catering to the ulterior motives of its directors or shareholders, the court can hold them

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169 [1939]4 All ER 116.

accountable for their actions by lifting the veil.

5. Development through cases

While the US law has remained consistent, mostly, with regards to this question, the rest of the common law countries, especially in the UK, the principle of lifting or piercing the veil has met with starkly contrasting opinions and judgments.\(^{171}\)

5.1. Common law cases

It began with the Salomon case, in 1897,\(^{172}\) after which, some criticised it thoroughly, while others stood in its support. But this principle could not withstand the staunch stance of the House of Lords with respect to separating the identities of the company and its members. House of Lords remained true to its verdict in the Salomon case. However, eventually, there was a wave of cases wherein the courts lifted the corporate veil. Most of these cases were decided in the first half of the 20\(^{th}\) century, and dealt with companies with multiple shareholders. They included Rainham Chemical Works Ltd v. Belvedere Fish Guano Co.,\(^{173}\) Athorpe v. Peter Schoenholfen Brewing,\(^{174}\) Gilford Motor v. Horne,\(^{175}\) etc. It was a period of experimentation that lasted till the Second World War, and failed to provide any specific grounds for the application of the principle in the future.

In 1939, the Smith Stone & Knight Ltd v. Birmingham Corporation\(^{176}\) case introduced six factors to be taken into account by a court in order to determine if the corporate veil should be lifted or not. In this case, a subsidiary company operated on a land owned by the parent company. Birmingham Corporation issued a compulsory purchase order for the land, and all companies which owned a part of the land would be compensated for it. Birmingham Corporation argued that the subsidiary couldn’t claim compensation as it did not own the land. But the court held that the subsidiary was an agent of the parent company, and therefore, was entitled to be compensated. This company-agency theory was thus validated by law. The principles laid down were as follows-

1. The subsidiary’s profits must be treated like the profits of the parent company;
2. The persons operating the subsidiary company must be appointed by the parent company;
3. There must be no transfer of ownership to the subsidiary company;
4. The holding company must have the authority and decision making power, especially with regards to the company’s capital;
5. The holding company’s direction, management and skill must be the reason behind the profits; and
6. The holding company must be in effective and perpetual control.

However, these principles weren’t essentially used as benchmarks of decision making as observed in Jones v. Lipman\(^{177}\) and In re FG (Films) Ltd.\(^{178}\)


\(^{172}\) Supra, note 2.

\(^{173}\) [1921] 2 A.C. 465 (H.L.).

\(^{174}\) [1899] 15 T.L.R. 245.

\(^{175}\) [1933] Ch. at 943.

\(^{176}\) Supra note 22.

\(^{177}\) [1962] 1 WLR 832.

\(^{178}\) [1953] 1 WLR 483.
sightly different scenario in *Creasey v. Breachwood Motors Ltd.* 179 an ex-employee sought justice for his wrongful termination, and decided to sue Breachwood Welwyn Ltd. To avoid this claim, the manager, Creasey transferred the assets of this company to a new company called Breachwood Motors Ltd. The old company was wound up, and the claimant impeded the substitution of the newly formed company. The court held that since the new company was formed with the intent to avoid the suit, it could be substituted and be made a party to the suit. However, only a dishonest act is not a ground for lifting the veil. As held in *Dadourian Group v. Simms,* 180 contracting company’s controller and co-owner misrepresented himself as an intermediary. Hence, although they were held liable for deceit, it was held that mere fraudulent activity is not a justification of piercing the veil.

Post World War II, this principle was used frequently, and the courts often held it, keeping in mind the Solomon judgment, but also peeling off the mask to hold the perpetrators responsible depending on the facts and circumstances of each case. 181 This era of flexibility is often termed to be the Golden Era of the English corporate veil doctrine. Thereafter, judges have judiciously incorporated this doctrine, and have continued to do so up until the present times. For instance, in *Beckett Investment Management Group v. Hall* 182 and in *Stone & Rolls v. Moore Stephens* the sole shareholder and director of a company defrauded huge sums of money from banks as a part of a fraudulent scheme, after which, when being liquidated, charges were brought against him for professional negligence. The question was whether the culpable intentions could be attributed to the company as well, considering there was only one shareholder. The House of Lords held that the veil needed to be lifted, as the person used the company for his fraudulent schemes, and could not make any claims against the auditors. 183 There have been several more substantial developments in the recent times. In the case of *Ben Hashem v. Al Sharif* 184 the following six principles were laid down so as to determine when the veil was to be lifted:

Ownership or control of a company weren’t grounds to lift the veil.

The veil can only be pierced in case of impropriety.

This impropriety must be with respect to the usage of the company to avoid or conceal liability.

To pierce the veil, the company must be controlled by the wrongdoers, and the impropriety must be the usage of the company to conceal their wrongdoing.

Even if the original intent of forming the company was not fraudulent, if the transactions or acts in question were done with an unlawful purpose, it is a ground for lifting the veil.

The court cannot lift the veil merely because it believes it to be in the interest

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180 [2006] EWHC 2973.
182 [2007] EWCA (Civ) 613.
of justice, even in the absence of third party interests in the company. There is a far more judicious interpretation of this principle in the modern juristic sphere, including several judgements that have established strong precedents for the future jurists to rely on, because of which the decisions are comparatively less contentious, and prevent any schemes attempting to defraud the institution of a company.

5.2. Indian case laws

Indian courts too have developed this principle in their own way over the decades where company law has flourished. In Tata Engineering Locomotive Co. Ltd v. State of Bihar & Ors 185 the Supreme Court held that a company has a separate legal identity, and is equal to a natural person (except for a few cases). It acknowledged the principle that differentiated between a company and its shareholders, and that the shareholders were only liable up to the amount they’d invested in the company, or the amount guaranteed by them.

In Life Insurance Corporation of India v. Escorts Limited and Ors. 186 The Supreme Court laid down two grounds of lifting of the corporate veil-

(i) If there is a judicial ground available.
(ii) Wherein a statutory provision provides for it.

Judicial grounds are the aforementioned common grounds used internationally to lift the veil. Some of the statutory grounds unique to India are-

(a) Failure to refund application money as per Section 39 of The Indian Companies Act, 2013-

If the company fails to refund the application money within 30 days from the date of the issue of the prospectus, they are bound to reimburse it jointly and severally. Such refund must legally occur either within 30 days or any other period of time specified by the Securities and Exchange Board. 187

(b) Misrepresentation in the prospectus issued as per Section 34 and 35 of The Indian Companies Act, 2013–

In case the prospectus issued contains any statements which may lead the society to believe something that is untrue, such misrepresentation would lead to every person who authorised the issuance of such a prospectus in addition to all the directors and promoters being personally liable to all the persons who subscribed the shares believing the statements to be true. 188

(c) Liability for fraudulent conduct as per Section 339 of The Indian Companies Act, 2013–

As per this provision, if it is found while winding up the company, that it had been a part of any fraudulent schemes targeted at defrauding the creditors, or any other people, the liquidator may submit an application to the tribunal with regards to informing it of such acts and initiating legal action against them. Thereafter, the tribunal may inquire the director, manager, promoter or the liquidator, and upon

185 AIR 1965 SC 40.
186 (1986) 1 SCC 264.
188 Supra note 37.
procuring sufficient information, may direct such a person to repay or restore the sum or property due, with any interest amount that it may deem reasonable and necessary.\textsuperscript{189}

(d) Incorrect usage of the company’s name
A company’s name is approved under Section 4 and printed under section 12 of the Companies Act. If a company’s representative signs on behalf of the company, furnishing incorrect particulars, then he or she will be held liable personally.\textsuperscript{190}

(e) Reduction in number of members as under Section 3A
In case the number of members of a company is reduced, and the total number of members falls below the requisite number (7 in case of a public company, and 2 in case of a private company) every person who remains a member after such a reduction and carries out business for more than half a year, they shall be jointly and severally liable to pay the whole of the company’s debts at the time.\textsuperscript{191}

Indian case laws with respect to parent and agent companies include \textit{State of UP v. Renusagar Power Company}\textsuperscript{192} wherein the Supreme Court lifted the corporate veil and held that Hindalco being the parent company was entitled to the Power Plant of Renusagar. In \textit{LIC of India v. Escorts Ltd.}\textsuperscript{192} the court held that the veil should be lifted when the parent and the agent company are intrinsically connected.

Some of the recent cases include \textit{Kapila Hingorani v. State Of Bihar}\textsuperscript{194} which held that the corporate veil that created a distinction between a corporation and the shareholders could be lifted, if it was found that it was “opposed to justice, convenience and interest of the revenue or workman or against public interest”. In fact, the doctrine of corporate veil developed much more after the Bhopal Gas tragedy, and has been growing ever since. The courts have also adopted new methods to unearth the exploitation of the corporate veil, by way of tax assessment. In the case of \textit{Vodafone International Holding B.V. v. Union of India}\textsuperscript{195} the company challenged the show cause notice by the revenue authorities. The notice was with respect to the indirect transfer of 67% of the shares of Hutchinson-Essar upon the purchase of 100% of the shares of another offshore company. This transaction required a capital gain tax of ₹12,000 crores to be paid. However, all the companies involved were incorporated abroad, and thus, Vodafone argued that the Indian Revenue Authorities had no jurisdiction over the transactions. However, Hutchinson-Essar is an Indian entity, and the aspect of multiple parties being involved was brushed aside, which is why such an elaborate and large-scale lifting of the veil took place. Bombay High Court upheld the lifting of the veil on the grounds that the transfer of shares of an Indian entity to a company incorporated abroad, amounted to a transfer of controlling stake. But the Supreme Court

\textsuperscript{189} Ibid.
\textsuperscript{190} Ibid.
\textsuperscript{191} Ibid.
\textsuperscript{192} AIR 1988 SC 1737.
\textsuperscript{193} AIR 1986 SC 1370.
\textsuperscript{194} 2003 Supp(1) SCR 175.
\textsuperscript{195} (2012) 6 SCC 613.

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overturned the judgement and ruled in favour of the company. It held that it was a common practice for foreign investors to enter India through foreign holding companies, which is a lawful practice recognised by securities, corporate as well as tax laws. This judgement was a huge relief to the foreign entities investing in Indian markets. However, a careful balance must be established to ensure that this precedent is not used as a shield by corporations to protect themselves from reasonable scrutiny and even legal action. The principle that the corporate veil could be lifted by the adjudicating authorities to determine culpability was established earlier in 1988, in Santanu Ray v. Union of India196 wherein the court lifted the veil to hold a director of the company liable for the violation of Section 11(a) of the Central Excises Act, 1944, 197 and for evasion of the excise duty by fraud, concealment or willful misrepresentation of facts. Therefore, it was laid down by the court that in order to lift the veil, it must be determined whether the company was acting as an agent of the managerial personnel or shareholders of the company to indulge in an illegal act.

With these judgements, the Indian judiciary explicated that with the privileges of being a member of a company, there is a corporate responsibility on them. Any of the impugned acts of the company must not be to a disadvantage of the creditors, shareholders, or any other third parties. At the same time, it is to be ensured that there is no excessive judicial intervention to the disadvantage of an independent market.

6. Conclusion

Company law isn’t as new a field of jurisprudence as is wrongfully perceived by many. Centuries of developments, and deliberations upon doctrines have led to the world we know today. The concept of corporate veil is intricate and difficult to adjudicate upon. Even with precedents dating back to the nineteenth century, their conflicting nature, and almost contradictory rationale poses a difficult terrain to tread upon.

This is an ever expansive doctrine which cannot be confined to one jurisdiction, or a few cases. However, with years of juristic analysis and precedents mounting through various countries, the aforesaid principle has garnered its intended, if not perfected application. It is requisite for the doctrine to leave room for judicial discretion, without which its rigidity would stifle both justice and commerce. From trade guilds, to fishing and shipping associations concentrated in England, the concept has crossed oceans and bounds of restrictive interpretation. The Salomon case, irrespective of its fading importance, can never permanently be erased from the legal archives. It still has a strong influence on judgements and academia. However, the world has come past the judgement, and has mended the loopholes in their own manner. The Indian statutory provisions go a step ahead and legislate a few more grounds based on which the interests of stakeholders and shareholders can be protected, and the institution of companies and their sanctity can be protected.

This brings us to a new era of company law, that is the flag bearer of ethical business-making in the globalised world today, wherein we not only share our products and investments, but our legal jurisprudence and precedents as well.

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IS RIGHT TO PRIVACY A FUNDAMENTAL RIGHT IN INDIA: AN ANALYSIS

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“All human beings have three lives: public, private and secret”
~ Gabriel Garcia Marquez

✓ ABSTRACT

“Privacy” is one of the most nebulous terms of the society has ever chanced upon. Right to Privacy be considered as bundle of rights. Even in the recent years, there have been debate on Right to Privacy, whether it is to considered as fundamental right in India or we should not give it the enforcement priority to our constitution. Many Indian jurists have raised this question while there is Right to life, there is Right to privacy? And this raises a very difficult problems as its matter is important collection and use of data is the risk of personal information falling into the hands of private players and service providers. Till today, there is no clear understanding that it will became a part or not. This paper tries to answer an issue that whether Right to Privacy is a fundamental right through analysis of cases and establish a relationship between Right to personal liberty under Article 21 and Right to Privacy. As Privacy be considered i.e., ‘personal liberty’. Through evolution and developments of Right to Privacy we get to know what is the history and origin. Finally, the paper calls for a constitutional amendment by the parliament adopting the judicially carved out right to privacy as a fundamental right under Part III of the Indian Constitution.

✓ INTRODUCTION:

Privacy is associate degree inherent right, and is needed for maintaining the human condition with respect and dignity. Article 12 of the Universal Declaration of Human Rights states that:

“no one shall be subjected to arbitrary interference along with his privacy, family, home or correspondence, nor to attacks upon his honour and name everybody has the right to the protection of the law against such interference or attacks.”

The privacy of people is also termed because the right to see however data regarding the individual is communicated to others and the way that data is controlled. Further, privacy has been determined to be the proper to be left alone; freedom from interruption, intrusion, embarrassment or accountability; management of the revealing of private information; protection of the individual’s independence, dignity and integrity; secrecy, namelessness and solitude; the proper to protection from intrusion into your personal life. the proper


200 J. N. Pandey, CONSTITUTIONAL LAW OF INDIA, 271,54 th EDITION
to privacy involves rules governing the gathering and handling of private knowledge (such as credit data and medical records), the protection of physical autonomy (including the proper to regulate personal matters), the proper to limit access to oneself (for example, dominant communication and intrusion into domestic and work space) and therefore the right to regulate one's identity. Privacy conflicts with: freedom of speech; national security; police powers of surveillance; personal morality; freedom of data and electronic commerce.

**EVOLUTION AND DEVELOPMENT**

The changes in the above contentions and evolution of Right to Privacy started in the later years wherein cases:

- **MP Sharma vs Satish Chandra** 202, District Magistrate Delhi, where, an investigation was ordered by the Union government under the Companies Act into the affairs of a company which was in liquidation on the ground that it had made an organized attempt to embezzle its funds and to conceal the true state of its affairs from the shareholders and on the allegation that the company had indulged in fraudulent transactions and falsified its records. Offences were registered and search warrants were issued during the course of which, records were seized.

The challenge was that the searches violated the fundamental rights of the petitioners under Article 19(1) (f) and Article 20(3) of the Constitution and a nine-judge bench rejected the challenge and question which addressed was whether there was a contravention of Article 20(3).

In support of arguments reference was made to the judgment of the US Supreme Court that, illegal seizures and search violate of Fourth and Fifth Amendments of the American Constitution but disregarding that contention the court held that the seizure was for a temporary period of time and it doesn’t violate Article20 (3) of COI, and there isn’t any enough justification to import privacy law of US in India.

- **Kharak Singh vs State of UP** 203, the Supreme Court had the occasion to consider the ambit and scope of this right when the power of surveillance conferred on the police by the provisions of the U.P. Police Regulations came to be challenged as violating of Articles 19(1) (d) and Article 21 of the Constitution.

The Court repelled the argument of infringement of freedom guaranteed under Article 19(1) (d) of the Constitution, and the attempt to ascertain the movements of an individual was held not to be an infringement of any fundamental right. The minority judgment, however, emphasized the need for recognition of such a right as it was an essential ingredient of personal liberty.

**POSITION: RIGHT TO PRIVACY, IMPLICIT IN LIFE, PERSONAL LIBERTY AND FREEDOM**

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201https://www.legalbites.in

202AIR 1954 AIR 300

203AIR 1963 SC 1295
Govind v. state of M.P \(^{204}\) and R. Rajagopal v. state of T.N\(^{205}\), the word ‘privacy’ has been described as “right to be left on my own” and held that every citizen has a proper to protect the privacy of his very own, his circle of relatives, marriage, procreation, motherhood, child-bearing and training amongst other matters. no person can put up whatever concerning the above topics without his consent – whether truthful or otherwise and whether laudatory or critical.\(^{206}\)

On a similar note, State of Maharashtra vs Madhukar Narayan Mardikar \(^{207}\), the supreme courtroom held that even a “woman of easy distinctive feature” is entitled to her privacy and nobody has the authority to invoke her privacy at their candy will.

- The issue Privacy has been raised again in the year 2011: RECENT CASES

Emanating from the Right to Privacy of an individual is the question of tapping of telephone. Telephone tapping constitutes a serious invasion of an individual’s Rights to Privacy.

The Supreme court in People’s Union for Civil Liberties v. Union of India \(^{208}\), held that telephonic conversations are non-public in nature and for that reason, telephonic tapping would be unconstitutional until conducted via a method set up through law. The court concluded by using saying that “we've, therefore, no hesitation in holding that the proper to privacy is part of the right to 'existence and private liberty' enshrined below article 21 of the charter as soon as the information in every case constitute a proper to privacy, article 21 is attracted. The said proper can't be curtailed, besides consistent with process mounted by regulation.\(^{209}\)

Currently, in Ram Jethmalani v. Union of India \(^{210}\), the Supreme Court has held that right to privateness is an crucial a part of existence that is a cherished constitutional price and it's far essential that human beings be allowed privateness, and be free of public scrutiny until they act in an illegal way.

However in Supreme Court Justice K.S. Puttaswamy v. Union of India \(^{211}\), Aadhar Scheme Case, Bench of 3 judges of this court, whilst thinking about the constitutional task to the Aadhar card scheme of the Union government referred to in its order that the norms for and compilation of demographic biometric statistics with the aid of authorities become wondered at the ground that it violates the right to privateness they referred the case to a 9 bench judge to addressed validity of MP Sharma and Kharak Singh instances, in which the questions raised were:

- whether or not there's a constitutionally blanketed right to privateness;
- If there may be a constitutionally protected right, whether this has the man or woman of an unbiased essential proper or whether or not it arises from inside the current guarantees of blanketed rights consisting of lifestyles and private liberty

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\(^{204}\) AIR 1975 SC 1378
\(^{205}\) AIR 1995 SC 264
\(^{206}\) id
\(^{207}\) AIR 1991 SC 207
\(^{208}\) AIR 1997 SC 568
\(^{209}\) M.P.Jain, INDIAN CONSTITUTIONAL LAW, 1328, 54TH EDITION
\(^{210}\) (2011) 8 SCC 1
\(^{211}\) (2014) 6 SCC 433

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the doctrinal foundations of the claim to privateness
✓ the content of privateness; and
✓ the character of the regulatory power of the nation.\textsuperscript{212}

 Justice Bobde and Justice Chelameshwar have expressed situation over Aadhar forcing humans to registration who aren't capable of comprehend the consequences of registration on their rights. Justice Bobde has additionally expressed concerns over the already took place and future leaks of facts involved. The legal professional trendy, Mukul Rohatgi, mentioning the vintage and controversial view on right to privateness in M.P. Sharma and Kharak Singh, had argued that proper to privateness does not exist, pointing out that the problem ought to be mentioned a larger bench. However, the bench is but to be constituted. Where, the nine bench choose in its 547-paged judgment had held that right to privacy is an inalienable intrinsic detail of the proper to life and personal liberty i.e. Article 21. Similarly, India’s dedication to a global order based on admire for human rights has been noticed alongside the particular articles of the UDHR and the ICCPR which encompass the proper to privacy.\textsuperscript{213}

Right to privacy has been postulated in each positive and negative content. The terrible content material restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its superb content material imposes an responsibility on the state to take all essential measures to guard the privateness of the individual.

\begin{itemize}
\item CONCLUSION
\end{itemize}

Although the bench in M.P. Sharma and Kharak Singh had held art. 21 to not include proper to privateness and the problem is being cited a larger constitutional bench, that does not render all the subsequent selections via the very Supreme court recognizing its existence legally untenable. This position changed into noted in Harbhajan Singh v. state of Punjab\textsuperscript{214} and Ashok Sadarangani v. Union of India\textsuperscript{215}, in which the very Supreme court located that “the pendency of a reference to a bigger Bench, does not imply that each one different lawsuits related to the same problem would continue to be stayed until a choice was rendered in the reference…. until such time as the selections mentioned at the Bar are not changed or altered in any manner.”\textsuperscript{216} However, though right to privacy has been recognized by many judgments to be implicit under Part III of the Constitution, there is a need to explicitly adopt Right to Privacy as a fundamental right by the Parliament.

The Right to privacy broadly encompasses physical privateness, informational privacy and decisional autonomy. The interplay of technological advances and the right to privateness in the digital age wishes to be carefully scrutinized. The nine bench has rightly emphasized the need for statistics safety laws — a assignment now entrusted, at a preliminary degree, to the Justice Srikrishna Committee.

\textsuperscript{212}https://thewire.in/law/supreme-court-aadhaar-right-to-privacy
\textsuperscript{213}http://iclq.in

\textsuperscript{214}(2009) 13 SCC 608
\textsuperscript{215}AIR 2012 SC 1563
\textsuperscript{216}Id., at 19
However, regardless of any technological changes, the respect of the right of individuals to make a desire of how and wherein they need to live, work and pursue their character dreams ought to be included. Nine judges of the best court docket have protected, for many years to come, the most crucial right emphasized with the aid of Justice Brandeis: The right to be left alone.\footnote{http://www.rediff.com}
OPEN INNOVATION IN IP EVOLUTION: A COMMERCIAL SOLUTION

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ABSTRACT:
In this developing age, creation of useful intellectual property is half work done, other half is its successful commercialization in the market. Open innovation is one of the emerging concept which helps in strengthening & supplementing the firm’s or other industry’s research and development wing by absorbing technical know-how or creativity from the outside world, such working methodology successfully accomplished from the process of delegation. But such process works in contrast with the ideas of rights provided under the intellectual properties viz. right of patent which grants monopoly rights to the innovator for the development of any innovation work. This paper has studied to join the dots to signify the relation between them in order to understand beneficial usage of both systems. This paper provides mechanism relating to assigning and licensing and concludes towards the optimum application of delegated innovation. This paper concludes that although both the concepts are opposite in nature but can be worked in synchronization with each other.

INTRODUCTION:
Open innovation is one of the management concept that promotes outsourcing of ideas from the outsiders aims at increasing the invention values or output of the industries. The advantages of such concept is easily visible at small or medium sized who would be easily suppressed by big players in the market in the cases of high quality innovation. If the small or medium size firms or industries given the opportunity to collaborate and import the methodology and technologies from large firms & industries, such collaborations may result in feasible growth in the working conditions of such small and medium size industries.218

The basic ideology of this concept should not be interpreted as to replace the home or internal research or development department of the small or medium size firms but instead it meant to boost and supplement the firm’s output with the innovative ideas of external firms to maintain its position in the ruthless competition of present market. The concept of open innovation contradicts this concept of closed innovation which was prominent in earlier times mostly in large firms.

Although, in the eyes of law, it seems very obvious to not to share any high level

218 DEEPAK SOMAYA, ‘COMBINING INVENTIONS IN MULTI-INVENTION PRODUCTS: ORGANISATIONAL CHOICES, PATENTS AND PUBLIC POLICY’ [2001] HAAS SCHOOL OF BUSINESS.
technological know-how, which indeed considered in the concept of intellectual property. So, in order to illustrate the point, patent is one of the major tool which can be taken as it is directly relatable with open innovation. Most of the jurisdiction for patent in the world were embossed by keeping in mind about the extraordinary efforts inferred by the innovator to conceive his novel invention and rights to protect such invention is provided to him under the intellectual property rights as a prize for such invention. But open innovation does not found this idea as a successful one because the parallel growth of any alternative model technology may result as a challenge anyway in front of innovator or firm. Such collaboration anyhow will be more beneficial for the small or medium size industries or firms rather than doing it individually.  

One of the major challenge in order to transfer any technology is when its own performance suddenly increases but it has been already successfully marketed by the industry or firm. Such a case in small or medium industry may be miserable for them which may result in throw them out of market. In such conditions, it would be a wiser step to make a collaboration or partner with the competing industries or firms than to commercialise the invention from its own. Such collaboration anyhow will be more random. As creativity in the present times also penetrate many different solutions for the same problems faced by many different firms and industries. One of the major challenge in order to transfer any technology is when its own performance suddenly increases but it has been already successfully marketed by the firm. Traditionally, the doctrine of patent hunts for “gods of creativity” which was also elaborated in the case of “Graham v. John Deere Co., 383 US I, 15(1966)” and in the prevalent time, it is largely affirmed that the concept or process of innovation is not random. As creativity in the present times put more reliance on the existing ideas and found its base of creation upon them. The idea of open innovation model may pass the litmus test on its practical & beneficial grounds in many ways like maximizing profits and to create something which may be intersecting for two different fields of art.


MODULATION OF OPEN INNOVATION:
The minor self-conflict makes it difficult to manage the open innovation model without complete idea about this concept. This model demands an open correspondence of ideas all with the assimilation of confidentiality at the same time. Such types of process may also come into action at the time of preparation of agreements & other documents for licensing. But, the priority at this juncture should be the basic norms of intellectual property laws over the other corporate laws.

It seems anecdote to promote the culture of an open innovation without compromising its advantages brought by the intellectual property laws especially by the patent laws. The portfolio management team of the firms or industries must be vigilant towards the present intellectual property dealings to smell the advantageous deals from the market.

The mechanism of open innovation comes into play after filing of the provisional patent application and before the step of collaboration with any other party, which may eliminate any unwanted confidentiality conflicts during the creation of any agreements between them. Even if it is advisable to file the full specification application but it may not be feasible in every circumstances.

1 Licensing: This is one of the famous mode to transfer information through know-how agreements on the process to perform any innovation. There are two modes of licensing in the case of patent laws, enumerated as:

1.1 Active licensing: It deals with the transfer of idea openly through know-how to work and explore that invention. This needs a very strong relationship between both the transferor and the transferee. The concept of active licensing is fascinating because along with the technological methods person also transfers his personal

222 JOHN R HARRIS, ‘PATENT ISSUES IN OPEN INNOVATION’ (2013) 6 AMERICAN BAR ASSOCIATION SECTION OF INTELLECTUAL PROPERTY.
223 LEE FLEMING, ‘RECOMBINANT UNCERTAINTY IN TECHNOLOGICAL SEARCH’ (2001) 47 GRADUATE SCHOOL OF BUSINESS.
experiences which is invaluable in nature. There are many small informations which lead to great creation of any invention which may provide edge while its usage or presentation to use. Sometimes transferee from a different field fails to absorb the in and out of the concept relating to the invention which leads to the inappropriate outcomes, which may demise the expectations of transferor, in such cases the application of active licensing emerges as the successful concept to comply the internal demands between the parties. Sometimes, due to limited understanding between transferor and transferee, either fails to comply with the conditions of the agreement which leads to create frustration in the relations of the parties. In such cases, active licensing is the concept which provide boundless conditions in order to maintain better understanding between the parties who creates such know-how for their invention.

Active licensing considered as most efficient mechanism in order to provide optimum output from the licensing for any invention.

1.2 Passive licensing: Passive licensing apparently founds in Patent Laws. The concept of passive licensing is not like active licensing; it works as its name suggests. In passive licensing, there are various limitations in sharing informations through technical know-how. The extra knowledge or additional personal experience along with such technical know-how are not shared between the parties. They share only on-paper technicalities which indeed important but lack personal touch factor for transferee due to limitations.

2. Integrated Modulation: In this mode, the transferee sets standards or provides mark and innovator provides innovation that can work under that standards. It is getting popular now-a-days due to its advantage of less transaction costs. Modulation can be encapsulated in the system to make it autonomous through various management mechanism. Any collaborative design effort in which the design tasks are partitioned ex-ante are essentially modular. The process of integrated modulation can be enumerated in three ways:

2.1 Open Architecture: Open architecture is the paramount concept of modulation. In such case, the firms or industries can freely provide interface in public. Any other developing firms or industries can be used by them by assembling innovation with the interface to understand a suggestive end.

Illustration: Firm 1 provided interface A in the open market. This interface helps firm 3,4&5 to create any innovation on the basis of the interface provided by firm 1 in the open market to public. It provides ease to concurrently use such interface without any fear of heavy opposition upon it vis-à-vis provides opportunity to create their own innovation on its basis and improve

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their position through its successful commercialization in the market. The drawback of open architecture is it may hamper the income of the interface providing firms or industries who toiled for such innovation from the beginning but end up providing its interface openly for public. They indirectly lose protection over the innovation and the commercial benefits as well.

2.2 Component Modulation: In this system, firms or industries provides various components in relation to the innovation, combination of which provides final output. This system is more prevalent in the technology market.

Illustration: Industry 1 uses wire A required for the creation of technology X. Other industries who tends to creates similar technology may use wire A as its essential component to enhance to make their technology successful from the experience of firm 1 which may provide them success commercially.

2.3 Design Modulation: Many times, the outline or pattern of provided interface becomes more useful than interface itself. The famous example of this system is semiconductor integrated circuit layout. As per this system, the design of the interface itself modularized instead of its provided component. It also includes shape, size, combination or any other things directly or indirectly includes design for modulation of invention done by any other party from such design.

Illustration: Firm 1 creates structure X of machine A provided to the open market. Firm 2, 3, 4 uses that structure on their own machines along with the design patterns of machine A which helps them to feasibly commercialise their product in market.228

Open innovation needs huge range of communication in market and essential exchanges of ideas for the collaboration without compromising the internal confidentiality of firm or industry risking it. Such secrecy can be maintained in multiple ways, as either by signing non-disclosure agreement or by the way of informal means such as putting trust on the other party in order to share their sheer hard work with them for the purpose of mutual development out of that collaboration between them.

CONCLUSION:
The completion of any innovation is not ending but it is starting itself to make visible its output by facing after process challenges. This indicates rising demand for the firms or industries to collaborate among themselves to achieve their innovative output. The appropriate management of open innovation model and of the intellectual property, a needy environment to synchronize them. This can be achieved through strategic assignment or licensing schemes and integrated modulation of their work.

Thus, open innovation model in intellectual property world can provide unexpected results to speed up the IP filings in various sectors by the firms and industries, if managed in a strategic, logical and practical manner.

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THE RIGHT OF WOMEN TO ENTER PLACES OF WORSHIP

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Abstract
The glaring example of Haji Ali Dargah, Sabarimala Temple and Shani temple has come up where women are stopped to worship but in Shani Temple case, A Division Bench of Chief Justice D.H. Waghela and Justice M.S. Sonak said: “There is no law that prevents entry of women in any place. If you allow men, then you should allow women also. If a male can go and pray before the deity, why not women? It is the State government’s duty to protect the rights of women.” But on the other hand it is a shame that even in the 21st century, we have not taken leave of superstition and obscurantism. The time has come for us to allow the light of reason into our religious life. God is light, not darkness. The crucial enquiries that has been covered under this paper is what kind of judicial scrutiny should be employed in examining the claims of religious denominations? How far can a gender discriminatory custom be allowed under the guise of it being an essential religious custom? Can the individual right to religion (Article 25) be completely overshadowed and abrogated by a denominational right to manage internal affairs [Article 26(b)]? Does preventing entry of ‘menstruating women’ in temples qualify as discrimination under Article 15? This paper also focused on the International Perspective of Rights of women. The battle for gender justice, individual rights and non-discrimination cannot be waged on piecemeal orders and obiter dicta

"You can tell the condition of a Nation by looking at the status of its Women.". Equality and Egalitarianism are just utopian concepts and can never be a reality in the society. They are just words to appease the masses. Absolute equality is impossible. You cannot socially engineer a society each and every person. India is a patriarchal society where we are trapped in old customs and traditions. In this web women are usually the victims and discriminated and men always rule. The old belief -a tradition-bound societal atmosphere where male line is considered as race bearer, family bearer and a developmental tread towards right direction.

India is facing a large number of social issues such as caste system, child labor, illiteracy, gender inequality, superstitions, religious conflicts, and many more. India, the cradle of civilization, is now beset with a number of social evils. They are so numerous that one shudders to think of them.

Women are constantly fighting a battle for equality. In India, they are also currently fighting to be treated as equals in the eyes of their gods. According India’s constitution, women are legal citizens of the country and have equal rights with men still women are powerless and are mistreated inside and outside the home. This paper highlights the

229Jawaharlal Nehru, Leader of India’s Independence Movement, and India’s first Prime Minister.
evil in the society where women are not given access to Right to Worship at worship places. It is an irony that we go to temple and worship goddess Lakshmi, Durga, Saraswati. We bow our heads in front of these sculptures and worship them and on the contrary women are denied to enter the religious places. If this the situation then all female goddess should be removed from temples and all male Gods should only be worshipped.

We call India as Bharat Mata or, Mother India, is the national personification of India as a mother goddess. She is an amalgam of all the goddesses of Indian culture and more significantly of goddess Durga. She is usually depicted as a woman clad in a saffron sari holding the Indian national flag, and sometimes accompanied by a lion. There is so much criticism when somebody denies to say Bharat Mata ki Jai. All the feeling of nationhood among the Indians awake but when it comes to actually giving them equality in any sphere our Indian behaves like Gandhi’s three monkeys. If men can pray to God why not women?

Navratri is amongst the most important Hindu festivals. This auspicious festival is celebrated with great zeal and devotion throughout the country. Navratri is a pious festival celebrated in the honor of nine different forms of the Goddess Durga, Lakshmi and Saraswati for nine continuous days. The Goddess of Power is worshipped during these days in order to seek her blessings and protection from any unknown fear and possible threat. The devotees ask for peace and prosperity from the Goddess. People do 'Kanya Puja' on the last day. On the concluding day, nine young girls are invited in the house and feasted with delicious food. These nine young girls are treated as the nine forms of the Goddess. They are welcomed by washing their feet and putting tilak on their forehead.

God is everywhere but if a woman finds her faith in a temple idol, how can tradition stand in the way of her right to worship? If we can worship women as a God then why can't a women worship God.

**MYTHS AND SUPERSTITIONS**

“When men are oppressed, it's a tragedy. When women are oppressed, it's tradition.”

When superstition has such influence on people, it becomes a social weapon, subtle yet devastating. Superstition works on the victims as much as on the perpetrators of injustice. Very few cultures across the world have acknowledged that menstruation is a natural phenomenon.

Even in historic times, menstruation was seen as a time to seclude women from the household. In Mahabharata, it is said that Drupadi was menstruating during her ‘vastra-haran’, and that is why she was in separate quarters, and wearing a single piece of cloth before taking her ritual bath, when she was dragged by Dushasana. Not much has changed since then because even today, girls are asked to stay away from rituals, temples, and anything remotely 'holy'. No touching, because then everything will become 'impure'.

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According to historian N.N. Bhattacharyya, different areas of India have had notions of the menstruating goddess. In Punjab, it was believed that Mother Earth (‘Dharti Ma’) ‘slept’ for a week each month. In some parts of the Deccan after the ‘navaratra’ goddess temples were closed from the tenth to the full moon day while she rests and refreshes herself. In Malabar region, Mother Earth was believed to rest during the hot weather until she got the first shower of rain. Still today in the Kamakhya temple of Assam and in parts of Orissa the rituals of the menstruation of the goddess are celebrated during the monsoon season.

Menstruation is stigmatized in our society. This stigma built up due to traditional beliefs in impurity of menstruating women and our unwillingness to discuss it normally. We don't know what may have been the reason that forced the holy men to refer to menstruating women as 'unclean'. But almost all religions refer to menstruating woman as 'ritually unclean' According to Hindu beliefs a girl should not visit a temple or offer prayers while she is menstruating. According to these beliefs and customs a girl who has periods is impure and hence, should not even touch anything that shall be given as an offering to God. They also cannot take part in the religious ceremonies. But if logic is taken into consideration it is something that is given by God himself. It is the biological key to a woman's motherhood. So how can this be impure? Without this the process of generation can’t continue.

There are the hilarious beliefs and customs which take the cake when it comes to treating menstruation as a malady. Among some of these customs and norms, there are beliefs that if a menstruating woman waters a plant, it is destined to die. Moreover, it is also believed that menstruating woman can spoil foodstuffs like pickles just by a mere touch. It is one thing to attribute supernatural, almost voodoo-oriented powers to menstruating woman, but another thing to claim that they are capable of destruction just because they are going through a biological transition. Strangely enough, in remote areas of the country, women are not even allowed to touch their husbands while they are menstruating. They are made to sleep on mats on the ground away from their husbands, irrespective of the season and the conditions which she finds herself in.

The silence and shame around the menstrual cycle has caused severe problems for girls. In a survey conducted in 2011, it was revealed that in north India, over 30% of the girls interviewed dropped out of school after they start menstruating.

Guru Nanak, the founder of Sikhism, condemned the practice of treating women as impure while menstruating. In Sikhism, the menstrual cycle is not considered a pollutant. Certainly, it can have a physical and physiological effect on the woman. Nonetheless, this is not considered a hindrance to her wanting to pray or accomplish her religious duties fully. The Guru makes it very clear that the menstrual cycle is a God given process. The blood of a woman is required for the creation of any human being. ‘By coming together of mother and father are we created, By union of the mother's blood and the father's semen is the body made. To the Lord is the creature devoted, when hanging head downwards in
the womb; He whom he contemplates, for him provides." 231

The requirement of the Mothers’ blood is fundamental for life. Thus, the menstrual cycle is certainly an essential and God given biological process. In other faiths blood is considered a pollutant. However, the Guru rejects such superstitious ideas. Those who are impure from within are the truly impure ones. ‘Should cloth be reckoned impure if blood-stained, How many minds of such be deemed pure, As blood of mankind suck? Says Nanak: With a pure heart and tongue God’s Name you utter: All else is worldly show, and false deeds’ 232.

There is one more belief that women were not allowed to worship because men would not be able to focus on prayers rather than watching women in the temples so they could be distracted and ‘protecting’ female worshippers from sexual attention because, when they bowed, the pallu [loose end] of their saris fell, exposing their chest area which aroused the men who might be looking at them,” Is it a valid reason? Stopping women from entering worship places. If this would be the scenario then women should not be allowed to go anywhere because men would be distracted everywhere.

The word "tradition" is most often deployed by patriarchal religions as a euphemism for practices designed to discriminate against women and demean them. These age-old customs are backed by a reasoning that presumes that women are somehow impure, or second-rate citizens. Most shrines cite menstruation as the ground on which the entry of women is limited, implying that a natural biological process renders a woman unworthy of the right to worship.

UPANISHADAS AND VEDAS
In India many temples we have God and Goddess together like we can’t imagine Rama and Sita sculpture standing alone or Krishna and Radha similarly every religious ceremonies are performed by husband and wife together. Prohibiting women from entering temples and castigating them as impure is squarely against the teachings of the Vedas.

Baba HariDass, a well-known modern living saint reminds us that:
“Wife and Husband are like two equal halves of a soybean. One half-alone will not grow. If two parts are separated and planted in the earth, still they will not grow. The bean will grow only when both parts are covered by one skin, which makes them one.”

Agnihotrayagnas, which is performed daily by vaidiks, is considered as mahayagna, which means prominent among all yagnas. The Vedas stipulate that this yagna should be performed by both men and women without fail. If mahayagna can be performed by menstruating women, there can be no ban on their temple entry during their monthly periods. Even hard-core traditionalists didn’t block women from Vedic rituals. Madhavacharya, whom many see as a traditionalist, has asserted that women have the right to learn and perform rituals. He cites the examples of women such as Urvasi,

231 Guru Granth Sahib Ji, p. 1013
232 Guru Granth Sahib Ji, pg. 140
Yami and Sami. Such instances are innumerable in the Vedas.

The philosophy of all the Upanishads is summarized in four verses, which are called Mahavakya (great utterances). These are: ahamBrahmasmi (I am the spirit, i.e. atman), tat tvamasi (That thou art), prajnanam Brahma (Brahman is pure consciousness) and ayamatma Brahma (this self is Brahman). In different ways and by different words, all these four Mahavakya simply confirm the fact that an individual regardless of religion, race, culture, gender, color, cast, creed or geographic location is atman clothed in a physical body. The physical body we get is the result of our past karma. What we are now is the result of our past practice and again practice makes us what we shall be. The differences between individuals exist only at physical level. There are no spiritual differences between man and woman. The husband and wife are the two sides of the same coin. They are the two manifestations of the same atman.

Louis Jaccoliot, the celebrated French author of the Bible in India: Hindu Origin of Hebrew and Christian Revelation said: "India of the Vedas entertained a respect for women amounting to worship; a fact which we seem little to suspect in Europe when we accuse the extreme East of having denied the dignity of woman, and of having only made her an instrument of pleasure and of passive obedience." He also said: "What! here is a civilization, which you cannot deny to be older than your own, which places the woman on a level with the man and gives her an equal place in the family and in society."

In conclusion, woman has the same religious and spiritual freedom in Hinduism as man. Like a man, she is the soul in bondage and the goal of her life is the same as that of man, spiritual perfection or moksha through selfless work, meditation and yoga. Hindus have elevated women to the level of divinity. They worship God in the form of Divine Mother. However, the status of women in Hindu society has also been affected by factors other than the ideals set forth in the Vedas and Upanishads, such as cultural mores and the exploitation of the biological and psychological differences between men and women. Therefore, on an individual and social level, complete and total equality of women is a goal that Hindu society (and other societies) is still striving for. As Swami Vivekananda says, we must realize that man and woman are two wings of the same bird; that in order to truly soar to great heights, a man and woman must work in unison in order to achieve greater harmony in life.

"Where women are honored, there the Gods are pleased. But where they are not honored, no sacred rite yields rewards." 

LEGAL PERSPECTIVE
The polity assured to the people of India by the Constitution is described in the Preamble wherein the word"secular" was added by the 42nd Amendment. It highlights the fundamental rights guaranteed in Articles 25 to 28 that the State shall have no religion of its own and all persons shall be equally entitled to freedom of conscience and the right freely to profess, practice and

233 Manu Smriti 3.56
propagate religion of their own choice, in brief, this is the concept of secularism as a basic feature of the Constitution of India and the way of life adopted by the people of India as their abiding faith and creed.234

“Fundamental rights are the rights having a noble pedigree. They are the natural rights which are in the nature of external conditions necessary for the greatest possible unfolding of the capacities of a human being. These secured and guaranteed conditions are called fundamental rights. It is generally agreed that these natural rights are inherent in man and cannot be taken away by the State.”235

The Indian Constitution has no unequivocal meaning of “religion” or ‘matters of religion’. Under the order of article 32 of the Constitution, which gives the privilege to protected cures, it is left to the Supreme Court to settle on the legal importance of such terms.

The view taken by court in Sabarimala Temple and Haji Ali Dargah case was that the custom of prohibiting women or menstruating women enjoyed constitutional sanction. Articles 14 and 15(1) emphasize equality before the law, and are two facets of the same fundamental right. The articles emphasize the fact that any discrimination which is based only on the ground of religion, race, caste, sex or place of birth is prohibited. Article 15(1) implies that there may be discrimination on other grounds, but these cannot be arbitrary, capricious or oppressive.

In the case of Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar&Ors. 236 The Court after considering a large number of its previous decisions observed as follows:

"It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to, pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible- differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis, namely, geographical, or according to objects or occupations or the like, what is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration".

But the decision of the Courts in Sabarimala Temple and Haji Ali Dargah case emphasized the restriction is reasonable as they are not stopping the entry of women of a particular age group and not women as a class. According to Article 14 of the Constitution, reasonable classification is inherent in the very concept of equality, because all persons living on this earth are not alike and have different problems. The legitimacy of classification by denying women to access to worship is totally unreasonable as the classification was clearly on the basis of sex. There is no nexus

234 Dr. M. Ismail FaruquiEtc, Mohd. V. Union Of India And Others AIR 1995 SC 605 A.


236 AIR 1958 SC 538
between the object and classification as there is no conclusive proof to ban the entry of women. Rule of law also, requires that no person shall be subjected to harsh, uncivilized or discriminatory treatment even when the object is the securing of the paramount exigencies of law and order\(^{237}\).

“Any god or goddess can be worshipped anywhere by anyone. The power is all around us, omniscient. But you have structured god into an idol. Women want to come to your temple and worship him there ... Why don’t you allow them,” Justice Dipak Misra. The ban, Justice Misra observed, is considered “grave” as it endangers gender justice. “There is this tradition, we understand, of not allowing women of a certain age. But what we will decide is whether this tradition, this source of the ban, overrides constitutional provisions... What right do you (temple authorities) have to forbid women from entering any part of the temple? This is a class grievance from women denying their right to worship.”\(^{238}\)

Article 21 of the Constitution- Protection of Life and Personal Liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.Bhagwati, J. in Maneka Gandhi case, established that the requirement of reasonableness of procedure in Art. 21 through Art. 14, it was said that the procedure in Art. 21 “has to be fair, just and reasonable, not fanciful, oppressive or arbitrary”. The ‘law’ in Art. 21 “is reasonable law, not any enacted piece”. Restricting women to enter to worship places clearly hampering the liberty of women to profess any religion which is also cover under article 19 of the Constitution. Personal liberty is being violated by stopping her access to worship places and it the duty of state to protect these rights. The Right to Freedom of Speech and Expression as per the Indian Constitution – means the right to express one’s own convictions and opinions freely. The word “freely” means the freedom of a citizen to express his views and opinion in any conceivable means including by words of mouth, writing, printing, banners, signs, and even by way of silence.

In case of Olga Tellis and others v. Bombay Municipal Corporation and others\(^{239}\), it was observed: Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right must conform the norms of justice and fair play. Procedure, which is just or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it.

Article 25 of the Constitution guarantees freedom of conscience and free profession, practice and propagation of religion to all the citizens of the Union of India Article 26(b) awards to religious categories the privilege to deal with their own undertakings

\(^{237}\)Rubinder Singh v. Union of India, AIR 1983 SC 65.

\(^{238}\)Krishnadas Rajagopal, ‘How can tradition impede woman’s right to worship?’ The Hindu New Delhi, April 12, 2016.

\(^{239}\)AIR 1986 SC 180
in the matter of religion. These rights are not absolute rights; they are subject to public order, morality and health, as well as to the other provisions of Part III. The right under Article 25(i) is further subject to the right of the State to make any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice. It is further subject to the right of the State to provide legislation for social welfare and reform.

In Javed vs. State of Haryana\textsuperscript{240}, this Court dealt with the issue in question and held that what was protected under Article 25 was the religious faith and not a practice which may run counter to public order, health or morality.

It is his proponent that the right of a woman to visit and enter the temple as a devotee of the deity, as a believer in Hindu faith is an essential facet of her right and restriction of the present nature creates a dent in that right which is protected under Article 25 of the Constitution. The distinction between entry into temples and right to conduct the worship of the deity as per ritualistic process of worship by an “Acharya” has been recognized to keep the constitutional norm at its pedestal\textsuperscript{241}.

Though Article 26 gives overriding power to the religious institutions to manage their own affairs but this regulation is fundamentally and irreversibly challenging the existence of the sect and its core belief system. In para 22 of the judgment in Sabarimala Temple, the Kerala High Court said:

“The position that emerges is that a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion. No outside authority has any jurisdiction to interfere with the decision of such religious denomination. Article 26(b) gives complete freedom to the religious denomination to manage its own affairs in matters of religion. The only restriction imposed by that article is that the exercise of the right is subject to public order, morality and health.”

This decision clearly depicts that Constitution makers were quite unfair, discriminatory religious practice and committed purging to remove them. The court has failed to provide harmony between individual interests with the group interests, here individual interest is the person who has Right to profess Religion under Article 25 and group interest is the Managements of Religious Affairs or Institutions. Moreover, managing religious affairs, all practices are not always sacrosanct, for there may be many ill-practices like superstitions which in due course of time may be merely accretions to the basic theme of that religious denomination. The entry to the temple is not essential to religion and there is difference between “regulation of entry” and “complete prohibition of entry”. The religious denomination cannot completely exclude the members of any community and may only restrict their entry in certain rituals\textsuperscript{242}. It is

\textsuperscript{240}Writ Petition (civil) 302 of 2001.
\textsuperscript{241}Nar Hari v. BadriNath Temple Committee (1952) SCR 849
\textsuperscript{242}Sri VenkatramanaDevaru&Ors. v. State ofMysore &Ors. (1958) SCR 895.
not a custom as is conceived of by the authorities and even if it is accepted as such it is wholly unconstitutional as it creates an invidious discrimination perpetrating sexual differences.

Section 295A of Indian Penal Code’1860 : Criminalizes “deliberate and malicious acts, intended to outrage religious feelings, including words, signs, visible representations”; entails 3 years and/or fine.

INTERNATIONAL PERSPECTIVE

Human Right, are derived from the dignity and worth inherent in the human person. Human Rights and fundamental freedom have been reiterated by the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are inter-dependent and have mutual reinforcement. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national developments social and family stability and growth, culturally, socially and economically. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. The Universal Declaration of Human Rights (UDHR), of which India is a signatory, requires that it gives to its citizen’s freedom of religion, and the right against discrimination on the basis of gender.

Notably, the International Covenant on Civil and Political Rights 1966 (ICCPR) 246, of which India is a signatory, says:

Freedom to manifest one’s religion or beliefs may be subject only to limitations as are prescribed by law that are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. As it has been established earlier, these exceptions are not relevant to women and their access to places of worship. Further, India is also a signatory to the Convention on the Elimination of All forms of Discrimination.

245 Article 07 of UDHR- All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

246 Article 18 of ICCPR-
1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others, and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.


244 Article 18 of UDHR- Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or
of Discrimination against Women, 1979 (CEDAW), which requires India to eliminate discrimination against women and recognize that they should be treated at par with men in the eyes of the law. The right to equality and right against discrimination fall under the ambit of *jus cogens*—principles of International Law which cannot be set aside. In addition to all this, the right to equality and right against discrimination fall under the ambit of *jus cogens*—principles of international law which cannot be set aside. This rule will apply in the context of customary rules so that no derogation would be permitted to such norms by way of local or special custom as *jus cogens* will always override domestic law.

“A woman is not an object of convenience; but a creation of Gods purpose.” — Wayne Chirisa

CONCLUSION

Dr. S. Radhakrishanan said, "I want to State authoritatively that Secularism does not mean irreligious. It means we respect all faiths and religions. Indian Scholars believe that every religion is a compound blind beliefs, irrational dogmas and evil social practice. The two fundamental axes of social inequality in India are caste and gender. Caste distinctions were central to orthodox Hinduism. Their influence was so pervasive that they carried over even when people converted to faiths based on more egalitarian principles. In India, Muslims and Christians also practiced (and often still practice) caste-based discrimination.

As for gender, Hinduism is notable for having many women represented in its pantheon. However, while there are women deities, until very recently there were no women priests. Successive Shankaracharyas have argued that women are not authorized to read or interpret sacred texts. In Islam, the discrimination is arguably even greater, with no women priests of course, and often, segregated worship as well. The religious texts of Hinduism and Islam are also heavily loaded in favour of patriarchy. No doubt, through selective quotations from the Quran or the Vedas, one can claim they respected or even revered women, but taken as a whole, there is no question that Hinduism...

247 Article 2—States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to send, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative or other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.
and Islam are both religions where men are held to be superior, and thus mandated to dominate family, society and community life. Indians need to press the managements of the country’s temples, mosques, churches and gurdwaras towards less discriminatory practices, so that women can enter and worship in any part of a shrine, so that women can, if they so wish, become pujaris, mahants, maulanas, imams, priests and bishops too.

Legal and religious reforms are important, but in the context of caste and gender discrimination, the reform of individual and collective behaviour may be more important still.

In this conservative society where internet pornography is popular and sex columns in the newspapers discuss masturbation and premature ejaculation, talk of menstruation is taboo. So many Hindu and Muslim women have internalized the notion that it is unclean that they voluntarily stay away from temples and mosques when they have their periods. The purpose of a holy shrine is worship, a deeply scared and sentimental act between a person and their god. The authors do not see how restrictions on women could help the act of worship, but do believe that such restrictions take away from women a right guaranteed to them by the Constitution.

The deification of women as goddesses, feared and worshiped, pure and powerful, gentle and bloodthirsty, emotional and stoic, strong and delicate, angry and loving, and any other stereotype one wishes to project onto the female sex, has contributed to the persistence of these contradictory ideas about women in popular culture. To put it simply, the notion of woman as goddess is a set of popular cultural memes that serve to justify anything one believes about women.

There is a pressing need for the legislature to create a central law which outlines the rights and duties of administrators and worshipers, especially women. This law should elaborate upon the right to worship and the right against discrimination available to all Indians in the context of entry into places of worship of all religions. Thus, it would follow that women could not be restricted from entering places of worship. Further, the judiciary should strike down all laws and customs which allow for such discrimination against women and declare them unconstitutional.

True equality means holding everyone accountable in the same way, regardless of race, gender, faith, ethnicity – or political ideology. – Monica Crowley
INDIA’S INTERNATIONAL TRADE LAW ISSUES AND THE ROLE OF WORLD TRADE ORGANISATION

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Abstract:
This research paper elucidates upon the less encroached area of International Trade Law and how the provisions of dispute settlement, act as a helping hand in curbing International Trade Law issues faced by India. India being a developing country influences the international market like any other developed country because of its vast geographical structure and huge domestic market. Agreements such as Anti-Dumping, Sanitary and Phytosanitary Measures, Countervailing Duties, Imposition of Tariffs, Safeguard Measures have been imbibed in the India’s national laws from the International Trade Laws formulated by World Trade Organisation (WTO) in order to function in an efficient manner in international markets. India also resorts to ways which will help the growth of domestic markets in international trade. Despite all these measures used there still exists a lacuna in the International Trade Laws, as trading countries import higher tariffs while importing goods in their market in order to decrease the use of international goods and increase the scope of domestically produced goods. India also uses the above-mentioned agreements as a shield to protect its domestic market, which agitates the traders of different nations to sell the goods in Indian markets, after which they resort to illegal means. Such inconsistency between international and national laws emerges trade disputes between member nations of the World Trade Organisation. Dispute Settlement Body (DSB) plays an important role in providing a multilateral platform for the disputing member nations and helps in using a unified structure for the growth of trade in international markets. The DSB under WTO has time and again upheld equity in delivering its pronouncement by highlighting on the growth of developing and least developed countries, thereby, bringing the world trading system under a level playing field.

INDIA’S INTRODUCTION IN INTERNATIONAL MARKET:

“Every man lives by exchanging.”
- Adam Smith

International Trade Law as a concept developed from the theories of economic liberalisation as was developed in Europe during the 18th century. International Trade Laws are set of rules and regulations governing exchange of capital, goods, and services between countries or between private organisations, while trading beyond their territorial limits with an increasing economic, social and political importance. It can also be understood as an aggregate of legal rules of “International Legislation” and new lex mercatoria, wherein international legislation includes international treaties and acts of governments affecting international trade and lex mercatoria means the law for merchants of the land248. International trade relations work in four levels, starting with

unilateral measures, i.e. national laws, the next being bilateral relationships, thirdly, multilateral and lastly plurilateral relationship subsisting amidst World Trade Organisations (WTO), General Agreement on Tariff and Trade (GATT), and General Agreement on Trade and Services (GATS) parties. World Trade Organisation as an authoritative establishment governs the regulation of these activities. Prior to WTO, international trade was governed by GATT which was an agreement between nations, however, with lapse of time there was an emerging need for establishment of an authoritative body having the capability to overlook all aspects of trade.

Trade and commerce are the cornerstones of India's developing economic growth and also have a lion’s share in positioning India as one of the essential players in the international trade market. The growth of international trade in India began after the year of independence in 1947. Textiles and spices were the initial products sold by India. From 1950’s to late 1980, India followed a protectionist policy where its average tariffs exceeded 200% and allowed only a few traders with huge quantitative restrictions to enter the Indian market. Indian government ruled its domestic markets by disallowing privatisation of companies and by beholding control over its companies. Such vigilant attitude is also evident while India imposes local content requirement provisions to boost its domestic market. The scenario started to improve after the election of the late Prime Minister Rajiv Gandhi. With the advent of policies such as globalisation and liberalisation, a new era of trade came into existence. India realised the importance of free and unbiased trade and advanced towards the growth of Indian economy in international trade. Since then India has shown prodigious progress and currently, India's foreign trade norms are a combination of rigidity and flexibility, where on one hand, regulations pertaining to foreign investment, dwindling of non-agricultural tariffs are open ended and on the other anti-dumping measures are still liberally used as a defensive measure. Many foreign economies regard India as a huge trading country while some still regard it as a country with protectionist policies.

Indeed, in the recent years, India has increased the scope of its trade and has set a benchmark for other developing countries around the globe. There has also been an increase in the average Gross Domestic Product (GDP) of the country by reduction in the trade barriers with the help of principles framed by WTO. The integration of the domestic economy through the twin channels of trade and capital flows has
accelerated in the past two decades which in turn led to the Indian economy growing from Rs 32 trillion (US$ 474.37 billion) in 2004 to about Rs 153 trillion (US$ 2.3 trillion) by 2016. Simultaneously, the per capita income also nearly trebled during these years, thereon, throwing light on Indian external sector’s bright future. India is taking steps to attract Foreign Direct Investment by simplifying the rules and promoting the growth of the industry. India has also changed the laws relating to Intellectual Property Rights in order to be at par with the developed countries. The Indian trade policy has been formulated by the government in the Foreign Trade Policy (FTP) for the year 2015-2020 and expects a growth in the exports by 3.5% in 2020.\(^\text{249}\) The formulation of GST in the year 2017 has also helped India in levying a uniform tax against the goods imported and produced in India. Owing to the simplified tariff structure due to this aspect, ways of trading in India have been simplified, thereby, resulting in an increased number of exports and imports. Moreover, in an attempt to flourish international trade, India has taken the following steps, inter alia, has set up a logistics division in the commerce ministry “to develop and coordinate implementation of an Action Plan for the integrated development of the logistics sector”, has set up National Trade Facilitation Committee under the Cabinet Secretary, drawn a National Trade Facilitation Action Plan, and has launched Trade Infrastructure for Export Scheme (TIES). Check-posts on state borders have been dismantled with the implementation of GST. Nitin Gadkari, Minister for Roads and Shipping has also been focussing on port-related infrastructure.\(^\text{251}\)

Many domestically produced goods are saved by the act of dumping of foreign commodities at less than production cost by implementing measures such as anti-dumping and safeguard duties, and minimum import licensing prices. Anti-dumping laws under the Indian legislation have been included under sections 9A, 9B, 9C of the Customs Tariff Act, 1975 and Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (“Rules”). Since the existing anti-dumping laws are based on WTO’s anti-dumping agreement, the provisions for determining dumping are also by and large similar to those defined under the agreement which are, inter alia, existence of the act of dumping established through a comparison made between the export price and normal price during the ordinary course of trade for products of like nature and also requires existence of a causal link between the material injury and the dumped products. Further, any investigation initiated for dumping remedies to come into action has to be to be applied by or on behalf of the domestic producers. On preliminary findings during the course of investigation, the designated authority may impose a provisional duty on the offender, which however, shall not exceed the margin

\(^{249}\) Article on “Foreign Trade Policy of India” by India Brand Equity Foundation, last updated in July 2018.

\(^{250}\) Article on “Foreign Trade Policy of India” by India Brand Equity Foundation, last updated in July 2018.

\(^{251}\) Article on “Foreign Trade Policy Review: India should address problems of competitiveness urgently, set an export target” as published on 7th December, 2017.
of dumping and on final findings; relief is provided to the domestic market in the form of levying of anti-dumping duties on the offender which shall subsist for a period of 5 years.

WTO recognises that every country has its own technical regulation and industrial standard, in order to avoid any obstacle to trade, there are set of international standards that the countries are required to abide by while laying out technical trade barriers. India, like other provisions, has also brought standards for trade in consonance with the international line of standards for goods and services. Most Indian standards are accordant with ISO standards and the Bureau of Indian Standards Act of 1986 is the national body which formulates and develops standards. However, on one hand some Indian standards are not at par with the international standards and on the other, some outdo the international standards, and in both the scenarios Indian standards act as trade barriers while trading with countries like US and Europe; for instance, laws for food safety.

As mentioned above, laws for sanitary and phytosanitary measures involving human health, animal health and plant health are an integral part of international and domestic trade and have existed since ages in India. Laws for human health are governed by various Acts and Orders, inter alia, Prevention of Food Adulteration Act, 1954, Fruit Products Order, 1955, Meat Food Product Order, 1973, Milk and Milk Products Order, 1992, Essential Commodities Act, 1955, etc. Likewise, laws for animal health and plant health are provided under the Livestock Importation Act, 1898 and Destructive Insects and Pests Act, 1914, Insecticide Act, 1968, Plants Fruit and Seeds (Regulation of Import in India) Order, 1989, Plant Quarantine (Regulation of Import in India) Order, 2003, Seeds Act, 1966 and Foreign Trade (Development & Regulation) Act, 1992 respectively. The regulations for protecting animal health in India bind an imposing duty on state to organise animal husbandry on modern and scientific lines and to take every step for preserving and improving animal breeds. Further, the laws for animal health include and regulate the imports of livestock and livestock products in a manner that such imports do not cause infectious and contagious diseases in the animal population of the country. Similarly, Plant Quarantine Order, 1903 has made imports to have phytosanitary certificate in order to prohibit, regulate and protect the imports of plants containing exotic pests and pathogens. These laws have been embodied in India’s legislation keeping in mind the developing aspect of the country and also the economy’s dependency on agriculture and livestock in international trade.

Lastly, before export of any product, pre-shipment practice of verifying shipment details of goods to be exported oversees is done in accordance with Export Quality Control and Inspection Act, 1963 under which the Export Inspection Council is established to overlook the pre-shipment inspection and certification of exports.

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IRREFUTABLE REALITY OF INDIA’S INTERNATIONAL TRADE LAWS:

Due to various components ranging from political, economic, legal and environmental, ground reality of India’s international trade remaining stagnant is true in some ways. These components all together act as a catalyst in hampering exports of the country and define India as a novice player. A restriction imposed on the free flow of goods and services act as a trade barrier which can be tariff barriers (levy of Custom duties according to Article. II of GATT) or non-tariff barriers (quantitative restrictions). In verity, India’s conservative trading laws influence the imposition of the following provisions, thereby, acting as a protectionist measure:

Anti-Dumping- India being a target market for sale of goods and services owing to its large consuming population, is often a victim of dumped imports by countries like China. Dumping is not against the obligations of GATT. It is condemned only when the domestic markets are at a loss. Thus, WTO has allowed the use of anti-dumping policy in some situations where the dumping of imported goods is a threat to the domestic manufacturers. Though India has made an effort of imbibing international agreement of anti-dumping into its legislation under the Customs Act, there still lacks an independent legislation dealing with the similar trade remedy. Section 9A (5) of the Customs Act elucidates upon revocation of anti-dumping duties on completion of 5 years, but it is ambiguous as to the circumstances under which it can be revoked earlier than 5 years. Rule 23 further contains provisions of continued need for reviewing the imposition of anti-dumping, but, it fails to encroach upon the details as to when and how can the review be done, thereby, handing out discretionary powers to the designated authority. Moreover, India is using this policy in an antagonistic manner and as a protectionist measure in order to safeguard its domestic products which raised concerns against the Due Process of Law followed by Indian officials.

Sanitary and Phytosanitary- Likewise, after the SPS agreement came into force, India had amended its laws to avoid any obstacle to trade. However, as far as health of humans, animals and plants are concerned, laws, orders and policies government these measures lack in areas as to its specificity of technical skill, the infrastructure, for instance, laboratories, testing equipment, quarantine treatments, the technology needed to produce the required output of international standards, etc. The labelling and testing of quality of food products by the Food Safety and Standards Authority of India under the Food Safety and Standards Act, 2006 has been established in order to check the standard of goods imported in the Indian markets. However, this process of certification is also sometimes used as a protectionist measure and is strictly condemned by the WTO.

Balance of Payment- There exists Balance of Payment (BOP) crises as there are higher import intensity resulting into sluggish growth of exports and burgeoning imports. Due to the increasing amount of government control over the imports and exports of the country. Such increasing imports of elitist products in order to modernise the economy has led to balance of payment crises. It is very important to maintain an equal level of imports and exports to avoid hindering of

www.supremoamicus.org
economy as compared to other developed countries. There is also a decrease in the value of currency as compared to Dollars which results in higher payment of imported goods and decrease in the foreign exchange of reserves. Dependence on imported goods and machinery for developmental policy has also prolonged the success of India in international trade.

Import Tariff- Other issue faced in the Indian trade scenario is, increased import tariffs which dissuades traders from selling goods into the Indian markets and generally resort to illegal means like smuggling in order to sell the goods at lower than market prices. Owing to lack of infrastructure, India fails to accommodate goods requiring better storage facilities. India’s exports will see a considerable boost if Indian traders work on improving the infrastructure facilities. The Foreign Trade Policy (FTP) 2009-14 has also listed infrastructure facilities as one of the three major pillars of the trading policy which needs to be worked upon. Another irrefutable truth about India’s trading policies is its complex trading structure and low promotion of goods. Traders of developed countries will not be attracted towards buying these products if they are not promoted properly. The documentation process before importing and exporting of goods should decrease with a fall in import tariffs in order to expand the economies of trade and have balance of payments. Several initiatives taken up by the top executives do not have a positive outcome and this failure has to be set right immediately.

Transparency Requirements- India often fails to maintain transparency requirements regarding new laws, regulations and publications of non-tariff barriers in its official gazette which has also caused a decrease in the international trade of India as traders face exorbitant non- tariff barriers. Import licensing barrier is the most common non-tariff barrier faced by foreign traders. The US officials have time and again condemned the act of imposing stringent arbitrary restrictions on traders who wish to sell non-insecticidal boric acid in the Indian markets as they aren’t allowed to sell their commodity to end users or obtain a “no objection certificate” from the Indian ministry. Whereas the Indian traders are allowed to sell non-insecticidal boric acid with a single requirement of maintaining the records to show that such a sale is not directed towards end users. The US officials have resorted to means and negotiations in order to curb these trade barriers in the meetings arranged by the WTO import licensing committee. However, US traders encounter such barriers which has reduced their sale.

Preferential Treatment- Restrictions are also prevalent in the service sectors e.g. telecommunication, construction, retailing, accounting, motion pictures and architecture. The government has a strong control over insurance and banking. Foreign participation is completely disallowed in legal services and thus there exists a service barrier in the Indian economy which leads to discouragement among Foreign Service suppliers. Domestic companies also have a preference as compared to foreign companies. The government of India sticks to domestic companies because the profits which are earned by these companies are retained in the home country and this also works as a developmental measure. Even if foreign entities have better earning and labour turnover, these companies are not
preferred when it comes to government contracts. This is against the National Treatment policy, which asserts that, exports of other member countries will not be discriminated with the domestically produced commodities and is guaranteed by article III of GATT 1947 and incorporated under the 1994 act.

**INDIA AND DISPUTE SETTLEMENT BODY (DSB) ESTABLISHED UNDER WTO:**
In the reign of international trade, dispute settlement takes form in several ways, one of them being amendments brought due to the trade disputes in the national legislations of the member nations to be at par with the international standards. The other being disputes brought before an international body like the WTO. The cornerstone of the DSB under WTO lies in the inception of GATT, 1947, which provided procedures for consultations and dispute resolutions. Owing to the inefficiency prevalent in the execution of dispute settlement provisions, there arose a need for the implementation of a comprehensive process requiring inclusion of panels and various other procedures. Reforms were made under the GATT dispute process, which started from the Uruguay round of Multilateral Trade Negotiations and concluded with the manifestation of Marrakesh Agreement, thereby giving birth to the institution of the World Trade Organisations (WTO) and the much-needed provisions of dispute settlement there under. Dispute settlement Understanding embodies the provisions of dispute settlement arising between member countries by setting out rules and procedures to govern the various agreements under the WTO. To overlook the procedures for settlement of disputes an institution under this agreement called the Dispute Settlement Body has been established.

The system of DSB includes proper timetable with a set of defined rules and procedures for completing a case. Thus, under the DSB of WTO, when a complaint is filed for consultation, the Director tries to mediate the resolution within 60 days. On failure of the consultation within the given time frame a review panel is set up which shall subsist for a period of 45 days, further the conclusion of the panel, which is called as the panel report is given to the disputing parties within six months and the same is circulated amongst the other members within three weeks. In case there lies no appeal, the report of the panel is adopted within 60 days. However, in case the disputing parties are dissatisfied with the panel reports, they shall appeal within 60 to 90 days since the pronouncement of the panel report. The settlement body thereafter adopts the appeal report within 30 days; wherein, if found guilty, the defendant shall state its intention to comply within 30 days and if it fails to comply then it must compensate the plaintiff within 20 days. Further, on failure to compensate, WTO may impose trade sanctions on the request of the plaintiff within 30 days.

As harmonisation is an essential feature under the WTO, developing countries are required to mend their laws in accordance with the international standards in order to grow in the international trade market. India being a founding and active member of both the GATT and WTO is a part of various agreements which have been taken up by the member nations to establish a unified and
unbiased system of trade. India, unlike other developing countries, has been dauntless in using the Dispute Settlement Understanding (DSU) in order to ascertain her rights. Strikingly, the cases brought by and against India under DSU are almost equal in numbers. Given that it participated in the Dispute Settlement Mechanism (DSM) 19 times as complainant and 20 times as respondent, moreover, it has participated as a third party in 63 disputes.253 Due to the well-proved system of dispute settlement, in the recent years, many countries like India are increasingly using the DSM under the WTO in order to enforce their rights and uphold their trade remedies. The below-mentioned details in the graph depict the resolution of disputes in the consultation stage.254

Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all members.

- WTO, Article 21.1 of the DSU.

A dispute under international trade usually arises in case one country is violating trade rules or imposing a trade measure against the defined trade policy. In such an instance, members of WTO, instead of taking an action unilaterally, have an opportunity to approach the DSB and resolve the dispute in a multi-lateral fashion which would benefit all the members. The following cases elucidate the role of DSB in resolving such disputes by upholding the international laws and ensuring that national laws are not prioritised to an extent which would defeat the purpose of international trade.

**Safeguard Measures**- Turkey is yet another jurisdiction which has imposed safeguard measures for the protection of their domestically produced goods. The term of the Safeguard measures is also extended beyond the specified limit and is used as a protectionist measure. Many member nations of the WTO have raised their concerns against these safeguard measures as this has decreased the level of imports and increased the amount of goods produced locally by the domestic companies. India challenged the definitive safeguard measures imposed on cotton yarn (other than sewing thread) and demanded consultations with Turkey on 13th February, 2012. India also challenged the extension of safeguard measures imposed by Turkey against the laws prescribed under the safeguard agreement.

**Source:** [www.wto.org](http://www.wto.org)

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253 Statistics as of 2010, published in an article “India at Dispute Settlement Understanding” by [www.cuts-citee.org](http://www.cuts-citee.org)

254 Statistics as on 27th February, 2013.
Turkey had imposed a safeguard duty on cotton yarn imports in July 2008. This resulted in import levies rising from 13%-20% from 5%, which was the bound import duty rate or its commitment to WTO. Under the WTO norms, a safeguard duty could be imposed only for three years and thus the said measures were to expire on 14th July, 2011. With the three-year term ending in July, Turkey decided to review the process of its extension, but at the same time also imposed provisional duties of 12% to 17% for up to 200 days\(^{255}\).

India considers that Turkey acted inconsistently with the provisions of Article XIX: 1(a) of GATT 1994 and Articles 2.1, 3.1, 4.2(b), 4.2(c) of the Agreement of safeguard (AoS) as Turkey failed to establish a causal link which caused a serious injury to the cotton industry by the imports of cotton yarn from other nations. Article 7.5 of the AoS states that the safeguard measure will not be applied on the product again for the same time period as it was previously applied and the minimum time for non-application or cooling off period after the expiry of the previous period will be for at least 2 years. India contends that as Turkey failed to apply for extension of period before its expiry, there cannot be any extension within the period of non-application. Also, according to article 7.2 there should be no gap from the period to expiry to the extension period and if there is, then a fresh application has to be filed after the cooling off period. However, after consultations, Turkey removed the wrongful safeguard measures imposed on cotton yarn.

**National Treatment** - In the year 2010, Jawaharlal Nehru National Solar Mission (JNNSM) was initiated by the Government of India. India imposed certain Local Content Requirements (LCR) such as the use of solar cells and modules to be manufactured in India which was opposed by the US officials. “These domestic content requirements discriminate against US exports by requiring solar power developers to use Indian-manufactured equipment instead of US equipment,” said US Trade Representative (USTR) Mike Froman. Announcing the “trade enforcement action” against India, Froman said it has requested World Trade Organisation (WTO) dispute settlement consultations with India on the issue \(^{256}\). The Panel established for the settlement of dispute issued a report finding the LCRs inconsistent with India’s national treatment obligations under Article III:4 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 2.1 of the Agreement on Trade-related Investment Measures (TRIMS Agreement). On 16 September 2016, the Appellate Body report sustained the United States' claims that India’s LCR measures are inconsistent with WTO non-discrimination obligations under the Articles mentioned above\(^{257}\).

**Anti-Dumping** - In a remarkable anti-dumping case against India, Taiwan had approached the WTO in order to take corrective action against India for imposing

\(^{255}\)Article on “India drags Turkey to WTO against import barriers on cotton yarn”, as published by the Vietnam Chamber Of Commerce and Industry, WTO on 15th February, 2012.

\(^{256}\)Article on “US challenges India’s domestic rules in national solar mission” as published by IANS, on 11th February, 2014.

\(^{257}\)Article on “India-trade barriers” as published by www.export.gov, on 8th August 2017.
anti-dumping duties on imports of USB flash drives or as commonly known as pen drives. India had imposed anti-dumping duties on imports of pen drives from China and Taiwan at USD 3.06 per piece and USD 3.12 a piece, respectively, for five years, on the recommendation of the Directorate General of Anti-Dumping & Allied Duties (DGAD) and the Central Board of Excise and Customs (CBEC). The recommendations were given after probing into the matter and the conclusion drawn was that the product was imported into the Indian market at prices less than their normal values. Affected by which, Taiwan initiated a step towards consultations and after analysing the issue in question, the authority observed that the product exported in India is below the normal value of the exporting country’s market, and the exporting country’s market has suffered material injury which has been caused due to the dumping of the product under consideration, thus there exists an act of dumping performed by the plaintiff. The WTO upheld India’s move of imposing anti-dumping duties. This decision of WTO has not only protected the Indian markets, but also preserved the international agreement of anti-dumping on a fair ground.

Countervailing Measures - In another instance, India used the dispute settlement provision to ensure a level playing field for its industries in the international trade market and filed a complaint before the WTO against United States for imposing countervailing duty (CVD) on India’s exports of Hot Rolled Carbon Steel Flat Products. India had challenged the determinations made by the US in various investigations / reviews which treated several programmes being subsidised by the Indian Government and also challenged various provisions under US Tariff Act and the Code of Federal Regulations as being inconsistent with the provisions of WTO Subsidy Agreement (ASCM). On being dissatisfied with the panel’s mixed pronouncement, India and US appealed before the Appellate Body (AB), wherein, India hailed to be victorious as the AB held that the Countervailing Duty (CVD) measures which mandates cumulating subsidized imports and dumped imports to arrive at the injury margin as imposed by the United States against “Hot Rolled Carbon Steel Flat Products” are inconsistent with the various provisions under US Tariff Act and the Code of Federal Regulations as being inconsistent with the provisions of WTO Subsidy Agreement (ASCM). This measure hit India as it was leading to extortionate duties against her. WTO’s Appellate Body empathetically endorsed India’s position by highlighting that the sectors under public undertaking are not considered public body unless they explicitly possess authority and discharge governmental functions, thereby, ordering US to amend its national law to be compliant with WTO.

However, despite the expiry of time period for implementing the Appellate Body’s report, US has failed to amend its national laws as per the orders, taking an action against it, DSB has accepted for setting up a panel to inspect the compliance of US in this matter as requested by India.

CONCLUSION:
International Trade Law has influenced India to perpetuate its success in the international market. There has been a tremendous increase in the GDP of India starting from the year India has opened its door to International Markets.
Harmonization of India's National Laws and International Trade Laws has helped India to work against the measures of dumping of imported goods. Likewise, inclusion of safeguard measures has also helped the domestic markets to protect themselves against the atrocious activities as executed by the developed countries in conducting international trade. However, these measures have also been used as a protectionist measure by the Indian officials, which have resulted in differentiation between imported and local goods thereby, giving India a repute of moulding the International Trade Laws according to its whims and fancies. The DSU has rightly come to rescue in case when a member nation acted rebelliously and imposed a trade measure against the International Trade Laws. The DSB of WTO has played an important role in resolving such disputes in a time bound and efficient manner without affecting the laws of any trading nation. Overall, India has utilised the measures provided by the Dispute Settlement Understanding in an effective manner to pursue the issues which may hinder the growth of India’s trade in the International Market.

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CARTEL CONTROL: INDIAN POSITION IN LIGHT OF THE DEVELOPED JURISDICTIONS

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1. Introduction:
Earlier, the state had a minimal role to play in market conditions as there was the prominence of concept of laissez faire. But with ever changing market conditions, there was a need of state regulation of market. The basic purpose of any antitrust law is to prevent practices having adverse effect on competition thereby protecting consumer interests. In line with this, any competition law regime should seek to prohibit anti competitive agreements, restrict abuse of dominance by a business enterprise, provide for regulation of combinations and for matters associated therewith. There is a difference between the market that actually exists and the one that we find in the books. Market economics forces the business players to go for better permutation and combination thereby resulting in greater benefits to the consumers. It needs to be understood that competition law has a social purpose as well. This social purpose could be found in the observation of the court in the US case of United States v Aluminium Co. of America, wherein it was stated as follows:

*It is impossible, because of its indirect social and moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. Throughout the history of these statutes, it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.*

In the Indian context, the constitutional foundations of antitrust law give the answer to the social purpose which a competition law regime must serve.259

2. Cartel control: General Perspective & Regulatory Control:
A historical review of the cartel problem would reveal that they were primarily opposed to competing business entities. In an effort to study cartel control mechanism, apart from the jurisdictions under study of that of US & EU, we would also look at the position pertaining to cartels in Germany and Japan.

3.1 Cartels and Germany:
The land of cartels, Germany, provided many a breeding ground for the growth of flourishing cartels. The economic depression in 1873 in Germany led to a situation where the fascination for free competition faded. One has to understand the process in Germany in two forms: public regulation and private regulation. Industrialization worked the opposite way on Germany as it led to the formation of strong cartels. The commodities also played a crucial role in the formation of cartels as they were suited to the formation and sustenance of the same.

258 148 F2d 416 (2d Cir 1945).

259 Articles 38 and 39, Constitution of India, 1950.
The purpose of legislation in Germany was not to eliminate cartels but to regulate the operation of cartels. Cartel formation and control has been affected by external factors as well. With the defeat in the second World War and the consequent redrawing of boundaries, the US came into picture and there was some sort of regulation sought to be put on cartels.

### 3.2 Cartels and Japan:
In Japan, there is the concept of Private Monopolization which means such business activities, by which any entrepreneur, individually, by combination or conspiracy with other entrepreneurs, or in any other manner, excludes or controls the business activities of other entrepreneurs, thereby, causing contrary to the public interest, a substantial restraint of competition in any particular field of trade. The aforementioned statement is sufficient to reiterate that cartels are well taken care of in Japan. But can a definition be sufficient or a well laid out plan was there for the aforementioned is not sufficient, the focus may turn on the phrase ‘unreasonable restraint of trade’. An unreasonable restraint of trade means such business activities, by which entrepreneurs by contract, agreement or any other concerted activities mutually restrict or conduct their business activities in such a manner as to fix, maintain or enhance prices; or to limit production, technology, products, facilities, or customers or suppliers, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade. An analysis of the second definition gives us a more exact picture. The meaning attributed to the phrase ‘unreasonable restraint of trade’ reveals that business activities which have the effect of distorting competition by contract, agreement or any other concerted practice. This is enough to include within its ambit cartels. The standard of proof of the existence of a cartel is almost the same as in other jurisdictions like that of the US and EU. There has to be a proof that there existed some kind of communication, even informal, amongst the cartel participants. Circumstantial evidence is accepted in Japan as a strong proof of cartel, but it is the other peripheral evidence that is also accepted. Cartels are permitted under certain circumstances as well in Japan.

### 3.3 Cartels & the US Jurisdiction:
The Sherman Act and Cartels:
The beginning of the cartel control mechanism in the US was with the passage of the Sherman Act, 1890. The first case in a long line of cases was that of United States v Trans Missouri Freight Assn., in which it was observed that the prohibitory provisions of the Sherman Act apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation and are not confined to those in which the restraint is unreasonable. In the instant case, a well laid out plan was there for any violation of the agreement entered into by the Trans Missouri Freight Association. In

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262 See, *Nikon Sekiyu K.K. v FTC*, (Tokyo High Court, Nov.9, 1956).


264 166 US 290 (1897).
other words there was a cartel and it was flourishing as well. The case is important in light of the discussion being undertaken in the present paper because in this case, there was an apparent violation of the Sherman Act but the railroad companies very cleverly said that they had dissolved the association and now, therefore, no case can be made out against them. The court stated the following with regard to the Sherman Act, 1890: ‘the language of the Act includes every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations. A contract therefore, that is in restraint of trade or commerce is by the strict language of the Act prohibited even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons or property.’ The next case that highlights the aspect of formation and operation of cartel, and its resultant effect thereon in the US is that of Addyston Pipe and Steel Company et al v United States;265 in which it was concluded that there was an existing cartel in the US cast iron pipe industry. The application of the Sherman Act was held valid in the present case. In the present case, it was charged in the petition that on the 28th of December, 1894, the defendants entered into a combination and conspiracy among themselves by which they agreed that there should be no competition between them in any of the states or territories mentioned in the agreement in regard to the manufacture and sale of cast iron pipe. It was concluded by the court in the present case that the combination thus had a direct, immediate and intended relation to and effect upon the subsequent contract to sell and deliver the pipe. In another case of United States v Socony Vacuum Oil Co., Inc.,266 numerous oil companies and individuals were convicted under an indictment alleging that in violation of section 1 of the Sherman Act, they conspired to raise and maintain spot market prices of gasoline, and prices to jobbers and consumers in the Midwestern Area embracing many states, by buying up distress gasoline on the spot markets and eliminating it as a market factor. In support of the allegations of the indictment, there was evidence to prove that the defendants with intent to raise and maintain prices, devised and carried out an organized program of regularly ascertaining the amounts of surplus spot market gasoline, of assigning its sellers to buyers who were in the combination, and of purchasing it at fair going market prices. In the present case also there was a finding of cartelization and subsequent fines and punishment was imposed accordingly as per the Sherman Act, 1890.

The aforementioned discussion of the US cases related to cartelization reveal that almost all cartels have been declared illegal per se by the US courts.

### 3.4 Cartels and EU:
Historically, the first European Treaty to aim at economic integration was the Treaty establishing the European Coal and Steel Community (ECSC) between France, Germany, Italy, Belgium, the Netherlands and Luxembourg. The ECSC treaty was intended to render impossible any further armed conflict between the member states,...

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265 175 US 211, 20 S.Ct. 96.

266 310 US 150 (1940).
while at the same time laying a firm foundation for European recovery after the second world war. The principal signatories to the ECSC Treaty signed another treaty at Rome on 25 March 1957, to establish what was then called the European Economic Community (EEC). It came into force on 1st January 1958, and it has been amended time and again since then, the major amendment to it being the Single European Act of 1986, which set a deadline for the establishment of a single European market. The main institutions which variously impinge upon the development of the Community and the enforcement of the EC Treaty are set out in Article 7, which provides that the task of the Community shall be carried out by (i) a European Parliament; (ii) a Council; (iii) a Commission; (iv) a court of justice and (v) a court of auditors. This section of the paper is concerned with Article 101 of the EC Treaty and how it affects the dynamics of competition regulation. Part 1 of the EC Treaty provides for articles 1 to 16 of the EC Treaty which provide for the basic framework of the Treaty. The aims of the EC Treaty are set out in Article 2 which provides as follows:267

“The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among member states.”

Four terms primarily need to be understood in the context of the TFEU which are as follows:
(i) Undertakings.
(ii) Agreements.
(iii) Decisions.
(iv) Concerted practices.

First question: what is an undertaking for the purposes of Article 101(1)?
It is important to define the term ‘undertaking’ as when we read the text of the Article, it says that agreements between undertakings are caught by the Article. Undertakings engaged in the supply of services are undertakings within the meaning of Article 101(1) as well as undertakings engaged in the supply of goods. But it is essential that an undertaking should carry on some economic or commercial activity; bodies which are not engaged in any such activity are not undertakings within the meaning of the article. In Poucet and Pistre case,268 the Court of Justice held that two autonomous schemes set up under the French law, one for sickness and maternity insurance and the other for old age insurance, were not undertakings, they pursued only a social objective and were based on the principle of solidarity in that the benefits were not related to the level of compulsory

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contribution which was determined by reference to individual income. An individual is to be considered as an undertaking for the purposes of Article 101(1) if he engages in any economic or commercial activity in his own right, for example, as a sole trader, self-employed professional, licensor of an industrial property right, performing artist or consultant. State owned corporations are undertakings within the meaning of Article 101(1) if they carry on economic or commercial activities which include the supply of public services. The primary case dealing with the question of meaning of an ‘undertaking’ is the case of Hofner and Elser v Macrotron GmbH. The idea in Hofner case that any activity consisting in offering goods or services on a given market for manufactured tobacco respectively. The following is a list of the cases where the Community courts and the Commission considered the term ‘undertaking’ and gave it an expansive interpretation: (i) The ECJ held in Hofner and Elser v Macrotron GmbH that: the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed. (ii) In Pavlov the ECJ added: It has also been held that any activity consisting in offering goods or services on a given market is an economic activity. (iii) In Houters v Algemene Raad van de Nederlandsche Orde van Advocaten the ECJ said that the competition rules in the treaty: do not apply to activity, which by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity or which is connected with the exercise of the powers of a public authority.

Second question: What is an ‘agreement’ for the purposes of Article 101(1)?
The answer to the above question again depends on the level of interpretation given by the Community courts and the Commission from time to time. There can be various forms which an agreement might take and therefore there can be no hard and fast rule in determining whether an agreement attracts Article 101(1) or not. It

275 [2001] 4 CMLR 30, para. 75.
277 Connected agreements may be treated as a single one. (ENI/Montedison OJ [1987] L 5/13). Source:
may be noted here that the concepts of ‘agreement’, ‘decision’ and ‘concerted practice’ overlap. The Commission may characterise the arrangements made by the parties to a complex cartel as constituting an arrangement and/or a concerted practice, and this approach has been upheld by the Community Courts.279 The court of justice has stated:280

“The list in Article 101(1) of the Treaty in intended to apply to all collusion between undertakings, whatever form it takes. There is continuity between the cases listed. The only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not regardless of any distinction between the types of collusion.”

The word ‘agreements’ in article 101(1) is not confined to legally binding contracts. As the court of first instance explained, “it is sufficient if the undertakings in question have expressed their joint intention to conduct themselves on the market in a specific way.”281 However if the parties are still in the stage of negotiations and have not reached a consensus, there will not be an agreement for the purposes of Article 101(1).282 The concept of ‘agreement” is an important one when determining the prosecution of cartels operating over a long period of time. This is because it is very difficult to prosecute cartels in their entirety due to the time and the costs involved. Many cartels are and almost all cartels are complex and of a long duration. Firms may go in and go out of a cartel over a period of time and this may present a difficulty for the competition authority. Active membership of a cartel may change over a period of time and this may present a problem for the competition authority. In Europe, the concept of a ‘single overall agreement’ operates whereby even those firms are made responsible who may not be involved in the operation of the agreement on a day to day or continuing basis.283 Another question that comes up for consideration is whether there is any difference between agreement and concerted practice. The two are conceptually different in Europe but the courts have in Europe over a period of time realised that there is little difference between the two. Linguistically, there might be a difference between the two but legally there is no difference. The courts in Europe have adopted a ‘joint classification’ approach whereby there is no difference between the two ideas viz. ‘agreement’ and ‘concerted practice’.

The concept of agreement has undergone a change over a period of time. For example, advisers and consulting firms now have to be cautious in Europe when they become aware of anti-competitive activities involving their clients. In a very recent case

278 Thus an ‘agreement’ can also be a ‘decision’. FEDETAB, OJ 1978 L224/29. (Source: Bellamy & Child, European Community Law of Competition, 5th ed. 2001, (Sweet & Maxwell, London) at p.51
280 Case C-49/92P Commission v Anic Partecipazioni.
decided in the year 2008, by its judgment dated 8 July 2008, the court of first instance ruled that firms providing consultancy and advisory services to cartel participants could be found liable for the entire cartel behaviour in the same way as if they were themselves active in the markets directly affected by cartel. While the court confirmed that the Commission may prosecute non market participants for their role as facilitators of cartel activity, its judgment nevertheless raises a number of issues about the limits of the Commission’s prosecutorial powers.

Third question: What is a ‘decision’ for the purposes of Article 101(1)?

The next question that beckons is what is a ‘decision’ for the purpose of article 101(1). How are these decisions taken and what is the modus operandi of taking such decisions. Such decisions may result in the formation of trade associations which may operate by way of a cartel. A trade association may take all the decisions related to the cartel and thus may require decision under article 101. Therefore a ‘decision’ refers to a practice whereby a trade association is formed and it takes decisions on behalf of the cartel.

Fourth question: What is meant by a concerted practice for the purposes of Article 101(1)?

The concept of ‘concerted practice’ in Article 101(1) has been defined by the court of justice as covering:

“....... a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been included, knowingly substitutes practical cooperation between then for the risks of competition.”

The court made an important point in the case of ICI v Commission (Dyestuffs) that whilst parallel behaviour by itself did not constitute a concerted practice, it may amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market. The court further noted that in order to decide the question whether market conditions diverge from the normal, it is necessary to examine the nature of the market for the products in question. The court in the aforementioned case found that the market for dyestuffs was fragmented and divided along national lines. The similarity of the rates and the timing of the price increases could not be explained away as the result of parallel yet independent behaviour prompted by market forces. In particular, the concerted prior announcement of price changes enabled the undertakings to eliminate in advance all uncertainty between them as to their future conduct on the various markets. The court said:

“Although every producer is free to change his prices, taking into account in doing so the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the Treaty for a producer to cooperate with his

284 Case T-99/04, AC - Treuhand AG v European Commission.
285 It has been held that the constitution of a trade association is itself a decision, Re ASPA JO [1970] L 148/9, [1970] CMLR D25.
competitors, in any way whatsoever, in order to determine a coordinated course of action, such as the amount, subject matter, date and place of the increases."

Another typical situation is the parent subsidiary relationship in a commercial context. The community courts have over a period of time developed the principle of concerted practice by interpreting that a wholly owned subsidiary enjoys sufficient autonomy so that it should not be considered to form part of the same economic unit with its parent. Difficulties may however arise in cases of partly owned subsidiaries. In Gosme/Martell – DMP,\(^{288}\) the Commission considered an agreement between Martell and DMP, the latter being a joint subsidiary owned 50% by Martell and 50% by Piper Heidsieck. The Commission that Martell and DMP were independent undertakings. At the relevant time, Martell was not in a position to control the commercial activity of DMP because:

(i) the parent companies each held 50% of the capital and voting rights of the DMP;
(ii) half the supervisory Board members represented Martell shareholders and half Piper shareholders;
(iii) DMP also distributed brands not belonging to its parent companies;
(iv) Martell and Piper products were invoiced to customers on the same document; and
(v) DMP had its own sales force and it alone concluded the conditions of sale with its customers.

Therefore why do we include ‘concerted practices’ within the scope of article 101. The idea behind a concerted practice is that there may be certain activities which are not directly connected with the undertaking, decision and agreement in question and therefore cannot be inquired upon directly. For example, the parties to a cartel may do all that they can to destroy incriminating evidence of meetings, emails, faxes and correspondence, in which case it would be very difficult for the competition authority to infer practice or conduct that is adversely affecting competition. It is to prevent this that the concept of ‘concerted practice’ comes in and gains ground.

3. Cartels & India:

The Competition Act, 2002 of India and cartels:

When we talk of cartels in the Indian context, we can have a look at section 3 of the Competition Act, 2002, (the ‘Act’) which talks of anti competitive agreements. There are many components which make up section 3 of the Act and a plain and simple reading would give us a clear picture of as to what is meant by the term anti competitive agreements particularly with reference to cartels. Section 3 of the Competition Act, 2002, refers to anti competitive agreements. These agreements result in the course of trade and are hardly found in writing. There has to be a concerted action to determine the effects of an agreement as anti competitive. It need not be a formal arrangement and it need not also be in writing. Section 3(3) recognises the term cartel with reference to a sector. Accordingly, there could be sugar cartels, tobacco cartels, cement cartels and so on. Section 3 targets ‘certain’ anti competitive agreements. Section 19(1) sets out the procedure for the initiation of the process of inquiry into an anti competitive agreement. It is to the effect that the

\(^{288}\) OJ 1991 L185/23.
Commission may inquire into any alleged contravention of the provisions contained in section 3(1) on its own motion or on the receipt of a complaint. But how is a person supposed to know that an agreement is anti-competitive. How can one understand that there has been an ‘alleged contravention’ of section 3(1) of the Act. There are so many parties involved in a business transaction like suppliers, sub suppliers, agents, distributors and retailers. Therefore each and every one of them cannot know the exact terms of an agreement which is falling within the purview of section 3(1). Thus what is the solution. The solution is in the fact of following a ‘rule of reason’ approach whereby every case is decided on its merits and a case by case approach is followed.

Another important point that arises here is that can multidisciplinary partnerships, which would allow delivery of composite services, be allowed. For example, there are various kinds of professionals like lawyers, chartered accountants, cost accountants and company secretaries, etc. Can these professionals provide services under one roof. This is the demand of the time and requires consideration by each and every professional as well as academician. The Competition Act defines the term ‘agreement’ to include any arrangement, understanding or action in concert. Such arrangement, understanding or action in concert could either be in writing or oral; and it could either be enforceable or not by legal proceedings.

The Competition Act, 2002, provides that no enterprise or association of enterprises or person or association of persons can enter into any agreement with respect to production, supply, distribution, storage, acquisition or control of goods or provision of services that causes or is likely to cause an appreciable adverse effect on competition within India, and any such agreement entered into shall be void.

The basic question as to what is an anti-competitive agreement is discussed with the help of the following points. Section 3(3) provides for certain statutory presumptions as to adverse effect of the agreement or combination on competition where the impugned agreement provides for the following:

1) Direct or indirect determination of sale or purchase price.
2) Limiting or controlling production, supply, markets, technical development, investment or provision of services.
3) Sharing of market or source of production or provision of services by territory allocation [geographical area allocation], product or service allocation [particular type of goods may be given to particular type of dealers], allocation of customers of particular market or allocation of market or source in any similar way.
4) Direct or indirect bidding or collusive bidding.

The primary rule behind the operation of section 3 of the Act is that the agreement

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290 The ‘rule of reason’ has been lucidly explained in *Board of Trade of City of Chicago v US*, 246 US 231 (1918).
292 Section 3(1) and 2, Competition Act, 2002.
in question should cause an appreciable adverse effect on competition within India. The section could be split into the following core areas:

1. Agreement.
2. Effect of the agreement on competition.
3. That effect being adverse on competition.
4. That adverse effect being appreciable.

In the US, it was held in the case of United States v Griffith,\(^{293}\):

I. Even if there was absence of specific intent to restrain or monopolise trade, it may be violative of Sherman Act;

II. It is sufficient that a restraint of trade results as a consequence of the defendant’s conduct or business arrangements. It is not necessary to find a specific intent to restrain trade to say that sections 1 and 2 of Sherman Act have been violated.

III. Specific intent in the sense in which the common law used the term, is necessary only where the act falls short of the results prohibited by the Sherman Act.

IV. The use of the Monopoly Power, however, legally acquired, foreclose competition, to gain competitive advantage, or to destroy a competition, is unlawful.

5. Cartels & Leniency in the Indian context:
Powers have been given to the Competition Commission of India to impose lesser penalty on the persons who come forward with important information with respect to the alleged violation of section 3 of the Competition Act, 2002. This provision draws its strength from the ‘leniency programme’ prevalent in Europe. This mechanism of lesser penalty provisions is particularly useful in the detection of cartels and helps in their detection and prosecution. Cartels operate by way of price fixing which means that cartels of producers come together and decide upon a fixed charge to be taken from some or all the consumers. The simplest form is an agreement on the price or prices to be charged on some or all customers. Cartel behaviour is very complex and strikes at the very purpose of consumer welfare in an adverse manner. The nature of a cartel is secretive and therefore it may become very difficult to detect and prosecute it. It is important to note that the lesser penalty provisions in India has its corresponding regulations across different jurisdictions. But before embarking on a detailed study of the leniency mechanism, it may be relevant to note here the law as it exists in India. The following will help us in understanding the position better. Amnesty provision has been made for making a full and true disclosure in respect of alleged violation of section 3 relating to cartel as defined in section 2(c) of the Competition Act, 2002 in which case the Commission may impose lesser penalty than the penalty provided in the Act.\(^{294}\)

6. Conclusion:
Observations & Recommendations:
The authors of the present paper suggest as follows:
There should be an additional set of leniency provisions apart from the Lesser penalty regulations of 2009 for India. These could be a new set of provisions or they can be made a part of the existing set of regulations. The following provisions may be given attention to:

\(^{293}\) 334 US 100.

1. An enterprise shall be entitled to immunity or leniency only if they fulfil the conditions laid down in these regulations.

2. Conditions for receiving leniency:
   In order to receive immunity or leniency, an enterprise must:
   a) End all illegal activity, except insofar as the Commission believes that the continuance of the activity is beneficial;
   b) Not have been the ringleader of the cartel or coerced anyone into joining the cartel;
   c) Not have been found guilty of cartelization in the past;
   d) Provide full and continuing disclosure to the Commission with respect to the cartel; and
   e) Plead guilty to any charges related to that activity.

3. Rate of immunity
   (1) The first informant shall receive full immunity subject to the conditions mentioned in this regulation if the information is provided before the investigation has started or before the Commission has adequate evidence to convict the members of the cartel.
   (2) The later informants shall receive leniency ranging from 10% to 100% depending on the value added by the information they provide to the Commission. The chronological order of providing this information shall be a relevant factor in determining the amount of leniency shown, with earlier disclosures being shown greater leniency.

4. Continuous Cooperation
   In order to receive immunity or leniency, an applicant must cooperate with the commission. Cooperation includes:
   (a) Providing the Commission promptly with all relevant information and evidence that comes into the applicant’s possession or under its control;
   (b) Remaining at the disposal of the Commission to reply promptly to any requests that, in the Commission’s view, may contribute to the establishment of relevant facts;
   (c) Making current and, to the extent possible, former employees and directors available for interviews with the Commission;
   (d) Not destroying, falsifying or concealing relevant information or evidence; and
   (e) Not disclosing the fact or any of the content of the leniency application before the CA has notified its objections.

4. Marker System
   As long as certain information is provided at the time of the original application being made, additional time should be given to an applicant to complete their application if the applicant can show a good faith basis for requiring the additional time. The information that has to be given at the time of the marker being given should include:
   (a) The basis for the concern which led to the leniency approach;
   (b) The parties to the alleged cartel;
   (c) The affected product(s);
   (d) The affected territories;
   (e) The duration of the alleged cartel;
   (f) The nature of the alleged cartel conduct; and
   (g) Information on any past or possible future leniency applications to any other competition authorities in relation to the alleged cartel.

5. Confidentiality
   The information provided by the applicant as well as the identity of applicant should be
kept confidential till possible. The information can be released once the notice has been served upon the other members of the cartel as the testimony of the applicant might be necessary for the case to proceed.

6. Information
The following information should be provided by the applicant when applying for leniency
(a) The name and address of the legal entity submitting the immunity application;
(b) The other parties to the alleged cartel;
(c) A detailed description of the alleged cartel, including:
(d) The affected products;
(e) The affected territory (-ies);
(f) The duration; and nature of the alleged cartel conduct;
(g) Evidence of the alleged cartel in its possession or under its control (in particular any contemporaneous evidence); and
(h) Information on any past or possible future leniency applications to any other competition authorities in relation to the alleged cartel.

10. Oral Applications
Upon the applicant’s request, the Commission may allow oral applications. In such cases the statements may be provided orally and recorded in any form deemed appropriate by the Commission. The applicant will still need to provide the Commission with copies of all pre-existing documentary evidence of the cartel. The oral application will be recorded and transcribed by the Commission.

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A GLOBAL QUAGMIRE: CHILD SEXUAL ABUSE AND CHILD PORNOGRAPHY

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ABSTRACT

Child sexual abuse, especially child pornography, in today’s digital era is a topic of great significance and merits discussion in the background of increasing crimes against children, thereby, making it the subject of intense study. However, with the increasing engagement of countries in matters of relations and policy, this issue seems to be inconspicuous in connection with the welfare policies and the enforcement of laws per se. The ignorance exhibited by nations worldwide, towards the pressing topic of child sexual abuse, is highlighted by their aversion to ratifying international treaties concerning the same. Despite there being a universal agreement that ‘something must be done’ about the problem of child sexual abuse, it is unfocused. Child sexual abuse refers to the sexual exploitation of a child by enticing, forcing or persuading, which may happen with or without physical contact by an adult or someone else with the power which makes the child do sexual activities. In India, the situation is much grave as one-fifth of the world’s child population resides here. With the wider reach of technology, child pornography has become as heinous a felony as other crimes. In the face of these developments, the present legal mechanisms have proven to be inadequate. This paper brings forth the exigent need for reforms in law and constructive implementation and protection of the child rights and therefore, essentially dealing with these major themes and concerns.

KEYWORDS: Child Sexual Abuse, Child Pornography, Child Rights, Enforcement, Welfare Policies

INTRODUCTION

With the hidebound sentiments on the rise, Lorraine Nilon had rightly penned “Abuse is never deserved, it is an exploitation of innocence and physical disadvantage, which is perceived as an opportunity by the abuser”. Sexual Abuse, especially child sexual abuse, is no lesser than a serious offence, consequently, raising the need for a change of mindset. Child sexual abuse is surrounded by social stigma which is accompanied by a culture of silence that prevents the victims and survivors from bringing forth their testimonies, thereby, allowing the perpetrators to run scot-free. The contemporary spasmodic trepidations of the scope of maltreatment of a child, have given rise to a mélange of legislation, conventions, case laws, treaties, guidelines, reports, and campaigns. Despite the existence of conventions and legislation recognizing and preserving the rights of a child, child sexual exploitation has continued to increase at alarming rates. A study conducted by the Ministry of Women and Child Development in 2007 noted that 50.76 percent of the respondents had faced
sexual abuse and 20.9 percent reported “severe sexual abuse”.  

These numbers are a testament to the fact, that child sexual abuse has emerged as a major threat to the development and security of children, and yet the national governments have failed to adequately address this problem. It is necessary for the state machinery to realize, that the mere signing of international treaties is not enough to resolve concerns as grave as child sexual abuse. The ratification of such treaties and formulation of national legislations in pursuance of the goals enshrined therein is equally important. One such extensively embraced treaty is the United Nations Convention on the Rights of the Child (CRC) which acts as a universal baseline for the development of other conventions and national legislations. One hundred ninety-two nations have now ratified or acceded to this landmark instrument, with the exception of the United States which has signed, but not ratified the CRC and Somalia which has signed the CRC but has no internally recognized government to ratify it.  

Those countries that have integrated the CRC into their legal systems and policies accept its central notions: that children are to be recognized as individuals with their own voice; that they should be nourished through education and healthcare; that they must receive protection from those that would hurt, exploit, or discriminate against them; and that they must be treated with their best interests at the forefront.

Initially, in the 19th Century, no single term was used to denote the adult–child sexual contact. In the late 20th Century, i.e. the 1960s and 1970s, the all-encompassing term “child abuse” came into vogue, comprehensive of all persecution and molestation of a child. Thenceforth, in the 1980s, “child sexual abuse” attracted spotlight due to the escalating rates of sexual crimes against children. “Child sexual abuse is the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not mentally prepared and cannot give consent, or that violates the laws or social taboos of society. Child sexual abuse is evidenced by this 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 is intended to gratify or satisfy the needs of the other person. This may include but is not limited to:

- the inducement or coercion of a child to engage in any unlawful sexual activity;
- the exploitative use of a child in prostitution or other unlawful sexual practices;
- the exploitative use of children in pornographic performance and materials.

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297 id.

CHILD SEXUAL ABUSE- THE INTERNATIONAL AND NATIONAL LEGAL PATCHWORK

Strike the iron when it is hot, is one of the key secrets for addressing and resolving a gordian knot prevalent in the society. Child sexual abuse, especially child pornography leaves an indelible mark on the minds of an individual, society and the nations as a whole. Hike in the child sex crime rates has given an impetus to child rights and has thus, led to the outright need for the systematic framework of laws and conventions recognized not only on the national but also the international level. Considering this fact, an international convention was developed i.e. United Nations Conventions on the Rights of the Child (CRC), which is a comprehensive framework of 42 articles and deemed as a bedrock for the rights of a child. CRC talks about the rights of children under four broad categories, namely, survival rights, membership rights, protection rights and empowerment rights. Article 26 of CRC illuminates not only the survival rights but also the benefits of granting social security and social insurance along with these rights. Keeping in view the right of the child to survival and development, Article 6 of the CRC enshrines the child’s right to survive and Article 27 recognizes the right to adequate standard of living. In consonance with these Articles, Protection of Children from Sexual Offences Act (POCSO) also incorporates model guidelines under Section 39. POCSO, passed in 2012, was the first step in bringing the problem of child sexual abuse to light as a heinous crime requiring exclusive regulations to prevent its occurrence and punish its perpetrators. One of the guidelines enumerates the child’s right to life and survival and to be shielded from any hardship, abuse or neglect. It also emphasizes the right of the child to harmonious and healthy development in case the child has been traumatized. Hence, CRC broadly reflects the view that child is not a chattel, but a human being in his or her own right. As such, the child is entitled to be recognized as a person under the law, which the U.S. court has so ruled.

Article 34 of the CRC elucidates the draconian practice of child sexual abuse and exploitation. It essentially deals with the role of the State Parties, undertaking all the national, bilateral and multilateral measures for the protection of a child to prevent inducement or coercion by captivating a child to engage in any unlawful sexual activity, exploitative use of children in pornographic or child sexual abuse material. The national counterpart of Article 34 in India, is the Protection of Children from Sexual Offences Act of 2012 (POCSO),

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300ibid, art. 6.
301ibid, art. 27.
which incorporates and expands the provisions of the CRC on child sexual abuse. POCSO covers a myriad of offenses under the umbrella of child sexual abuse including penetrative sexual assault, aggravated penetrative sexual assault, aggravated sexual assault, sexual harassment and use of a child for pornographic purposes. The enactment and enforcement of POCSO have given traction to child sexual abuse as a problem plaguing the society and has dispelled the notion that child sexual abuse should be seen as a taboo. The gravity and magnitude of the prevalence of the problem are indicated by the increase in victims of child sexual abuse. The number of victims recorded under POCSO increased from 8,990 in 2014 to 36,321 in 2016\(^3\) which represents a whopping 304% increase in the total aggrieved. These numbers are also significant in pointing towards the utility of POCSO as a mechanism for reporting offences since it recognizes a wider variety of crimes against children as opposed to the situation prior to 2012, wherein several crimes went unpunished due to the lack of an organized legal structure tackling the issue of child sexual abuse. Not only child sexual abuse as explained in the above provisions, CRC also throws light on the contribution of the States in making an effort for the prevention of the sale, trafficking and abduction of a child, stated in Article 35\(^5\).

Though it is apodictic about the child sexual abuse that children must not suffer and be protected from the abuse, the role of the state which draws a margin between the ‘state business’ and ‘parental choice’, remains questionable. Article 18 of CRC shed light on the duty and responsibility of the parents and the state. It acknowledges that parents and legal guardians have the primary responsibility for the upbringing and development of a child, with the best interests of a child as their basic concern. It also states that the ‘State has a secondary responsibility to provide appropriate assistance to parents and legal guardians in meeting their responsibilities.’\(^6\)

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention -2010) focuses on ensuring the protection of the best interests of children through prevention of abuse and exploitation, protection and assistance for victims, punishment for perpetrators, and promotion of national and international law enforcement cooperation. The Lanzarote Convention encourages an array of preventive measures combating all forms of sexual exploitation and sexual abuse of children.\(^7\)


\(^6\)ibid, art. 18.

DISTINCTIVE FEATURES OF POCSO ACT, 2012

The rapid increase in child sexual abuse crimes across the globe has necessitated the strengthening and evolution of legal mechanisms, especially in the case of India, which is one of the top five countries in dire straits of sexual crimes against children. POCSO Act, 2012 hit a home run in addressing these vulnerable issues by laying down certain provisions which were previously unaddressed. One of the major lacunae in the previous legislations was the narrow ambit of “penetrative assault”. Prior to 2012, Indian laws considered only vaginal penetration by the penis as qualifying under the definition of “penetration.” This is evident from the case of State v. Pankaj Choudhary, where, in the absence of POCSO, the accused could be prosecuted only for ‘outraging the modesty of a woman’ when he committed digital penetration of the anus and vagina of a 5-year-old child. Rape could not be proved, as the High Court observed that digital penetration was not recognized as an offence under the Indian Penal Code. The broader definition under POCSO has resulted in greater punishments for child abusers by widening the scope of the offence. Section 11(iv) of the Act defines sexual harassment as including repeatedly or constantly following, watching or contacting a child either directly, electronically or through other means. This is a departure from the traditional definition as it covers the harassment of a child by sexting or sexual cyberbullying as well. Furthermore, Section 16 acts as a proper deterrent by penalizing the attempt or abetment of any of the offences listed under the Act. The ‘extraordinary clause’ of the Act is Section 29, which is in stark contrast with the generally accepted norms of the justice system and provides that the accused be presumed guilty, until proven innocent. Before the enactment of the POCSO Act, all cases of pornography were investigated under Section 67, 67A, 67B and 67C of the Information Technology Act, 2000, which was considered a grey law and was inefficient in dealing with the problem of child pornography due to the lack of special focus on children. The advent of POCSO has enabled speedy and systematic redressal and it tries to go to the bottom of these sensitive issues. The incorporation of Section 13, 14 and 15 in the legislation has provided specific guidelines to deal with the grave issue of child pornography and provides stringent punishments for committing such an offence. One of the biggest achievements of POCSO in battling the menace of child pornography was evidenced by Kamlesh Vaswani v. Union of India, where the court mandated the banning of all websites publishing sexually explicit content involving children, especially those aged between 14-18 years.

CHILD PORNOGRAPHY: A WORLDWIDE CRIME

The present time is considered to be the ‘heyday’ of technology and digitalization

but has given way to many serious crimes spread worldwide. Like child sexual abuse, Child pornography is a problem with international implications which constitutes the production, exhibition, distribution, and collection of child sexual abuse material, alternatively referred to as child pornographic material. The term “child sexual abuse material” is now preferred over “child pornography” to dispel the notion of willingness on the part of the child in any way and to reflect the grave nature of the content. 311 In the mid-1990s, one distinguished expert on child protection was able to describe the traffic in child sexual abuse material as being “a cottage industry”. 312 There are many intricacies involved in evolving a standard definition for “child pornography” due to various dissensions on determining the universally accepted definition of “child”. According to CRC, a “child” is recognized as any person under 18 years of age, whereas, dubiousness is involved in the international recognition of the definition, for instance, child pornography legislations of all Australian States and Territories determine “child” as a person under 18 years of age. In other jurisdictions such as the United States, children even at 15 years of age, can consent to engage in sexual activities with an adult. However, this does not give such adult, the freedom to create, distribute or possess visual recordings of such sexual activity because the federal statutes define a child as a person under 18 years of age.313

Though national differences exist in determining the meaning of child pornography, international bodies have attempted to arrive at a commonly accepted definition. The definitions so evolved, concentrate more on the visual, rather than the written material. The Council of Europe defines child pornography as "any audiovisual material which uses children in a sexual context." Council of Europe, Recommendation R(91)11 and Report of the European Committee on Crime Problems (1993).314 The International Criminal Police Organization (INTERPOL) delegates, define child pornography as "the visual depiction of the sexual exploitation of a child, focusing on the child's sexual behavior or genitals."315

The rudimentary requirement for the development and dissemination of child sexual abuse material is the access to information. Article 17 of CRC provides for regulations to the States, which ensures that the child has access to information and


materials from a diversity of national and international sources, especially those aimed at the promotion of his/her social, spiritual and moral well-being and physical and mental health.\textsuperscript{316} However, this information should be subjected to the reasonable restrictions and limitations as some information might be detrimental to the development of a child. The information so provided must be in harmony with the motive of the social, psychological and educational development of a child as provided in Article 29 of the CRC. Therefore, the right to access information should not be absolute. On similar lines, Article 13 also fortifies the child’s right to freedom of expression which shall include the right to seek, receive and impart information and ideas of all kinds, through any medium, depending upon the discretion of a child. Likewise Article 17, it also talks about the imposition of rational limitations. Right to access to information in Article 17, is inextricably related to the right to seek, and impart information in Article 13\textsuperscript{317}.

Considering the interpretation of both these Articles, it is axiomatic that the focal point of both of them is to ensure that the child has access to information, especially such information that is beneficial for his/her health and well-being.

One of the major challenges faced by the society and nation as a whole is considering a discussion of “sex” and “sexual abuse” a social taboo. According to Article 18, which is in accordance with Article 17, parents have the primary responsibility in imparting education, especially sex education, for the better build-out of their personality. Sex education also plays an important role in dissipating the hesitation that children have while discussing the issues related to sex and sexual abuse. In addition to this, the State should guide the parents for providing sufficient information about the contents of TV and other social media and should supervise the child’s use of such media. This guidance by the State is of utmost importance considering the findings of a survey, which reported that 51\% of parents either do not have or do not know if they have software on their computer to monitor their teenagers’ online navigation and interactions.\textsuperscript{318} It has also been reported that, 75\% of child pornography victims are living at home when they are photographed, which blazons that parents themselves are often responsible for such plight of children.\textsuperscript{319} In the 13th session of the Committee on the Rights of the Child, a discussion was made about “child and media” and 12 recommendations were proposed by the Committee. The proposed recommendations suggest voluntary, rather than legislative, controls in developing guidelines to protect children from harmful information. One recommendation is that state parties work


\textsuperscript{318}John Walsh,Parental Internet Monitoring Survey, National Center for Missing & Exploited Children and Cox Communications Parental Internet Monitoring Survey

\textsuperscript{319}Michael B. Mukasey et al., Commercial Sexual Exploitation of Children: What do we know and what do we do about it? (US Department of Justice) 7 (2007).
with media companies to protect children from harmful influences and institute measure which is not broadcasting violent program during certain hours, providing clear presentation before programs about their content, and developing technological devices such as V-chips to help consumers block out certain programs. Another recommendation calls for the national plan of action to empower parents in the media market and support them in their role as guides to their children by encouraging greater media knowledge.320

While understanding the hazards of child sexual abuse material to the development of the individual and to the society as a whole, it becomes imperative to question the basis of the appeal of the manufacture, distribution, and collection of pornographic material for those who engage in such activities. It is of paramount importance because in order to curb this dreadful issue there is a need to remove the motive behind an undesired activity which seems to be the root cause. Margaret A Healy, in a working document prepared for ECPAT, highlights the usages of child sexual abuse material. Firstly, pornographic material of any kind is mostly consumed for the purposes of arousal and gratification. Child pornography, in particular, may be used as a precursor to actual sexual activity with a child, apart from using it to stimulate the sexual drive. Secondly, child sexual abuse material also acts as a validation and justification for pedophilic behavior. Viewing such pornographic content causes a pedophile to believe that his/ her actions are not abnormal and are shared and accepted by other people worldwide. Thirdly, such material allows child exploiters to lower the inhibitions of children. Through pornographic content, they encourage reluctant children to engage in sexual activities and indicate what they want the victim to do. It is to be noted that child abusers play with the psychology of a child by luring and exposing him/her with a kind of images based on the age and their sexual preferences. Fourthly, and most dangerously, child pornographic material may be used to blackmail a child victim into silence. Child abusers may exploit the child by threatening to show the pictures or video graphic content to parents or peers. Further, this kind of content also helps exploiters in establishing connections with other pedophiles and gain access to other markets or to other children. Finally, profit also acts as a motivating factor, while most producers of such material do not sell it, some may engage in the sale of self-produced materials to finance trips to popular sex tourist destinations. It is thus, an amalgamation of these factors that motivates and encourages an exploiter to engage in the production and dissemination of child sexual abuse material.

As discussed above, international organizations have made conscious efforts in addressing the motives behind the menace of child pornography, but this exercise also has its fair share of challenges. Firstly, there is a lack of any uniform definition of what child pornography entails. Secondly, this area of study suffers from a lack of data...


regarding the production and distribution of child pornography in many parts of the world, particularly Africa and Latin America. Lastly, there has been a shift in global patterns of production and consumption of child pornography. In order to deter these challenges, some international organizations, not only the governmental organizations but also the non-governmental institutions, have risen above these and come up with the statistical reports to investigate this baleful issue.

ECPAT International came out with a report in 2002, that estimated the existence of 100,000 child pornography websites in 2001. In 2003, the National Criminal Intelligence Service in the U.K. recorded that the number of such websites had doubled globally. In 2001, the number of reports received by the CyberTipline of the U.S.-based National Center for Missing & Exploited Children stood at 24,400 which increased to more than 340,000 at the outset of 2006. International Resource Centre) (IRC) was formed in 2006, as a result of the combined effort of International Centre for Missing and Exploited Children (ICMEC) and INTERPOL for the effective law enforcement by furnishing both public information and private investigative resources and conducted the built-in training program for the same. These efforts were made to combat the insidious challenge of child pornography prevalent worldwide. Notwithstanding the prevalence of Global Child Protection laws, many countries still do not consider child pornography a crime. This can be substantiated by the ICMEC Report, 2006 conducted in 184 countries which found that only 27 countries had laws sufficient to protect children from child pornography. With the passing of the time, the situation took a turn in the affirmative direction, where 100 countries have enacted at least one of the organization’s recommended criteria in which 51 of the countries that had no law in 2006 have law today and the number of countries deemed to have sufficient law has climbed from 27 in 2006 to 69 in 2012. Yet, 53 countries still have no law at all that specifically criminalizes child pornography.

DIFFERENT FORMS OF CHILD PORNOGRAPHY UNDER CHILD SEXUAL ABUSE

Child sexual abuse has taken many forms which have the potential to damage a child. The technology and the internet have introduced a new dimension which it is abusive to a child. This has magnified the problem, for instance, further or repeated publication of the images re-abuses and re-victimizes the child which is aggravated by actions of the people who deliberately engage in viewing or downloading the images and are in reality child abusers by proxy. As a result of this, child self-


confidence and esteem are lowered. This is the first major reason why such images should be immediately removed because a child may never know and never be certain who might have seen or downloaded these pornographic images. Downloading these images adds fuel to fire for committing an illegal act by intensifying the downloader’s sexual fantasies. This is the second major reason why pornographic images of children should be hastily removed.

Every coin has two faces, but when the negative face outweighs the positive one, it portrays a shoddy image and is considered a bane in the society. This is true for the internet as well, because, on the one hand, it is a hub of knowledge, while on the other it acts as the breeding ground to the antagonists and evildoers due to the garb of anonymity that it provides. One of the poignant examples of this is the “internet chat rooms”. These are online channels that act as facilitators for communication between knowns and unknowns on the internet. The major reason for internet chat rooms being the prime home to child abusers is the facelessness it provides to them which enables them to communicate with their scapegoats by attuning to their fabricated age and sexual preferences. The abuser in an internet chatroom takes undue advantage of a gullible child by a rattrap of trust. Research in 2000 found that 19% of young people reported being approached for sex at least once a year.324 Also, one in five children (aged 10 to 17) receives a sexual solicitation or approach via the Internet in a one-year period,325 which is enough evidence to show the impact of internet chat-rooms.

Grooming acts as a viaduct to online sexual abuse, involving a series of stages. The groomer initially tries to understand the mental state of the victim and analyzes whether he/she wants to move from the public mode to a private mode of conversation. Following this, he adopts mannerisms that he thinks the child would admire and attempts to evolve a relationship, which can be in the form of a friendship, to acquire information by engaging in conversation with the victim through the exchange of messages. Grooming entails luring a child into sexual conversations to prepare him or her for sexual abuse and exploitation and other illegal activities.326 These sexually explicit conversations are detrimental to the child, as they lead to enhanced sexual drive at a young age which causes him/her to engage in other potentially harmful activities like sexting. Sexting means sending or posting sexually suggestive images, including nude or semi-nude photographs, via mobiles or over the Internet. Research found that 61% of secondary school head teachers reported this as a greater concern than smoking, drugs, obesity or offline bullying.327

326 UNICEF, Child Online Protection in India 46 (2016).
327 UK Council for Child Internet Safety Report, Texting in Schools and Colleges:
The above mentioned online child sexual abuse techniques, an increase in online communication between the abused and the abuser gives rise to another aspect of child sexual abuse, which is termed as ‘child sex tourism’. It refers to the sexual exploitation of children done by domestic or international tourists who travel with the intention of having sexual contact with that child. Under CST, perpetrators take undue sexual advantage under the veil of accommodation, transportation or any other tourist activity which involves a child, to remain unnoticeable in the circumambience. Child sex tourism is still a developing phenomenon. While it has been reported as a recurrent problem in several destinations, for over five years, it is still an emerging trend in other destinations. Countries like Brazil and Mexico have been identified as long-affected CST destinations. In recent times, Argentina, Peru, Colombia and South Africa have been pinpointed as emerging CST countries. In addition to this, India has also come to the fore as a lucrative destination for child sex tourists.  

As human behavior has been diverted from the notion of forgiveness to retaliation, there is a sudden porn bombing which has actually resulted in the emergence of revenge porn. Revenge Porn is the sharing of private, sexual materials, either photos or videos, of another person without their consent and with the purpose of causing embarrassment or distress. The images are sometimes accompanied by personal information about the subject, including their full name, address, and links to their social media profiles.  

It has been illustrated through an incident that happened in India. In April 2015, a 21-year-old man was booked by the police in Gujarat for allegedly spreading photographs of his teenage ex-girlfriend in compromising positions on popular social media sites. The pictures were reportedly taken on a mobile phone but were posted by the accused when the girl’s parents were looking for a groom for the girl. The accused was charged with molestation under different sections of the Information Technology Act and the Protection of Children from Sexual Offences Act.  

Using 1995 as the baseline, INTERPOL reported knowing of only around 4,000 unique child pornographic images in total worldwide. For determining the present situation, reliable data does not exist it is estimated that around 100,000 child pornographic images are there on the internet whereas 50,000 new images are going into circulation each year. In June 2009, in a single action, police in Mexico arrested a Canadian citizen, Arthur Leland Sayler, in possession of 4 million images.  

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331 COMMONWEALTH TELECOMMUNICATIONS ORGANIZATION, ONLINE CHILD PROTECTION: COMBATING CHILD SEXUAL ABUSE MATERIAL ON THE INTERNET 6 (2017).
To overcome the challenge of insufficiency of data and to improve the efficacy of the existing conventions and protocols, international organization - United Nations has come up with the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Article 3(1)(c)\textsuperscript{332} of this protocol, concerns itself with the import, export, sale and possession of child pornographic material. Furthermore, Article 10\textsuperscript{333} urges the State Parties to take steps to curb child pornography and child sex tourism by strengthening international cooperation. It also recognizes, that different countries face distinct situations. While in developed countries, child pornography is perceived as a lucrative industry to flourish on, whereas in developing countries, it is a result of extreme destitution, staggering infant mortality rates, hunger, and prevalence of illiteracy.

**SHORTCOMINGS AND PROGRAMS INITIATED**

Augmenting crime rates and the lack of an adequate mechanism to tackle them, has given hiatus to the efficacious development of the society. The major reason for this, was the lack of awareness and knowledge. Though the national and international organisations need to be lauded for their efforts in attempting to formulate and enact laws that tackle these challenges, the shortcomings of such legislations cannot be overlooked. At the national level, the POCSO Act was a breakthrough legislation in providing justice to victims of child sexual abuse but the stringent legislation failed to take into account the sexual autonomy of a child. POCSO criminalizes all forms of sexual relations with a child, irrespective of his/ her consent. This effectively means, that a child does not have the right on his/ her own body. This lacuna has been recognized by the judiciary as a court observed that the body of every individual under 18 cannot be considered the property of the State.\textsuperscript{334} Another aspect of this, is the “victim-perpetrator” dilemma, that arises in cases where both parties involved in a consenting sexual act, are children. Since both of them are incapable to consent according to the existing laws, it is practically impossible to determine who would be the victim and who would be the perpetrator in such cases. Section 19 of the POCSO Act makes the reporting of CSA cases mandatory by any citizen, especially those working with children and young people in the education, social, religious and health sectors. This obligatory reporting though well-intended, has a consequential flip side which acts as a curtailment to the autonomy of people working with, or related to children in making independent decisions. This acts as an impediment to their self-governing and self-determining actions. Criminalizing sex under 18 years virtually pushes it beyond the purview of health professionals and school counsellors who

\textsuperscript{332}Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography art. 3(1)(c), Jan. 18, 2002.

\textsuperscript{333}Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography art. 10, Jan. 18, 2002.

\textsuperscript{334}Consensual Sex with Minor Not A Crime, TIMES OF INDIA, Aug. 26, 2013.
might be reluctant to impart safe sex advice or treat effects of unsafe or reckless sexual practices, without breaching patient confidentiality and/or getting involved with reporting it to the authorities. A legislation such as POCSO, is highly dependent on accurate determination of the age of the victim and the accused. The applicability of this law depends upon, whether or not, the person is below 18 years of age. In a country like India, which is ridden with poverty and illiteracy, the lack of documentation is a ubiquitous problem. This aspect was pointed out by the court in the case of BablooPasi v. State of Jharkhand and Anr, where the court observed that age determination was very difficult in the absence of birth certificates or other official documentation. In the international framework of laws in relation to the CSA, the major loophole seems to be the lack of a uniform set of rules and regulations which can be adopted by the countries. This puts the nations in a dilemma of adoption of the heterogeneous existing laws and the formulation of a supplement legislation in harmony with the existing ones.

In order to vanquish the draconian problem of child sexual abuse and triumph over the above-mentioned shortcomings and lacunae, international organizations and national activists have initiated fruitful campaigns and programs. One of the prominent examples of this, at the national level, is the organization “Recovery and Healing from Incest” (RAHI) which was the first organization to deal with these issues. It is a center for adult women survivors of incest and child sexual abuse. The epidemic of child sexual abuse in India compelled Kailash Satyarthi, a Nobel prize winner, to combat this grave problem which led to the initiation of the “Full Stop” campaign to expand the arena of awareness by educating the people and make them vigilant against such crimes. On the international front, one such initiative was “Project Spade”, which began in October 2010 and was an investigative program into child pornography by the international police in Toronto, Canada. It eventually panned out over 50 countries, leading to almost 350 arrests and around 386 children being rescued. These campaigns and successful measures set up a paradigm for further affirmative actions.

CONCLUSION
Child sexual abuse, which covers the grave problem of child pornography as well, is indeed a global quagmire that is an outcome of a plethora of causes. The research tries to establish a link between the black letter law and what actually happens, as one indicator of the legitimacy of that law. One should realize, that the above-discussed child protection laws would be futile if they cannot be implemented effectively. They will merely be regarded as ‘paper tigers’ which have theoretical authority but lack practical implementation. This article tried to distills and compares the crux of the concerned legislations of much complexed social and legal issues prevalent across the juridical and geographical boundaries. This

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comparison was aimed at bringing to the fore, the positives and negatives of both, the national and international regulations so that the plusses can be combined to form a condensed version of the existing legislations which would aid in the effective tackling of the vice of child sexual abuse.

It is well-established that every change, be it social, legal or political, comes from the efforts of an individual. No amount of governmental laws would suffice if people do not take up the cause of their own volition. Therefore, it has been rightly penned by an eminent personality, Joe Biden, “No fundamental social change occurs merely because government acts. It’s because civil society, the conscience of a country, begins to rise up and demand - demand - demand change”.

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THE INDIAN CROSS BORDER MERGER REGIME: IN LIGHT OF FOREIGN EXCHANGE REGULATIONS

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ABSTRACT
Mergers and amalgamations date long back. We hear about the merging of companies making rounds of the news each day. With the increasing frequency of these transactions happening on a day to day basis, while it may seem to be a fairly simple phenomenon, these transactions certainly don’t happen overnight. Myriad laws along with various legal and regulatory compliances are required to be complied for such mergers and it may take over months or even a few years for the enforcement of a merger. In this era, mergers are happening across jurisdictions and it has become crucial to develop stringent laws and rules for regulation of such international transactions. The Ministry of Corporate Affairs recently enforced Section 234 of Companies Act, 2013, thereby opening the gates in India to a cross border merger regime. Subsequently, the Reserve Bank of India, also released the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 to prescribe a detailed mechanism for the implementation of cross border mergers. Through this paper, the authors aim to shed some light on the Indian cross border merger regime in light of the newly notified laws and the key takeaways therefrom.

INTRODUCTION

What is a merger – back to basics!
‘Mergers and Amalgamations’ are often used synonymously in the context of Indian commercial law and simplistically mean combination of businesses including all assets and liabilities of two or more entities into one. Typically, in a merger, as the name suggests, one or more entities merge themselves into a surviving entity such that the surviving entity retains its corporate existence whereas the merging entities cease to exist post the merger. Let’s take an example to understand this better. In a merger of a Company A with Company B, all the businesses of Company A will merge with the business of Company B, such that Company A will cease to exist and all its businesses will be carried out by Company B instead. As consideration for the transfer of all assets and liabilities of the merging entities into the surviving entity, the surviving entity issues its securities to the security holders of the merging entities and accordingly, the security holders of the merging entities become the security holders of the surviving company.

The possible objectives of mergers are manifold - greater economies of scale, reduction in administrative expenses, operational synergies, diversification of businesses, access to sectors / markets, to name a few. Mergers may be of several types- horizontal (in the same industry), vertical (in the same line of process), triangular (subsidiary merges with another company and ceases to exist) etc.

Framework of mergers: Companies Act, 2013
Sections 230 to 232 of Companies Act, 2013 (“Act”) read with the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (“Rules”) set out the procedure for implementation of mergers. The National Company Law Tribunal (“Tribunal”) has been appointed as the adjudicating authority to enforce a scheme of merger. Under the Act, a merger process may be initiated either by the companies involved in the merger or their respective members or creditors, by filing an application with the jurisdictional Tribunal. After the board of directors of the companies involved in the merger have approved the proposed merger scheme, it is required to be approved by such number and percentage of their members and creditors as prescribed under the Act, either by way of meeting called by the Tribunal or by way of procuring their consents / no-objections. Once the members and creditors of the companies are on board, governmental and sectoral authorities are given an opportunity to provide their suggestions / comments on the proposed scheme of merger. Thereafter, the merger scheme is sanctioned by the jurisdictional Tribunal. If any of the companies involved in the merger scheme is a listed company, then in addition to the procedure prescribed under the Act and the Rules, the procedure prescribed under laws framed by the Securities and Exchange Board of India are also required to be complied with.

With the globalization of economies and growth & expansion of businesses beyond local markets, mergers are no longer limited to domestic jurisdictions and cross border mergers have now become a very popular choice. The increasing inflow of foreign direct investment in India is one of the main factors for changing the M&A landscape in India making the companies open to options of merging with foreign body corporates. Countries, either through amendment of their domestic laws or by being signatories to various bilateral trade treaties or multilateral conventions, have introduced various laws to regulate such international transactions and protect the interest of the parties involved.

**INDIAN CROSS BORDER MERGER REGIME**

**Companies Act 2013: Section 234**

The Ministry of Corporate Affairs, Government of India (“MCA”) vide its notification dated 13 April 2017, has enforced Section 234 of the Act, thereby permitting cross-border mergers. In addition, the MCA vide its notification dated 13 April 2017 has also amended the existant Rules by insertion of Rule 25 A to prescribe for the cross border merger regime.

The erstwhile regime on mergers and acquisitions as prescribed under Companies Act 1956, permitted inbound mergers i.e., merger of a foreign transferor company with an Indian transferee company. However, outbound mergers i.e, merger of an Indian transferor company with a foreign transferee company were not provided for under Companies Act 1956. In contrast to this, Section 234 of the Act permits both, inbound cross border mergers as well as outbound cross borders, subject to prior approval of the Reserve Bank of India (“RBI”).

www.supremoamicus.org
Foreign Exchange Management (Cross Border Merger) Regulations, 2018 (“Cross Border Regulations”)
The introduction of cross border mechanism under the Act and the Rules, necessitated a need for a corresponding change to the existant foreign exchange control laws as prescribed under the Foreign Exchange Management Act, 1999 read with the regulations framed there under (“FEMA”). Accordingly, on 20 March 2018, RBI issued the Cross Border Regulations which set out in detail the procedure to be followed for implementation of cross border mergers. We have highlighted below some of the key provisions of the Cross Border Regulations.

CROSS BORDER REGULATIONS: KEY PROVISIONS

Key definitions
‘Cross border merger’ has been defined under the Cross Border Regulations to mean any merger, amalgamation or arrangement between an Indian company and foreign company in accordance with the Rules.
‘Resultant company’ means the Indian company or the foreign company which takes over the assets and liabilities of the companies involved in the cross border merger. Where the resultant company is an Indian company, the merger is an ‘inbound merger’ and where the resultant company is a foreign company, the merger is an ‘outbound merger’. An outbound merger is permitted with only such foreign companies which are incorporated in certain permitted jurisdictions as prescribed under the Rules.

Valuation
The valuation of the Indian company and the foreign company should be conducted in accordance with internationally accepted principles on accounting and valuation, by valuers who are members of a recognized professional body in the jurisdiction of the resultant company.

Issuance of security by resultant company
In an inbound merger, the Indian resultant company may issue or transfer any security / foreign security to a person resident outside India, subject to compliance with the conditions for foreign investment prescribed under FEMA, including pricing guidelines, entry routes, sectoral caps, and reporting requirements. Additionally, where the foreign transferor company is a joint venture / wholly owned subsidiary of the Indian resultant company, then conditions prescribed for the transfer of shares of such joint venture / wholly owned subsidiary under FEMA must also be complied with.

In an outbound merger, a person resident in India is allowed to acquire or hold securities of the foreign resultant company in accordance with the provisions of FEMA. However, where such person resident in India is a resident individual, then the fair market value of such securities should be within the limits of the liberalized remittance scheme prescribed under FEMA.

Office of the transferor company
In case of an inbound merger, pursuant to the scheme of cross border merger, the office of the foreign transferor company outside India is deemed to be the branch / office outside India of the Indian resultant company in accordance with FEMA.

337Rule 25A, TheCompanies (Compromises, Arrangements and Amalgamations) Rules, 2016 (India)
Conversely, in case of an outbound merger, the office in India of the Indian transferor company is be deemed to be a branch office in India of the foreign resultant company in accordance with FEMA. Accordingly, the Indian or foreign resultant company, as the case be, is allowed to undertake any transaction as permitted to a branch / office under FEMA.

**Guarantees / outstanding borrowings of the transferor company**

In an inbound merger, the guarantees or outstanding borrowings of the foreign transferor company which become the liabilities of the Indian resultant company are required to comply with the norms on external commercial borrowings and foreign borrowings, within a period of 2 (Two) years. Within such period of 2 (Two) years, no remittance for repayment of such liability can be made from India.

In an outbound merger, the guarantees or outstanding borrowings of the Indian transferor company which become the liabilities of the foreign resultant company are required to be repaid in accordance with the manner set out in the scheme of merger. Additionally, the foreign resultant company cannot acquire any liability of the Indian transferor company payable towards a lender in India in rupees which is not in conformity with FEMA and a no-objection certificate to this effect has to be obtained from the lenders in India of the Indian transferor company.

**Acquisition of assets by the resultant company**

In an inbound merger, the Indian resultant company can acquire and hold any asset outside India, which it is permitted to acquire under FEMA. Such assets can also be transferred for undertaking transactions which are permitted under FEMA. If the Indian resultant company is not permitted to acquire or hold any asset or security outside India, then the Indian resultant company is required to sell such asset or security within 2 (Two) years from the date of sanction of the scheme of cross border by the Tribunal and the sale proceeds are required to be repatriated to India immediately through normal banking channels. Further, where any liability outside India is not permitted to be held by the Indian resultant company, the same may be extinguished from the sale proceeds of such overseas assets within a period of 2 (Two) years from the date of sanction of the scheme of cross border.

Conversely, in an outbound merger, the foreign resultant company can acquire and hold any asset inside India, which it is permitted to acquire under FEMA. Such assets can also be transferred for undertaking transactions which are permitted under FEMA. If the foreign resultant company is not permitted to acquire or hold any asset or security inside India, then the foreign resultant company is required to sell such asset or security within 2 (Two) years from the date of sanction of the scheme of cross border by the Tribunal and the sale proceeds are required to be repatriated outside India immediately through normal banking channels. Further, the Cross Border Regulations also permit the repayment of Indian liabilities from the sale proceeds of such assets or securities within 2 (Two) years.

**Opening of bank account**
In an inbound merger, the Indian resultant company is permitted to open a bank account in foreign currency in the overseas jurisdiction for a period of 2 (Two) years from the date of sanction of the scheme of cross border by the Tribunal for putting through transactions identical to the cross border merger.

In an outbound merger, the foreign resultant company is permitted to open a special non-resident rupee account for a period of 2(Two) years from the date of sanction of the scheme of cross border by the Tribunal for putting through transactions under the Cross Border Regulations.

**Deemed RBI approval**
If a transaction on account of a cross border merger is undertaken in accordance with the Cross Border Regulations, it shall be deemed to have the prior approval of RBI and an express prior approval from the RBI will not be required. However, the companies are required to furnish a certificate from the managing director, a whole time director and company secretary, if applicable, ensuring compliance with the Cross Border Regulations along with the application made to the Tribunal under the Act.

**Reporting requirements**
The companies involved in the cross border are required to furnish such reports as may be prescribed by RBI from time to time.

**CONCLUSION**
In the backdrop of a rapidly globalizing economy, the notification of Section 234 of the Act and the subsequent release of the Cross Border Regulation is definitely a welcome move. With outbound mergers now being permitted under the Act, the foreign direct investment in India is likely to see a huge boost. Further, the mechanism for deemed RBI approval is expected to considerably narrow down timelines which otherwise would have been incurred, thereby increasing the efficiency and efficacy of the merger process. At the same time, it is important to note that certain loopholes exist in the prescribed regime, which we hope will only be resolved with time. What remains unclear is whether arrangements including demerges will also be covered under the Cross Border Regulations. What is also unclear is what could be the possible implications of tax and other intersecting laws on such cross border transactions. The practical ramifications of the Cross Border Regulations remain untested. How these will eventually play out will only be answered in due course.
FINES V. PRISONS IN THE WORLD OF WHITE COLLAR CRIMINALS

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The paper deals with efficiency of prison term over fines in criminal sanctions given in white collar crimes like price fixing, tax evasion, securities fraud and bribery. The amount of fine depends on the level of income, and ability to pay of the individual. The essence of selecting white collar criminals is that these criminals have ability to pay and proving the assumption wrong that fines are always efficient in deterring criminals. The efficiency of prison term is established as the loss of income and reputation of the white collar criminals has more effect than fines. The paper also takes into consideration enforcement cost involved in detecting such crimes and enforcing the legal sanctions.

I. Criminal Sanctions and white collar crimes

The world is experiencing the growth of different business industries, which in turn have also led to an increase in the crimes committed while conducting these businesses. Whether to consider these crimes as a civil or criminal sanction was a topic of debate for long, however the paper does not go into that question and rather assumes that criminal sanction are most efficient for such crimes. Criminal sanctions are majorly of two type fines and imprisonment. The debate between efficiency of fines and incarceration has been a subject of many research projects. This paper addresses the debate with reference to white collar crimes. The paper focuses on determining the efficient punishment for white collar criminals indulging in crimes like price fixing, tax evasion, securities fraud, bribery.

Criminal sanctions usually depend on the theory used by the judges. They may be deterrent, retributive and reformative. As per the deterrent theory an offender is given a punishment which has a deterrent effect on him and society. As per the retributive theory the offender is given punishment equivalent to the harm he has caused to the victim and the society. Most of the criminal sanctions are based on the deterrent theory to reduce the crimes in future. The judges enforce the sanction as per the theory while not taking its enforcement cost into consideration. The question before us is which sanctions are efficient to deter the white collar criminals from committing crimes. The ‘white collar criminals’ are those offenders who are more privileged than the other offenders, in terms of money. These criminals have more wealth and as a consequence more ability to pay fines. They have a reputation in the society. The crimes committed by these offenders are related to the amount of trust that is placed upon them, or not doing an act which they were supposed to do. These criminals commit different kind of crimes like price fixing, tax evasion, securities fraud, and bribery.

Price fixing refers to the situation where the company with other companies on the

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same side of the market fixes a higher price of the goods, and even controls the supply and demand of the goods to maintain that price. They don’t let the market forces determine the price of the goods. This leads to the consumer paying more for the good, more profits to the companies and elimination of competition.

Tax evasion refers to the situation here the companies misrepresent their actual income so that they have to pay less tax and they can retain a large part of their income. It refers to illegal action taken to avoid the lawful assessment of taxes. 339 This is also a type of fraud committed against tax authorities. This leads to less amount of tax with the state which hinders the social welfare and creates inequality with those who show their actual income and pay tax.

Securities fraud refers to providing false information to investors so that they purchase or sale securities based on that information, which results in huge losses to the investors who rely on such information. Such an act violates securities law.

Bribery refers to the practice of making improper payments to judges, magistrates, or other judicial officers. 340 These public officials in return for such payments act in favor of the person.

The paper further analyses the two criminal sanctions in terms of these crimes. There are four motives in giving criminal punishments (1) justice, (2) deterrence, (3) incapacitation, (4) rehabilitation. 341

II. Fines

Fines are costless to enforce as they involve no fixed cost to be made by the state. Fines are said to be efficient as they don’t involve cost and serve to deter criminals. After the criminals are convicted the optimal fine to be imposed is determined. To have an optimum fine so as to deter white collar criminals it should be equal to their wealth. The fines presently are determined by the amount of damage that a criminal act has caused to the society. The assumption made here is that all the criminals have an ability to pay, i.e. they are solvent. Therefore any amount of fine which is equivalent or less than their ability to pay can be imposed upon them. The fine which is greater than the damage, which is equivalent to their income, is not enforced as it leads to overpunishment 342 and less deterrence as the high and middle income individuals can easily bear such costs.

1. Price fixing

The amount of fine to be imposed on the offenders involved in the price fixing will be equivalent to the damage caused by them i.e. loss to the customers. The cost involved in finding about this loss and determining which company earned more profits due to such price fixing is also high. Moreover the theory of justice says that all the offenders who have committed the same crime should be punished in the same manner. This leads to overpunishment of those who have made less profits and underpunishment of those who have earned more profits. Therefore a lump sum amount of fine is imposed. Such fines do not assure that the companies would not involve in committing such a crime again in the future as they have

339 Oxford law dictionary
340 Oxford law dictionary
341 Supra n1
342 Supra n.1
attained more benefit than the fine they have paid.
Add an example
2. Tax evasion
The amount of fine to be imposed on these offenders will be equal to the damage done, i.e. the amount of tax unpaid. Such a fine does not serve as a deterrent factor because the firm has already benefitted from the funds that it did not report. The firm may use it as a service and hide its income from the tax authorities and use those funds to make further profits till the tax authorities come to know about the hidden income, it is noteworthy that probability of detection in such cases is low. However when the tax authorities come to know about it the firm will pay the amount of damage done, i.e. the tax unpaid. The other firms may start using the same method to earn more profits.
3. Securities fraud
The amount of fine involved in such cases is the damage to the stake holders, the offender will commit such kind of crime only when the benefit that it will give him is more than the cost he will incur. The cost of finding information regarding who committed the crime and how much loss is caused due to that crime is very high, therefore the fine imposed by the court may be less or more than the benefit earned by him. This asymmetric information problem leads to less deterrence.
4. Bribery
The damage in these cases is difficult to estimate and even if it is estimated it will be less than the benefit it has caused to the offender. The probability of detection in such cases is low as it involves the people who are to detect the crime. Therefore imposing only fines in such cases is inefficient.
Whenever a criminal act is done by white collar criminals, a cost and benefit analysis is done as they are aware about the law and will only do a particular act if its benefits are more than its cost. And the cost, i.e. the fine imposed on them is influenced more by the theory that the judge follows rather than his wealth. Therefore fines in the case of white collar criminals do not serve as a deterrent factor but as a service factor which allows them to have the benefits from the criminal act at low cost. As the fine increases the probability of detection decreases as the individuals will make more efforts towards safeguarding themselves while committing crime so as not to be convicted. Therefore imposing a criminal sanction consisting of fine only is inefficient.

III. Prison
Prison sanctions are considered costly because they involve a large amount of cost like constructing and maintaining prisons, giving salaries to prison authorities, taking care of the prisoners. Therefore when there is a choice between prisons and fines, in terms of cost fines are said to be more efficient. Even though imprisonment has a cost the deterrent effect that it has on criminals is more than the deterrent effect of fines. When the white collar criminals are given a prison

343 Mitchell Polinsky and Steven Shavell, the optimal use of fines and imprisonment, 24 Journal of public economics 89-99 (1984)
sanction they suffer a large reduction in income and greater penalty in terms of opportunity cost. The opportunity cost involves earning higher wages if he would not have been convicted, more future job opportunities and loss of reputation i.e. if he would not have committed the crime he would still hold a good reputation in the society. He may lose the opportunities available in the business environment when he is in prison serving his terms. The quality of his human capital may also decrease for legitimate activities while he is in prison.

Goodwill is the essence of these white collar criminals, if they are imprisoned they lose their goodwill in the market further no companies will be willing to have transactions with them and investors will not invest in their companies.

1. Price fixing
If the individuals who were involved in price fixing are imprisoned, it will serve as deterrence to other companies as they will not indulge in such crimes. The probability of detection being low a longer prison term is imposed which leads to more loss in income. Imposing of fine will just lead to them being used as service, prisons serve as a deterrence factor involving loss of income which is greater than the benefit they will get from committing that crime.

2. Tax evasion
The people who are imprisoned for hiding their income from tax authorities are deterred from doing it again due to loss of income and reputation.

3. Securities fraud
The individuals involved in giving out the false information to the investors are imprisoned for a long period due to low probability of detection, this imprisonment leads to decrease in his human capital to earn legitimate earnings and decrease in wages due to absence of trust on him by his employers.

4. Bribery
The probability of detection being very low in this case a high imprisonment period is given. Bribery conviction leads to loss of job, income and reputation.

The damage done to the society by white collar criminals cannot be compensated by their ability to pay, because these damages are huge and involve many people. The loss in income due to long imprisonment term is more than the fine levied on the criminal, these losses in income has a long term effect rather the fine has a short term effect. After the prison term the released offenders are monitored so the probability of committing further crime is reduced. Therefore imprisonment serves as an efficient sanction to deter further continuance of crime.

IV. Collateral punishments

The imprisonment and fines both lead to collateral penalties which are not taken into account by the court while giving a criminal sanction.

1. Long term Effects
When a person is convicted either by fine or imprisonment, in the future people will not trust him as on agreements made by him with reference to information

345John R Lott Jr., An attempt at measuring the total monetary penalty from drug convictions: The importance of individual’s reputation, 21 J Legal Studies 159 (1992)
346Ibid
regarding securities, his income statements, his pricing structure, and with public officials. Even though the short term cost of the crime may be low the long term effect on his reputation and his future agreements is very high.

2. Employee preferences
After an individual is convicted, he may not be able to secure a job position equal to his qualification as the employer would doubt his honesty, even if he is employed he may get less wages. No employer would prefer an employee who does not follow the law and indulges in criminal liability.

3. Debarment
His license may be cancelled if he is convicted of the crime. He may even lose his job through which he committed the crime.

V. Enforcement cost

The enforcement cost involved in these white collar crimes is high as the individuals have the ability to pay and their incentives to resist such penalties are high. The state has to incur prosecution, settlement and collection cost.\textsuperscript{347} The enforcement cost also increases while paying the public authorities who detect such crimes. The upper and middle class people who have a probability of detection and payment of huge fine may give money equivalent of fines to these officials, which is less than the fine imposed by conviction as it does not involve cost of trial, because they want to save themselves.\textsuperscript{348} The public authorities will accept that amount because they are paid less by the state. The crime of bribery can also be decreased by increasing the enforcement cost. The fines and imprisonment decreases as the enforcement cost increases as there will be more number of people among whom the cost of enforcement is to be divided.

VI. Tree Game - Decision making process

The individual ‘I’ may either prefer to commit crime of price fixing or refrain from doing so, the benefits earned by him in both the situation is 5000 and 2500 respectively. We assume that per month he earns 2000$. We are assuming that the probability of detection is low due to low enforcement investment done by the state. The commission of crime will lead to -

1) Fine being equal to his ability to pay, but less than the benefit he is earning from committing that crime so he will commit the crime by paying the fine. Fines depend positively on income.\textsuperscript{349} Fine of 2000$

\textsuperscript{347} Supra n.5
\textsuperscript{348} David Friedman, Efficient institutions of private enforcement of law, 13 Journal of Legal Studies 379 (1984)
\textsuperscript{349} Supra n.1
under punishes as the harm caused is 5000.

2) Imprisonment for 5 months, which will lead to loss of 10000$ as his monthly income will not be paid to him, and he may not even get the job in future. This sanction over punishes an individual because the harm caused is only 5000$.

3) The imprisonment along with fines is said to be the most efficient option because it will not over punish or under punish an individual but will give optimal punishment with deterrence.

VII. Conclusion

Indeed in terms of cost fines are the most efficient criminal sanctions, but they fall short of deterrent effect on middle and upper class criminals. The ability to pay and solvency of middle and upper class criminals, also known as white collar criminals enables them to use these fines as services and to commit more crimes. The fine imposed for individuals committing the same crime may be less than the wealth of most of the white collar criminals and therefore low wealth individuals pay everything they have and middle and upper class criminals pay fine which is less than their wealth. A punishment consisting of only fine can satisfy the money debt only if the money debt to the society is less than the highest possible fine. Fines and prison sanctions are indeed substitutes of each other, when the individuals have an ability to pay.

As the income increases fines increases and prison term decreases, because the shorter period of prison will lead to same loss of income as fines. The prison sanction though a substitute of fines is more deterrent as the collateral punishment involved with the serving of such prison term adds to more loss in income and reputation of the offender. The pain of imprisonment is the highest to the educated and sensitive individual, who has the ability and power to pay the amount of damage that he has caused. White collar crimes like price fixing, tax evasion, securities fraud, and bribery are grave in nature as they affect the society. They have a high enforcement cost as the cost of collecting information required for finding the offender, the damage amount, the parties affected by the offence is very high, salaries to be paid to public authorities to detect the crime. The high enforcement cost may not be incurred by all the states, therefore the probability of detection is low leading to choices between high amount of fine or long imprisonment term. High fines do not deter criminal who have the ability to pay and are earning more benefit from committing such crimes, they tend to use these fines as services without any long term effects which may lead to commission of the crime again because they are aware that they can escape liability by paying fines. The option left with the court is to award long imprisonment which leads to more deterrence as imprisonment has a long


Supra n.1

Ibid

term effect on individual’s loss of income and reputation.\textsuperscript{355} Imprisonment also leads to decrease in human capital, decrease in labor market activities of the individual as employers will avoid appointing him. Long imprisonment term increases the disutility of the individual, as his income is lost. This high deterrence will lead to less crime especially in white collar crimes, which are financial in nature, as loss of income and reputation affects the middle and upper class people the most.\textsuperscript{356}

\textsuperscript{355} Ibid
\textsuperscript{356} See also M. Clinard, The black market- a study of white collar crime, 244(1969)
INTELLECTUAL PROPERTY RIGHTS IN PHARMACEUTICAL AND BIOTECHNOLOGY INDUSTRIES

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ABSTRACT
The part of Intellectual Property Rights (IPR) is exceptionally powerful in pharmaceutical and biotechnology businesses. In pharmaceutical industry in regards to wellbeing area it obviously characterizes the market cost of the medications though amid subsidence most organization proprietors were spent their cash to construct the R&D and furthermore they reinforced the IPR cells. It additionally unmistakably characterizes the patent, patent term reclamation and the difference in laws which are as of late embraced by other nations. In addition it covers consistently greening of licenses and medication cost factor. The connection between General Agreement on Tariffs and Trade (GATT) and IPR is set up. In biotechnology IPR states the benefit of biotechnology enterprises through protected innovation security though the new patterns suggests in the field of biotechnology is secured. The protecting procedure of biotechnology is a dubious viewpoint through IPR. An answer was showed up and additionally it survived biotechnology businesses in India and in world.

I. INTRODUCTION
Intellectual property is about human creativities. Licensed innovation rights are considered as reward for imaginative and able work in execution of thoughts. In other way, mechanical property and protected innovation are nearly related at times back and IP was considered as mechanical property. Customarily various licensed innovation rights, for example, trademarks also; mechanical plans were on the whole known as modern property. At long last we can characterize that the licensed innovation is a "result of psyche". It is like any property comprising of moveable or immovable things wherein the proprietor or proprietor may utilize his/her property as he/she wishes and no one else can legally utilizes his property without his/her authorization. The various types of licensed innovation rights would be ordered as 1. Copyright, 2. Trade mark, 3. Geographical indications, 4. Industrial designs, 5. Semiconductor chips and integrated circuits, 6. Patents and 7. Trade secrets.

II. EFFECT OF RIGHTS ON HEALTH SECTOR
In India in light of low level wage of the general population, the vast majority lean toward for the nearby prescriptions like ayurveda and so forth, and furthermore the costs of meds were raised too high so the ordinary citizens can't stand to purchase these cutting edge prescriptions and anti-infection agents. Also, a considerable lot of the new medicinal analysts are focusing on created nations with promising benefits for prescriptions for way of life sicknesses while creating nations are still in need of fundamental human services aside from three segments i.e., nourishment preparing, pharmaceutical and agrochemicals. The Indian patent act permits item patent as it were. Just in these three divisions process patent is permitted, as on today. India has
just process patent administration with connection to pharmaceuticals item.

III. PHARMACEUTICAL COMPANIES DURING RECESSION

As per Tyron Stading, when cash turns out to be tight, organizations search for other options to increment their income and discover two ways I) item development, and ii) suit. A few organizations dismissing advancement or security of development for cutting expenses or maintaining a strategic distance from hazard will be off guard both in current downturn showcases and, to a more prominent degree, at the point when the monetary tempest passes and exchanging exercises increment once more. Organizations that proceed to center around their IP resources amid the downturn will pick up a focused edge after it. At the season of retreat the greater part of the pharma organizations were moved in the field of R&D regions. To the extent wockhardt constrained, an eminent Indian pharmaceutical and biotechnology organization, Mumbai concerned, did most extreme R and D works amid retreat period. Its IP approach states that being an exploration and innovation driven association, they unequivocally trust in making, keeping up and regarding IP. In any case, IP spending plans for a large portion of the ventures, for example, wockhardt was a noteworthy worry amid subsidence planning. This put a great deal of spotlight on making the scholarly riches, expanded by 7 to 10% and drifted in the scope of Rs 15-20 crores amid subsidence we can close as I) Spending in R&D and IP has not quit amid subsidence, ii) Innovation is the best approach to develop, iii) Cost cutting in the regions where it is essential will be useful amid retreat. Since money stream is less, ventures ought to be restricted to chosen regions, and iv) There is immense fixation on keeping up just that patent which guarantees to create potential items or have high advertise esteem anyway rest are being relinquished.

IV. ONGOING CHANGES IN IPR LAWS IMPACTING PHARMACEUTICAL INDUSTRY

The pre-Trade Related Intellectual Property Rights (TRIPs) period saw the world isolated into gathering of countries I) permitting patent in all fields of advances (items and procedures) and ii) Having prohibitive patent laws accommodating procedure licenses in all fields with the exception of item licenses in chosen fields, for example, pharmaceuticals and medications, nourishment and so forth. Likewise, the term of licenses, conditions for obligatory authorizing, regardless of whether importation ought to be considered as working of licenses, and so on., differed in light of existing national laws. Excursions endeavor to blend the IPR laws by bringing the differences into center.

Since the development of the World Trade Organization (WTO) on January 1, 1995, a few countries have rolled out noteworthy improvements in their national laws administering IPR. Appropriate comprehension and use of the IPR laws in different nations would help in the worldwide situating of pharmaceutical organizations.
The European Parliament on July 8, 1998, affirmed the biotechnology order, which set the rules for lawful assurance to biotechnology items and procedures inside the European Association. This would extraordinarily impact the pharmaceutical business in Europe. It was actualized in the European Union by July 2000. Be that as it may, there had been some restriction from Holland. The result of the restriction procedures chose the eventual fate of the biotechnology mandate in Europe. Since June 1995, USA changed the term of licenses from 17 to 20 years. The act of "first of create" instead of "first to document" has been reached out to all individuals from WTO. All licenses in compel on eighth June, 1995, will have a term of 20 years from the date of issue, whichever is longer. According to this arrangement, a few licenses got an augmentation of their term. This has significantly affected the pharmaceutical business. In November 1999, the US introduced the system that a patent specification will be published 18 months after its filing.

In Spain, the patent law was revised in January 1998 to evacuate the prerequisite that pharmaceutical organizations must make the protected item in Spain before a directive would be conceded against a denounced infringer. Presently it is getting less demanding to acquire break orders from Spanish courts.

In Argentina, the 1995 Patent Law aligned arrangements with TRIPs to make the term of licenses 20 years from the date of recording, instead of 15 years from the conceding date. The issues of where the old patent law closes and where the 1995 enactment begins have not been palatably settled.

The Australian Patent Act was changed on August 10, 1998, to give pharmaceutical licenses an successful term of 20 years to align them with the laws in USA, Japan and Europe. The most huge arrangement in Australia for pharmaceutical patent proprietors has been the augmentation of licenses to give a successful term of 15 years, where item enrollment necessities have held up the acquaintance of the item with the market.

V. PHARMACEUTICAL INDUSTRIES

After the GATT changed into WTO, the vast majority of the created nations were stirred to secure their items. At first the vast majority of the world driving pharmaceutical ventures constructed a different cell for IPR and directed exceptionally well. So the benefit of the organizations were expanded and IP played a significant part in controlling the fake and copycat drugs. However, in India that time just pharma organizations were plan to set their IP cell a portion of the organizations in India built up the IPR cell in the year 1995. Greater part of the organizations began IPR cell after 2000 in India. Before the finish of year 2004, greater part of organizations began a different division to take care of the issues identified with licenses. It can be securely assumed that the licenses that are allowed to Indian pharma organizations or then again connected by these organizations are for either new procedures or new medication conveyance frameworks.
VI. BIOTECHNOLOGY

Biotechnology is an examination identifying with the down to earth use of living creatures in various fields. Essentially it is an examination identifying with living beings in the modern usage. It is the innovation, which utilizes living life forms or its parts for particular business utilize. Presently a-days it is being utilized as a part of various fields for better outcomes. The new developing field pharmaceutical biotechnology is growing quickly for those individuals working in the field of drug store and pharmaceutical sciences, totally new and novel procedures and item show up at a quick put. This is the consequence of transaction between various distinctive regions like sub-atomic science, sub-atomic hereditary qualities, science and pharmaceutical sciences.

VII. IPR AND BIOTECHNOLOGY

IP assurance in the circle of biotechnological development is rising as a topic of savage discussion at national and worldwide level. The creations in biotechnology cut crosswise over issues identified with science, innovation approaches, morals, financial aspects, legitimate controls and complexities of global exchange. The aggregate overall offers of biotechnology created pharmaceuticals keep on increasing quick. For example in 1990 US deals added up to roughly $2 billion, deals expanded to $5.1 billion of every 1994 and $7.7 billion in 1995 though it comes to $16 billion in 2002. Finally the IPR supportive for new business openings and for esteem including information based industry the opportunity has already come and gone that India quickly adjusts to the difficulties postured by a persistently developing innovative condition of the world.

VIII. NEW TRENDS IN BIOTECHNOLOGY

Biotechnology assumes a noteworthy part in three territories viz., i) plant rearing, ii) creature reproducing and iii) modern microbiology. The new innovations like rDNA innovation, protoplast combination innovation what's more, hybridism innovation assume a fundamental part in plant, creatures and human life. These innovations have been utilized in the creation of hereditarily built life forms and modified qualities DNA falling in the territory of hereditary building, protein designing, cell combination, tissue culture, quality treatment, hereditarily adjusted living being (GMO) and aging innovation. Other imperative check in biotechnology like cloning of warm blooded creatures i.e., late claim of human cloning has shocked the entire world and mask. Cloning of individuals is as yet a hazy area of innovative virtuoso of bio-researcher encompassed by host of moral and lawful issues.

IX. BIOTECHNOLOGY INDUSTRIES IN INDIA

Like programming organizations, biotechnology organizations' part in Indian economy is a renowned thing. In 2008-09, the Indian biotech industry had an aggregate turnover of US $2.51 billion looking at to US $2.13 billion amid 2007-08. As of late, India is rising center for biotechnology industry and one of the critical segment getting outsourced occupations from abroad. This area stands fourth position in volume and thirteenth regarding esteem. This
segment had a fast development rate of 40% with a yearly turnover of US $1.07 billion out of 2005 and a recorded development of 36.55%.

CONCLUSION

IPR in the pharmaceutical organization situation assumes an indispensable part in the patent filing, legitimately rebuffing the fake medication fabricating enterprises and building up the business name in the advertise for their medication security and quality. Though in India it expanded mindfulness with respect to licenses which helped organizations document licenses in lucrative markets and global bargains that were done will be useful to Indian organizations concerning recording numerous applications. While in the field of biotechnology, reaction of IPR had a gigantic part in ensuring plant, creature and human welfare. For coming years GMO will be the immense supplement of proteins to the human life. Henceforth these are legitimately ensured though the perilous exercises like cloning are entirely restricted in human with the assistance of IPR.

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THE AGREEMENT THAT MADE KASHMIR “SEPARATE”: DELHI AGREEMENT A CRITICAL STUDY

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Abstract
On June 19th, 2018 when Chief Minister of State of Jammu and Kashmir Mehbooba Mufti resigned from the post of Chief Minister due to break of alliance between BJP and PDP, the buzz around the struck down of Article 35A and Article 370 gained the momentum after the state elections in 2015. The BJP from its time of Bharatiya Jana Sangh, commonly known as the Jan Sangh has been advocating the removal of the above-mentioned article. BJP way back in 1999 and 2014 manifesto promised the removal of the Article 35A and 370. On July 24, 1952 a Delhi Agreement was announced. As the Constituent Assembly expected time to deliver an authoritative report, Nehru, as a break measure, chose to get from Sheik Abdullah, a feeling of the sort of relationship that would develop between the Indian association and the province of J&K. A progression of transactions was held in Delhi between the delegates of J&K (speaking to the National Conference) and the Government of India, the consequences of which were typified in a report called the Delhi Agreement. This was declared on July 24, 1952; however, it had no protected legitimacy. This paper focuses on how the delhi agreement has influenced both the life and political direction of the people of state of Jammu and Kashmir. The paper shall be based on the review of various literature on the concerned subject matter.

Introduction
“An India in which all communities shall live in perfect harmony.”357

An extensive number of political and safeguard examiners quality insecurity in Jammu and Kashmir (J&K) to India’s failure to completely incorporate the state into the association. The difficulties towards such joining have verifiable roots, dating to the conditions under which the state, drove by Maharaja Hari Singh, agreed to India, following Pakistan's endeavors to add the state through power. Truly, Pakistan has additionally reliably offered help to psychological oppressor and dissenter developments in J&K and has likewise stretched out such help to advance fear in different parts of the nation, in assistance of its own advantages. The third factor is the inconvenience of Article 370 in the Indian Constitution and the expansion of Article 35A, through the arrangements of Article 370.

Article 35A of the Indian Constitution is an Article that engages the J&K state's governing body to characterize "changeless inhabitants" of the state and give exceptional rights and benefits to those lasting occupants. It was added to the Constitution through a Presidential Order, i.e., the Constitution (Application to Jammu and Kashmir) Order, 1954, issued by the President of India on May 14, 1954, "in exercise of the forces given by" proviso (1) of Article 370 of the Constitution, with the

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- History
The Government of India Act, 1935, presented the idea of the Instrument of Accession, wherein a leader of a Princely State could consent his kingdom into the 'Federation of India'.

Between May 1947 and the exchange of intensity on August 15, 1947, by far most of the states marked Instruments of Accession. This was encouraged by the Congress, with its pioneers, for example, C. Rajagopalachari contending that as centrality "appeared as a reality and not by assertion," it would essentially go to the administration of autonomous India, as the successor of the British.359

A couple, in any case, waited. Among them were Hyderabad and Kashmir, which pronounced that they proposed to stay free. Hyderabad had a Muslim ruler and Muslim respectability in a mind-boggling Hindu lion's share state.

After "Operation Polo," an Indian military activity to reestablish arrange in the state, Hyderabad agreed to India and was ingested into the association. The province of J&K, in any case, represented a test of a by and large diverse nature.

- State of Accession Jammu and Kashmir
At the time of the exchange of power, the province of J&K was controlled by Maharaja Hari Singh, who had declared his aim to stay autonomous. Sheik Abdullah, the pioneer of Kashmir's biggest political gathering, the National Conference, was against Hari Singh's administer and was vociferously requesting his renouncement. Pakistan, meanwhile, endeavored to constrain the hand of the Maharaja and sent in bandits, helped by the Pakistan Army, to attach the state by drive. Being stood up to by a militarily sad circumstance, the Maharaja looked for India's assistance to push back the trespassers. India required the marking of an Instrument of Accession and setting up of a break government headed by Sheik Abdullah consequently.360

The Maharaja consented, yet Nehru pronounced that it would need to be affirmed by a plebiscite, although there was no legitimate necessity to look for such affirmation. That was maybe a screw up of epic proportions. Many more would be submitted in the years to come. The Indian Army was transported to Srinagar and the looters were ended a couple of miles from the city. At that point, in a progression of gallant activities, the Indian Army pushed back the Pakistan Army-helped pillagers till the beginning of winter stopped the tasks. Nehru presently announced a truce and looked for UN mediation—a second bungle following the primary, which viably internationalized a two-sided issue. The UN supported truce became effective on January 01, 1949. Right now, parts of the state's region were still under Pakistan's unlawful


occupation. With the truce coming into constrain, the state stood successfully partitioned and the contradicting powers took positions over a line which came to be known as the Cease Fire Line (CFL). The plebiscite was never held as Pakistan did not pull back from the territories it had coercively involved—an obligatory pre-condition for holding the plebiscite. These regions are presently alluded to as Pakistan Occupied J&K (POJ&K), and incorporate the Mirpur-Muzaffarabad regions and the recent Northern Areas, now called Gilgit-Baltistan.

- Article 370

“The terms of Article 370 were negotiated by the Kashmiri Muslims keeping only their interest and sentiments in mind, while completely ignoring the sentiments and aspirations of the people of Jammu and Ladakh Divisions.”

Article 370 reads as:-

“(i) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify

Explanation For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharajas Proclamation dated the fifth day of March, 1948;

(c) the provisions of Article 1 and of this article shall apply in relation to that State;

(d) such of the other provisions of this Constitution shall apply in relation to that State, subject to such exceptions and modifications as the President may by order specify: Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub clause (b) shall be issued except in consultation with the Government of the State: Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government

Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from
such date as he may specify: Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.\textsuperscript{361}

On 26 January 1950, when the constitution of India came into force special provisions were made for the state of Jammu and Kashmir as Article 370, which was an impermanent arrangement and remains so till date.

In the liquid circumstance that got quickly after autonomy, Sheik Abdullah named a 4-part group to the Indian Constituent Assembly. They declined to sit in the Assembly yet consulted from outside the status of J&K opposite the Indian association. They demanded to acquiesce just those three subjects to the association that was incorporated into the Instrument of Accession. In the expressions of Ayyangar, Nehru's partner and drafter of Article 370, "At last, the will of the general population, through the instrument of the J&K Constituent Assembly will decide the Constitution of the State and additionally the circle of Union purview over the State.\textsuperscript{362}

The inclusion of Article 370 was to characterize the pertinence of the Constitution of India in the province of J&K until the point when the Constitution of the state was concluded. It was nevertheless an extra administrative component to encourage this change. In 1950 itself, the Government of India had elucidated the impact of Article 370 of a White Paper on Indian states which among others incorporated the accompanying:

- The Constituent Assembly will be met to go into the issues in detail.
- When the Assembly will go to the choice on every one of the issues, it will suggest to the President who will either repeal Article 370 or coordinate that it will apply with such alteration and exemptions as he may indicate.

Article 370 was drafted in Part XXI of the Constitution, which identifies with "Temporary, Transitional and Special Provisions". Proviso 3 of the Article enables the President of India on the suggestion of the J&K Constituent Assembly to issue a warning for the repeal of Article 370. Be that as it may, the J&K Constituent Assembly broke down itself on January 25, 1957, without prescribing annulment of Article 370, abandoning a few people to contend that Article 370 had turned into a changeless the apparatus of the Constitution of India, regardless of being titled a brief an arrangement in the Constitution.\textsuperscript{363}

- Delhi Agreement

As the Constituent Assembly expected time to create a complete archive, Nehru, as an interval measure, chose to get from Sheik Abdullah, a feeling of the sort of relationship that would develop between the Indian association and the territory of J&K. A progression of transactions was held in Delhi between the agents of J&K (speaking to the National Conference) and the Government of India, the aftereffects of which were exemplified in a record called the Delhi Agreement. This was reported on

\textsuperscript{361}The Constitution of India 1950

\textsuperscript{362}Anil Gupta, “Kashmir’s Special Status: Contentious Constitutional Provisions,” Indian Defence Review

\textsuperscript{363}Nirmal Ghorawat, “Article 370 - A Primer,” available at https://www.pgurus.com/article-370-primer/
July 24, 1952, however, it had no sacred legitimacy.

The eight salient points included in the agreement were as under:

- The head of the state of J&K would be a person recommended by the state legislature and recognised by the President of India and would be called the Sadar-i-Riyasat.
- The Indian flag would have the same status in J&K as in any part of India, but the state flag would also be retained.
- Citizenship would be common in two parts of the country, but the state legislature would have the power to define and regulate the rights and privileges of the permanent residents in Kashmir.
- The fundamental rights, as laid down in the Indian Constitution, would be extended to Kashmir, but these would not come in the way of the state’s program of land reforms.
- The power to reprieve or commute death sentence would belong to the President of India.
- The Indian President’s power to declare a state of emergency in case of external danger or internal disturbances would be extended to Kashmir, but regarding internal disturbances, it would be used only at the request of the state government.
- Residuary power would be retained by the state, but the state could transfer more rights to the union.
- The Supreme Court could adjudicate regarding disputes between the state and the Centre and other provincial governments and on fundamental rights agreed to by the state.

Article 35 A

“Article 35A abuses the specific idea of fairness revered in the Constitution of India. Its treatment of non-changeless inhabitants of J&K is much the same as regarding its own kin as peons. The arrangements of Article 35A likewise abuse the standards of gender equality. Article 6 of the Constitution of J&K, which gets its capacity from Article 35A, segregates against women’s occupants of the state who wed a man from another state.”

Article 35 A reads as

ARTICLE 35A: Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of the State,

(a) defining the classes of persons who are, or shall be permanent residents of the State of Jammu and Kashmir; or
(b) conferring on such permanent residents any special rights and privileges, or imposing upon other persons any restrictions, as respects:

(i) employment under the State Government;
(ii) acquisition of immoveable property in the State;
(iii) settlement in the State; or
(iv) right to scholarships and such other forms of aid as the State Government may provide;

shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens on India by any provisions of this part.  

In February 1954, the Constituent Assembly approved the state's increase to India. In this

364 Constitution of India 1950
way, the confirmation given to the general population of India was satisfied. In compatibility of this approval, the President of India proclaimed the Constitution (Application to Jammu and Kashmir) Order, 1954, putting on a last balance the relevance of alternate arrangements of the Indian Constitution to J&K and concurred legitimate holiness to the Delhi Agreement. Section 2(3) and 2(4) of the Order made Part II of the Constitution of India managing citizenship, and Part III managing basic rights relevant to the province of J&K. Notwithstanding, it presented forces to the state council to make unique arrangements for the changeless occupants of the state and for that reason, Section 2(4)(j) of the Order embedded.

The change made to Article 35A, the consideration of Article 35A and the way that Articles 12 to 15 of the Indian Constitution don't make a difference to the province of J&K must be contemplated together to comprehend why the J&K Constitution is an assault on the main stream and popularity based texture of India. Under the Constitution of India, the Right to Equality is the bedrock of majority rule government. This stands relinquished as far as the arrangements of Article 35A. J&K is the main state in the Indian association which has the forces to control the rights and freedoms of other Indian residents in J&K. This is the reason there is disavowal of legal redressal for the non-lasting inhabitants of J&K. Article 35A blesses and legitimizes this fundamental resistance of the Indian Constitution. A great many people in the legitimate calling stay uninformed of this viewpoint, since it was embedded as an Appendix, which isn't a piece of the official content of the Constitution. It was never displayed the Parliament as the sole specialist to correct the Constitution is vested just in the Parliament of India. It is additionally very amazing that Sheik Abdullah and his National Conference, the primary draftsmen of the State Constitution, who were resolved to annul all images of Dogra manage, were exceptionally quick to hold the State Subject Act,1927, ordered by the Maharaja.

Reason for expunging of the Article 35A

Article 35A is an image of "Kashmiri expansionism" over whatever remains of J&K. In a circumstance verging on joke, the possibility of Article 35A being struck around the Supreme Court has united all political, aggressor, religious and other extremist gatherings in the Valley that have been customarily at war with each. Presently, in help of Article 35A, all such different gatherings—the National Conference (NC), People's Democratic Party (PDP), Congress Party and Hurriyat—have met up, to bolster the most backward proviso in the state's history. Dreading political underestimation, PDP pioneer, and Chief Minister Mehbooba Mufti was the first to caution the Center that "there will be nobody left in Kashmir to give a shoulder to the Indian tricolour if 35A is struck down". 365 Her most despised opponent, Farooq Abdullah, the previous Chief

Minister and leader of the NC, had the audacity to caution New Delhi, "Kashmiris will influence you to overlook the change of the Amarnath development when they ascend against invalidating of 35A."16 Leaders of the Hurriyat and other aficionado bunches too have propelled another schedule of hartals (open strikes) and cautioned New Delhi of a bloodbath if the Supreme Court gives such a decision. Clearly, annulment of Article 35A is seen by such individuals as the initial step to rolling back the shared plan took after for quite a long time and the beginning of another period of participatory vote-based system, which sick suits their political purposes.

Article 35A is an image of "Kashmiri expansionism" over whatever is left of J&K. In a reminder to the Union Home Minister and to the National Human Rights Commission, the Jammu and Kashmir People's Forum exhibited instances of the networks whose major rights have been "legitimately" grabbed by the state government—the privilege to property, ideal to vote; appropriate to business; ideal to marriage by decision; ideal to advanced education; ideal to be an individual from a panchayat or an agreeable society; ideal to benefit bank advances. These people group are:

- Refugees from POJ&K who were compelled to live and settle outside J&K after they traversed to Jammu in 1947.
- Kashmiri Pandits and Sikhs who were persuasively pushed out of Kashmir Valley.
- West Pakistan Refugees (WPR) who moved to abutting Jammu in 1947.
- Families uprooted because of consistent terminating along the Line of Control (LOC) with Pakistan.
- Balmiki people group individuals who were convinced by Sheik Abdullah to relocate from Punjab to J&K to attempt the searching of night soil.
- Descendants of Gorkha officers of the Maharaja's Army.
- Women of J&K who wedded men from different states. The youngsters conceived of such posterity too are denied all rights. No such arrangement exists for the men who wed non-state subjects, making it a sexual orientation one-sided issue.
- The general population of Ladakh who showed to inhabit the kindness of the Kashmiri organization.

Except for the ousted Pandit families and the general population of Ladakh, every single other network specified in this rundown have been precluded the status from securing lasting inhabitants or state subjects due to Article 6 of the J&K Constitution, which draws its forces from Article 35A of the Indian Constitution.

It involves disgrace that the weakest strata of society, the Balmikis, keep on being liable to the most noticeably bad type of human rights mishandle. According to the principles of the express, the occupant authentication issued to such people, regardless of whether they are third or fourth era pioneers, brands them as "qualified just for the activity of a scrounger". In this way, regardless of whether a young woman from the network holds a MBBS degree, she must be utilized in the state as a safai karamchari (cleaning staff). Such manhandle would put
much Hitler's Nazis to disgrace. In any case, the majority in India stay oblivious of such arrangements.

In 1981, the J&K State Assembly utilized its total Kashmiri greater part to pass a law, the J&K Resettlement Act, which opened the entryways for those Kashmiris and their relatives who had moved to Pakistan, or POJ&K amid parcel in 1947, to come back to J&K as its honest to goodness subjects and assume responsibility of their familial properties. In any case, evacuees from POJ&K and their relatives, numbering around 1.5 million today, have not exclusively been kept out of this legitimate arrangement however the state government has reliably declined to give them or their relatives a chance to settle in J&K as state subjects". These people group have been requesting their entitlement to those 24 situates in the Assembly which are left empty for the sake of POJ&K.

Amusingly, the Muslim outcasts from Xinjiang and Tibet, who had relocated to Kashmir following the Chinese control of their nations in 1949 and 1959, separately, have been allowed "state subject" status, alongside voting rights in the Assembly by the J&K government. The collective motivation of past state organizations was, thus, clear. The state was being transformed into a state for Muslims just and Article 35A was the instrument used to complete such a terrible demonstration.

Conclusion

Jammu and Kashmir is a fundamental piece of India. The State involves an exceptional status in the political domain of the nation because of verifiable and geological components. The Article 370 of the Indian Constitution agrees lawful support to this comprehension and act like an extension between the Indian Constitution and the Constitution of Jammu and Kashmir. As the present debate over the Article 35A, but in a roundabout way, is endless supply of the major inhabitants representing the Center-State relationship opposite Jammu and Kashmir, the legal, as the caretaker of the Constitution, is the correct stage to settle on the issue.
VICTIM COMPENSATION: AN URGENT NEED FOR PROPER IMPLEMENTATION

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ABSTRACT
Victim compensation has been prevalent since the historical period and its evolution is remarkable. A criminal getting punished is no way helping the victim but is only helpful for other people who could have been the victim of such atrocities. It is high time when the norm of restitution needs to be adequately applied so that the victim not only gets the chance of rehabilitating, rather it is the most retributive punishment where the convict not only gets punished but also needs to compensate the victim for loss caused by him to the victim. This concept of victim compensation was never a new concept and was derived from the kingdom period itself where victims were given the Royal rights. This concept was even described in mythology where Dharma played great role and described the area of rights and duties. Standing in 21st century it is the need of the hour to also look on the plight of the victims too, where little more effective implementation of the provisions of sec 357 and sec 357A of CrPC is required in order to give the victim fair chance to live the life properly and normally after such trauma or sufferings. Granting mercy can be the best action which can be done by the victim for the convict; but, at the same time, it is also needs to be seen that the victim also gets compensated or restituted for the loss so that there remains balance in the society and secure justice for both the parties. Proper implementation of the victim compensation in criminal justice system would also reduce the number of false cases.

Keywords: Compensation, Punishment, Rehabilitation, Restitute and Victim

INTRODUCTION
Crime and deviance is an “integral part of all healthy societies” and a society without crime would be as unimaginable as a utopian world. According to Emile Durkheim, though “crime” is a behavior against social standards yet serves as an important reactive function for social change transforming social belief. Though scholars like Durkheim rebuffed individualism and stressed on social solidarity while contemplating crime, yet it is not far from the truth that fundamentally the coin of crime has two facets, the accused and the victim, and proportionately punishing the accused and adequately compensating the victim, has now become the prime concern for the state.

But this scheme of compensation was never a distant dream. Since time immemorial compensating the victim was a major concern, be it through lex talionis or through a more reformed and revised mechanism of state machinery. Though an exact time or date cannot be determined as to when it

started, yet the oldest document reiterating the principle is Chapter 21 of Exodus:

“If men are fighting and hit a pregnant woman and she gives birth prematurely but there is no serious injury, the offender must be fined whatever the woman’s husband demands and the court allows. But if there is serious injury, you are to take life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, and bruise for bruise.”

The victim compensation concept was evident in history where the victims were compensated in order to save the offenders from violent repercussion of the victim or from the society.

Victims who were mere witnesses of justice, equity and good conscience got the opportunity to get compensated for the windfall loss rendered by the convict. Victims of crimes when enter in the world of criminal justice with the only hope of getting justice have often been harassed by the policemen or investigator or defense counsel as for them victims are just like a mere toy, who are used by them to search for the matter intensely. Even after the offenders get convicted, the victims are not getting their mode of rehabilitation through victim compensation, rather they are making a path for the offenders to modern cells where they are given the basic necessities of life by using state funds. There has now been a major realization that only punishing or convicting the accused would do victims no good. Even death sentence or life imprisonment of the person convicted of a crime would leave not a single stone turned in the pavement of the dingy lanes of a victim’s fate.

Though, in the human rights era, there had been flares of human rights activism for protection of rights of prisoners/criminals, yet tales of compensating the victims for the losses suffered are still in whispers. Though it has become a matter of substantive right, yet in reality, the procedural safeguard lacks regulation and monitoring. Often, the inevitable test of “proximity” and “proportionality” is overlooked while compensating the victims resulting in lack of proper and adequate compensation.

Neither did the Indian legislature nor the Indian judiciary brainstorm on defining who a “victim” was nor what “rehabilitation” meant. But such definition can be borrowed from Article 1 of UNGA’s Declaration of Basic Principle of Justice for Victim and Abuse of Power adopted in November 1985 and Paragraph 23 of UN Standard Rules respectively.


368 Article 1. “Victims” means any person who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

369 Paragraph 23. “Rehabilitation” is a process aimed at enabling persons with disabilities to reach and maintain their optimal physical, sensory, intellectual, psychiatric and/or social functional levels, thus providing them with the tools to change
Under Section 357 of the Code of Criminal Procedure, 1973 Courts have been conferred with power to award compensation to victims of crime only after conviction. But it was only after 2009, with the introduction of Section 357A in the Code of Criminal Procedure, 1973 that the State Governments along the Central Government formulated a scheme for compensation to victims or their dependants. Not only that, other provisions of the Code of Criminal Procedure like Sec. 250, Sec. 358 and Sec. 359 also talk about compensating the victims of false accusation, illegal arrest, etc. Even other Acts, such as, Probation of Offenders Act, 1958 and Fatal Accidents Act, 1855 compel the offender to pay compensation to the victims on respective grounds.

Compensation only is not enough. Rehabilitating the victim is also required. Rehabilitation consists of victim’s right to just and fair treatment, restitution, compensation and assistance. Thus, victim compensation can be one such step which not only provides compensation to the victim but also assures the rehabilitation of the victim in the society.

**History**

The concept of victim compensation was evident since the ancient period and its presence was even seen in the mythology. Further, it was seen that in the “Laws of Manu” compensation needs to be paid off to the victim for the loss done by the convict. Even this particular concept had become very vital at that time. During ancient time itself, sutra period, the claiming of compensation was considered as Royal right for the people. Further, it was seen that in the Law of Moses are examples of pecuniary compensation to the victim in early societies. Emperor Hammurabi had created a code of laws in order to govern Babylon where the laws regarding punishment were based upon the theory of ‘eye for an eye’ and ‘tooth for a tooth’ . The Code of Hammurabi, for instance, made clear that the criminal’s pecuniary obligation served not only to make the victim whole but also to increase the severity of the criminal's punishment.

370 M.J. Sethna, JURISPRUDENCE,(Lakhani Book Depot, 2nd,1959)- for murder the offender was obliged by the king to compensate the relatives of the deceased or the king or both.


372 Law No. 196, Code of Hammurabi.

373 Law No. 200, Code of Hammurabi.

374 Supra note 7, at 6.
Several barbaric forms of punishments were prescribed to the offenders in order to satisfy the victims’ loss in Egypt. But as time passed, slowly things started shifting from barbaric efforts to the concept of granting mercy. In Rome, Seneca developed his own theory of punishment and had supported the concept of granting mercy.\textsuperscript{375}

Indian legal system at that time completely focused on the concepts so highlighted in Dharamashatras and Arthashatras. Here, the concept of dharma had played a very big role. Dharma in Hindu vedic times was such that it had to be followed by not only the people but also needed to be followed by the king. There, at that time, king also needed to focus on the points that laws should be such that it should not be against the dharma. Kautilya’s Arthashastras was of great importance that time and it used to give proper directions and details of the ancient legal system of India. The Arthashastra gives directions regarding the treatment of petitioners in courts, behavior of the judges, methods of identifying witnesses indulging in falsehood,\textsuperscript{376} and punishment of offenders. The king at that time used to fix up the punishment for the crime so committed by the offender by seeing the offenders and further it was seen that if the offender seeks for the mercy, then he could be rehabilitated in the society. At that time when minors (under age of 15 years) were not punished for the sin committed, rather they were sent to the reformatory homes.\textsuperscript{377}

During this period, there was the dominance of caste, religion, and sex and it was evident that more the victim belongs to the higher caste, penalty for the crime would increase for the offenders. The concept of penalty which was adjusted according to the level of the understanding of the culprit also comes in the purview of Manu where the penalty of theft by Shudra should be 8 times (the value of the stolen goods), those higher in the social hierarchy should be more severely punished: the Vaishya 16 times, the Kshatrya 32 times and Brahmin 64 times and may even a hundred or a hundred and twenty-eight times on the ground that he was educated to know the consequences of actions.\textsuperscript{378} The offence like that of theft and destruction of property, in the western world, it used to lead to the barbaric execution of the convict. Thus, soon, it was observed that there was evolution of hefty monetary fines as punishment for the crimes as an alternative for physical punishments which were imposed upon. Even it was often seen that the severity of the punishment often got reduced on the basis of compensation paid to the victim who ultimately led to granting of probation or parole sentences. Soon the compensation came into the picture in the middle ages and the concept of duty played its role where any loss so committed by the convict had to pay it back as a punishment. But towards the end of middle ages, the concept started losing its grasp from the society and there was


\textsuperscript{376} Supra note 13, at 6

\textsuperscript{377} Id

\textsuperscript{378} T.S. Batra, CRIMINAL LAW IN INDIA 2, (Metropolitan Co. Pvt. Ltd., 1981)
introduction of two different concepts, one is tort and the other is crime where it was seen that the State had monopolized the laws by stating that the penal laws are only applicable to crimes and, thus, were not subjected for claiming compensation where the criminals were physically punished but, the monetary compensation was exclusively given and implemented in the civil procedures.\(^{379}\)

Thus, from the historical period itself, it had been seen that there was an arbitrary decision and enforcement regarding victim compensation had been made in the civil law itself and it is high time where it needs to be properly inculcated in criminal law.

**NEED FOR VICTIM COMPENSATION IN CRIMINAL LAW**

The concept of victim compensation was never a foreign concept in India. It was evident since the old kingdom period where kings used to compensate their people if any loss happened to them and the offenders were not caught and further the state fund was re-compensated by the village officer for whose neglect such loss happened.\(^{380}\) From the royal period, it had been seen that the victim used to get compensated for any loss caused to him. At that time, the growth of turmoil and dissatisfaction resulted in innovative ideas, such as, determinate sentencing or part-time imprisonment. But restitution is never a big deal for rich offenders and even if there is application of “victim compensation” in the criminal trial, they just pay off the damages and again commit crime. However, it can be made grave if restitution is sentenced along with other criminal penalties. Then, definitely the sentence will be much more grievous; but it should be applicable in only cases of serious offence. But there are many critics who do not support the concept in criminal law and have upheld the traditional model legal system by stating that compensation needs to be given in terms of private wrong. Whereas penal code defines those crimes which are against the public and breaches the state’s peace. Thus, their argument is to punish the accused of criminal offence, rather extracting the punitive compensation. Thus, their word is very clear that the victim compensation needs to be applicable only in civil law. But one thing which was missed out, that the concept of restitution completely focuses on rehabilitation, deterrence, and retribution which actually suffices the purpose and need of its presence in criminal penalties.\(^{381}\) Restitution seems to be a good substitute of fines and imprisonment especially in case of probation or parole.\(^{382}\) Victim Compensation and restitution are often used interchangeably; but two are different concepts. Victim compensation and restitution still uphold the similar interest i.e. the interest of the victim. It may seem that the restitution is not so effective punishment for the respective crimes committed in the society. If seen minutely, it gets clear that it also upholds the retributive theory of punishment where it

\(^{379}\)K. Kishore, _The History Of Compensation Of The Victims Of Crime_, 27,(Cf.LJ, 2006)


not only focuses on the wrongfulness of the offence and moral responsibility but also puts light on the relation of the victim and offender where the offender pays off the former for the loss so committed. If victim compensation is not inculcated in criminal law, then it is evident from several situations that many prosecution parties may not be financially sound to achieve ends of justice. They have to fight for themselves. It not only helps the offender to rehabilitate in the society, rather it is the same for victims too. And moreover as it is also stated above that fine is much more arbitrary and it is of no good to the victim; because loss so caused does not get sufficed by such fine. Though there were several efforts taken up still the implementation of restitution or victim compensation became limited. But yes, one thing needs to be kept in mind that compensation so stated should not be such that it becomes even difficult for the victim to even survive back in the society. Moreover, in the 152nd Law Commission Report, it had been seen that there was recommendation of introduction of 357A where the victims who have undergone any bodily injury would be compensated with 25000/-; whereas the murder will entail penalty of 1000000/-. This very recommendation was again made in 154th Law Commission Report; but no such efforts were made by the government to work on this recommendation. Even in case of Hari Kishan case385, the apex court had expressly directed all the courts to make the exercise of the Sec. 357 and need to compensate the victims, especially in that case when the accused gets release on admonition, probation or when both parties enter into a compromise. The aim of the court through this provision was to avoid the anger of the society towards the offender and, ultimately, to help that person to accomplish the self-respect what he has lost due to his action. Though there are provisions like Sec 357 and Sec 357A in CrPC; but they lacks proper awareness and implementation.

There are cases where there is no individual who has done a crime and has to pay compensation for it; but there are incidences where offenders become victims due to the several atrocities done by the public officers. At that time, burden comes to the state to compensate the family members and the victim for such physical injury and mental harassment. Prosecution may be initiated against a victim due to false report lodged against him. So, due to state’s monopolization of legitimate violence, it is the state which becomes responsible for the protection of the injured party as "The king usurped the right of the citizen to restore equilibrium after a crime had been committed". When the state becomes unsuccessful in its work, it is obligated to compensate the injured party for resulting damage. The victims of custodial atrocities are entitled to get compensation from the state as decided in the case of Nilabhati Behera v. State of Orissa386 and further in the case of D.K.Basu v. State of West Bengal387, it was stated that the victims or the

383 Supra note 19, at 8.
385 Hari Kishan And State Of Haryana v. Sukhbir Singh, AIR 1988 SC 2127
heirs of the deceased victims are entitled to claim compensation for the tortious act so committed by the functionaries of the state. Thus, awareness of victim compensation should be in created on large scale so that masses at large get well acquainted with such compensation and implementation of the law relating to victim compensation is made more effective.

**CONCLUSION**

“Of all the persons involved in the criminal justice system, the VICTIM is the one who has most often been overlooked.”  
Alfred Cohn and Roy Udolf

In the case of Rattiram & Ors.v. State of M.P.\(^{388}\), the apex court was of the opinion that:

“Criminal jurisprudence, with the passage of time, has laid emphasis on victimology which fundamentally is a perception of a trial from the view point of the criminal as well as the victim. Both are viewed in the social context. The view of the victim is given due regard and respect in certain countries. It is the duty of the court to see that the victims’ right is protected.”

Victim compensation has always been a tough aim to achieve where victims have to fight to get it. Although victim compensation is an age old concept, yet its development needs more vigorous efforts. Besides that, compensatory jurisprudence has also emerged in the light of human rights activism as a dynamic and liberal interpretation of Art. 21 of the Constitution of India. However, the term “Compensation” in present context means amends for the loss sustained. Compensation is anything given to make things equivalent, a thing given to make amends for loss, recompense, remuneration or pay.\(^{389}\) It is an indication of duty of the general public which is considerate in nature speaking to a non-criminal reason and end.\(^{390}\) Though the principle of the protection of rights of accused is one of the prime concerns of administration of criminal justice, yet there is a dire need also to balance the rights of victims. Practically, the victim remains a forgotten man. Providing compensation is one such tool that can mitigate victim’s agony to some extent; but its weak implementation has crippled the criminal justice system and victims remain at the loggerheads in their fight for justice. While the Code of Criminal Procedure, 1973 accepts, the principle of victim compensation, in practice, the provision has remained merely on paper. It also lacks proper motivation. It does not assure speedy or sure relief as the trial period is lengthy in India. It has also failed to provide interim or immediate compensation to victim. Not only that, the Indian judiciary has no alternative for getting relief from the backlog of cases because our system is crippling under its own weight. Effective implementation of the victim compensation is the only hope through which the confidence of the masses can be restored in the system.


\(^{390}\)V.V. Devasia, and L. Devasia, CRIMINOLOGY, VICTIMOLOGY AND CORRECTIONS, 97 (Ashish Publishing House, 1992)
However, an analysis of case laws also gives an indication that the courts in India, at least the higher level courts, have started realizing the plight of the victim and the necessity to provide relief to the victim to the extent possible by restitution. Natural justice guarantees rehabilitation and ultimate removal of hardships of the aggrieved, which to an extent, can be achieved through compensation. If the victim compensation is properly and speedily implemented in criminal justice system, it would lead to reduction in lodging of false cases also.

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STATE OF ACCOUNTABILITY

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Introduction
If you are an unfamiliar visitor to an organization engaged in international development assistance and unsure of the reception you will receive, there is a way to win over your hosts: tell them you believe that four key principles are crucial for development—accountability, transparency, participation, and inclusion. Your hosts will almost certainly nod enthusiastically and declare that their organization in fact prioritizes these very concepts as key tools in the larger battle to eradicate extreme poverty and achieve sustained development. This holds true no matter whether you are visiting a major bilateral or multilateral aid agency, a foreign ministry engaged in development work, a transnational, nongovernmental organization, a private foundation, or any other of the many groups that now make up the tremendously heterogeneous world of international development aid.

These four concepts have become a ubiquitous feature of the policy statements of countless aid organizations over the past few years. For example, the U.S. Agency for International Development (USAID)’s recent strategy on democracy, human rights, and governance frames “greater citizen participation and inclusion, and more accountable institutions and leaders” as its primary high-level objectives, arguing that this framework will help “empower reformers and citizens from the bottom up.

The Organization for Economic Cooperation and Development’s Development Assistance Committee affirms that “there is growing consensus on the value of human rights principles—such as participation, non-discrimination and accountability—for good and sustainable development practice,” and defines effective states as “those that . . . have open, transparent, accountable and inclusive political institutions.” Similarly, in its 2007 Governance and Anti-Corruption Strategy, the World Bank asserts that “engaged local communities, a vibrant civil society, and a transparent flow of information . . . support poverty reduction by helping to hold governments accountable for delivering better services, creating jobs, and improving living standards. Besides serving as both means and ends of development programs, the four principles also represent mainstays in the international discourse over relations between donors and aid recipients as well as other stakeholders. In the course of the past decade, the aid community has increasingly emphasized the importance of expanding recipient country ownership over development processes through greater donor accountability, transparency, and multi-stakeholder engagement. In the course of the past decade, the aid community has increasingly emphasized the importance of expanding recipient country ownership over development processes through greater donor accountability, transparency, and multi-stakeholder engagement. Contributing to this sense of intrinsic goodness is the post-ideological nature of these concepts. They rise above the burgeoning arguments around the world about the value of liberal democracy and whether it is the most effective and desirable political system for
every country. Chinese officials sparring ideologically with their Western counterparts do not hesitate to question democratic processes and institutions. But they are unlikely to argue that Chinese citizens and businesses are better served by a government that is fundamentally unaccountable to their interests and needs. Transparency and public participation have in fact become popular themes in Chinese political discourse, with former general secretary Hu Jintao himself stressing “the growing enthusiasm of the people for participation in political affairs” and affirming the intent to “improve the open administrative system in various areas and increase transparency in government work.

The four concepts also transcend ongoing debates within the development community between conservative and left-of-centre philosophies. Accountability, for example, easily aligns with the emphasis that conservatives place on anticorruption and the rule of law. Yet at the same time, it attracts developmentalists on the left who underline the need to make government more responsive to disadvantaged and marginalized groups. Similarly, conservatives may see greater participation as an integral component of small-government approaches in which citizens take up roles that pared-down states no longer play. Those on the left, on the other hand, often use participation as a synonym for the grassroots mobilization of ordinary citizens against entrenched power holders. Proponents find in these four concepts not just intrinsic value but, just as importantly, a natural instrumental logic. State institutions that are accountable to their people will use their resources constructively rather than misspend or steal them. Greater governmental transparency will allow citizens to determine where their political leaders are going astray and exert well-targeted pressure to put them back on track. Increased public participation in governance processes on the local and national levels will provide those institutions with direct input on how to best respond to citizen needs and bring additional information about blockages and inefficiencies into decision-making processes.

Of course, these are not the only enthusiasms to have blossomed in the international aid world during the past several decades. But the agreement around them appears to be unusually broad and its implications far reaching. Rather than simply adding new elements to the conventional wisdom about development, the consensus calls on donors to revise their approach to all areas of assistance. The four principles together in effect form a new conventional wisdom about development, one with interlinked normative and instrumental rationales and one that promises to bridge long-standing divides both within aid organizations as well as between donors and recipients.

Yet behind the ringing policy declarations and the ubiquitous presence of these concepts in programming lie a number of significant fissures. They concern fundamental aspects of the agenda defined by these four concepts: whether they really bridge longstanding ideological and operational divides within the aid community, whether or not they represent a unified and coherent agenda, and how deep
the donor commitment to these concepts truly is in practice.

Bridging the Three Rivers of Politics in Development
Accountability, transparency, participation, and inclusion have emerged as crucial aid priorities and principles as part of the broader opening of the door to politics in development work over the past twenty-five years. This opening was driven by a change in thinking about development that occurred at major aid institutions in the late 1980s—the realization that bad governance is often a key driver of chronic underdevelopment, and that the donor emphasis on market reform would only succeed if developing countries built capable, effective state institutions. Developmentalists at the time framed this insight in politically neutral-sounding terms as “good governance.” Yet by incorporating this concept into mainstream development work, they inevitably recognized the pressing need for greater donor attention to political institutions and processes. The dramatically changed international political landscape opened the door to politics in aid work in several additional ways. The end of the global ideological schism as well as rapidly growing civil society activism in many countries attempting democratic transitions also brought about a greater international consensus on human rights frameworks and their role as tools for social and political change. Some Western donor governments that had previously emphasized only the political and civil sides of human rights began giving greater attention to socioeconomic rights. This emerging agreement in turn triggered heightened attention to human rights issues and approaches as an integral part of development work. Human rights advocates argued for disempowerment and exclusion to be understood both as root causes and consequences of chronic poverty and stressed that economic growth should serve as a means rather than the end goal of human development. Reflecting this emerging perspective, the Vienna Declaration issued at the 1993 World Conference on Human Rights emphasized economic interests—including, for example, with Egypt and Saudi Arabia. Yet in a number of places no longer ensnared in a global ideological contest, such as sub-Saharan Africa, they proved increasingly willing to raise problematic domestic political issues with aid-receiving governments. In addition, the onset of a startling global wave of democratization, which Western governments generally perceived to be in their political and economic interest, prompted Western aid actors to find new ways to support this trend. Providing politically related assistance quickly emerged as a crucial tool in this regard.

The end of the global ideological schism as well as rapidly growing civil society activism in many countries attempting democratic transitions also brought about a greater international consensus on human rights frameworks and their role as tools for social and political change. Some Western donor governments that had previously emphasized only the political and civil sides of human rights began giving greater attention to socioeconomic rights. This emerging agreement in turn triggered heightened attention to human rights issues and approaches as an integral part of development work. Human rights advocates argued for disempowerment and exclusion to be understood both as root causes and consequences of chronic poverty and stressed that economic growth should serve as a means rather than the end goal of human development. Reflecting this emerging perspective, the Vienna Declaration issued at the 1993 World Conference on Human Rights emphasized economic interests—including, for example, with Egypt and Saudi Arabia. Yet in a number of places no longer ensnared in a global ideological contest, such as sub-Saharan Africa, they proved increasingly willing to raise problematic domestic political issues with aid-receiving governments. In addition, the onset of a startling global wave of democratization, which Western governments generally perceived to be in their political and economic interest, prompted Western aid actors to find new ways to support this trend. Providing politically related assistance quickly emerged as a crucial tool in this regard.
that “democracy, development, and human rights are interdependent” and affirmed that development efforts themselves should respect and enhance human rights, rather than pursue economic prosperity at the expense of the latter.

As a result of these varied drivers of change, the development community started to shed the apolitical mindset and technocratic habits that had characterized it since the 1950s. Three new streams of assistance took hold, reflecting the impetus toward a greater integration of politics into development: aid to strengthen governance, to support democracy, and to advance human rights. Governance quickly became a focus at many mainstream development organizations. Democracy was taken on as a priority area by a smaller number, initially USAID and several more specialized political aid organizations that were funded by governments but at arm’s length from them, such as the National Endowment for Democracy and various European political foundations. Rights-based development became a growing preoccupation of several northern European donors as well as a number of multilateral institutions, especially within the United Nations family.

Although these three different streams all grew out of a greater attention to political methods and goals in development work, they took shape as somewhat separate areas of aid. Governance assistance aimed at strengthening core institutions of public administration and financial management, and gradually expanded to also cover service delivery. Democracy aid concentrated primarily on assisting the formal processes and institutions regulating and shaping political competition, such as elections, political parties, and parliaments. And rights-based programming tried to define core socioeconomic areas—like food, shelter, and education—in terms of rights-holders and duty-bearers and to translate this conception into more forceful policy attention to the power inequalities underlying core development problems. These three new rivers of international aid were separated not only by different programming foci, but also by different philosophies of development and some degree of mutual distrust among their respective communities. Governance practitioners were often wary of emphasizing rapid democratization in developing countries with weak state institutions, afraid that premature political liberalization might pave the way for fragmentation and populist pressures that would undermine efforts to foster governance efficiency and effectiveness. Democracy promoters in turn worried that governance programs emphasizing the strengthening of central state institutions might reinforce anti-democratic governments resistant to the distribution or alternation of power. The human rights community, for its part, viewed the new democracy promotion cause with considerable suspicion, worried that it might be the handmaiden of ideologically driven political interventionism serving interests far removed from development. Governance work initially concentrated on public sector efficiency and competence, with a programmatic focus on public expenditure management, civil service reform, and privatization. Yet this narrow conception steadily broadened to take on board the principles of accountability,
transparency, participation, and inclusion. This change occurred for multiple reasons. Starting in the mid-1990s, the World Bank and other major donors began concentrating on corruption—which many aid providers had traditionally avoided confronting head on, viewing it as too politically sensitive—as a key obstacle to poverty reduction. Public sector accountability and transparency emerged as crucial concepts in the effort to reduce opportunities for corruption and strengthen internal and external monitoring mechanisms.

The emergence in those years of transnational advocacy movements that were focused on government transparency and accountability further pushed the aid community to begin tackling these issues in their work. Transparency International and other groups helped push anticorruption onto the agenda. Nongovernmental groups in developed as well as developing countries led a widening campaign for freedom of information that in many places produced new laws and regulation guaranteeing citizens’ right of access to government information. More recently, the global civil society push for open government has further solidified attention to public sector transparency in domestic and international policy circles.

The rising emphasis on the citizen side of the equation therefore naturally prompted greater attention to accountability and participation. The United Nations Development Programme (UNDP) was a leader in this area in the early 2000s, pushing for the concept of democratic governance—by which it meant the infusion of elements of accountability, transparency, participation, and inclusion—as a fruitful formulation of a broadened governance agenda. The 2004 World Development Report, Making Services Work for Poor People, further specifically highlighted the importance of accountability in addressing the catastrophic failure of service delivery to the world’s poorest people, and pointed to citizen engagement and direct interaction with service providers as a crucial part of the solution. It recommended, for example, that donors should not only focus on channeling resources and technical assistance to underperforming public education systems, but also support citizens in addressing local challenges such as teacher absenteeism and bribery by monitoring performance and directly engaging with responsible providers and officials.

**An Incomplete Bridge**

The apparent convergence among the governance, democracy, and human rights communities is striking. Yet general agreement on the importance of accountability, transparency, participation, and inclusion has not fully bridged the underlying divisions between these camps. Ask governance specialists at one of the multilateral development banks or major bilateral aid agencies whether they are engaged in aiding democracy and they will likely insist that they are not. They will emphasize that they are pursuing greater participation, transparency, accountability, and inclusion for developmental rather than politically normative purposes and are not in the business of trying to shape the political life of other countries. Democracy promotion, in their view, remains a separate terrain, more ideological than governance work, more about changing overall political
systems than improving the performance of state institutions and delivering economic growth. They may note that they often carry out governance programs for decades in undemocratic contexts such as Kazakhstan, Ethiopia, or Vietnam, without any intention of changing the larger political direction of the country.

Democracy practitioners, meanwhile, highlight the political dimension of each of the four concepts. Rather than focusing on social accountability mechanisms that target the relationship between citizens and service providers, they attempt to strengthen broader institutions and processes of political accountability, such as regular and competitive elections and effective, independent parliaments. When they work on participation, their focus is on citizen involvement in local and national political processes rather than development planning and programming. Similarly, they frame issues of inclusion mostly in terms of political empowerment and representation rather than social or economic marginalization. In other words, for this group, democratic institutions such as well-functioning political parties, responsive parliaments, and a legal framework that guarantees basic political and civil rights are the central pistons of accountability, participation, and inclusion.

As a result, democracy practitioners are skeptical of governance programming that skirts the political dimensions of these concepts. They worry that their governance counterparts are inescapably inclined toward narrow and technocratic interpretations of these principles that fail to take into account the broader distribution of power in a society (although some aid programs billed as pro-democratic fall into the same rut of technocratic efforts to improve the functioning of state institutions, without challenging underlying power inequalities).

One Agenda or Several?
There is also disagreement over the extent to which the four principles actually constitute a unified agenda. Aid providers typically present them as such, grouping them together in policy documents as an apparently mutually reinforcing set. And these principles do share a certain common ground—all of them pertain to the interaction of states and their people, pointing toward a greater role for citizens in the functioning of the state. Moreover, some natural links do exist among them in practice. Accountability programs for example often incorporate transparency as a constituent element while also relying on citizen participation, such as support for local groups that seek to press a particular government institution to be more responsive to public concerns. Similarly, efforts to foster greater inclusion naturally connect to increased participation by the targeted group. In short, what is presented to the outside world as a unified agenda instead appears from within the development community to be a set of goals that compete with each other for attention and resources. Different aid organizations or groups within them pursue very different relative emphases on the four principles. For example, enthusiastic proponents of the growing transnational movement for accountability and transparency view these issues as a potentially transformative advance of the
The four principles are not only frequently pursued at least somewhat independently of each other: they can also at times be in tension. For example, an effort to push a government emerging out of civil war to pursue accountability for past human violations may limit the inclusion of some groups in the post-conflict political system. Accountability programs that seek to reduce state capture may actually try to limit participation in the workings of certain institutions, such as central banks, in order to isolate them from political pressure or improve efficiency. Certain attempts to strengthen public sector accountability by increasing provider competition in service delivery may perpetuate patterns of marginalization, and poorly conceived participatory projects can exacerbate rather than alleviate the exclusion of disadvantaged groups. These tensions are rarely acknowledged, and remain buried beneath the continual references to the four principles as a shared agenda.

The Problem of Superficial Application

Another fissure arising in the application of the four principles centers on the actual depth of donor commitment to transparency, accountability, participation, and inclusion in programming and implementation. Despite their stated devotion to these principles, aid organizations sometimes treat them as boxes to be ticked rather than genuinely significant or even transformative elements to be pursued in substantial, sustained ways.

This problem partly stems from the fact that despite their suggestive and appealing nature, the four concepts are sufficiently broad that agreeing on them in theory does not necessarily translate into agreement about them in practice. References to principles such as participation and accountability in aid programming have become so frequent and widespread that pinning down with any precision what is meant by those terms often proves difficult. At times the terms appear to have the quality of an elixir that aid providers sprinkle—at least rhetorically—on everything they do, in the hopes of giving their activities an appealing extra shine. Participation, for example, is generally used to refer to input by citizens into governmental processes, including, for example, in the planning, design, implementation, or review of policies that affect them. Yet such input varies widely in type, duration, and intensity—it can be formal or informal, sporadic or continuous, limited or far-reaching, local or national, and so forth. Participatory measures can be part of broader vertical accountability efforts relating to public financial management and service delivery, forming an integral element of citizen attempts to exert a disciplinary role vis-à-vis the state. Yet the term is also used to describe broader consultations and public input into decisionmaking processes that remain firmly in the hands of...
Efforts to bolster the inclusion of marginalized groups also often suffer from the problem of superficial application. For many mainstream donor organizations, inclusion emerged as a priority issue on the international aid agenda due to the efforts of women’s activists who argued that the economic, social, and political marginalization of women—for example, through their exclusion from education and political decisionmaking—perpetuated chronic poverty. However, the domain of gender inclusion is nevertheless littered with examples of aid providers who have professed their commitment to gender awareness in their program design without in fact attempting to address the systemic exclusion of women from development processes.\textsuperscript{14}

Similarly, a first wave of efforts to foster transparency in different arenas of state action is quickly giving way to the realization that achieving meaningful developmental impact this way is a considerably more complex and uncertain process than many aid providers had initially realized. Scholars have warned of the frequent conflation of open data technologies and the politics of open government, emphasizing that a government can “provide ‘open data’ on politically neutral topics even as it remains deeply opaque and unaccountable.” In a recent review of transparency’s impact on governance and public services in particular, Stephen Kosack and Archon Fung further draw attention to the ways in which different governance contexts account for variations in the effectiveness of transparency initiatives. They argue that reforms can face obstacles of collective action, political resistance, and long implementation chains,
and are most likely to succeed in situations marked by competitive service delivery that poses fewer of these hurdles.

**The Unsettled Intrinsic Case**

Beyond divisions among various practitioner communities and difficulties in implementation persists a broader debate about the appropriate role of the four principles in development work. The intrinsic case for making accountability, transparency, participation, and inclusion major pillars of development aid seems straightforward to enthusiasts of these principles: the four concepts describe a relationship between governments and their citizens that honors and reinforces basic human dignity. As such, they are good things in and of themselves that should be understood as intrinsic elements of development. In other words, a society is more developed when its people are treated in accordance with these values and less developed when they are not. It is impossible to assess with any precision the degree to which the intrinsic case is accepted within the many aid organizations putting forward these four concepts as important priorities. Official policy statements affirming donor commitment to inclusive, participatory, accountable, and transparent governance often do not explicitly state whether this commitment is primarily normative or based on an assumed instrumental case, and only provide vague or incomplete theories of change relating to these issues. The World Bank, for example, argues that social accountability initiatives, besides facilitating better governance and improved public policies and services, can also serve to “empower those social groups that are systematically under-represented in formal political institutions” and to “ensure that less powerful societal groups also have the ability to express and act upon their choices. . . Yet the World Bank does not specify whether empowerment—another ubiquitous, yet conceptually ambiguous term—is advanced as a normative end goal or as a means to achieve better socioeconomic outcomes.

However, it is clear that many mainstream developmentalists remain strongly attached to a traditional socioeconomic conception of development and are reluctant to embrace normative principles for their own sake. Few donors clearly state the normative argument in their policy statements. The Swedish government is a notable exception in this regard: its core aid strategy seeks to operationalize Amartya Sen’s argument that a lack of freedom is a form of poverty, thereby merging normative political principles with a traditionally socioeconomic definition of development. Rights-based approaches to development take participation, accountability, and inclusion as inalienable rights that should be integral to both development processes and outcomes and thus represent an embodiment of the normative case. But they have gained only partial ground over the past twenty years, and even the minority of major aid organizations that embrace a human-rights-based approach are still struggling to incorporate it substantially into development practice and make a difference in programming beyond appealing statements of intent. One at least partial exception is the UNDP, which since the early 2000s has advanced a rights-based conception of development in its Human Development Reports and pushed for a convergence
between human rights and development agencies in the UN system. UNDP has invested in efforts to develop clear indicators for this approach to aid programming and assist donors in assessing human rights standards and principles in project design, implementation, and monitoring.

**Divisions Over the Instrumental Case**
Not only is the intrinsic case for the four concepts unsettled, so too is the instrumental one—the argument that building the four principles into development assistance will help produce better socioeconomic outcomes in aid-receiving countries. Limited and generally inconclusive evidence base to date exacerbates this problem. Despite the rapid increase of aid programming relating to accountability, transparency, participation, and inclusion in the course of the past fifteen years, relatively little time and funding have been invested in examining the long-term socioeconomic and political impact of these initiatives. However, one overarching message does emerge from the existing evidence: the need for a strong dose of realism and caution regarding donor expectations of developmental impact. Many studies show that programs targeting accountability, participation, transparency, or inclusion are at least somewhat successful at achieving their intermediate goals—such as establishing a social audit process, strengthening the transparency of a particular ministry, or improving citizen input into a national planning process. However, translating such achievements into longer-term socioeconomic progress is much less common, or, at the very least, much harder to detect.

Of course, few studies suggest that incorporating these concepts into programs has no developmental effect at all. Success stories do exist: In Uganda, community monitoring has contributed to improvements in public service delivery, such as increased student and teacher attendance in schools and better education outcomes. Similarly, community monitoring of health services using citizen report cards to facilitate regular dialogue with health workers about problems and expectations led to an increase in student and teacher attendance in schools and better education outcomes.
in the use of outpatient services as well as overall improvements in medical treatments and a significant reduction in infant mortality. Participatory governance councils in Brazil have improved the access to and quality of healthcare services, and participatory budgeting in cities such as Porto Alegre has stimulated citizen participation in local politics and increased public funding for housing, health, and education. However, these initiatives have also been criticized for failing to ensure inclusion of the poorest or perpetuating clientelistic politics in certain contexts.

A central challenge for the aid community is how to move from these scattered, often small-scale successes to greater socioeconomic impact. Aid providers eager to make progress on this question are increasingly trying to move beyond isolated bottom-up or top-down approaches, instead working to tackle both sides of the state-society relationship at once. Various analysts have highlighted the importance of such integrative approaches. For example, in an insightful analysis of the empirical basis for social accountability work, Jonathan Fox criticizes what he calls tactical approaches that rely on bounded interventions, neglect the role of the state, and rest on flawed assumptions about the power of information. Instead, he praises strategic approaches that attempt to coordinate citizen action with governmental reforms to bolster public sector responsiveness. While the impact of tactical approaches has been minimal, Fox suggests that the evidence base for strategic approaches “driven by coalitions of pro-accountability forces across the state-society divide” is considerably more promising.

The Larger Developmental Debate

The debate over the evidence base for the four principles is rooted in the larger, often fierce debate about the overall relationship between governance regimes and economic development. In recent years this debate has focused extensively on whether a clear empirical case exists for the proposition that Western-style governance (which is seen as including the four principles as well as other elements such as the rule of law) is good for development, whether as a contributing factor in achieving socioeconomic success or in sustaining it. Three main (and overlapping) camps contend with each other in this debate.

The optimists believe that mounting evidence from both historical analysis and more specific empirical studies indicates that inclusive or democratic governance is the key to generating and sustaining high levels of socioeconomic development. Driven by the hopefulness of the immediate post-Cold War years, policymakers in the 1990s initially embraced this argument primarily axiomatically rather than on a firm empirical basis. Scholars have since assembled a significant body of research pointing to a positive correlation between various aspects of a country’s governance—including transparent, accountable, and participative institutions—and its economic progress. Daniel Kaufmann and other World Bank economists built an influential set of aggregate Worldwide Governance Indicators to measure changes in governance quality over time, and found a positive correlation between a country’s performance on these measures and its economic development. Their work generated numerous efforts that
relied on those indicators as well as comparable measures to tease out the relationship between particular aspects of governance—such as property rights, transparency, and the rule of law—and global variations in income levels. This research points to the overarching conclusion that open and inclusive polities and economies ultimately tend to be more successful at sustaining economic growth.

Another influential line of work attempts to trace the historical relationship between institutions and economic growth. In their widely discussed book, Why Nations Fail, Daron Acemoglu and James Robinson find that countries that develop inclusive rather than extractive political and economic institutions produce better socioeconomic outcomes in the long run. Similarly, Douglass North, John Wallis, and Barry Weingast juxtapose “open access orders,” characterized by political and economic competition, impersonal governance, and a shared commitment to equality and inclusion, and “limited access orders,” in which elites engage in rent-seeking and pursue their personal interests. They argue that historically, the former has been more successful at sustaining economic growth than the latter.

A perhaps more prominent line of research on the sceptical side acknowledges the centrality of governance but disagrees that democratic or inclusive institutions are key to prosperity. Scholars embracing this view argue instead for a capable and effective developmental state, a model that gained prominence following the remarkable economic rise of the Asian Tigers in the early 1990s. Countries such as South Korea, Taiwan, and Singapore did not institutionalize Western-style democratic governance, yet rapidly grew their economies by centralizing state power, developing autonomous and effective bureaucracies, and actively intervening in the market process. In fact, scholars have argued that the success of these efforts specifically depended on limiting citizen participation in the political process and isolating state institutions from popular pressure and accountability mechanisms.

Focusing on governance challenges in Sub-Saharan Africa, David Booth and the Africa Power and Politics Programme argue that fragmental clientelist governance systems often pose bigger obstacles to economic growth than various forms of “developmental patrimonialism” that effectively centralize economic decision-making. They therefore stress the importance of state capacity and cohesion, while rejecting a normative insistence on bottom-up pressure and accountability as a means to better government performance. Following a similar line, Mushtaq Khan criticizes the good governance agenda for prioritizing market-enhancing measures such as transparency, rule of law, and anticorruption in contexts with limited governance capabilities. Instead, he argues for a greater focus on growth-enhancing aspects of governance, such as the capacity to strategically attract new investment. Linking these scholars is an overarching concern that a premature opening of political institutions and decision-making processes can exacerbate existing collective action problems, and a wariness of good governance approaches that assume state capacity and political will for reform where
both are lacking. The ongoing, fiercely contested research debate over the relationship between governance and development exacerbates the continued fissures within the aid community over the value of incorporating accountability, transparency, participation, and inclusion into development work. The arguments for their developmental impact are strong enough to give at least some comfort to their devoted proponents. Yet the strengths of the arguments on the other side give those aid practitioners skeptical of the concepts’ instrumental value a foundation for their doubts. Given the fact that this decades-old research debate does not appear to be headed soon toward any definite resolution, these deep-seated splits over the instrumental case are likely to continue for some time.

**Uncertain Commitment to International Initiatives**

The apparent consensus around the four concepts extends to governments on both sides of the aid equation—donors and recipients alike. Part of the strong appeal of recent transnational initiatives that have taken up the four concepts—such as the Open Government Partnership, which now counts 65 member governments committed to improving government transparency—lies precisely in the fact that they put developed and developing countries on the same plane and acknowledge that they face many of the same core problems.

Yet here too, fissures persist. The problem of superficial application identified with regard to aid programming around the four concepts to some extent also affects international initiatives centered on issues such as government accountability and transparency, which struggle with the question of how to best translate international commitments by participating governments into meaningful domestic reforms.

This challenge arises with regard to the Extractive Industries Transparency Initiative, a voluntary international regime that aims to expose revenue streams to citizen scrutiny in order to expose resource theft and increase public and private sector responsiveness to citizen demands. EITI-compliant governments regularly publish their revenues from the extractive sector and require private industry actors to do the same. Developing countries have strong incentives to join EITI, as membership is tied to not only reputation but also improved performance on various international ratings, such as the World Bank “Doing Business” Index, which in turn influence aid flows and investment. However, critics argue that corrupt regimes can reap these benefits while at the same time maintaining kleptocratic governance structures. EITI’s compliance standards remain relatively weak and narrow in scope, despite The Open Government Partnership, founded in 2011, represents another interesting case study of an international initiative attempting to trigger domestic reforms on transparency and accountability issues. The OGP is open to all countries that meet a set of eligibility criteria, and it compels participating governments to implement regularly monitored open government action plans developed in consultation with civil society. Some observers have criticized the
initiative for allowing governments to present themselves via their OGP membership as reform minded and transparent while committing to few specific, measurable, or genuinely transformative reform proposals. The OGP’s Independent Reporting Mechanism for example found that up to two-thirds of the existing partnership commitments “do not pass the three hurdles of being relevant, having the potential to have a major impact, and being implemented.” Yet the initiative has also been praised for achieving considerable success in a very short period of time, with 194 ambitious reform commitments in 35 countries mostly or fully implemented and completed within three years. Moreover, the OGP is still a relatively new initiative and deserves time to gain traction and fine-tune its approach.

For international initiatives such as EITI or the OGP, there may of course also be value in including governments with bad track records on accountability, transparency, and citizen participation in order to encourage a “race to the top,” as Western proponents of these sorts of endeavors like to argue. The inclusion of governments with chronically poor governance records may indeed serve to gradually socialize them into a different outlook. Yet research on the European Union and other multilateral initiatives shows that governments are often most likely to reform before joining an initiative, suggesting that both entry and compliance criteria should be carefully designed and reviewed to maximize leverage.

**The Continuing Donor-Recipient Divide**

The four concepts also appear as a potential bridge across the donor-recipient divide in a second sense—they are not only widely embraced by aid organizations as programmatic principles and objectives but have also been agreed on by both donor and recipient governments as a means to achieve greater aid effectiveness. Yet here too the consensus is less solid than the rhetoric may indicate. A number of developing country governments remain fiercely opposed to incorporating these principles into the international development agenda as universal characteristics of good governance. While they advocate for their application to international partnerships, they reject donor attempts to promote them in recipient societies as illegitimate political meddling. In other words, donors embrace the four concepts as things that they hope recipient governments will do, while recipient governments embrace them as things that they hope donor governments will do.

Scepticism on the side of recipient country governments about the four concepts first emerged when the World Bank and other major aid organizations began pushing the accountability and anticorruption agenda in the 1990s. Developing country power holders were unconvinced by the instrumental case for anticorruption work, fully aware that many developed countries had in fact experienced substantial corruption throughout their own histories, yet still managed to reach prosperity. They also doubted the intentions of Western donors, seeing the new agenda as a cover for political interventionism, an excuse to embarrass or even delegitimize governments that the West happened not to favor.

These initial suspicions have continued to
fester throughout the expansion of the governance agenda over the past two decades. The argument that concepts such as accountability, participation, inclusion, and transparency are post-ideological is not persuasive to some developing country officials and observers, especially as they are often presented as core elements of “democratic governance.” With sensitivities over Western political interventionism having risen dramatically across the international political landscape over the last ten years, movements by the aid community toward more normative approaches to governance inevitably encountered rough terrain on the recipient side. Moreover, power holders in nondemocratic societies such as China, Vietnam, Rwanda, and Ethiopia often present their own developmental success as counterarguments to the instrumental case.

The difficulties of reaching a global agreement in the ongoing negotiations over the post-2015 development agenda sharply highlight this continuing fissure. Major Western donors have persistently argued for the inclusion of a goal that would incorporate governance principles in a substantial way—particularly since the Millennium Development Goals fell short of addressing the developmental role of governance, democracy, and the rule of law. Considerable momentum has gathered for commitments on accountability and transparency as well as citizen participation and political freedoms to be incorporated into a future framework. The High-Level Panel appointed by the UN secretary general to assist the formulation of a post-2015 development agenda recommended in its final report that “good governance and effective institutions” be included as a stand-alone goal, and put governance among the “transformative” factors affecting development beyond 2015. But disagreements persist over whether such governance components should be incorporated as cross-cutting principles, measurable targets, or overarching objectives, and whether their inclusion should follow an intrinsic (for example, human-rights-based) or instrumental rationale.

Governance principles have been a contentious topic not just across the donor-recipient divide but among developing country governments as well: the consultations leading up to the Common African Position on the post-2015 development agenda were marked by disagreements over the inclusion of the rule of law as well as peace and security, issues that were prioritized by conflict-affected countries in particular but dismissed by others as a Western agenda. South Africa, for example, has stressed a holistic approach to peace and security that centers on human rights and the rule of law, while Uganda and Rwanda have emphasized conflict-prevention and resolution. Egypt, on the other hand, opposed any references to governance and the rule of law whatsoever, arguing that it would be “premature” to mainstream “an abstract notion . . . without having an agreed definition and commonly shared vision” and emphasizing that “diverse cultures and traditions have to be respected at all times.”

Other developing country governments have welcomed a greater focus on governance, human rights, and even democracy in the
post-2015 framework. But the very difficult road that proponents of these concepts have had to travel to get close to even a partial inclusion of governance principles in the post-2015 agenda—partiality that some have rejected as potentially counterproductive—is testament to the still very shaky and incomplete consensus around the four concepts within the broader aid community.

**Conclusions**

The recent embrace of accountability, transparency, participation, and inclusion as crucial aid priorities and overarching principles should not be seen as one more minor enthusiasm of a donor community prone to grasping for magic bullets. It is a concrete embodiment of the fundamental movement by international aid providers away from their decades-long preference for technocratic approaches that bypassed or neglected the political dynamics of recipient countries and treated states as deus ex machinas operating without any organic connection to the citizens they are supposed to serve.

In simple terms it represents the third stage of the evolution of development thinking across the last fifty years. In stage one, from the 1960s through the 1980s, aid providers focused on state-led development without giving serious, sustained attention to how governance processes operate and evolve. In stage two, the 1990s, donors took governance on board as a crucial factor in development, yet hewed to a primarily narrow, top-down view of the concept. In stage three, from the early 2000s on, the aid community expanded its approach to governance, emphasizing the relationship between states and citizens, ideally informed by principles that embody the importance of citizens’ roles.

Yet powerfully important though these principles are, the consensus around them is not as strong as it might appear based on formal policy statements by major aid organizations and the extraordinary proliferation of references to them in aid programs and projects. Indeed, the consensus is fissured by a host of doubts and disagreements:

- Although these principles serve as a bridge among the three communities that emerged in the overall aid world in direct response to the opening of the door to politics in the 1990s—practitioners focusing on governance, democracy, or human rights—the bridge is only partial. These communities still have very different understandings of and approaches to the four principles in practice. Governance specialists view them primarily as tools to tackle specific service delivery failures and increase government efficiency and responsiveness; they remain wary of appearing too political. Democracy and human rights practitioners, for their part, reject technical applications that they believe risk stripping the concepts of their transformative political value and reducing them to mere formalities in program design and implementation.

- Aid providers’ application of these principles is often superficial and based on simplistic or incomplete theories of change. Concepts such as participation and transparency evoke powerful notions of citizen empowerment, yet in practice they are often reduced to consultation
mechanisms or exercises in information dissemination that fail to seriously challenge structural inequities in the distribution of power.

- Divisions also surround the empirical case for the instrumental value of the four principles. The impact of donor interventions related to accountability, transparency, participation, and inclusion is often long-term, indirect, and difficult to isolate from other factors, and the evidence base to date is still too thin to arrive at firm conclusions.

- This uncertainty about the instrumental value of the four principles is compounded by the continuing debate over the relationship between governance and economic development. While some researchers argue that open, participatory, and inclusive institutions are closely correlated with socioeconomic success, another important school of thought de-emphasizes the importance of Western-style governance. Instead, scholars in this latter camp stress the crucial role of state capacity to intervene in the economy as well as the potentially beneficial role of neopatrimonialism structures or informal settlements in accelerating economic growth. Several recent approaches have attempted to carve out an eclectic middle ground that focuses on context specificity, attention to the different stages of growth, and working with rather than against the grain of existing governance processes. Yet the ongoing debate is enough to fuel the scepticism of developmentalists reluctant to take on board politically charged principles of uncertain instrumental value.

In sum, the apparent consensus around transparency, accountability, participation, and inclusion should be understood as very much a work in progress, not a transformation that has largely already been achieved. Enthusiasts of these principles should avoid the temptation to act as though the agreement around them is stronger than it really is—and they should be willing to face head on the many lasting fissures and look for ways to reduce them. Some, like the debates over the legitimacy of the intrinsic case, reflect differences in the very core idea of what development is and are thus unlikely to be overcome anytime soon. But others, like the continuing divisions between governance, human rights, and democracy practitioners or the problem of superficial application of the four principles, are much more amenable to practical solutions. In other words, whether the consensus genuinely solidifies will depend greatly on how effectively its proponents deepen their understanding of how to put the four concepts into practice, share that understanding clearly across all parts of the assistance community, and bridge the divide between donors and recipients on these issues. The degree of their success will be a major factor determining the shape of international development work over the next generation.

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TRADE AND WASTE DISPOSAL SYSTEMS

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Abstract

Human social life has spillovers such as “wastes”, the disposal of which needs systems in place. In early days, the population was less and hence lesser amount of waste was generated such that waste disposal as a system did not become a challenge, they were simply dumped in the landfills. However, with industrial revolution and exponential increase in population, the quantity of waste generated increased, became much more toxic and indisposable causing irreparable damage to the natural and human environment. This along with scarcity of land prompted the industrialized countries, who did not want their landfills to be polluted, to dispose the waste generated into the landfills of poorer countries.

In the aftermath of globalization, waste acquired the status of a commodity. It became incumbent upon the developed countries to spend more money and resources in order to dispose their waste. Call it the bourgeoisie-mindedness of these countries, they find in waste disposal a capital generating potential. Poorer countries in that scheme of things became the dump yards. They were appeased by projecting the employability waste disposal will create in those counties.

However, this development has the poorer countries dealing with challenge of degrading quality of human life and surrounding environment. In this milieu, it becomes important to analyze the global waste trade and its impact on developing countries post-globalization.

Part I of this article articulates in detail the above made observations and verifies them. Part II discusses the impact of waste disposal on developing countries like the human rights violation, environmental degradation, etc. Part III examines the ongoing global efforts to address the above said spillovers of waste disposal. In Part IV the article concludes that despite all efforts to mitigate the problem of spillovers, there is limited success to claim. The article proposes a plan to maximize success in waste disposal.

WASTE DISPOSAL: A PRACTICE

With the increase of population the challenge of maintaining a better human social life also increased. Maintenance of pollution free environment to safeguard the human health is an issue which was previously not a challenge to maintain but due to increment in waste generation it has become a challenge to maintain it. Waste disposal was a simple matter due to less waste generation but with the industrial revolution and exponential increase in population, the quantity of waste generated increased. Ashes & human biodegradable waste was produced earlier which was released back to the ground with full protection to environment & there was no issue of maintainability. Technological innovation led to the creation of hazardous
products like the pesticides, PCBs, paint removers etc. Landfills contents, hence, became more toxic. Waste became an issue when people started migrating to industrial areas from rural areas posing threat to environment & human health. Waste collected were in form of industrial waste, toxic waste, hazardous waste, even the e-waste. The industrialized or developed countries generated more waste which need to be disposed for which they need to spend more money and resources. They also have to abide by the strict disposal practice of its own country. So, they started disposing of waste in developing countries which are in need of revenue generation for economic development. Waste disposal in developing countries cost less because these countries are benefited by it, they established several new businesses that would dispose of waste without any proper regulation, or technique. These new business created employment to its people helping the poor families, also established a system of collective fee.

The non-proper way of waste disposal has created a threat to human health & life and animals, also environmental degradation. These toxic materials are disposed of contaminating land, water & air. There are many workers involved in the harmful waste disposal methods where there is not even a proper law to protect them and the environment causing a serious health disease. Toxic chemicals disposed to land overtime released to the atmosphere, impacting the communities nearby and environment. Release of heavy metals such as lead, cadmium & mercury into ashes & air causes serious environmental issues & harm to general public. United Nations Environmental Programme warns that the growing waste, like the municipal waste, pesticides, food waste, or the discarded chemicals, are having a significant role in environment & economic impact.  

Dumping can be extremely hazardous to health. Pollution causes a greater effect to human health to which no one can escape, children are most exposed to it.

Contaminated air has the negative impact on environment which includes the wildlife & humans. Humans are also exposed to ingestion of contaminates food. The incineration of toxic waste creates more hazardous & dangerous toxins than that of original form. Recycling operations by the developing country are also harmful for health & environment. For example in Thor Chemical & Mercury recycling plant in South Africa several workers lost their life from mercury poisoning & many are disabled. This plant processes mercury waste from Europe & North America. This mercury also made its way to nearby river which is generally used for the purpose of cooking & washing up by the surrounded communities. Recycling of plastic waste also has devastating impact on health & environment of workers & local peoples.

**IMPACT OF WASTE DISPOSAL**

According to United Nations Environment Programme (UNEP), thousands of tonnes of e-waste are declared falsely as the second hand goods & are then exported to developing countries which includes computer monitors declared as metal scrap,
batteries described as plastic metal scrap. Slowly the African & Asian countries are turning as a hub of illegal waste. Food waste, pesticides, chemical release, e-waste all these have a greater impact on environment & economy. As a result countries are losing the resources like the earth metals, gold, copper & the conditions in which products are dumped is hazardous to health. With the time phase, as electronic medium emerged the new form of waste added to the challenge of waste disposal mechanism. With the emergence of new electronics we rapidly replace the old one, such growth in electronic devices led to increase in e-waste production. The developing countries disposed of the waste without proper regulations, equipment or techniques. Economically it was good for the countries but the incentive of shipping waste to developing countries only adds to the amount of more unsafe disposal practice which in turn causes harm to human health & environment.

Toxic Chemicals largely originate from household appliances such as washers, dryers, refrigerators, also by cell phones, computers, monitors whose large part is made up of hazardous chemicals. Their waste includes the iron, steel, plastics, ferrous metals, batteries also have lead, cadmium, lithium. Direct exposure of toxic chemical takes place when these chemicals are inhaled, touched by skin contact, or ingestion of chemical. These chemicals easily leach out to water sources, food, air. The recycling procedure & disposal methods results in environmental degradation. These toxic chemicals remain in environment & will continue to remain with the increase in waste. The effect of waste causes a urinary metabolites and skin diseases. Melting components, incineration, are in themselves capable of contaminating water & air thus causing problems. These toxins then make their way to groundwater creating water pollution to plants.

Such a waste disposal could cause serious health issue due to lack of clean water resource & sanitation facilities. It is one of the most serious environment health problems faced by large number of population especially those living in the developing countries. It is been estimated by the world trade organization that 1.1 billion people do not have access to drinking water resources & 2.4 billion have inadequate sanitation facilities which causes a number of disease which are very acute & chronic in nature. Many of the young people especially the children die each year from the waste disposal causing the water borne diseases like cholera, typhoid acute fever. The water used in general are linked to the non-existent sanitation & sewage disposal facilities. This has also effected many freshwater streams, like the lake & groundwater aquifers which are contaminated by the industrial waste discharge method & agricultural runoffs which carry high level of toxic chemicals & hazardous waste which cause liver disorders.

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394 Mike Ives, ‘In Developing World, A Push to Bring E-Waste out of Shadows’ (2014) e360.yale.edu/.../in_developing_world_a_push_to_bring_e-waste_out_of_shadows
which in turn develops to developmental abnormalities, neurological diseases & even cancer. Air pollution equally causes environmental problem by the increased business setup or the industries in developing countries to dispose of waste which resulted in decline of air quality causing threat to human life & health. The world health organization (WHO) estimates that the 1.4 billion urban residents are exposed to pollutes air, in addition in heavily populated regions indoor air pollution greater threat to human health mainly the women & children.

In many regions today the municipal landfills & waste incinerators are full & not in a position to receive additional supplies of unwanted materials. Such acts of waste disposal has impact on environment which has a direct link to human rights. Hence loss of human health & environment contributes to breach of human rights.

GLOBAL EFFORTS

In past decade, international community adopted some agreements & conventions which proposes the procedures & guidelines to control the export & shipment of toxic substances & hazardous wastes. An international code of conduct on the distribution & use of pesticides was adopted in 1995 by the Food & Agriculture Organization (FAO), then in 1987 London guidelines for the exchange of information on chemicals in international trade was adopted by the United Nations Environment Programme (UNEP). For the protection of developing countries, in 1989 an international agreement was adopted to help in controlling the importation of banned or restricted products, known as Prior Informed Consent (PIC). Under this the officials of the developing countries must be informed by the developed countries about the characteristic of product, like the toxic character, the hazardous chemicals in the product, etc.

Many countries have banned the import of hazardous materials but still some developing countries have found an economic benefit in importing it. The Basel Convention on the Control of Transboundary Movement of Hazardous wastes and their Disposal is a convention that regulate transport & disposal of wastes along with encouraging waste minimization & implementation of environmental policy. Developing countries in order to alleviate environmental & human health occurring from informal recycling procedures have attempted to use policy. For the same the Basel convention was formed banning the trading of hazardous waste to other countries. Developing countries have encouraged & invested in formal facility enterprise structure in resolving the waste issue. For example within last 10 years china invested in around 100 formal facility enterprises but it cannot compete with the informal recycler collection. The informal recycle sector still is recycling without a legislation & formal facility infrastructure. For the same purpose Stockholm convention on persistent organic pollutants (POPs treaty) was adopted in 2000 under which the toxic chemicals need to be phased out.

Environmental protection & safeguarding the public health are the rights that should be provided to each individual in the context of sustainable development. As a matter of fundamental human right, the importance of
safeguarding the environment & human health was very first enunciated in 1987 Brundtland commission report. It defined the concept of sustainable development in the context of safeguarding the need of future generation by enabling the sustainable development.

Due to the waste disposal & lack of sanitation facilities and water shortage, lives & health of humans are affected in large number of developing countries. In past few years the oil exploration, drilling & refining in developed as well as in developing countries have affected the health of communities. Destruction of natural resources also has impact on communities, this at global level leads to ozone loss & climate change which has a major impact on the right of human communities of a clean & healthy environment. Rio declaration on declaration on environment & development, 1992 states the right of a clean & healthy environment as a human entitlement. Even the right of human to health right under the Universal Declaration of Human Rights is directly linked to environmental protection focusing on clean water, air for a good health. In the United Nations millennium declaration, 2000 stress was for the need of development of water resources. International code of conduct on the distribution & use of pesticides was adopted in 1995 by the food & agriculture organization (FAO) also in 1987, London guidelines for the exchange of information on chemicals in international trade was enacted by the United Nations Environment Programme (UNEP). An international agreement in 1989, prior informed consent (PIC) was adopted which was later extended to Rotterdam convention in 1998, with the aim in helping the control of importation of restricted products into developing countries. In the international conference on freshwater (ICF) held in Bonn, Germany on 2001, set of recommendation was proposed by the government ministers with the aim to achieve management of water resources & sanitation facilities which includes the water management to the local communities & watersheds & river basins.

CONCLUSION

The transformation of waste from a need to a commodity at a global level is mainly based on economic which have determined the movement of waste from developed countries to developing countries. Global trade has encouraged the movement of waste for disposal in developing countries in need for foreign exchange. The effects of waste imports are harmful for the environment, human health & economy as well. Environment NGOs like Greenpeace has made alliance with developing countries government for rendering the waste disposal issue. NGOs even campaigned for the waste problem which was successful after a decade, with negotiation by states & NGOs in international forum determined rules for the global waste disposal.

Classification of waste should be done so that the manufacturing water is separated from the cooling water along with the

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production of less waste products\textsuperscript{396}. Instead of so many efforts there is not much success, workers in the developing countries who recycle the waste materials, didn’t know the Basel convention & whether their country is party of it. Thus, here human rights education is implicated. The convention does not provide full protection to human rights which can be fulfilled only by the widespread knowledge of existence of these rights. The STEP Green Paper 2015\textsuperscript{397} mentions that there is no incentives taken so that the producers focus on eco-design options with that would enable them to put less toxic & easily repairable products on markets. The step green paper mentions that due to lack of effective policy options, producers must take efforts & to encourage them steps must be taken. The different notions for words between the national policy & international legislation i.e the inconsistency is another problem. Lack of consistency in what is hazardous leads to a difficult regime. Hence, rules needed to be enforced & monitored which can be done with considerable resources.

To overcome the effect from the recycling Basel convention on the control of transboundary movements of hazardous wastes was formed but this could not stop the informal recycling of waste. The reason for the ineffectiveness is lack of governance & enforcement system, also it have a lot of loopholes under which countries were allowed to export to developing countries for the recycling purpose. This informal recycling system still works regardless of legislation & formal facility. So, instead of taking measures to abolish the informal sector its advantage should be taken. The advantage of having informal sector cannot be competed with formal sector in terms of network established not even in terms of low operating costs, as experienced by China. So it is suggested that the informal recyclers would bring their collected waste to formal sector where it is treated so that it is not harmful to environment & human health, & for this some financial measures has to be taken. These incentives will help in increasing the environmental & legislative awareness. For the same government has to provide subsidies to formal sectors for limiting the financial measures because government has to provide anyway to enhance the working of formal sector which is suppressed in due course of time, so placing of formal sector along with the informal one is necessary. Developing countries also need to take individual efforts or invest in resources which is needed in enforcing the restrictive measures for waste disposal importation.

RIGHT OF WOMEN TO WORSHIP:
ASININE TRADITION Vs. 
EGALITARIANISM

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Abstract
The most exquisite modeling of Almighty God manifests in His creation, men and women, who are just the same important as the two wheels of a chariot. The gravity of one cannot be snubbed at the expense of other. Both men and women are equal, harmony is necessitated between the two for the progress and development of a society. Walking of both hand in hand is yearned to harmonise the growth of a Nation. The Constitution of India vows to its people right to freedom of religion under Article 25. At the same time, the Constitution also avers the right to equality to everyone irrespective of any caste, creed, race, religion, or gender. Periled concept of secularism is sponsored by, in addition to the Constitution, International Conventions and efforts of UN which fortifies the rights of women. Recently, the issue that confronted gender inequality came up in the case of Sabarimala Temple in the State of Kerala which denied the women aged 10-50 years access to the temple and banned their entry in the temple. Women are discerned as the victims of gender inequality in the era of patriarchal ideology. The paper examines the aloof attitude towards women’s rights of freedom of religion and also negating their right of equality. The researcher ventures to aid the community in developing a rational thinking and put a halt to utter nonsense practices.

Keyword: Exquisite, Patriarchal, Secularism, Ventures.

INTRODUCTION
Humans, being the most beautiful gift of God, crafted as male and female can be personified as the two wings of a bird, sailing and soaring through the vast sky symbolizing the flourishing and heightening nation to a standard of dignity, equality and liberty for each. Men and women both are essential in a society. Certainly, one alone would not lead a nation or even a smaller unit, a family. Can one rule out one from the other? Is it the men who is the best and most needed? Or taking it the other way, is it the women who could supersede the men? Obviously, the answer is a sure No. Both should strive to consonance a balance for the sake of the rights of the other. To reflect the indispensability of women, it would be felicitous to reproduce the following quotation:
“What would men be without women? Scarce, Sir..........mighty scarce.”
-Mark Twain

In fact, clarifying the debate of the supremacy between the two, it can be put to remind that men are a part of woman. It is the indeed the woman who bears the pain to nourish the child all through the nine months of severity and austerity. The role of male is momentary and short, it only sows the seed, rather it’s an instantaneous pleasure.
A woman is not simply a tool of satisfaction of man’s lust, but is the mother, the
daughter, the wife, the sister, the maker, and the leader. Our Scriptures observe, “Matro Deva Bhav”— revere your mother as Goddess. Furthermore, the people of our nation worship Goddess as Durga, Saraswati, Laxmi, and Kaali. The woman is celebrated as the most powerful and the empowering force in some Hindu Upanishads, Sastras and Puranas, particularly the Devi Upanishad, Devi Mahatmya and Devi-Bhagavata Purana. The 10th chapter of the Rigveda, for example, asserts the feminine to be the supreme principle behind all of cosmos, in the following hymn called as Devi Sukta, “I am the Queen, the gatherer up of treasures, most thoughtful, first of those who merit worship.

Thus Gods have established me in many places with many homes to enter and abide in.

Through me alone all eat the food that feeds them,-each man who sees, breathes, hears the word outspoken,

They know it not, yet I reside in the essence of the Universe. Hear, one and all, the truth as I declare it.

I, verily, myself announce and utter the word that gods and men alike shall welcome.

I make the man I love exceeding mighty, make him nourished, a sage, and one who knows Brahman.

I bend the bow for Rudra that his arrow may strike and slay the hater of devotion.

I rouse and order battle for the people, I created Earth and Heaven and reside as their inner controller.

On the world’s summit I bring forth the Father: my home is in the waters, in the ocean.

Thence I prevade all existing creatures, as their Inner Supreme Self, and manifest them with my body. I created all worlds at my will, without any higher being, and permeate and dwell within them.

The eternal and infinite consciousness is I, it is my greatness dwelling in everything.”

Such esteemed is the status of women in the society. But all tracks its real place in spiritual books. At the standard of practicability, these views are at zero. Portraying a woman as goddess in spiritual books, and rebuffing her right to pray and enter the shrines. Where do these two contradicting field of vision stands together? No nexus between the two could be glimpsed from the facts. Evidently, as perceived by peeping into the pages of history women are always side cornered and they need to follow the man’s orders, practices and procedures in every decision of the family and community at large. Similar is the situation even in the case of worshipping and offering prayers to God. All are equal before the law; likewise, both men and women are equal in the eyes of the Almighty. Then, why is it that women who are opposed ingress to the altar of temples and shrines on the some mere moronic basis of so-called ages old practiced rituals of some archaic peoples.

Worship is the act of the adoration and showing honour to a deity which can be performed individually or in groups and


399 The Rig Veda/ Mandala 10/ Hymn 25 translated by Ralph T.H Griffith.

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sections. It refers to a gesture of religious dedication and devotion to the omnipotent Creator. Women are tussling to secure their right to freedom of worshipping in many worship places in the country.

HISTORICAL OVERVIEW

This callous behavior is not new; decades ago dalits were refused entry in the temples due to untouchability. Dalits were regarded as the lowest strata of the prevailing caste system. However, gone are those days. After the independence of India, the concept of untouchability was altogether abolished through Article 17 of Constitution. The Prevention of Civil Rights Act, 1955 added untouchability a punishable offence.

Mournfully, the condition of women has not ameliorated at all, still in this 21st century. They are still spurned entrance into temples at some places in India. Women are always regarded as weak and incapable. It is the men who are to settle and resolve every matter for the family according to their sweet will. Women stand nowhere in the figure. Men are always preferred over the women in every walk of life, which is obvious from the verity that no priests in the temples, father of the Church, or the Qazis of the mosque can be seen to be a woman. There are disparate religious places in India where entry of women to worship respective idols is banned. Few are cited hereinafter. The most recent controversial Lord Ayappa Temple, Sabarimala is situated in the state of Kerala. The temple authorities disallow female of the age 10 to 50 years into the shrine on the basis of biological and hormonal issues with them. The next is the Haji Ali Dargah Shrine, Mumbai, where women are not permitted to come close to the grave. In Sree Padmanabhaswamy Temple, Kerela also the same condition prevails, women are forbidden entrance to the holy place.

Here in Lord Kartikey Temple, Pushkar, it is well profound myth that curse befalls on women who enter the temple. Patbausi Satra, Assam also bars the women entry to maintain the purity of the temple. A large board in front of the Ranakpur Temple, Rajasthan also prohibits entry of women, even they are required to wear Indian clothes and cover their legs at least up to knees. Jama Masjid, Delhi does not sanction entry of women after sunset.

Women wearing western attire are stopped entrance into Jain Temples, Guna, Madhya Pradesh. Others that stand in the queue are Nizamuddin Dargah, New Delhi and Bhavani Deeksha Mandapam in Vijayawada.

RATIONALE FOR THE BAR TO WORSHIP

One perception behind refusing the right of entrance and offering prayers in the sanctum of the Sabarimala Temple in Kerala is related to menstruation. “Menstruation” refers to the monthly discharge of blood from the inner lining of uterus walls through vagina. Period is the most commonly used word for it, lasting usually for 5-6 days. The onset of menstruation, alluded as menarche, begins at the age of usually 12 years. Menopause is the stage when bleeding ceases, commonly at the age of 45 years. The so-called religious scholars attribute this menstruation as a reason behind the refusal...
of women to access temple. It is believed by the temple authorities that women are “unclean” and “impure” during this period. “Menstruation is God’s gift. It is natural. There is no point in banning menstruating women from places of worship. Didn’t Lord Ayyappa too come from his mother’s womb, and wasn’t menstruation an important part of his birth?” asked Sushma Sahu, member of the National Commission for Women, commenting on the debate about the entry of women to the Sabarimala Ayyappa Temple. There appears no logic in this holding ban of women post menarche and up to menopause.

This statement can be firmly backed by instances from the holy scriptures of some major religions prevalent in India. Gazing into the holy books Quran, the Prophet Mohammad never laid down restrictions on menstruating women in regard to their worshipping rights. To embellish the point, it would be apt to recall the verses of The Quran.

“Our Lord! We have heard someone calling us to faith - "Believe in your Lord" - and we have believed. Our Lord! Forgive our sins, wipe out our bad deeds, and grant that we join the righteous when we die. Our Lord! Bestow upon us all that you have promised us through Your messengers - do not humiliate us on the Day of Resurrection - You never break your promise.' Their Lord has answered them: 'I will not allow the deeds of any one of you to be lost, whether you are male or female, each is like the other.'” (Qur’an 3:193-195)

The above verse is crystal clear that in the matter of opportunities to worship both men and women are equal in the eye of Allah. Allah has additionally stated all prohibitions that men and women need to observe.

“Believers, when you prepare for prayer, wash your faces, and your hands to the elbows; wipe your heads and wash your feet to the ankles. If you are in a state of ceremonial impurity, then purify yourselves. But if you are ill, or on a journey, or one of you has relieved himself, or have been in contact with women, and find no water, then take for yourselves clean sand, and rub your faces and hands with it. Allah does not wish that you should show yourselves unclean, but to make you clean, and to complete his favour to you, that you may be grateful.” (Qur’an 5:6)

Here, emphasis should be laid on the fact that Allah specifies a list of actions that are in the zone of restriction. Thus, it could be said that menstruation is no where mentioned as a ground for dismissing the freedom of religion. For menstruation, Allah placed one restriction in following words: [Quran 2:222] They ask you about menstruation: say, “It is harmful; you shall avoid sexual intercourse with the women during menstruation; do not approach them until they are rid of it. Once they are rid of it, you may have intercourse with them in the manner designed by God…” [Quran 2:223] Your women are the bearers of your seed. Thus, you may enjoy this

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402 Ibid.
privilege however you like, so long as you maintain righteousness. You shall observe God, and know that you will meet Him. Give good news to the believers.\textsuperscript{403}

Allah rejected sexual coitus during menstruation as it is harmful for both of them due to biological issues, obvious from the phrase “it is harmful”. No spiritual nexus appears to forbid worshipping in Islam. It is only the biological harm. No where it is revealed that God constrains women from praying, and fasting during menstruation. Insensible and irrational misconceptions are simply due to the cooking up of verses of the Quran by the alleged religious intellectuals with no convincing and cogent backing from the Quran.

Jesus said: “It is from within, from people’s hearts, that evil intentions emerge: fornication, theft, murder, adultery, avarice, malice, deceit, indecency, envy, slander, pride, folly. All these evil things come from within (the heart). They make a person unclean” (Mark 7,14-23)\textsuperscript{404}

Marching towards Christian religion, the verse discloses that it is the internal purity which Jesus demands to be observed.

“When a woman has a discharge, and the discharge in her body is blood, she shall be in her menstrual impurity for seven days, and whoever touches her shall be unclean until the evening. And everything on which she lies during her menstrual impurity shall be unclean. Everything also on which she sits shall be unclean. And whoever touches her bed shall wash his clothes and bathe himself in water and be unclean until the evening. And whoever touches anything on which she sits shall wash his clothes and bathe himself in water and be unclean until the evening. Whether it is the bed or anything on which she sits, when he touches it he shall be unclean until the evening. ..[Leviticus 15:19-33]\textsuperscript{405}

“You shall not approach a woman to uncover her nakedness while she is in her menstrual uncleanness.”[ Leviticus 18:19]\textsuperscript{406}

“But if she is cleansed of her discharge, she shall count for herself seven days, and after that she shall be clean. And on the eighth day she shall take two turtledoves or two pigeons and bring them to the priest, to the entrance of the tent of meeting. And the priest shall use one for a sin offering and the other for a burnt offering. And the priest shall make atonement for her before the Lord for her unclean discharge”[Leviticus 15:28-30]\textsuperscript{407}

Combining the above verses, it is explicit menstruation is not impure for spiritual purposes, rather it proscribes sexual intercourse during periods. Also, even if they are unclean, it is only for seven days, after that they are clean. So, as such there is no hindrance in spiritual offerings after the expiry of seven days.

\textsuperscript{403} https://submission.org/Menstruation_Religious_Duties.html accessed on August 11, 2018, 22: 31 PM.

\textsuperscript{404} http://www.thebodyissacred.org/body/periods.asp accessed on August 12, 2018, 06:15 AM.

\textsuperscript{405} https://www.openbible.info/topics/menstruation accessed on August 12, 2018, 6:35 AM.

\textsuperscript{406} Ibid.

\textsuperscript{407} https://www.reddit.com/r/Christianity/comments/4rlxjw/what_does_the_bible_say_about_menstruation/ accessed on August 12, 2018, 6: 39 AM.
Buddhism stress for inner purity and sanctity and lays no bar on right to pray. Menstruation is viewed as "a natural physical excretion that women have to go through on a monthly basis, nothing more or less".408

Guru Nanak also condemned the idea of impurity of a woman in the days of her menstrual cycle. Guru Nanak said there is no impurity in it. It is a natural cycle. Actual impurity is in the mouth of a person who tells lies after lies. Impurity is due to bad qualities and not due to natural bodily function. Then he condemned the idea of impurity after the woman gives birth to child. There was a system to keep woman isolated from the rest of the family for some days after the child’s birth. She was not allowed to touch anything because her touching anything would render it impure. This impurity was called Sutak. Guru Nanak raised his voice against this evil practice. He said everywhere reproduction is taking place. Even the cowdung-cakes, used to cook food, are not free from it. The insects are reproducing, then, there must be impurity in fire also. None of the things we eat or use otherwise is free from life, which is multiplying every moment. He told that actual impurity is due to evil thoughts of mind.

If impurity attaches (to life’s birth), then all, all over, are impure. In the cow-dung and the wood too is the life of worms. As many are the grains of food, not one is without life. And, is not water life that brings all to life?

How can then we believe in life’s impurity, when impurity is in our bread?

Further the Guru tells about the actual impurity:

The mind’s impurity is covetousness; the tongue’s impurity is Falsehood. The impurity of the eyes is coveting another’s woman, beauty and riches. The ear’s impurity is to hear and carry tales.

Nanak: even the purest of men, thus bound, go to the city of the Dead.409

Collecting above discussion, conclusion can be affirmatively established that some religion do not regard menstruation as a hindrance to spiritual path, while others prescribe a maximum period of seven days, post this they are virtuous and clean. Apart from the misconception about menstruation, the other thread to right to worship of women is the notion that women are extreme seductress and temptress, having the capability to distract men while they are enchanting mantras or engrossed in their prayers.

Patriarchal set up in India society hinders modernization and compels to adhere to antediluvian ritual.

LEGAL AND JUDICIAL FRAMEWORK

The Constitution of India assures the very right of equality and right to freedom of religion expressly under Part III concerning with Fundamental Rights. Article 14 states “The State shall not deny to any person

408 https://en.wikipedia.org/wiki/Culture_and_menstruation accessed on August 12, 2018, 6:54 AM.


www.supremoamicus.org 187
equality before the law or the equal protection of the laws within the territory of India.” Women can claim equality with men as all are equal before law. When a man is allowed to worship in any age, then why discrimination towards a female? Article 25(1) promises the right to practice, profess and propagate any religion to all persons. Moreover, Article 15 of the Constitution says that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

Article 25 (2) empowers the State to make any law or restrict the operation of any existing law for regulation or restricting any economic, financial, political or other secular activity which may be associated with religious practice or for providing for social welfare and reform or throwing open of Hindu religious institutions of a public character to all classes and sections. Inspite of the expressed provision in Article 25(2), the State remained numb and turned deaf in its duty to encourage social reform by throwing open the doors of many temples in the country. Instead they lend a strong hand to the anachronistic tradition. A controversy began when Jayamala, a Kannada actor, claimed in 2006 that she had entered the sanctum sanctorum and touched the idol of the presiding deity in Sabarimala. With the incident leading to a storm, the Kerala government had then ordered a crime branch probe but the case was later dropped410. Stance taken by the Kerala Government in setting up a case against a female conveys the kind and succour attitude towards maintaining the primordial illogical culture of the temple authorities. The State Government has been an utter failure with regard to its duty under Article 25(2).

Being a signatory to international conventions, India is bound to observe their provisions. One most prominent is the Universal Declaration of Human Rights [UDHR], which under Article 18 states “everyone has the right to freedom of thought, conscience and religion……". Another paramount convention, the International Covenant of Civil and Political Rights [ICCPR] under Article 18(1) says "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice ..."

1981 United Nations Declaration of the General Assembly on the Elimination of All forms of Intolerance and discrimination based on Religion or belief states under Art. 1 (1): "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice ....."

Reckoning the judicial take on the right to freedom of religion, the doors of judiciary have always been wide open to secure the fundamental rights of the people. In S. Mahendran vs. the Secretary, Travancore411, a petition treated as public interest litigation posed the question whether the temple is open for all woman of any age to trek the hills and reach out the temple to worship Lord Ayyapa and whether it would be


411 AIR 1993 Ker 42.
against the pre existing “acharas” or beliefs. The Court favoured the contention of the Board and temple authorities and upheld their right of religious denominations to maintain and manage its own affairs guaranteed under Article 26(b).

In today’s context, the Supreme Court needs to prove this Kerala High Court verdict wrong in order to assure the right of religion to woman class in Sabarimala temple controversy brought to the Supreme Court again by Indian Young Lawyers Association. Another case decided by Supreme Court, Dr. Noorjehan Safia Niaz & Another V/s State of Maharashtra & Others 412 glorifies the lifting up off the ban on the entry of woman in the sanctum sanctorum of the Haji Ali Dargah, exemplifying it as a clear cut violation of Article 14, 15 and 25 of the Constitution. Sham of the Trust Authorities created on the false pretext of safety and security of women from eve-teasing in the Dargah did not stand anywhere firm. At the time the case was decided in 2016, a lot many legislation are already enacted to stop outraging the modesty of the females in the mosque. Judiciary adopted stern action in Smt.Vidya Bal & Ors. vs. The State of Maharashtra & Ors 413, where a 400-year-old ban on entry of women into the shrine’s core area was lifted following the agitations of Bhoomata Brigade group against gender inequality.

CONCLUSION AND SUGGESTIONS

Reviewing the whole discussion, it could be gathered that despite the Constitutional provisions 414 and judgments of Supreme Court 415 exist on establishing the right of women to offer pray at all worship places, still there prevails lots of hue and cry for their enforcement in the real practicability. Backed by Article 15(3) of the Constitution, a new contemporary legislation is desired to control the occurrences of such other incidents of discrimination against women in the premises of divinity. History signifies as the desideratum for the elevation of women from the primeval downtrodden conditions of being inferior to men knocked the doors of the State, the Government have welcomed and embraced full support to them, in the form of legislations requisite for their progress to another level of ceremoniousness and respectability. The Commission of Sati Act, 1987, The Dowry Prohibition Act, 1961, The Domestic Violence Act, 2005, The Prevention of Sexual Harassment at Workplaces Act, 2015 are some prominent in the list.

Demand for terminating the clunky practices in Sabarimala Temple and other pilgrimages has struck the clock again to wide open the eyes of the Judiciary and the Legislature. Both need to play their respective roles efficiently and effectively. Judiciary, being an independent organ of the State, has the major role to play and should shoulder the maximum responsibility in creating a healthy nation with the fundamental rights of all preserved. Judiciary should act as

412 PIL NO.106 OF 2014 in Bombay High Court.
413 PIL No.55 of 2016 in Bombay High Court.
414 Article 14, 15, 25.
415 Dr. Noorjehan Safia Niaz & Another V/s State of Maharashtra & Others, PIL No.106 of 2014; Smt.Vidya Bal & Anr. vs. The State of Maharashtra & Ors, PIL No. 55 of 2016
chaperone and a real watchdog in protecting the violation of religious rights of women at the name sake of illogical custom. Furthermore, as the concept of untouchability has been disrooted completely by the Protection of Civil Rights Act, 1955 and the status of dalits improved both generally and in regard to their ingress into the temples, similarly extreme felt enhancement and upgradation in the position of women can be accomplished through a legislation to interpret truly Article 14, 15 and 25 in favour of women, dismantling orthodox brutalities.

Till the enactment of legislation, a strict administrative or executive order could sort a way out of the mess created at such temples and religious centers. In this era of 21st century, education is the basic solution to every problem. Elevating the level of education among the people might prove an answer to such issues. Awareness, about the verses and hymns in holy scriptures describing the real scene behind all religious scholars-made hogwash concocted stories about menstruation, should be spread in a manner to deroot such discriminatory practices. Women should be made aware of their rights through more campaigns like Happy to Bleed and Me too. Education is the remedy for enforcement of every right.

“Every rapist, murderer, thief or delinquent is allowed to enter a temple, but a menstruating woman cannot, this is the only crime she has committed.”

Is being a woman crime? The atrocities against her even in this century disapprove modernization, rather reflects that even today it is they who stands no position of dignity and honour in the patriarchal society. Reformation most desired.

Historically, importance of custom cannot be overlooked but merely following blindly the foolish customs and usages would hamper the growth of an egalitarian society. Such custom need not be promoted at all. Proof of their antiquity and continuity should be checked to track out the real story, blindly not to be followed as in the case of Haji Ali Darga case, where earlier women were permitted in the mosque but later trust authorities denied their entry on fictitious grounds of ignorance of the Islam and seduction caused to men by woman when she bends to pray with wide-necked blouses showing her chest.

Looking into the real reason for the ban would be helpful; earlier the custom of not allowing woman in the temple was the result of hard journey of trekking hills to reach the sanctum which gave rise to this rubbish culture of barring women. After advancement of road transport, trip has been made quite easy, time has come to throw this misinterpreted custom out of the window.

Analysing from the spiritual point of view, worship is the act of devotion and dedication towards God, it does not require the body to be pure. To intimate a relation with the supreme power, all that works is the soul. Analogous to the revelation in the form of hymns and verses in the holy books of other religions as Islam, Christianity and

416 https://blog.ipleaders.in/womens-right-worship-india/ accessed on August 12, 2018, 8:18PM.

417 PIL NO.106 OF 2014 in Bombay High Court.
Buddhism, the decision about such discriminatory practices in Sabarimala Temple should be put to halt. Menstruation is not a taboo. It is a physiological issue that need not be highlighted unnecessarily. Importance of woman can be illustrated eloquently through the following verse:

From woman, man is born; within woman, man is conceived; to woman he is engaged and married. Woman becomes his friend; through woman, the future generations come. When his woman dies, he seeks another woman; to woman he is bound. So why call her bad? From her, kings are born.

From woman, woman is born; without woman, there would be no one at all.

— Guru Nanak, Raag Aasaa Mehal 1, Panna 473.

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SECTION 377 AND AFTERMATH THE KS PUTTASWAMY CASE

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Abstract

It is surprising that independent India has not yet been able to rescind the colonial era monstrosity in the shape of Section 377, dating from 1861. In a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. The rights of the lesbian, gay, bisexual and transgender population cannot also be construed to be so-called rights. They are real rights. The purpose of this research is to study the impact of the section 377 in India, introduced in the year 1861 by the British government which criminalizes sexual activity done in an unnatural way even done with the consent of the person involved in such an activity. This study shows that how section 377 is not only inconsistent to the current scenario but is also unconstitutional in its nature as violating the fundamental rights of the minuscule class of the society. The research is an analysis of the said law, its application and impact on the homosexual class of the society restricting their development as a human being; mentally, physically, economically and socially. This paper looks at the history of this legislation, and examines how vague it is, the definition of what constitutes “natural” and the challenge upon its constitutional validity, and the reasons given by the Hon’ble High Court of Delhi and the Supreme Court of India. The research paper analyzes the impact of the decision of KS Puttaswamy case on the homosexual community in terms of their right to privacy.

SECTION 377 AND AFTERMATH THE KS PUTTASWAMY CASE

In India, so far, no such progressive changes have taken place as regards social and legal recognition and homosexuals remain victims of violence in different forms supported by the state and society. In India from a scattered group of a few hundred, homosexuals are at present hundred million strong and growing community evolving its own hip and happenings. These Indian gays are talking live in chat rooms, looking for soul mates, falling in love, having sex on the net and crossing cities to be with each other in real world. This shows that homosexual relationships are not unheard of in India, but they generally exist in the country's larger cities where people can be more open about their sexuality. In recent past, the homosexual community of Calcutta, Mumbai and Bangalore also hosted the gay pride march. All the above instances show that the homosexual community in India is visible, and is gradually becoming vocal in their demand.

418http://www.ilga.info/index.html
419BBC news article dated 29 May 2001
420findarticles.com/p/articles/mi_m2065/is_n1_v50/ai_20344099/pg_4-28k
421Arvind Narain, Queer Despised Sexuality, law and Social Change (Books for Change, 2004).
The existence of Section 377 raises fundamental questions. Why should someone’s dignity and privacy be undermined by their sexual preference? Why should someone’s fundamental life choices be conditioned by other people’s prejudice, ignorance, and stigmatization? Why should public health be compromised by an archaic and pedantic notion of public morality? And finally, why should a sizeable population of Indians (or even a “minuscule minority”) be deemed criminals in the eyes of the law, simply for being themselves?

At the outset though, it is important to understand why privacy is particularly important to the LGBTQI community. First, privacy has come to be viewed as central to one’s identity, dignity, sense of self and autonomy. In this view privacy is a prerequisite for self-development or, as Cohen puts it, a shorthand for “breathing space”. Section 377 denies a person the right to full personhood, by going against the, constitutional values of dignity, fraternity, and inclusiveness.Second, an integral part of such individual/ decisional autonomy is the ability to make one’s own choices, develop and determine one’s personality and identity, and have intimacy and meaningful interpersonal relations. At its root, thus, it is the freedom to express one’s identity without fear. Third, the existence of the law, regardless of its exercise, causes a chilling effect on the true expression of one’s identity. It encourages anti-gay violence and facilitates harassment, blackmail, and exploitation by the police and larger society. As noted by the Supreme Court sexual orientation is an essential component of identity, whose fulfillment is hindered when there is a loss of privacy and dignity.

What is 377?

377 of the Indian Penal Code criminalizes any “unnatural” offences with an imprisonment for life or extending to ten years, and a fine. It draws a parallel from laws prohibiting sodomy and bestiality in England, consent being wholly immaterial. India has an anti-sodomy provision that is Section 377 of the Indian Penal Code. This section has been included in a Chapter of the Indian Penal Code titled 'Of Offences to the Human Body'. The sub-chapter in which Section 377 is located is titled 'Of Unnatural Offences'. Sec 377 of IPC states that:

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine. Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section.¹ The ambit of Section 377, extends to any sexual union involving penile insertion. As evident from the language of this section, consent is wholly immaterial in the case of unnatural offences and the party consenting would be equally liable as an abettor. Thus, even consensual sexual acts such as fellatio and anal penetration may be punishable under this law. The question arises what are these unnatural offences? ⁴²² This section is very vague as what is against the order of nature

is not possible to define objectively. What is natural and what is not is a subject of debate and has led to much confusion. As per this section, homosexuality is construed as an unnatural offence as it is considered to be against the order of nature. This has led to many controversies and has led to questions regarding the constitutional validity of this section. Thus, in order to determine the constitutional validity of this section and the reasons for its incorporation in the IPC it is important to look at its historical basis.

Natural v. unnatural

The Black’s law dictionary defines natural as (1) “A fundamental quality that distinguishes one thing from another the essence of something. (2) Something pure or true as distinguished from something artificial or contrived. (3) The basic instincts or impulses of someone or something”. To determine what is natural, a functional basis is cited which basically means that every instrument or organ of the body has a particular function to perform, and therefore using such an organ for a purpose inconsistent with its principal function is unnatural.\(^423\) As per this logic, every form of sex other than penile-vaginal will be considered as unnatural. The same logic is used to denounce anything other than procreative sex as unnatural. This logic though prima facie illogical has been endorsed by courts in various cases. In *Khanu v Emperor*\(^424\) it was held that “the natural object of carnal intercourse is that there should be the possibility of conception of human beings, which in the case of coitus per os is impossible”. The courts in India have interpreted the term “carnal intercourse against the order of nature” so broadly that it now includes from oral and anal sex to penetration into artificial orifices such as folded palms or between thighs. Such a wide application of section 377 where the language itself is not very clear has led to the arbitrary application of the law and thus questions were raised regarding the constitutional validity of this section. Apart from this, section 377 clearly makes homosexuality illegal on the ground that it is against the order of nature. This has also led to various controversies in view of recognition of right to freedom as a fundamental human right, it is considered world over that criminalization of homosexual acts is a clear violation of right to privacy.\(^425\) In view of the arbitrariness of section 377 and violation of basic fundamental rights the constitutional validity of this section was challenged in the court. Lord Macaulay drafted the Indian Penal Code and introduced it in British India in 1861\(^426\) at that time; moral standards largely based on religious views (particularly Judeo-Christian beliefs) governed the inclusion of many laws. Thus, sodomy was criminalized because, according to Judeo-Christian beliefs, sexual intercourse for non-

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\(^423\) See Burton Leiser, *Homosexuality and the Unnaturalness Argument in SEX, MORALITY AND THE LAW* 44 (Gruen & Panichas eds., 1996)

\(^424\) AIR 1925 Sind 286


procreative purposes was 'against the order of nature'. Section 377 reflects these beliefs and codifies them as part of Indian law.

Section 377, since its conception, has been the subject of changing judicial interpretation in India. Different tests have been prescribed over time to penalize crimes under this Section. Initially, in cases such as Khanu v. Emperor, the court held that the test to determine whether carnal intercourse is against the order of nature is to see whether the sexual act is performed without the possibility of reproduction. Later cases such as Lohana Vasantlal Devchand v. State and Calvin Francis v. Orissa arrived at contradictory judgments as to whether oral sex fell within the ambit of Section 377. In Calvin Francis, the Court made its judgment using the guiding conditions of 'sexual perversity' and 'abnormal sexual satisfaction'. Subsequently, in Fazal Rab Choudhary v. State of Bihar, the Court held that for a crime to be punishable under Section 377, it would have to indicate a level of 'sexual perversity'. Therefore, the first test described in Khanu in order to determine whether sexual acts were against the order of nature was based on considerations of the possibility of procreation, whereas the later test described in Calvin Francis and Fazal Rab Choudhary was based on considerations of sexual perversity. The Court held that the petition fell within the ambit of Section 377 and the defendant would have to face trial. The determination of the meaning of the term 'carnal intercourse against the order of nature' has been a matter of substantial judicial concern. The meaning of Section 377 was restricted to anal sex initially in 1884; it was expanded to include oral sex by 1935, and later was broadened further to include thigh sex. The absence of a consent-based distinction in the wording of the Section has equated homosexual sex with rape and equated homosexuality with sexual perversity.

**INDIA AND HOMOSEXUALITY**

**Legal Status of Homosexuals in India**

Section 377 of the Indian Penal Code (1860) relates to Unnatural Offences and includes homosexuality within its domain. In India, this Law relating to homosexuality was adopted from the British penal code dating to 19th century. Similarly, section 292 of IPC refers to obscenity and there is ample scope to include homosexuality under this section. Also, section 294 of Indian Penal Code, which penalizes any kind of "obscene behavior in public", is also used against gay men. It is important to note here that in England the offence of homosexuality between consenting partners has been abolished by the Sexual Offenders Act 1967 (that is in the country of origin of this law) whereas in India, the consent is quite immaterial for constituting an offence as

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428 AIR 1925 Sind 286

429 AIR 1969 Guj 255

430 24. 1992 (2) Crimes 455

431 AIR 1983 SC 32
defined under this section.\textsuperscript{432} Thus in India, it is primarily section 377 which explains and defines unnatural offences.\textsuperscript{433} It is this section which makes Homosexuality illegal with life imprisonment or with imprisonment for ten years with fine.

**Cases and Sentence**

In the history of the statute from, 1860 to 1992 there were only 30 cases in the High Courts and Supreme Court. Out of these 30 cases, 18 were non-consensual, four were consensual of which three were before 1940 and eight were unspecified and 15 out of 30 cases registered were assault on minors.\textsuperscript{434} In a judgment (Fazal Rab Vs State of Bihar) the Supreme Court was dealing with a case where a man had homosexual relations with a boy with the consent of the boy.\textsuperscript{435} The Supreme Court in 1983 observed that: the offence is one under Sec. 377, IPC which implies sexual perversity.\textsuperscript{436} Considering the consent of the boy, the Supreme Court reduced the sentence from three years of rigorous imprisonment to six months rigorous imprisonment.\textsuperscript{437} All these instances indicate that the actual sentence imposed under this section is not usually heavy.\textsuperscript{438}

**Mainstream Reaction**

Indian society is a traditional multicultural diversified integrated society wherein Hindus dominate. And for Hindus marriage is an enduring heterosexual Sacrament. Other Indian communities also have a similar opinion that marriage is a heterosexual institution. Even Shiv Sena member attacked theaters in New Delhi and Bombay where the film fire’ (1988) and ‘Girlfriends’ (2004) was being screened they tore down posters, smashed furniture and organized violent protests. But at the same time, Lesbian groups and women’s rights organizations organized rival protests to demand the film run.\textsuperscript{439} That is the strong reaction of society is that many people dismiss same-sex behavior as a Western, upper-class phenomenon. Many others label it as a disease to be cured, an abnormality to be set right or a crime to be punished. While there are no organized hate groups in India as in the West, the persecution of sexual minorities in India is more insidious.\textsuperscript{440} But in the last five years, the Indian gay

\begin{itemize}
\item Under this clause, a third party can sue the persons who voluntarily entered into sodomy thereby denying on the right to personal liberty and privacy as enshrined in the Fundamental Rights of the Constitution.
\item The legal status of homosexuality in the Indian Armed Forces follows the model set by Sec. 377 of IPC. Sec. 46 of chapter VI – offences of the Army Act, 1950 states: any person subject to this Act who is guilty of any disgraceful conduct of a crude, indecent or unnatural kind shall on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or much less punishments as is this Act mentioned. Similar provisions exists in the Air force Act and Navy Act.
\item AIR 1983 (SC) 323
\item \url{http://gendwaar.gen.in/rep9.pdf}
\item In this case perversity was treated synonym for homosexuality
\item It went on to say that “No force appears to have been used neither omissions of permissive society nor the fact that in some countries homosexuality has ceased to be an offence, has influenced our thinking’.
\item Urvashi Vaid ‘Building bridges: thoughts on Identity and South Asian G/L/B/T Organizing’ Trikone Magazine, Tenth Anniversary Issue, 1996.
\item web.amnesty.org/library/index/engPOL100012005
\item According to a report published by the People’s Union for Civil Liberties – Karnataka in February 2001
\end{itemize}
community has moved into and flourished on what has probably been the most accepting space they could have ever hoped to find- the Internet. Thus, they are forming NGOs, calling up help-lines and meeting regularly to evolve strategies for their cause. Above all, they are partying- not just in remote farmhouses in secret but also in starred hotels and at gatherings of the glitterati where gay fashion designers and diplomats are counted among the star guests. The sexual minorities in India are largely stigmatized and disempowered socially, culturally, politically and often legally and economically too says Ashok Row Kavithe. Due to which isolation becomes intrinsic to the existence of a large number of lesbian and gay adolescents, and this feeling of isolation is often accompanied by self-loathing and confusion as to their future this is so because Section 377 which is used to criminalize and prosecute homosexuals in actual legitimizes the abuse of homosexuals. Gay right activists and homosexuals have now started demanding social and legal recognition of homosexuality because they have a firm opinion that Legal protection is probably the only way by which homosexual community can be guaranteed social rights, rights against exploitation and more importantly, health rights.

The issue started with the Naz foundation case. The Naz Foundation (the petitioner in the 2009 case) is an NGO that has been working for many years on HIV/AIDS intervention and prevention. The petitioner argued that Section 377 should be limited for several reasons outlined below. First, the petitioner argued that the existence of Section 377 of the Indian Penal Code caused extensive discrimination towards the gay community and transgendered individuals by state authorities (physical and verbal abuse, harassment, and assault) under the pretext of enforcing the provision of the IPC for severely impairing HIV/AIDS prevention efforts. According to the petitioner, the existence of Section 377 led to the denial of fundamental rights to these individuals. Second, the petitioner contended that legislation criminalizing consensual oral and anal sex was based on Judeo-Christian moral standards and had no place in modern society. According to the petitioner, Section 377 was predominantly used in contemporary India in cases of sexual assault and abuse of minors. Thus, criminalizing consensual same-sex activity in private served as nothing more than a weapon for police brutality and abuse. The existence of this section perpetuated discrimination, abuse, harassment, arbitrary arrests and detention amongst other human rights travesties. This in turn adversely affected HIV/AIDS prevention efforts, since these communities took their activities underground in fear of persecution and

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431 Ashok Row Kavithe is the editor of Bombay Dost ("Bombay Friend"), the Quaterly gay magazine published in India.

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442 49 Peoples' Union for Civil Liberties, Human Rights Violations against the Transgender Community: A study of kathis and hijras sex workers in Bangalore, India (2003).
abuse and became largely inaccessible to AIDS prevention workers. The provision therefore directly resulted in the marginalization and victimization of a certain class of people for no legitimate reason.\(^{444}\) Third, the petitioner submitted that Section 377 of the IPC infringed upon the fundamental rights of privacy and dignity that fall within the ambit of Article 21 of the Indian Constitution. The petitioner argued that the fundamental right to privacy and dignity under Article 21 could only be waived in existence of a compelling state interest, but that such an interest was notably absent in the application of Section 377. Fourth, the petitioner submitted that Section 377 infringed upon the fundamental right to equality under Article 14 of the Indian Constitution because there was no rational connection between the legislative objective of the Section (to penalize 'unnatural sexual acts') and the classification created by this Section (differentiating between procreative and non-procreative sexual activities). Because it arbitrarily targeted the gay community, the petitioner contended that the classification was unreasonable. \(^{445}\) The petitioner also submitted that the expression 'sex' in Article 15 of the Indian Constitution could not be read to include only gender but should also include sexual orientation. Therefore, since Article 15 outlined the right of non-discrimination, it implied that discrimination on the basis of sexual orientation (perpetuated by Section 377) violated this fundamental right. \(^{446}\) Finally, the petitioner also submitted that Section 377 curtailed the basic freedoms guaranteed to all citizens under Article 19(1) (a), (b), (c) and (d). The petitioner argued that the section curtailed an individual's ability to make personal statements about one's sexual preferences, one's right of association/assembly, and one's right to move freely to engage in homosexual conduct. \(^{447}\) The Court found the argument of the respondent to be 'completely unfounded since it is based on incorrect and wrong notions', because there was no evidence showing the link between decriminalization of homosexuality and the spread of HIV/AIDS. \(^{448}\) Responding to the petitioner's final argument regarding Section 377's violation of Article 19(1) of the Indian Constitution, the respondent contended that Section 377 did not impact the freedoms given under Article 19(1), since it criminalized only a sexual act, leaving people free to express their opinions on homosexuality and its decriminalization. \(^{449}\) Therefore, the respondents maintained that Section 377 was constitutionally valid. \(^{450}\) However, in light of the Court's findings on Section 377 of the IPC's infringement on Articles 14, 15 and 21 of the Indian Constitution, the Court did not find it necessary to explore infringement of Article 19. \(^{451}\) NACO's submission corroborated the petitioner's contention that homosexuals and other sexual minorities were highly susceptible to HIV/AIDS, and stated that the increased vulnerability of these particular groups stemmed from a higher level of unsafe activity as well as

\(^{444}\) Supra note 1
\(^{445}\) Id. at 22.
\(^{446}\) Id. at 9.
\(^{447}\) Id. at 10
\(^{448}\) Id. at 59
\(^{449}\) Id. at 24
\(^{450}\) Id. at 24
\(^{451}\) Id. at 101
impeded decision-making abilities that hindered HIV/AIDS prevention. In terms of the right to health (recognized as a part of Article 21 of the Indian Constitution), the Union Ministry of Health and Family Welfare argued that since homosexuals lived in constant fear of law enforcement, they were reluctant to reveal same-sex sexual behavior. As a result, this large section of society carried out its sexual activities in silence, making it very difficult for public health workers to access them for the purpose of HIV/AIDS intervention and prevention. NACO submitted that it was imperative that the gay community had the right to render themselves visible without fear of persecution by state authorities so that HIV/AIDS prevention efforts could be effectively conducted.

The Law Commission of India, in its 172nd report, recommended the removal of Section 377 before the judgment in 2000. The Law Commission, in reviewing laws relating to sexual offences (in light of increased incidence of sexual assault of minors, as well as custodial rape), endorsed the deletion of Section 377 along with amendments in Section 375 of the IPC to a new Section 376E. The Law Commission recommended the redefinition of Section 375 under 'Sexual Assault', penalizing not only rape but also any non-consensual, non-penile-vaginal penetration.

On these grounds, the Court was unable to accept the respondent's argument that Section 377 should be retained to cover consensual sex between adults in private in the interest of public health and morality. The Delhi High Court held Sec 377 as violative of the constitution of India, but in Suresh Kumar Kaushal vs UOI, it again held to be not violative of the constitution of India. But now the verdict in the K.S. Puttaswamy Case (2017) directs again towards the judgment of 2009 and gives a ray of hope for de-criminalizing section 377. The Supreme Court in Puttaswamy has laid the ground for overruling Kaushal. It is now up to the same court to recognize the validity of same-sex love.

The other two judgments:

The judgment in Suresh Kumar Kaushal case is both constitutionally preposterous and morally egregious. The Supreme Court tells us that our Constitution, whose Preamble proclaims a commitment to equality and justice for all, whose Bill of Rights has three specific Articles dedicated to equality and non-discrimination, nonetheless relegates Indians to second-class citizenship on the basis of their sexual orientation. And in so doing, it flies in the face of international law, the dicta of respected human rights instruments such as the ICCPR and the Universal Declaration of Human Rights and puts India in the company of countries such as Somalia, South Sudan, Yemen and Saudi Arabia. And it perversely tells a minority to take the case for protecting its rights to the most majoritarian institution of government, the Parliament.

All of which might be justifiable if it was even remotely supported by constitutional reasons. It is not. The result is a travesty, and the reasoning is farcical. The fundamental points are: this judgment is likely to be presented—and discussed—as

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452. Id. at 51
453 Id. at 51
454 Id. at 51
455 Id. at 67

www.supremoamicus.org
an issue of judicial restraint and separation of power, because it holds the matter ought to be decided by Parliament. That, however, is a smokescreen for the real issue: does the Constitution—in particular, Articles 14, 15 and 21—prohibit discrimination on the basis of sexual orientation? If the Constitution does do so, then S. 377 is unconstitutional, and there is no question of judicial restraint, and no space for arguments that the legislative forum is the appropriate sphere for this. Article 13(2) of the Constitution could not make this clearer: "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

For example, if the Parliament made a law today that banned all newspapers from reporting on political issues, no Court would ever hold that that was "a matter for Parliament to decide." They would strike it down for violating a Constitutional right—Article 19(1) (a). The basic issue, therefore, is about the existence of a constitutional right that protects homosexuals from discriminatory legislation. To frame this as an issue of "restraint" and argue that the Court was operating on the principle of judicial restraint is deeply misleading.

CASE CRITIQUE

Now, considering the decision of Supreme Court in SK Kaushal’s case, placing reliance on Dworkin’s theory it is pertinent to mention that Supreme Court simply stated that a decision cannot be taken by ignoring the legislative intent behind a statute. It noted that there is a presumption of constitutionality in favour of all laws, including pre-constitutional laws, as the Parliament is deemed to act for the benefit of the people. The element of ‘self’ - restraint’ is extremely violative of what Dworkin states in his theory. Even if the judge requires certain standards and principles before establishing that certain rule or law should be interpreted or reinterpreted in a certain way, how can the Court bring the clause of ‘self’ - restraint’. This is an absurd point and definitely unconscionable to a basic logic. However, the Supreme Court did not even look into the constitutional validity of Section 377 properly and in depth. The Court has failed on both the aspects: in looking into the constitutional validity of Section 377 and resorting to ‘self - restraint’.

The first basis of the Supreme Court judgment was on the basis of the pre-constitutional laws and the presumption of constitutionality of the legislative law. Law on Sec 377 is a pre - constitutional law. Though the power of judicial review is plenary however keeping in view the importance of separation of power self-restraint is exercised by the judiciary and has manifested itself in the presumption of the constitutionality of the law, enunciated by a constitutional bench in Ram Krishna Dalmia vs Shri Justice SR Tendulkar and Others AIR 1958 SC 538. It was considered that this principle of presumption of constitutionality of law not only applies to the post-constitutional laws (future laws) but also to the pre-constitutional laws (existing laws) and if no amendment is made in such a pre-constitutional law it may represent a decision that the legislature has taken to leave the law as it is and this decision is no different from the one to amend and change the law or enact a new law. Also, what court
relied on was that the doctrine of severability and the practice of reading down a statute both arise out of the principle of presumption of the constitutionality of the law. However, the question arises is that it may be pertinent to know that a statute although could have been a valid piece of legislation keeping in views the societal norms and conditions of those times Another significant canon of determination of constitutionality is that the court would be reluctant to declare a law invalid or ultravires on the account of unconstitutionality. Declaring a law unconstitutional is one of the last resorts taken by the court, the courts would preferably put into service the principle of ‘reading down’ or ‘reading in’ the provisions to make it effective, workable and ensure the attainment of the object of the act, but what are the objects of this sec 377? However, in Minerva Mills Ltd and Others vs UOI (1980) the court identified the limitations upon the practice of reading down. The device of reading down is not to be used to be resorted to in order to save the susceptibilities of the lawmakers, nor indeed to imagine a law of one’s own liking to be passed.

The Court relied on the principle that self-restraint must be exercised and the analysis must be guided by the presumption of constitutionality. A Number of amendments had taken place in IPC since then and also the 172nd report of the law commission also insisted upon the deletion of sec 377. However, the legislature has chosen not to amend the law or revisit the law, so the court presumed that the representative body of the people of India since has not chosen to amend the law or touch upon it, therefore, the law is untouchable or is incapable of being addressed. Legislature most of the time prefer not to open the Pandora boxes relating to many issues as per their own conveniences so does that mean that the law is valid or is such that it is incapable of being remitted or being addressed.

Archaic- The history of unnatural offences against the order of nature and their enforcement in India during the Mogul time, British time and post-independence, shows that the concept was introduced by the British and there was no law criminalizing such acts in India. It is based on Judeo-Christian moral and ethical standards which conceive of sex on purely functional terms, that is, for procreation. Post-independence the section remained on the statute books and is now seen as part of Indian values and morals.

Sec 377 is vague and seeks to introduce classification which is not based on rational criteria and the object it seeks to advance is not a legitimate state object. It impacts them as a class disproportionately because it restricts only certain form of sexual intercourse that heterosexual persons can indulge in the section ends up criminalizing identity and not only merely the acts as it is usually homosexuals or transgender persons who are associated with the sexual practices proscribed in section 377. The expression “carnal intercourse against the order of nature “is not clearly defined anywhere in the code. In the absence of the legislative guidance, courts are left to decide what acts constitute the same. This results in the
arbitrary application of the penal law which is violative of article 14. 456

Article 14 permits class legislation only if there is an intelligible differentia between the classes, a rational nexus with the objective of the legislation, and the constitutional validity of the objective itself. The State’s reasons for retaining the law were health—it would prevent the spread of AIDS—and enforcing public morality. The Delhi High Court found on fact that there was no connection between homosexuality and public health (in fact, quite the opposite), and it held that the only morality that the State was permitted to enforce was found within the four corners of the Constitution constitutional morality, derived from the text, the structure and the philosophy of the Constitution itself. On Article 15, the Court held that “sexual orientation” was a protected category, contained within the term “sex”. And on Article 21, the Court held that the right to privacy—incontestably an aspect of personal liberty, as upheld by a string of decisions—could only be restricted by showing a compelling state interest. Here, the State had shown none.

Pause for a moment and take this in. First, the Court says—without an iota of evidence—that there are two classes of persons—those who engage in sexual intercourse in the “ordinary course”, and those who don’t. What is ordinary course?

Presumably, heterosexuality. Why is this ordinary course? Perhaps because there are more heterosexuals than homosexuals around, although the Court gives no evidence for that. Well, there are also more black-haired people in India than brown-haired people. Is sex with a brown-haired person against the order of nature because it happens less often? But forget that. Where is the rational nexus? What is the legitimate governmental objective? Even if we accept that there is an intelligible differentia here, on what basis do you criminalize—and thus deny equal protection of laws—to one class of persons? The Court gives no answer. Alternatively, “ordinary sex” is anal-vaginal, and every other kind of sex “against the ordinary course of nature”. Again, no evidence to back that claim up apart from the say-so of the judge. There is only one possible justification, which the Learned Judge briefly cites before—that in defining an offense, the Court is not indulging in class legislation at all, but only in prohibiting action (presumably to get around Article 15), but here he has already rejected that argument by admitting that there is class involved. And if there is class involved, then the government needs to show rational nexus and legitimate objective! No rational nexus—there is no rational nexus to the classification created between procreative and non-procreative act and thus violative of article 14. Section 377 IPC makes no distinction between acts engaged in the public sphere and acts engaged in the private sphere. It also makes no distinction between the consensual and non-consensual acts between adults. Consensual sex between adults in private does not cause any harm to anybody. Thus, it is evident that the

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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. Section 377 IPC targets the homosexual community as a class and is motivated by an animus towards this vulnerable class of people. The criminalization of private sexual relations between consenting adults absent any evidence of serious harm deems the provision's objective both arbitrary and unreasonable. The state's interest "must be legitimate and relevant" for the legislation to be non-arbitrary and must be proportionate towards achieving the state interest. If the objective is irrational, unjust and unfair, necessarily classification will have to be held as unreasonable. The nature of the provision of Section 377 IPC and its purpose is to criminalize the private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalize conduct which fails to conform to the moral or religious views of a section of society. The discrimination severely affects the rights and interests of homosexuals and deeply impairs their dignity. When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity. The result is that a significant group of the population is, because of its sexual non-conformity, persecuted, marginalized and turned in on itself.\(^{457}\)


In Para 43 of the judgment the most absurd and retrograde reasoning given by the court is that since in the last 150 years only 200 people have been prosecuted (as per the reported orders) this cannot be made a sound reasoning for declaring sec 377 ultra vires of article 14,15 and 21 of the constitution of India.

If there is class involved—and the Court admits there is—and if homosexuals necessarily engage in sexual intercourse against the order of nature—then by criminalizing that act, there is discrimination on the basis of sexual orientation. The question is whether that attracts Article 15. Article 15 prohibits discrimination on a number of grounds: religion, race, caste, sex and place of birth. With the possible and partial exception of religion, what unites these features is that they are all essential aspects of any individual’s private and public identity. To this we can add Article 16(2) (prohibition of discrimination in employment on similar categories); Article 17 (prohibition of untouchability — discrimination on the basis of birth); and Article 18 (abolition of titles—advantages (a form of discrimination), normally on the basis of birth).

And lastly, Article 21 and the right to privacy, expressly upheld in \textit{Gobind} to include family life, and in \textit{Kharak Singh} to require a compelling State interest in case of interference. This is not just bad constitutional law. \textit{This is no constitutional law}. The Court tells us today that our Constitution guarantees all citizens the equal protection of laws—but withholds that protection from homosexuals. The Court tells us today that our Constitution prohibits...
discrimination if you’re born a certain gender, or a certain caste, or a certain religion—but not if you possess a certain sexual orientation. The Court tells us today that we all have a right to privacy in our personal lives—but not in our choice of whom to love. Is there any conceivable constitutional principle that justifies this, the unbearable wrongness of *Kaushal v Naz Foundation*?

The court must consider the principles of interpretation and the changing nature of the society. Public disapproval or disgust for a certain class of person can in no way serve to uphold the constitutionality of a statute. Union of India in its argument submitted that law cannot run separately from the society since it reflects the perception of the society, if it is so then the reservation policies are a matter of the need of the hour then rights to homosexuals too is the need of the hour. Decision on triple Talaq be another marvelous example. The government relied on the doctrine of compelling state interest, restrictions of public morality public health and healthy environment.

**Doc of compelling state interest**—the compelling state interest rather demands that the public health measures are strengthened by de-criminalization of such activity. Therefore, there is a need for retention of sec 377. In Case of State of *M.P. v. Kharak Singh*, Mathews J. said Privacy can only be denied by there is compelling state interest shown must superior to the fundamental rights or any constitutional rights which is guaranteed by the constitution of India. Secondly, it must be noted that it was observed that the case of right to privacy differs in different case according, keeping this point into the consideration we can’t ignore the fact that the conditions and the situation are the important factors when we come to the facts of any case thus in our opinion the law should be according or consistent with the current situation of the country. In Case of Gobind Singh, Kennedy J. observed that compelling state interest is applicable when comes to restriction on fundamental rights but he explained subjects such as the area for the protection of children and others incapable of giving a valid consent or the area of non-consensual sex, enforcement of public morality does not amount to a "compelling state interest" thus, this makes a clear appearance that the contention of the state on 377 to protect morality of the country is totally invalid as it is clear that non-consensual sex is a subject which does not come under compelling state interest which the state is talking about.

Sec 377 does not fulfill the just fair and reasonable criteria of substantive due process now read into Article 21. By criminalizing these acts which are an expression of the core sexual personality of homosexual men, sec 377 makes them out to be criminals with deleterious consequences thus hampering their human dignity. Also, the criminalization impairs health services for gay men and thus violates their right to health under 21.**Health**-Article 21 protects intrusion into the zone of intimate relations entered into in the privacy of the home and this right is violated by Section 377, particularly of homosexual men. The issue is therefore whether protection of the privacy is available to consenting adults who may indulge in “carnal intercourse against the order of nature”. Right to health is an inherent part of the right to life under Article

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21; it is recognized by the ICESC which has been domesticated through Section 2 of the Protection of Human Rights Act 1993. Article 12 of the ICESCR requires states to take measures to protect and fulfill the health of all persons. States are obliged to ensure the availability and accessibility of health services, information, education facilitates and goods without discrimination especially to vulnerable and marginalized sections of the population.

**ARTICLE 15** Section 377 is disproportionate and discriminatory in its impact on homosexuals. The law must not only be assessed on its proposed aims but also on its implications and effects. Though facially neutral, the section predominately outlaw’s sexual activity between men which is by its very nature penile non-vaginal. While heterosexual persons indulge in oral and anal sex, their conduct does not attract scrutiny except when the woman is underage or unwilling. In fact, Courts have even excluded married heterosexual couples from the ambit of Section 377. When homosexual conduct is made criminal, this declaration itself is an invitation to perpetuate discrimination. It also reinforces societal prejudices.\(^{458}\) Sec 377 violates article 15 by discriminating on the ground of sexual orientation as although facially neutral it treats homosexual men unequally compared to heterosexuals and imposes an unequal burden on them. The government of India has introduced an option for “others” in the sex column of the passport application form. This can only be achieved only if the expression “sex” is read to be broader than the binary norm of biological sex as a man or a woman. Like gender discrimination, discrimination on the basis of sexual orientation is directed against an immutable and core characteristic of human personality. If a law operates to discriminate against some persons only on the basis of prohibited ground, it must be struck down.\(^{459}\) The Case of Naz foundation the High Court stated 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.

**WHAT THE SUPREME COURT SAID ON HOMOSEXUALITY IN THE PRIVACY JUDGMENT (2017 KS PUTTASWAMY CASE)**

- The Supreme Court, in its judgment on privacy, said that 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.
- The court noted that sexual orientation is an essential attribute of privacy, and discrimination against an individual on the


basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual.

- "That a minuscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgender is not a sustainable basis to deny the right to privacy," the Supreme Court said in its judgment.

- "The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular," the nine-judge bench observed.

- The rights of the lesbian, gay, bisexual and transgender population cannot be construed to be "so-called rights", the court observed.

Taking the landmark case of K.S. Puttaswamy v. (UOI AIR 2017) decided by nine-judge bench into the consideration we come up with the opinion that the article 377 can be challenged for its constitutional validity as according to judgment given by the SC in case of Right to Privacy which the court said is a fundamental right mentioned not expressly yet implicitly in the constitution and can be brought by interpretation.

Points taken to show invalidity of 377:

International treaties to which India is also a party Directive Principle Article 51c, “Foster respect for international law and treaty obligations in the dealings of organized people with one another” means that state cannot make any law which is inconsistent to international law or treaties to which it is party or that the legislation can make any law to enforce the subjects of international treaties.

Article 17 of International Covenant on Civil and Political Rights Act 1966, “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence or to unlawful attacks on his honor and reputation”

Article 12 of Universal Declaration of Human rights;

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honor and reputation. Everyone has the right to the protection against such interference or attacks.”

Under Right to Privacy, sexual orientation is also part thus a person freedom to conduct his sex life and personal relationships as he cannot be infringed as it is his personal liberty and dignity that how a person brings up his body.

National Legal Services Authority v. UOI

It was stated that provisions in conventions UDHR and ICCPR ensures the protection against unlawful interference with a person’s privacy, family, and home. Thus, by reviewing all this we see that in the case of Suresh Kumar Kaushal v. Naz Foundation the decision of Delhi HC was consistent to international conventions to which India is also a part and the decision of SC was inconsistent with the international conventions as these conventions protect right to privacy in which interest of these minuscule is also protected.

The Constitution of India
Preamble the basic structure of Indian Constitution, liberty, and dignity are the words which are incorporated in the preamble which comes within the ambit of the right to privacy. J. Sapre in his judgment explained that both the words are interrelated with each other in such way that contravening on would ultimately affect another, need to be practice along. Article 14, Right to Equality, talks about classification which should be reasonable for protecting public interest or policy and restrict legislative classification. The Case of Maneka Gandhi explains that there should be a reasonable classification, which the law or the procedure with restrict the fundamental rights of an individual must reasonable, just and fair Bhagwati J. stated

“The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be “right and just and fair” and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.”

Article 21- It is explained by many cases that the scope of this article is very larger. It protects the personal liberty and dignity of an individual, therefore, ultimately protects the privacy of an individual. Kania J. in case of Gopalan stated that “Personal liberty covers many more rights in one sense and has a restricted meaning in another sense. For instance, while the right to move or reside may be covered by the expression, “personal liberty” the right to freedom of speech (mentioned in Article 19(1)(a)) or the right to acquire, hold or dispose of property (mentioned in 19(1)(f)) cannot be considered a part of the personal liberty of a citizen. They form part of the liberty of a citizen but the limitation imposed by the word “personal” leads me to believe that those rights are not covered by the expression of personal liberty”

In the case of NALSA, it was interpreted that article 21 confirms the right to privacy of every individual by giving the expression such as individual autonomy, dignity, identity and personal liberty. Explaining the ambit of article 21 in case of Anuj Garg v. Hotel Association court explained “personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.” Article 19 (1) has relation with article 21 as it deals with personal liberty mentioned in article 21 overlapping each other. According to Sanjay Kaul, J. sex orientation is one important aspect of the dignity that every person under Indian Constitution has right to maintain his sex relation, it is an essential attribute of privacy. Section 377 thus denies the right of certain class or group of people which is a fundamental right described in the constitution not expressly yet implicitly which is interpreted by the judges in the recent case of Right to Privacy and any fundamental right cannot be taken by any...
class even if the class is minuscule. Thus article 377 is in violation of article 21, 19 and as well as article 14 as there no equal protection of rights for the minuscule fraction of the Indian society that is lesbians, gays, transgender, bisexuals. Thus, the classification made by the government is unreasonable which is merely on the non-acceptance of the society at large and not considering the constitutional rights of that small fraction of the constitution. 377 can be said invalid law or constitutionally invalid.

**Triple test** mentioned in Maneka Gandhi case for reasonable interference:

- Must prescribe a procedure
- The procedure must withstand the test of one or more of the fundamental rights conferred in article 19 which may be applicable in a given situation
- Must also be liable to be tested with the reference to article 14.

Here, in this case, the interrelationship between the same sex person is restricted under the 377 which restrict their fundamental right of dignity, personal liberty, and autonomy mentioned in article 21. Secondly, seeing the reasonability of the law, reasonable restriction can be put to fundamental rights by article 19[2] as it mentions subjects for which state can put reasonable restriction to fundamental rights, in this case the contempt of the state is all about the non-societal acceptance of this which cannot be considered as reasonable restriction. Third, with reference to article 14 which talks about right to equality that no classification should be there, here there is unreasonable classification made by the state which doesn’t give equal rights to minuscule class of the society that is gay, lesbians. Thus, 377 doesn’t fit with triple test and need to be abolished as it violates the fundamental rights of the minuscule group and creates a classification which is unreasonable, vanishing their rights given in article 21, 19, 14 of the constitution of India.

**Relation of Human Rights with Right to Privacy**

Human rights are the basic rights which are given to every individual by birth which can’t be infringed by any person or the state itself, these are basic rights which person possess for maintaining his life with liberty and dignity. These are rights which are inalienable and cannot be taken at any stage. It is also to notice that in the world of democracy and civil society the state has the duty to maintain the human rights of every individual by making laws or by removing such law which is in contrary with the human rights. Human rights to Communication Surveillance launched at U.N. human rights council in Geneva in September 2013:

“Privacy is a fundamental human right and is central to the maintenance of democratic societies. It is essential to human dignity and it reinforces other rights, such as freedom of expression and information, and freedom of association, and is recognized under international human rights law....”

**Indian provisions on Human Rights**


“Human rights” means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the constitution or
embodied in the international covenants and enforceable by the courts in India;

The Case of *Ram Deo Chauhan v. Bani Kanta Das* (AIR 2010) it was explained by the court that the scope of human rights mentioned in Protection of Human Rights Act 1993 has a large scope which covers rights related to life, liberty, equality and dignity of the individuals. The significance of this case is much as it defines what human rights actually are as there is no particular definition or says the scope of human rights. The court stated that rights related to life, liberty, equality, dignity, of the individual guaranteed by the constitution or international covenants, denial of such rights is a violation of human rights itself.

**CONCLUSION**

Archbishop Desmond Tutu rightly said that “I have spoken against the injustice of apartheid, racism, where people were penalized for something about which they could do nothing, their ethnicity I, therefore, could not keep quiet, it was impossible when people were hounded for something they did not choose, their sexual orientation. “If you are not like everybody else, then you are abnormal, if you are abnormal, then you are sick. These three categories, not being like everybody else, not being normal and being sick are in fact very different but have been reduced to the same thing”\(^{460}\). The existence of Section 377 raises fundamental questions. Why should someone’s dignity and privacy be undermined by their sexual preference? Why should someone’s fundamental life choices be conditioned by other people’s prejudice, ignorance, and stigmatization? Why should public health be compromised by an archaic and pedantic notion of public morality? And finally, why should a sizeable population of Indians (or even a “minuscule minority”) is deemed criminals in the eyes of the law, simply for being themselves?

A modern democracy rests on the twin principles of majority rule and the need to protect the fundamental rights of *all* citizens. Fundamental rights are inalienable and transcend challenge or limitation. These rights identify subjects, withdraw them from political controversy, place them beyond the reach of majorities, and establish them as legal principles to be applied by courts equally for everyone this was recognized by the court in Puttaswamy (the plurality opinion and separate concurrences), holding that privacy is an inalienable right that inheres in every person, which is reflected in the Fundamental Rights Chapter of the Constitution, rather than guaranteed by it. In this context, it is important to appreciate that just as homosexuality is not a ‘western import’, IPC was neither Indian nor a gift from God. IPC was drafted by the British, based on prevailing Victorian notions of morality which were imported to India, and continue to remain here long after they have been discarded by the British. The second aspect of a constitutional democracy relates to the counter-majoritarian role played by the judiciary, which has to ensure that a majoritarian government does not override minority rights. While the law may be the product of representative majoritarian moral beliefs, constitutional guarantees (and constitutional morality) will lose significance if they are given majoritarian interpretations. There are many groups, or

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“discrete and insular minorities” who remain excluded from the everyday exchanges and compromises of democratic politics, which tend to prioritize political expediency over protection of rights. In 2016, the Lok Sabha voted against Shashi Tharoor’s bill to decriminalize homosexuality. In this background, Justice Kennedy’s majority opinion in the US Supreme Court gay marriage ruling in Obergefell vs Hodges bears reiteration: “The nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act.”

The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular. The guarantee of constitutional rights does not depend upon their exercise being favorably regarded by majoritarian opinion. The test of popular acceptance does not furnish a valid basis to disregard rights which are conferred with the sanctity of constitutional protection. Discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or way of life does not accord with the ‘mainstream’. Section 377 could be decriminalized; however, this must not mean that they would be allowed to do things in open and pollute the society but must be allowed only when done in private as at last, it’s a matter of their freedom which they do have. In a democratic Constitution founded on the rule of law, their rights are as sacred as those conferred on other citizens to protect their freedoms and liberties. Sexual orientation is an essential attribute of privacy. 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 lies at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.

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DEVOURING FELLOW BEINGS: THE NORM OF HUMAN CANNIBALISM

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Cannibalism is often described as the eating of human flesh by another human or as man eating man. Though it is considered one of the most barbaric acts, but there is no specific or direct law that illegalizes cannibalism. Cannibalism was widespread in the past among humans throughout the world, continuing in the 19th century in some isolates South Pacific cultures, and in a few cases in insular Melanesia, indigenous flesh-markets existed. This paper elaborates the way cannibalism evolved from pre-Neolithic era to the present stage. This paper attempts to focus on cultural norms with regard to several traditions prevailed all over the world regarding cannibalism. It also emphasizes on the way cannibalism is perceived throughout the world and how incidents of cannibalism were reported from various parts of the world. The later part of the paper posits on the judicial precedents on cannibalism ranging from 18th century cases to the recent 2011 case of Surendra Koli. The paper concludes with the poignancy of lack of laws in India and in other several parts of the world with regard to cannibalism.

Introduction

“Then Jesus said unto them, verily, verily, I say unto you, except ye eat the flesh of the Son of man, and drink his blood, ye have no life in you. Whoso eateth my flesh, and drinketh my blood, hath eternal life; and I will raise him up at the last day. For my flesh is meat indeed, and my blood is drink indeed..”


Cannibalism is the act of an individual of a species consuming all or part of another individual of the same species as food. Cannibalism is a common ecological interaction in the animal kingdom and has been recorded for more than 1500 species. Cannibalism is derived from “Canibales”, the Spanish name for the carib people, a West Indies Tribe, which was well known for their practice of cannibalism, the act or practice of eating the flesh of other human beings. It is also called “anthrophagy”. A person who practices cannibalism is called a “cannibal”.

Cannibalism has recently been both practiced and fiercely condemned in several wars, especially in Liberia and Congo. Today, the “Korowai” are one of the very few tribes still believed to eat human flesh as a cultural practice. It is also still known to be practiced as a ritual and in war in various Melanesian Tribes. Allegations of cannibalism were used by the colonial powers to justify the enslavement of what were seen as primitive people. Cannibalism has been said to test the bounds of cultural relativism as it challenges anthropologists to “define what is or is not beyond the pale of acceptable human behavior.”

Cannibalism was widespread in the past among humans throughout the world, continuing in the 19th century in some isolates South Pacific cultures; and in a few cases in insular Melanesia, indigenous flesh-markets existed. Fizi was once known as the
‘Cannibal Isles’. Cannibalism has been well documented around the world, from Fizi to American Basin to the Congo to Maori, New Zealand, Neanderthals are believed to have practiced cannibalism and they may been eaten by modern humans.

Cannibalism has been occasionally practised as a last resort by people suffering from famine. Occasionally, it has incurred in modern times. A famous example is crash of Uruguayan Air Force Flight 571, (in 1972) after which some survivors ate the bodies of dead passengers.

These are following reasons of cannibalism:
1. Cultural norm.
2. Necessity in extreme situation of famine.
3. Self-cannibalism, a form of major self injury as a result of major mental illness.
4. Insanity or social deviancy.

Cannibalism: A cultural norm
Cannibalism has been prevalent from time immemorial. During a recent study, near the village of Herxheim, there were evidences of cannibalism in Neolithic Europe. Dr. Bruno Bouslestin of the University of Bordeaux in France in one of the research papers had stated how his team members have found human bones with markings in Western Europe. More evidence of cannibalism was found in caves of Gough and El Sidrón caves of Western Europe. Paleolithic Cannibalism is either considered either being for nutritionalistic purposes or for rituals. Several archaeologists have posited that there has been evidence that people resorted to cannibalism as recent as in the eighteenth century. There are regular practices of cannibalism in East Africa, in jungles between Argentina and Paraguay, in Brazilian rainforests and remote areas of New Guinea. Even in India, there were crystal evidence of cannibalism during ancient times. We find in Ramayana and Mahabharat period that the Nishachar Tribes used to eat human beings. In the folk stories also, the Nishachar are described living on the blood and flesh of human beings. Cannibalism was also in practice in Europe.

The Daily Mail of London quotes the book, “Mummies, Cannibals and Vampires” authored by Richard Sugg of Durham University that the British Royal long famous for their lavish banquets and rich recipes had a taste for human flesh. They as recently as 18th century possibly swallowed parts of the human body. This practice was not only reserved for monarchs but wide spread among the rich in Europe. The Royals denounced barbaric cannibals but they applied, drank or wore powdered Egyptian mummy, human fat, flesh, bone, blood, brains and skin. Moss taken from the skulls of dead soldiers was used for cure of nose bleeding. The human body has been widely used as therapeutic agent. “James I refused corpse medicine; Charles II made his own corpse medicine and Charles I was made into corpse medicine.”

In India ‘Aghori Panth’ is well known for all rituals connected with Shamshan Ghat. They eat flesh of human corpse as one of the essential rituals of their sadhana.

Also, there have been few instances of Cannibalism been reported all over the world and some of the shocking reports are stated below:
(a) In some tribes in Western Countries, the body of the dead person would be devoured

461 Brit Royals dined on human flesh, Sunday, Times of India, Lucknow, 22-05-2011, p.15
by the family and neighbours as a sign of respect.

(b) The people of Wari Tribe gathered the next day followed by a death to cook the flesh of the corpse and consume the flesh as a symbol of departing spirit.

(c) In 1932, seven million people died when Soviet Union leader Stalin engineered a famine in Ukraine. Millions of people sorted to eating humans. It also led to infanticides wherein mothers killed one child to feed another child. In 1930s around thousands of people were in jail for acts of cannibalism.

(d) A man named Joachim Kroll targeted young females and had a paraphilic need for their flesh. He used to rape the girls and would then chop off their body parts. He continued this barbaric act for almost two decades after which he was caught when his apartment water pipes were filled and blocked with internal organs of a four year old girl. When police conducted an investigation and raided his apartment, they found the legs and hands of the girl boiling in the water and parts of the girl’s body were left in refrigerator. He was later arrested and sent to life imprisonment during the course of which he died of heart attack.

(e) Albert Fish, a serial killer and a cannibal used to kidnap and murder young girls and eat their body parts and he even went to the extent of torturing a girl’s family by writing a letter to them describing how he ate and devoured the young girl. He was executed in 1936 by electric chair.

(f) Issei Sagawa, a Japanese man and an experienced cannibalistic, desired human flesh at an early age and sought out to fulfill his desires. In 1981, he invited one of his classmates over for dinner. He shot him and feasted on him for two days. He was eventually arrested after he was caught dumping the body.

(g) One of the most disturbing cases is that of Rudy Eugene. On 26th May 2012, 31 year old Eugene brutally began to eat the face of a 65 year old man. Around 75-80% of his face above the beard was gruesomely gnawed off and eaten including his eyebrows, nose, parts of his forehead and eye. The act came to an end after eighteen minutes when a police officer saw Eugene during the act and shot him dead.

**Cannibalism and related precedents**

In *R v. Dudley and Stephens*[^62], which is famous as Mignonette case, the facts were that Dudley, Stephen and Brooks and a boy Parker of 18 years of age were lost in a sea storm about 1600 miles away from the Cape of Good Hope. They were compelled to sit in an open boat of the ship Yacht Mignonette. Dudley, Stephen and Brooks were quite healthy-men. They had no supply of food and water but on the fourth day they caught a turtle and subsisted upon it for eight days. For the next eight days, they had nothing to eat. They could have only the water collected by them from time to time in their oil-skin caps. The boat was drifting in the open-sea about one thousand miles away from the earth. On the eighteenth day, Dudley suggested Brooks that someone should be sacrificed to save the rest. But Brooks did not agree. Thereafter, he suggested that the lots should be drawn as to who should be sacrificed but Brooks never consented. Then, Dudley with consent of Stephen went to the boy Parker who was lying helpless, weakened by famine and drinking sea water, unable to make any resistance, and told him that his time had come.

[^62]:  R v. Dudley and Stephens (1884) 14 QBD 273
come. He then put a knife on the throat of the boy. Before during this ghastly act Dudley had offered prayer that he should be forgiven in case he was tempted to commit such a rash act. The three men fed upon the body and blood of the boy when they were picked up by a passing vessel. Although they were rescued alive yet they were in the lowest state of prostration. They were prosecuting for committing murder. It was found that if the men had not fed upon the body of the boy, they would probably have died earlier in case not being slain. However, there was no greater necessity of killing the boy than any of the other three men. The Divisional Court, through Lord Coleridge, C.J., with the concurrence of other four judges found them guilty of murder. It was held that upon the facts stated above there was no proof of any such necessity as could justify the killing of the boy.

To the argument, that in order to save your life you can take away the life of another when there is no threat or attempt to save your life by him, it was said that there was no authority which could support it. The case of R v. Stratton was also not applicable as that was the case arising out of a political necessity. Lord Coleridge, C.J., observed:

“The one real authority of former time is Lord Bacon who in his commentary on the maxim, ‘Necessitas Inducit Privilegium Quod Jura Privita’ lays down the law as follows:- ‘Necessity carreith a privilege in itself. Necessity is of three sorts—necessity of conservation of life; necessity of obedience and necessity of the act of God or of a stranger. First of conservation of life, if a man steals viands to satisfy his present hunger, this is neither felony nor larceny. So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get the some planks or on the boat’s side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned, that is neither se defendendo nor any misadventure, but justifiable.’ On this it is to be observed that Lord Bacon’s proposition that stealing to satisfy hunger is no larceny is hardly supported by Staundford whom he cites for it, and it expressly contradicted by Lord Hale…. And for the proposition as to the plank or boat, it is said to be derived from the canonists. At any rate he cites no authority for it and it must stand upon his own… there are many conceivable state of things in which it might possibly be true, but if Lord Bacon meant to laydown the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbor, it certainly is not law at the present day.”

Sir James Stephen 463 criticizing R v. Dudley’s judgment observed:

“I discover no principle in the judgment in R v. Dudley. It depends entirely on its peculiar facts. The boy was deliberately put to death with a knife in order that his body might be used for food.”

According to him, the facts of this case are quite different from the following cases—

“(i) A and B swimming in the sea, after a ship wreck, get hold of a plank not large enough to support both. A pushes off B who is drowned. This is not a crime. Here the successful man does not direct harm to the
other. He leaves him the chance of getting another plank.

(ii) Several men are roped together on the Alps. They slip and the weight of the whole party is thrown on one, who cuts the rope in order to save himself. Hence, the question is not whether some shall die but whether one shall live.

(iii) The choice of evils, the captain of a ship runs down a boat as the only means of avoiding ship wreck. A surgeon kills a child in the act of birth as the only way to save the mother.”

In Surendra Koli v. State of U.P., several children had gone missing over two years from Sector 31, Nithari Village, Gautam Budh Nagar, Noida. The appellant, accused no. 2 was the servant of accused no. 1 Mohinder Singh who lived together at D-5, Sector 31, Noida. There was allegation of chopping and eating the body parts of children after cooking them. The appellant had made confession before the Magistrate under Section 164 of the Code of Criminal Procedure in great detail that he used to kill the girls after luring them inside the house by strangulating them and he would then chop up and eat up their body parts after cooking them. The confession was corroborated by the material particulars. Accused 1 and accused 2 were convicted by the Additional Sessions Judge, Ghaziabad under Sections 302/364 and 376 of the Indian Penal Code and sentenced to death. The conviction and sentence of accused 2 was affirmed by the High Court on appeal/reference to it but accused 1 was acquitted. Accused 2, therefore preferred an appeal before the Supreme Court. The appellant was a serial killer and therefore, the Supreme Court held the case to fall in the category of rarest of rare case and no mercy can be shown to the appellant, Surendra Koli.”

Conclusion

Cannibalism or the act of eating fellow humans could not be encouraged at any cost. It is thus intra-specific predation. Although there are certain prevailing customs regarding cannibalism throughout the world but this could not be a rationalization of rendering cannibalism legal. Cannibalism is the most drastic act and it should be considered the epitome of evil. No sane human would find tranquility or satisfaction


by rendering or causing death to the fellow beings and by devouring their flesh and blood. Human body should be treated with respect, even after death. People who practice cannibalism are not mere cannibals but devils inside the human body and thus, they are worthy of the utmost punishment the law could augment. There are still countries where there is no direct law against cannibalism such as the United States and India. There is no express law that states that consuming a part of human body is illegal. The cases like that of Surendra Koli in India could not be ignored as it shows the pinnacle of immorality and iniquity a person could practice as the Supreme Court judges clearly indicates it to be one of the rarest of the rare cases. These cases put the wisdom of a human in trauma lending them to consider how civilization has stooped to this level of barbaric behavior. India should not wait for a drastic incident to happen to directly criminalize cannibalism rather India should implement laws in order to further prevent the cases like that of Surendra Koli. Hence, Cannibalism could not be ever given an affirmative disputation because a crime is a crime, even it is done out of necessity.

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HINDU WOMEN'S RIGHT TO INHERIT PROPERTY PRE AND POST HINDU SUCCESSION (AMENDMENT) ACT, 2005- A COMPARATIVE STUDY

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Abstract
The Constitution of India provides that every person has the right to equality before law and equal protection of the laws & thereby prohibits discrimination on the basis of caste, creed & gender. In India, women’s rights have suffered serious setbacks among all communities. The Hindu Succession Act, 1956 has been enacted to amend & codify the law relating to intestate succession among Hindus. It lays down a uniform & comprehensive system of inheritance. The Hindu women's limited estate is abolished by it. Under the Act, for the first time, absolute property rights were granted to women. The Act is basically based on Mitakshara law, under which coparcenary rights are in favour of male child by birth. This provision was against the principle of gender equality. Therefore, the Hindu Succession (Amendment) Act, 2005 was enacted to enlarge the rights of a daughter, married & unmarried both & to bring her at par with a son or any male member of a joint Hindu family governed by the Mitakshara law. In this paper, comparative analysis of Hindu women’s right to inherit property pre and post-Hindu Succession (Amendment) Act, 2005 has been done.

Introduction

Gender equality is recognised as a basic human right in all civilised nations. The concept of gender equality is considered as a universal principle. At the international level, the Universal Declaration of Human Rights, 1948 also recognises the principle of equality. Article 1 of the Universal Declaration of Human Rights, 1948 provides that all human beings are born free and equal in dignity and rights. In India also, attempts have been made to raise the status of women in accordance with these universally accepted principles. The Indian Constitution enshrines the principle of gender equality in its Preamble & Parts III, IV & IVA relating to Fundamental Rights, Directive Principles of State Policy & Fundamental Duties respectively. It provides that every person has the right to equality before the law and the equal protection of the laws within the territory of India. It also empowers the State to make special provisions for women as there is a need to empower women who have suffered gender discrimination for centuries. The Constitution of India is the supreme law of India. Certain laws were also enacted to raise the status of women. But a significant change took place when the Parliament in 1955-56 enacted a series of Acts better known as the Hindu Code, which significantly improved the status of Hindu women to a great extent. The principle of equal social status to women also includes their right to hold & inherit property like the male members of the family. In spite of the equality guaranteed by the supreme law of India, women in India had suffered a lot of inequalities.

The Hindu Succession Act, 1956 has been enacted to amend & codify the law relating
to intestate succession among Hindus. According to the Hindu Succession Act, 1956, the expression "Hindu" in any portion of this Act is construed as if it included a person who, though not a Hindu by religion is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in section 2 of this Act. Thus, the Act is applicable to any person who is a Hindu, Buddhist, Jaina or Sikh by religion & applies to those governed both by the Mitakshara & the Dayabhaga Schools & also to those in South India governed by the Murumakkattayam, Aliyasantana, Nambudri and other systems of Hindu Law. It lays down a uniform & comprehensive system of inheritance. The Hindu women's limited estate is abolished by it. Under the Act, for the first time, absolute property rights were granted to women. However, under the Act, Hindu women could not inherit ancestral property by birth right & was excluded from joint family coparcenary under Mitakshara system merely by reason of their biological identity (i.e., gender). This resulted in the violation of their right to equality. Thus, the Hindu Succession (Amendment) Act, 2005 was enacted to remove gender discriminatory provisions in the Hindu Succession Act, 1956 & to give equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have. The daughter has been made a coparcener by birth in the joint property after commencement of the Hindu Succession (Amendment) Act, 2005.

Constitutional Provisions ensuring Gender Equality

The framers of the Indian Constitution were well aware of the adverse condition of women in the society. Thus, they incorporated a number of provisions for the upliftment of the status of women. The principle of gender equality is incorporated in the Constitution of India in its Preamble, Fundamental Rights, Directive Principles of State Policy and Fundamental Duties.

The Preamble of the Indian Constitution contains various objectives including “the equality of status and opportunity” to all the citizens. This objective has been incorporated with the view to give equal rights to men & women in terms of the status & opportunity.

Part III (Articles 12 to 35) of the Indian Constitution deals with the Fundamental Rights. The provisions regarding fundamental rights are applicable to all the citizens. However, certain fundamental rights contain specific provisions to protect the rights of women.

Article 14 of the Indian Constitution provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15(1) of the Indian Constitution provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 15(3) of the Indian Constitution provides that nothing in the article 15 shall prevent the State from making any special provision for women and children.

Article 16(1) of the Indian Constitution provides that there shall be equality of opportunity for all citizens in matters
relating to employment or appointment to any office under the State.
Part IV (Articles 36 to 51) of the Indian Constitution deals with the Directive Principles of State Policy. They are fundamental in the governance of the country. Article 39(a) of the Indian Constitution provides that the State shall, in particular, direct its policy towards securing that the citizens, men & women equally, have the right to an adequate means of livelihood. Article 39(d) of the Indian Constitution provides that the State shall, in particular, direct its policy towards securing that there is equal pay for equal work for both men & women. Article 39(e) of the Indian Constitution provides that the State shall, in particular, direct its policy towards securing that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

Article 42 of the Indian Constitution provides that the State shall make provision for securing just and humane conditions of work and for maternity relief.

Part IVA (Article 51A) of the Indian Constitution deals with the Fundamental Duties. Article 51A (e) provides that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women.

**Hindu Women’s Right to inherit Property Pre-Hindu Succession (Amendment) Act, 2005**

Prior to the Hindu Succession Act, 1956, Hindus were governed by shastric & customary laws that varied from region to region. Sometimes such laws varied even in the same region due to different castes. This resulted in multiplicity of laws with diversified nature. As a result, in the matters of succession also, there were different schools. Amongst the Hindus, there were two major schools which governed the inheritance. These are Mitakshara & Dayabhaga. The Mitakshara School prevails in the whole of India except Bengal & Assam. The Dayabhaga School prevails in Bengal & Assam.

Under the Mitakshara law, a son, grandson & a great grandson acquire a right by birth in the joint family property. They constitute a class of coparceners, based on birth in the family. Under the Mitakshara law, female members are not considered as a part of the coparcenary. Under the Mitakshara law, the devolution of joint family property is based on the principle of survivorship. It means that the joint family property does not devolve by inheritance but it goes to those who, among the group called as coparceners, survive others, that is, are able to live longer than others. It means that with every birth of a male in the family, the share of every other surviving male gets diminished and with every death of a male in the family, the share of every other surviving male increased. However, in case of property separately owned by an individual male or female, inheritance by succession is allowed under Mitakshara law. Females are allowed to inherit separate property under Mitakshara law.

Under the Dayabhaga School, sons do not have right by birth in any property & all properties devolve by inheritance. Thus, the
Dayabhaga School has only one mode of succession, irrespective of the kind of property. Neither sons nor daughters become coparceners at birth nor do they have rights in the family property during their father's lifetime. But, on his death, they can inherit the property. Under the Dayabhaga School, daughters also get equal shares along with their brothers.

With the advent of independence, the framers of the Indian Constitution took note of the adverse discrimination perpetrated against women and incorporated many provisions in the Indian Constitution for ensuring gender equality. For implementing those provisions, many laws were enacted. Thus, the Hindu Succession Act, 1956 was enacted in 1956. It extends to the whole of India except the State of Jammu and Kashmir. It tries to bring an end the discrimination between sons & daughters followed in inheritance laws. It aims to integrate the Mitakshara & Dayabhaga, schools of Hindu law. It codified personal laws of Hindus as before this Act came into force, they were governed by shastric & customary laws which varied from region to region. Now, the Hindu Succession Act, 1956 is a principal Act which applies to all Hindus in India.

Section 6 of the Hindu Succession Act, 1956 deals with the devolution of interest of coparcenary property. Before the enactment of the Hindu Succession (Amendment) Act, 2005, section 6 of the Hindu Succession Act, 1956 provided that after the commencement of the Act, when a male Hindu dies intestate, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary & not in accordance with the Act.

But, proviso to section 6 provided that if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under the provisions of the Act & not by survivorship.

Explanation 1 of the section 6 further provided that for the purposes of section 6, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2 of the section 6 further provided that nothing contained in the proviso to section 6 shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

This meant that the principle of survivorship applied in the devolution of interest of Mitakshara coparcenary property. It meant that Hindu females were not entitled to inherit Mitakshara coparcenary property by birth right & were excluded from joint family coparcenary under Mitakshara law. For example, if a joint family property was
divided, then each male coparcener took his share & female has no right to get any share.

Illustration- a Mitakshara Coparcenary consists of A, the father & his two sons, B & C. A dies leaving his undivided interest in the coparcenary property & leaving behind his two sons B & C & a daughter D. A’s interest devolves upon B & C, the surviving coparceners by the principle of survivorship. The daughter has no right to get any share as she is not a coparcener as under Mitakshara Law, no female is a coparcener.

Under Section 14 of the Hindu Succession Act, 1956, the disability of a Hindu female to acquire & hold property as an absolute owner is removed and the existing Hindu woman’s estate (existing prior to the commencement of the Act & over which Hindu woman has possession) which is held by her as a limited owner is converted into her absolute estate.

Section 14 provides that any property possessed by a Female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof & not as a limited owner.

However, this provision shall not apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

In section 14, property includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of the Act.

For Section 14, the following conditions are necessary:
(i) Ownership of property must vest in her, and
(ii) Section 14 has qualified retrospective application. It converts only those women’s estates into full estates over which she has possession (possession is used in the widest possible sense, including actual and constructive possession) when the Act came into force. In the wider sense, the term “possession” is co-extensive with the ownership. Therefore, whenever the woman has the ownership of property vested in her, she will be deemed to be in its possession & if the ownership does not vest in her, even if she is in actual or physical possession, she will not be deemed to be in its possession within the meaning of the section.

Before the enactment of the Hindu Succession (Amendment) Act, 2005, section 23 of the Hindu Succession Act, 1956 provided that where a Hindu intestate has left surviving him or her both male & female heirs specified in class I of the Schedule & his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in the Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares.
therein; However, the female heir shall be entitled to a right of residence therein:
Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.
Before the enactment of the Hindu Succession (Amendment) Act, 2005, section 24 of the Hindu Succession Act, 1956 provided that any heir who is related to an intestate as the widow of a pre-deceased son, the widow of a pre-deceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens, she has re-married.

Hindu Women’s Right to inherit Property Post-Hindu Succession (Amendment) Act, 2005
The Hindu Succession Act, 1956 has been amended by the Hindu Succession (Amendment) Act, 2005. It has undergone many changes by the Hindu Succession (Amendment) Act, 2005. The Constitution of India makes provision for ensuring gender equality. But, before the enactment of the Hindu Succession (Amendment) Act, 2005, the provisions of the Hindu Succession Act, 1956 were discriminatory towards women and thus, against the principle of gender equality enshrined in the Indian Constitution.

Due to the fact that the provisions of the Hindu Succession Act, 1956 were discriminatory towards women, certain States of India, namely, Kerala, Andhra Pradesh, Tamil Nadu, Maharashtra & Karnataka made State amendments in the Hindu Succession Act, 1956 to ensure gender equality.
The State amendments only made reforms in their respective States. However, Hindu women in other States of India continued to be subjected to inequality in relation to their property rights due to the shortcomings of Hindu Succession Act, 1956.

To improve the status of Hindu women, the initiative was taken up by the Law Commission of India which in its 174th Report on “Property Rights of Women: Proposed Reforms under Hindu Law” under the Chairmanship of Justice B. P. Jeevan Reddy made important recommendations for the removal of anomalies & ambiguities with regard to property rights of Hindu women under the Hindu Succession Act, 1956. According to the view of the Law Commission, the exclusion of the daughters from participation in coparcenary Property ownershship merely by reason of her gender was unjust.

Thus, the Hindu Succession (Amendment) Act, 2005 was enacted to provide full-fledged property rights to daughters in coparcenary property along with sons. It was enacted on 5 September, 2005 & came into force from 9 September, 2005 incorporating the reforms suggested in the 174th Report of the Law Commission of India.

The Hindu Succession (Amendment) Act, 2005 omitted sub-section (2) of Section 4 of the Hindu Succession Act, 1956 and has made women’s inheritance rights in agricultural land equal to men’s. Section 4(2) excluded, from the ambit of the Hindu Succession Act, 1956, significant interests in agricultural land, the inheritance of which...
was subject to the succession rules mentioned in state-level tenurial laws.

Especially in the north-western states, these laws were highly gender unequal and gave primacy to male lineal descendants in the male line of descent. Women came very low in the succession order and got only a limited estate. The new legislation brings male and female rights in agricultural land on par for all states, overriding any inconsistent state laws. This can potentially benefit millions of women dependent on agriculture for survival.\footnote{Whether Amendments Made To The Hindu Succession Act Are Achieving Gender Equality?, Legal Service India, available at http://www.legalserviceindia.com/articles/gehsa.htm, last seen on 22/07/2018.}

The Hindu Succession (Amendment) Act, 2005 has addressed a very important issue relating to the rights of daughters in the Mitakshara coparcenary & thus, elevated daughter’s position by amending section 6 of the Hindu Succession Act, 1956. The amended Section 6 deals with the devolution of interest in coparcenary property.

The section 6 of the Hindu Succession Act, 1956 has been completely replaced by a new provision. After the enactment of the Hindu Succession (Amendment) Act, 2005, section 6(1) of the Hindu Succession Act, 1956 provides that in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall, on & from the date of commencement of the Hindu Succession (Amendment) Act, 2005, by birth become a coparcener in her own right in the same manner as the son. She shall have the same rights in the coparcenary property as she would have had if she had been a son. She shall be subject to the same liabilities in respect of the said coparcenary property as that of a son & any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in the sub-section (1) of section 6 shall affect or invalidated any disposition or alienation including any partition or testamentary disposition of property which had taken place before 20 December, 2004.

Section 6(2) of the Act provides that any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in the Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

Section 6(3) of the Act provides that where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under the Act & not by survivorship, & the coparcenary property shall be deemed to have been divided as if a partition had taken place &:

(a) the daughter is allotted the same share as is allotted to a son;
(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of
partition, shall be allotted to the surviving child of such pre-deceased son or of such
pre-deceased daughter; &
(c) the share of the pre-deceased child of a
pre-deceased son or of a pre-deceased
dughter, as such child would have got had
he or she been alive at the time of the
partition, shall be allotted to the child of
such pre-deceased child of the pre-deceased
son or a pre-deceased daughter, as the case
may be.

For the purposes of the sub-section (3), the
interest of a Hindu Mitakshara coparcener
shall be deemed to be the share in the
property that would have been allotted to
him if a partition of the property had taken
place immediately before his death, irre
spective of whether he was entitled to
claim partition or not.

Section 6(4) of the Act provides that after
the commencement of the Hindu Succession
(Amendment) Act, 2005, no court shall,
recognize any right to proceed against a son,
grandson or great-grandson for the recovery
of any debt due from his father, grandfather
or great-grandfather solely on the ground of
the pious obligation under the Hindu law, of
such son, grandson or great-grandson to
discharge any such debt:

Provided that in the case of any debt
contracted before the commencement of the
Hindu Succession (Amendment) Act, 2005,
nothing contained in the sub-section (4)
shall affect-
(a) the right of any creditor to proceed
against the son, grandson or great-grandson,
as the case may be; or
(b) any alienation made in respect of or in
satisfaction of, any such debt, & any such
right or alienation shall be enforceable under
the rule of pious obligation in the same
manner & to the same extent as it would
have been enforceable as if the Hindu
Succession (Amendment) Act, 2005 had not
been enacted.

For the purposes of clause (a), the
expression "son", "grandson" or "great-
grandson" shall be deemed to refer to the
son, grandson or great-grandson, as the case
may be, who was born or adopted prior to
the commencement of the Hindu Succession
(Amendment) Act, 2005.

Section 6(5) of the Act provides that nothing
contained in the section 6 shall apply to a
partition, which has been effected before 20

For the purposes of section 6, partition
means any partition made by execution of a
deed of partition duly registered under the
Registration Act, 1908 or partition effected
by a decree of a Court.

Section 23 of the Hindu Succession Act,
1956 has been omitted by the Hindu
Succession (Amendment) Act, 2005, as a
result of which, at present all daughters,
both unmarried and married, are entitled to
same rights as sons to reside in & to claim
partition of the parental dwelling-house.
Section 23 disallowed married daughters
(unless separated, deserted or widowed)
even residence rights in the parental
dwelling-house. Unmarried daughters had
rights of residence but not of partition.

Section 24 of the Hindu Succession Act,
1956, which had disqualified certain widows
from inheriting the property of the intestate,
if they had remarried, has been omitted by
the Hindu Succession (Amendment) Act, 2005. Now the widow of a pre-deceased son or the widow of a pre-deceased son of a pre-deceased son or the widow of the brother can inherit the intestate’s property even if she has remarried.

Also the Hindu Succession (Amendment) Act, 2005 has added some more heirs to the list of Class I heirs who are son of a pre-deceased daughter of a pre-deceased daughter, daughter of a predeceased daughter of a predeceased daughter, daughter of a predeceased son of a predeceased daughter, & daughter of a pre-deceased daughter of a pre-deceased son.

Case laws
Danamma @ Suman Surpur & Anr. v. Amar & Ors.467
In this case, the Supreme Court has held that daughters who were born before the enactment of the Hindu Succession Act, 1956 are entitled to equal shares as son in ancestral property.

Prakash v. Phulavati468
In this case, the Supreme Court has held that the rights under the Hindu Succession (Amendment) Act, 2005 are available to daughters living on the date of amendment, irrespective of when they were born.

Comparative analysis of the Hindu women’s right to inherit property Pre & Post-Hindu Succession (Amendment) Act, 2005.
The comparative analysis of the Hindu women’s right to inherit property pre & post-Hindu Succession (Amendment) Act, 2005 can be done under the following heads:

(1) Agricultural lands (Section 4(2))
Before the enactment of the Hindu Succession (Amendment) Act, 2005, inheritance of agricultural land is subject to state-level tenurial laws & not to the Hindu Succession Act, 1956. Many of the tenurial laws specify inheritance rules that are against the principle of gender equality. But after the enactment of the Hindu Succession (Amendment) Act, 2005, inheritance rights in all agricultural lands are subject to the Hindu Succession Act, 1956. The Act overrides such State laws which are inconsistent with the Hindu Succession Act, 1956. The Hindu Succession (Amendment) Act, 2005 omitted sub-section (2) of Section 4 of the Hindu Succession Act, 1956 and has made women’s inheritance rights in agricultural land equal to men’s.

(2) The Mitakshara Joint Family Property (Section 6)
Before the enactment of the Hindu Succession (Amendment) Act, 2005, Hindu females were not entitled to inherit Mitakshara coparcenary property by birth right & were excluded from joint family coparcenary under Mitakshara law. But a son, grandson & a great grandson acquired a right by birth in the joint family property. They constitute a class of coparceners, based on birth in the family. Female members were not considered as a part of the

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coparcenary. Also, the devolution of joint family property was based on the principle of survivorship.

After the enactment of the Hindu Succession (Amendment) Act, 2005, sons and daughters both have independent equal birth rights and liabilities as coparceners in joint family property. Also, the joint family property devolves by testamentary or intestate succession, as the case may be, under the Act & not by survivorship.

(3) Class I heirs
Before the enactment of the Hindu Succession (Amendment) Act, 2005, the Class I heirs of a Hindu male included the children of predeceased children, but these were recognised up to two generations for predeceased sons and only up to one generation for predeceased daughters. But, after the enactment of the Hindu Succession (Amendment) Act, 2005, the Schedule amended to include as Class I heirs, the children of predeceased children going down to two generations for both sons & daughters.

(4) Parental Dwelling-House (Section 23)
Before the enactment of the Hindu Succession (Amendment) Act, 2005, under section 23 of the Hindu Succession Act, 1956, in a dwelling-house wholly occupied by members of the deceased’s family, no female heir can claim partition, until the male heirs choose to divide their respective shares. Daughters only had rights of residence, only if she is unmarried, or deserted, separated or widowed.

Section 23 has been omitted by the enactment of the Hindu Succession (Amendment) Act, 2005. Now daughters, whether unmarried or married, have the same rights as sons to reside in & to claim partition of the parental dwelling-house.

(5) Rights of certain widows (Section 24)
Before the enactment of the Hindu Succession (Amendment) Act, 2005, under section 24 of the Hindu Succession Act, 1956, the widow of a pre-deceased son or the widow of a pre-deceased son of a pre-deceased son or the widow of the brother, was not entitled to inherit the intestate’s property as a widow, if on the date the succession opens, she has re-married. Section 24 has been omitted by the enactment of the Hindu Succession (Amendment) Act, 2005. Now such widows can inherit the intestate’s property even if they have remarried.

Conclusion
The provisions of the Hindu Succession Act, 1956 were discriminatory towards Hindu women. Earlier, Hindu women could not inherit ancestral property by birth right & was excluded from joint family coparcenary under Mitakshara system merely by reason of their biological identity (i.e., gender). The Constitution of India provides for the gender equality. Thus, the Hindu Succession (Amendment) Act, 2005 was enacted to remove gender discriminatory provisions in the Hindu Succession Act, 1956 & to give equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have. The Hindu Succession (Amendment) Act, 2005 is a significant step towards gender equality.

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THE EFFECTIVENESS OF THE REMEDIES FOR THE INFRINGEMENT OF COPYRIGHT IN INDIA

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Abstract
Intellectual property is the creative work of the human intellect. Copyright is a kind of intellectual property. It subsists in literary, dramatic, musical, & artistic works, cinematograph films & sound recordings. It is a legal right created by the law of a nation that gives the creator of the original work certain exclusive rights over his work. It protects only the original expressions of ideas & not the underlying ideas themselves. Infringement of copyright takes place when exclusive rights of the owner of copyright are exercised by the infringer without prior permission of the copyright owner. There are three kinds of remedies available for the infringement of copyright, namely, civil remedies, administrative remedy & criminal remedies. In the interest of justice, it is necessary that there should be an effective remedy available for the infringement of a right. In this paper, the effectiveness of the remedies for the infringement of copyright in India is analysed.

Introduction
The intellectual property plays an important role in the economic development of a nation. Thus, it is necessary to protect the intellectual property rights. Copyright is a type of intellectual property. For the enforcement of a right, it is of vital importance that remedies should be available to those who are aggrieved as a result of its violation. The concept of remedies in law is based on the maxim ubi jus ibi remedium which means where there is a right, there is a remedy. In India, the Copyright Act, 1957 protects the copyright in various works. In case of infringement of copyright, the owner of the copyright has certain remedies under the Act. There are three kinds of remedies available for the infringement of copyright, namely, civil remedies, administrative remedy & criminal remedies. The existence of a right is meaningless unless an effective remedy is available against its violation. The effectiveness of a remedy depends on its ability to redress the violation of the right. In this paper, the effectiveness of the remedies for the infringement of copyright in India is analysed.

Intellectual Property
Intellectual property means the creative work of the human intellect. Intellectual property right is an intangible right to a product of the human intellect. The main reason of its protection is to promote the progress of science & technology, arts, literature & other creative works & to encourage & reward creativity. Countries provide statutory expression to the economic rights of creators in their creations & to the rights of the public in accessing those creations. Intellectual property includes copyright, trade marks, service marks, patents, geographical indications, plant varieties, utility models, industrial designs, trade secret, etc. The Constitution of India guarantees the right to property as a constitutional or a statutory right under
Article 300A which provides that no person shall be deprived of his property save by authority of law. The expression “Property” in Article 300A includes not only tangible property, but also intangible property, such as the intellectual property rights and includes every possible interest recognised by law. However, the right to property is subject to reasonable restrictions.

Copyright
Copyright is an essential element in the development process of a nation. The level of protection given to literary, dramatic, musical, & artistic works, cinematograph films & sound recordings affects the enrichment of the national cultural heritage. The higher the level, the greater the encouragement for authors to create. Copyright is a legal right created by the law of a nation that gives the creator of the original work certain exclusive rights over his work. However, the exclusive rights are not absolute but subject to the provisions of the Copyright Act, 1957. Copyright protects only the original expressions of ideas & not the underlying ideas themselves. In India, copyright subsists in original literary, dramatic, musical & artistic works; cinematograph films; computer programme; & sound recording. Under the copyright law, the owner of copyright has the right to reproduce the work in any material form; to issue copies of the work to the public; to perform the work in public, or communicate it to the public; to make any cinematograph film or sound recording in respect of the work; to make any translation of the work; to make any adaptation of the work; etc. The term of copyright protection extends to the life of the author & 60 years after his death. After expiry of the copyright term, the copyrighted work falls into public domain. It means that after the expiry of copyright term, any person can use the copyrighted work without any permission or authorization & without paying any royalty or fee.

Infringement of Copyright
The Copyright Act, 1957 provides copyright protection to the work by conferring certain exclusive rights on its author. The copyright protection is provided to the owner of the copyrighted work to enable him to reap the fruits of his labour & investment to the exclusion of others. However, at the same time, public has also been given certain rights in his work under section 52 of the Copyright Act, 1957 (permitted uses). Thus, if a person uses any of the exclusive rights available to the owner of copyright without his prior permission or without any licence granted by the Registrar of Copyright, he shall be deemed to have infringed copyright provided such use was also not permitted under section 52 of the Act.

Section 51 of the Copyright Act, 1957 lays down provisions regarding the infringement of rights of copyright owner. For copyright to exist in a work, registration is not mandatory, but for availing civil or criminal remedies against the infringement of copyright, such work should be registered. Under section 51, infringement of copyright takes place when exclusive rights of the owner of copyright are exercised by the infringer without prior permission of the copyright owner.

Remedies for the Infringement of Copyright in India
There are three kinds of remedies available for the infringement of copyright which are as follows:

1. Civil remedies,
2. Administrative remedy, and
3. Criminal remedies.

1. Civil Remedies
Section 55 of the Copyright Act, 1957 deals with civil remedies for infringement of copyright. It provides that where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by the Copyright Act, 1957, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right.
The civil remedies for the infringement of copyright are of two types which are as follows:

   (i) Preventive civil remedies, and
   (ii) Compensatory remedies.

(i) Preventive Civil Remedies
Preventive civil remedies are used before the actual occurrence of the act of infringement of copyright or before the damage is caused. Due to this reason, these are also the most popular among the remedies.

(a) Interlocutory injunction
Injunction is considered as the most important remedy for the infringement of copyright. Interlocutory Injunction is the main civil remedy which is awarded in cases related to infringement of copyright. An interlocutory injunction is an order of the court to compel or prevent a party from doing certain acts until further order. A temporary injunction consists of two stages, one granted without finally disposing of the application for injunction to operate immediately till the disposal of the said application & the other granted while finally disposing of the main application to operate till the disposal of the suit. While the former is known as \textit{ad interim} injunction, the latter is known as temporary injunction. In granting interlocutory injunction, three factors are taken into consideration. First, the existence of a \textit{prima facie} case, second, the balance of convenience in the favour of plaintiff & finally irreparable injury would be caused to plaintiff if interlocutory injunction was not granted.

(b) Mareva injunction
Mareva injunction is a particular form of interlocutory injunction. Its purpose is to restrain the defendant from disposing of assets which may be required to satisfy the plaintiff’s claim or removing them from the jurisdiction of the court. Mareva injunction was granted in CBS v. Lambert case where the principal assets, however, were cars & the order included a provision requiring the defendant to disclose their whereabouts. The prevention of disposal is not of much use if the plaintiff cannot locate the assets when it comes to seek to enforce any final judgment obtained. Therefore, such injunctions are usually sought \textit{ex parte}.\footnote{1983 FSR 127.}

In India, the Copyright Act, 1957 provides the remedy of interlocutory injunction for the infringement of copyright. Interlocutory injunction is granted under Order XXXIX, Rules 1 & 2 of the Code of Civil Procedure, 1908. The principles laid down in English

The remedy of injunction is based on equity & it cannot be sought as a matter of right. It is also liable to be refused where the court found that plaintiff had approached it with unclean hands by suppressing material facts & had acted in an unfair & inequitable manner. However, where his claim appears to be *bona fide prima facie*, his rights would have to be protected pending adjudication of his claim in the suit as the purpose is to mitigate injustice to him & avoid the possibility of his being non-suited.

The appellate courts normally do not interfere in the exercise of the discretion by the subordinate courts as the power to grant or refuse an *ad interim* injunction is discretionary. The appellate court does not generally reassess the material on record before that court & substitute its view to grant or refuse a temporary injunction. It also not disturbs the order in this regard even where a contrary view or conclusion is possible. However, at the same time, the appellate court does not hesitate to intervene where the impugned order is found to be against the settled principles of Law regulating grant or refusal of interlocutory injunction or where it proceeded on non-appreciation of nature of controversy or the material on record.

The proviso to Section 55(1) of the Copyright Act, 1957 states that if the defendant proves that at the date of infringement, he was not aware & had no reasonable ground for believing that copyright subsisted in the work, the plaintiff shall not be entitled to any remedy other than an injunction in respect of the infringement & a decree for the whole or part of the profits made by the defendant by the sale of the infringing copies, as the court may in the circumstances deem reasonable.

(c) Permanent or Perpetual injunction

If the plaintiff succeeds at the trial in establishing copyright infringement, he will normally be entitled to a permanent injunction to restrain future infringements. This injunction operates only during the unexpired term of copyright. It is granted in accordance with the provisions of section 38 of the Specific Relief Act, 1963. The permanent injunction can only be granted by the decree made at the hearing & upon the merits of the suit. The defendant is thereby perpetually restrained from the assertion of a right or from the commission of an act, which would be against the rights of the plaintiff. For obtaining the final injunction, plaintiff need not prove actual damage. If the plaintiff establishes that his copyright has been infringed, the court will grant an injunction without the proof of actual damage. However, at the same time, the plaintiff must show that there is a probability of damage, that this is not, simply trivial.

(d) Anton Piller Orders

In certain cases, the courts in the United Kingdom issue orders *ex parte* on the application of the plaintiff after a hearing in camera & in the absence of defendant, to order the defendant or the occupier of his premises to allow the plaintiff & his solicitor to inspect the defendant’s premises. The order permits the plaintiff’s solicitor to take possession of infringing copies & documents & other relevant materials or
require the defendant to keep infringing stock, thereby preserving or securing the evidence. The order is called as ‘Anton Piller Order’ named after one of the first reported cases in which such an order was issued.

This order is not a search warrant. It only permits entry & inspection by permission of the defendant. Entry without defendant’s permission in defendant’s premises would be a trespass. But the defendant is ordered by the court in personam to give his permission with the result that if he doesn’t do so, he is in contempt of court, but the plaintiff still has no right to enter without defendant’s permission.

Conditions for making Anton Piller Order
This order can be issued only in the most extreme circumstances. It is frequently accompanied by a Mareva injunction. The combination of both the orders could have a drastic effect on the defendant’s business. Thus, three conditions must be satisfied before the court issues the order. These are as follows:

1. The plaintiff must prove that he was having an extremely strong prima facie case;
2. The plaintiff must prove that he has suffered, or is likely to suffer very serious & irreparable damage if an order is not made; and
3. There must be clear evidence that the defendant has in his possession incriminating documents or things & that there is a real possibility of its being destroyed by defendant before & after the inter partes application is made.

If the order is misused by the plaintiff or his solicitor, the defendant is entitled to claim damages from the plaintiff.

(ii) Compensatory remedies
Compensatory civil remedies for the infringement of copyright are of three types which are as follows:

(a) Damages
Damages are awarded to restore the plaintiff to his position before the infringement of his copyright. Thus, such damages are considered as compensatory. The infringement of copyright is considered as a tort & it is the principle of tort law that damages should be compensatory. Damages in tort aim to restore the victim back to his position before the tort. If the infringement of copyright is established, damages are presumed. Nominal damages are always awarded where a legal right has been infringed irrespective of the actual damage. Many factors are taken into consideration to assess the damages, e.g., diminution of the sales of copyright owner’s work, or the loss of profit which he might otherwise have made.

In Microsoft Corporation v. K. Mayuri, the court held that in cases where blatant infringing activities of the defendant are found, damages can be awarded under the following three heads:

i. Compensatory/ Actual damages
Actual damages means the damages which the plaintiff actually suffered because of the infringement of the plaintiff’s intellectual property rights by the defendant.

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ii. Damages to goodwill
Such damages are awarded on account of undermining the plaintiff’s goodwill & reputation in the market as a result of unauthorised counterfeiting by the defendant of the plaintiff’s product.

iii. Exemplary/ Punitive damages
They are awarded to deter the wrong-doer & the like-minded from indulging in such unlawful activities.

(b) Damages for conversion/ delivery up
Section 58 of the Copyright Act, 1957 provides that all infringing copies of any work in which copyright subsists, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of possession thereof or in respect of the conversion thereof:

Provided that the owner of the copyright shall not be entitled to any remedy in respect of the conversion of any infringing copies, if the opponent proves—
(a) that he was not aware and had no reasonable ground to believe that copyright subsisted in the work of which such copies are alleged to be infringing copies; or
(b) that he had reasonable grounds for believing that such copies or plates do not involve infringement of the copyright in any work.

Section 59 provides that the remedies of claiming recovery of possession of infringing copies or damages for conversion thereof are not available in respect of the construction of a building or structure which infringes or which, if completed, would infringe the copyright in some other work. The remedies of damages for copyright infringement and for conversion, are cumulative & not alternative. The court may provide both the remedies in the appropriate cases.

(c) Account of profits
In the interest of justice, in appropriate cases, the defendant may be required to account to the plaintiff for profits made from wrong doing such as the infringement of copyright. Thus, the plaintiff has the right to require the defendant to account for the profits made by him by the infringement of former’s copyright. This is not a notional computation as with damages, but an investigation of actual accounts. The account is of net profits, that is, the sale price of infringing article as deducted by the manufacturing & delivery cost.

A plaintiff has the right to opt for damages or for an account of profits. He cannot claim both an account of profits & damages. The basis on which an account is ordered is that there should not be any unjust enrichment of the defendant & that the defendant should be deprived of any profit which he earned by wrongful acts committed in breach of the plaintiff’s right.

The plaintiff shall be refused an account of profits, if there are no profits. In such a case the plaintiff may opt to claim damages & he shall be bound by his choice once made. The difference between damages & an account of profits is that by the former the infringer is required to compensate the party wronged for the loss he has suffered whereas by the latter he is required to give up his wrongful
gains to the party whose rights he has infringed. Section 62 provides that every suit or other civil proceeding for the civil remedies arising in respect of the infringement of copyright in any work or the infringement of any other right conferred by the Copyright Act, 1957 shall be instituted in the district court having jurisdiction.

2. Administrative Remedy
For preventing importation of infringing copies in India, the Copyright Act, 1957 provides an effective & quick administrative remedy to the owner of copyright. Section 53 of the Act provides that the owner of any right conferred by the Act in respect of any work or any performance embodied in such work, or his duly authorised agent, may give notice in writing to the Commissioner of Customs, or to any other officer authorised in this behalf by the Central Board of Excise and Customs,—
(a) that he is the owner of the said right, with proof thereof; and
(b) that he requests the Commissioner for a period specified in the notice, which shall not exceed one year, to treat infringing copies of the work as prohibited goods that are expected to arrive in India at a time and a place specified in the notice.

The Commissioner, after scrutiny of the evidence furnished by the owner of the right and on being satisfied may, subject to the provisions of section 53(3), treat infringing copies of the work as prohibited goods that have been imported into India, excluding goods in transit:
Provided that the owner of the work deposits such amount as the Commissioner may require as security having regard to the likely expenses on demurrage, cost of storage and compensation to the importer in case it is found that the works are not infringing copies.

When any goods treated as prohibited have been detained, the Customs Officer detaining them shall inform the importer as well as the person who gave notice of the detention of such goods within forty-eight hours of their detention.

The Customs Officer shall release the goods, and they shall no longer be treated as prohibited goods, if the person who gave notice does not produce any order from a court having jurisdiction as to the temporary or permanent disposal of such goods within 14 days from the date of their detention. Section 53(1) of the Act empowers the Registrars of copyrights to make an order prohibiting the importation into India of copies of a copyrighted work made outside India which, if made in India, would infringe copyright in the work, on the application of the owners of copyright in such work, or his duly authorized agent, after making such inquiry as he deems fit.

In Gramophone Company of India Ltd. v. Birendra Bahadur Pandey and Others472, the Supreme Court held that the word import in sections 51 & 53 of the Act meant bringing into India from outside India & that it was not limited to importation for commerce only, but included importation for transit across the country.

3. Criminal Remedies
The copyright owner can bring criminal proceedings against infringer. This is also

472 AIR 1984 SC 667.
called as criminal remedies. The criminal remedy is different & independent of other remedies & can be availed simultaneously to prevent further infringement & punish the infringer. The pendency of a civil suit does not justify the stay of criminal proceedings in which the same question is involved. Besides, a criminal complaint cannot be dismissed merely on the ground that the dispute is civil in nature.

Knowledge or mens rea is an essential element of the offence. Sections 63 to 70 of the Act deal with offences relating to copyright. Section 70 of the Act provides that no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence under the Act.

Section 63 provides that any person who knowingly infringes or abets the infringement of—
(a) the copyright in a work, or
(b) any other right conferred by the Act except the right conferred by section 53A shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 3 years & with fine which shall not be less than Rs. 50,000/- but which may extend to Rs. 2 lakhs:
Provided that where the infringement has not been made for gain in the course of trade or business the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees.
However, the construction of a building or other structure which infringes or which, if completed would infringe the copyright in some other work is not an offence and thus not punishable.

Under section 63A of the Act, for the second and subsequent convictions, the minimum term of imprisonment is enhanced to 1 year & minimum fine to Rs.1 lakh which may be relaxed for adequate and special reasons to be mentioned in the judgment where the infringement was not made for gain in the course of trade or business. However, there is no change in the maximum punishment.
The offence under section 63 of the Copyright Act, 1957 is a non-bailable offence. The provisions of section 438 of the Criminal Procedure Code, 1973 can, thereof, be applied in respect of offence punishable under section 63 of the Act.

Knowing use of infringing copy of computer programme
A new Section 63B has been inserted by the Copyright (Second Amendment) Act, 1994. It provides that knowing use of infringing copy of computer programme shall be an offence, under which the offender is punishable with imprisonment for a term which shall not be less than 7 days but which may extend to 3 years and with fine which shall not be less than Rs. 50,000/- but which may extend to Rs. 2 lakhs. But, where the computer programme has not been used for gain or in the course of trade or business, the court for adequate and special reasons to be specified in the judgment, not impose any sentence of imprisonment and may impose a fine which may extend to Rs. 50,000/-.

Seizures of infringing copies by police
Before the enactment of the Copyright Amendment Act, 1984, seizure of infringing copies by police was possible only after a magistrate had taken cognizance of an
offence relating to infringement under Section 63 of the Act. Also, such seizures could only be of infringing copies and did not extend to plates used for making infringing copies.

The Copyright Amendment Act, 1984 had widened the powers of the police. After the amendment, Section 64 lays down that where any police officer not below the rank of sub-inspector of police is satisfied that an infringement or an abetment of infringement of copyright in any work of has been or is likely to be committed, he may seize without any warrant all copies of the work and all plates used for the purpose of making infringing copies of the work, wherever found. The copies so seized must be produced before a magistrate as soon as practicable.

Section 64 further provides that any person having an interest in any copies of a work, or plates seized may, within 15 days of such seizure, make an application to the Magistrate for such copies, or plates being restored to him and the Magistrate, after hearing the applicant and the complainant and making such necessary inquiry, shall make such order on the application as he may deem fit.

Delivery of infringing copies to the owner of copyright
Section 66 of the Act provides that in a criminal proceeding, the Court may, whether the alleged offender is convicted or not, order that all infringing copies of the work or all plates in the possession of the alleged offender, be delivered up to the owner of the copyright or may make such order as it may deem fit regarding the disposal of such copies or plates.

Punishment for contravention of section 52A
Section 52A provides that it is compulsory to provide certain information on the sound recordings or video films, regarding the name and address of the person who makes such sound recording or the video film; and the name and address of the owner of the copyright in such works, etc. Section 68A provides that any person who publishes a sound recording or a video film in contravention of the provisions of section 52A shall be punishable with imprisonment which may extend to 3 years & shall also be liable to fine.

Appeal
Section 71 of the Act deals with the provisions regarding the appeals against certain order of Magistrate. It provides that any person aggrieved by an order made under section 64(2) or section 66 may, within thirty days of the date of such order, appeal to the Court to which appeals from the court making the order ordinarily lie, and such appellate court may direct that execution of the order be stayed pending disposal of the appeal.

Effectiveness of the remedies for the Infringement of Copyright in India
The remedies for the infringement of copyright in India are not completely effective as there are many problems which made them ineffective. The effectiveness of the remedies for the infringement of copyright in India can be analysed as follows:
In civil remedies, the remedy of damages is effective when the loss suffered by the plaintiff is an economic loss as only the economic loss can be compensated by way of damages. The harm other than economic loss cannot be compensated by damages. Thus, the remedy of damages is not effective in such a case as the damages cannot restore the plaintiff to his original position if the plaintiff has suffered harm or injuries other than economic loss. They also do not compensate for the time wasted, inconvenience, & stress caused in litigation. The remedy of injunction is effective as in certain circumstances it can effectively prevents further damage to the plaintiff. But it is ineffective also as it cannot compensate the plaintiff for any loss already suffered. In R.M. Subbiah v. N. Sankaran Nair,\textsuperscript{473} the Madras High Court held that injunction being an equitable remedy, which is granted by a court in exercise of its judicial discretion has to be considered from various facets which arise from a particular set of circumstances in each case. There may be cases in which the grant of an injunction temporary or permanent will only meet the ends of justice & an alternative safeguard for the preservation of the rights of the challenging party cannot at all be thought of. The owner of copyright wants speedy & effective remedy to prevent further infringements of his copyright and further damage to his business and cannot afford simply to wait for years until the full trial takes place. As a result, the law provides interim relief to the plaintiff by way of grant of interlocutory injunction. The plaintiff who gets an interlocutory injunction has tremendous advantage because the defendant is prevented from doing further infringement of his right. The grant of this remedy is within the discretion of the trial court. The discretion exercised by the court is a judicial one which is governed by rules. It is not arbitrary, but legal and regular. One of the main difficulties with pursuing civil remedies is the cost involved in it. There incur huge amount of cost in litigation for availing civil remedies. Also the cost awarded by the court is lesser than the actual cost incurred by the complainant. Also the people refrain from approaching court for availing civil remedies due to heavy expenses incurred in litigation. This made the remedies ineffective. The effectiveness of any remedy also depends on how expeditiously the remedy for the infringement of a right is provided to the concerned person. In the judicial system of India, there causes delay in giving the judgements by the courts. Thus, this made the remedy ineffective. Also the judges of the courts do not have the expertise knowledge of the intellectual property rights. This also affects the effectiveness of the remedies badly. In India, there are no separate tribunals especially established for the purpose of dealing cases related to the intellectual property rights. If such tribunals are established in India, then remedies can be provided to the concerned person expeditiously.

From a particular point, criminal remedies are more effective than civil remedies as the former can be disposed of quickly. Besides, criminal proceedings directly strike at the honour & social status of an infringer, as a result of which sometimes he comes for a settlement out of court to save his reputation. The criminal remedies cause a deterrence which has the effect throughout

\textsuperscript{473} AIR 1979 Mad 56.
the market which cannot be brought about by initiation of civil litigation. Though the Copyright Act, 1957 has provided for enhanced punishment for second and subsequent offence, there is only a slight increase in punishment for second and subsequent offence. The penal provisions of the Act should be made more deterrent for preventing the infringement of copyright.

**Conclusion**
Copyright is an exclusive right of the author of the original work over his work. In case of infringement of copyright, there are three remedies available which are civil, administrative and criminal remedies. The remedies for the infringement of copyright in India are effective to some extent. There are some problems which made the remedies ineffective to some extent. Thus, appropriate steps need to be taken for the effective enforcement of the rights of the owner of copyright.

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WOMEN AND LAW

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ABSTRACT
Gender justice a bone of contention cover subject of wide variety and remains a key factor in prosperity of any civilization. The research though purports to describe the transition which has taken place in law concerning women and at the same time contemplate the result on women per se. Each point is contextualized to depict its impact on contemporary time and state of rights conferred on women.

What usher in a change is of interest and mechanism which bring about change are pivotal in this research. Their bearing on contemporary times is also discussed in an elaborated manner.

Current legal principles are examined on touchstone of various societal aims and corresponding defects in laws which are plaguing society due to its notional value rather than actual as perceived.

History of personal law and its intimate relationship with women rights in contemporary times. How the British era influenced the legal system of India. Transition in law concerning women on chronological basis is discussed. How the system existing before based there law on more coherent rationale then what exist today.

Changes in personal law post -independence are discussed specifically of hindus whose personal are overhauled completely and its effects on women are discussed at length. Change in economy and its impact on women
Segment dedicated on transition in law concerning women of minority community and current dynamics which concern them are also discussed.
And at last findings and opinion formed after completion of the topic.

INTRODUCTION
Women being equal constituent of human species remain a force to reckon for a flourishing society. It is this recognition through entitlement of rights and the legal footing on which women stands decides how progressive a society is.
To endow upon modern society of progressive and more towards approaching gender justice is erroneous assumption as a comparative study shows primitive culture and laws being more women oriented then what are today.

Sphere of law concerning women mainly comprises of social and economic rights and curing of infirmities. Specially in society such as Indian which is agrarian with a feudal concept of land system which mainly tramples upon women rights which emanates from a patriarchy system.
The patriarchy system gained a boost over the reign of British administration with evolution of legal principles on lines of women bias and promotion the ulterior motive to keep intact their rule.
Indian society pluralistic and diverse in culture also appears to differ in various rites for essential custom in one’s life.

In the coming chapters some of these points are dealt with in detail with subjects integral to law regarding women.

To depict transition is main purpose as it has happened with its consequence.

WHAT HERALD A CHANGE IN LAW CONCERNING WOMEN

Mechanism which brings change in law is of particular interest in this chapter while the subject of women and law concerning them remains intricate of this aspect. A study of legal historical facts is necessary to chart out a course which is followed.

From historical perspective change in law with regard to mechanism can be segregated in two parts period of state intervention and period of non-state intervention that is period from when state came into operation for purpose of establishing and enforcing laws regarded today as personal and at that point of time as religious. Whole point to postulate the transition by taking state intervention as a parameter is to depict transition in justice system and change in society state initiated law making and it’s enforcement which are glaringly manifested today and to depict the pitfalls of such mechanism as is in today and the one which existed in former.

Period of non-state intervention dates back to primitive time inception of ancient civilization and law in this era emanated from vedas which considered as religious in scheme contained many principles for social and economic regulation for society which is paramount to women across era.

Later in period of smriti and post smriti period laws were elaborately enumerated on subjects including marriage, property devolution, stridhan and other women oriented laws. Among one such prime importance and great reverence was of in smriti period and commentaries of vijaneshwar and jimuthvana in post smriti period.

Interesting point arise if epoch non-state intervention existed which authority did enforced the laws? Answer lies in here to our both purpose of knowing which authority did enforced laws and our primary question of what usher in a change in law.

As laws in that epoch were in nature of acceptance. That is there was no authority which was determinate and obedience was owed to it. Reverence for law originated from divine authority which they wielded. Duty was cast upon smritikars in former period and on commentators or nibandkars to expound law as per need of society. To initiate new legal reformation process for anything they perceived as something ought to be change several such instances are manifested.

Besides mechanism stated above there were several other authorities such as king and social organization of authority to outcast someone from society.

Coming to later epoch of state intervention which is of more importance to contemporary time as it laid down genesis of such system as is in operation today.
Inception of era starts with advent of English men and establishment of their rule in India. Until India was under the administration of east India company religious laws which included social and economic rights of women were left untouched it is after the crown took to reign directly over India that a clear practice was manifest to influence personal law of Indians.

The English method of legislating by definite authority and another to enforce it though that to come in effect required uniformity and rigidity in law enforced over all subject.

Corollary to the above proposition makes the authority solely responsible for ushering in change as to meet women their due. The basic principles of English legal authority in matters concerning women differed as their rhetoric was to promote women equality but was taken over by their ulterior motive to bolster patriarchy as can be seen in several instances which points to the English authorities had been in collusion with male patriarchs to promote their mutual interest.

After India achieved freedom from the colonial rule new legal principles got laid for women empowerment under constitution and several other laws though it is under scrutiny as how much reformation has taken place with these new foundation.

In today context it can be said that several other players have also come into as to postulate before society what is required course to taken among them are women’s right activists, NGO and many more such reformists.

The English influenced legal system place onus on the modern legislature to meet the ends of women’s cause and equal onus is also placed on the courts to enforce what are mandates to abolish women discrimination. While studying both the epoch we come to as what precisely usher a change in law with to contemporary time.

IMPACT OF IMPERIALISTIC LAW AND POLICIES ON PREVALELING LAW IN INDIA
Impact of imperialistic policy is two pronged. First is on the legal order and societal circumstances which were existent before the start of English introduction of legal system to Indian society. Second is the one which tries describe the legal order created by English authorities have on today’s regime of personal law.

Starting with the former era which existed before the establishment of legal order influenced by English legal system. Hindu law being pluralistic at that point of time had applied exclusively to 3 level of hindu caste hierarchy 4th and last that is the shudras were regulated by thereown customs. That aspect is treated in the later part of the chapter. Another categorization in hindulaw it’s application according to region likewise we have prominent schools such as mitakshara and dayabhaga school of hindu law.

Mainly differ in their law regarding succession. Except above area of law, the law was similar in every other field. It is pertinent here to note that law concerning women remained law in social and economic arena that is strictly personal laws.

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with this in mind personal law is approached from a women’s perspective. 
Starting with economic rights which are aligned or rather dwells in property rights which stood as property rights of women were divided in two shelves stridhana and property acquired by a woman by inheritance. While it is also been described the tinkering done by English authorities which was detrimental to woman’s limited property rights.

stridhana is woman’s property it is assigned different meanings by smritikars prominent among them is manu who defined stridhana.

He divided stridhana in six different types:

1. Gifts made before the nuptial fire, explained by katyayanna to mean gifts made at the time of marriage before the fire which is the witness of the nuptial.
2. Gifts made at the bridal procession, that is, says katyayanna, which is the bride is being laid from the residence of her parents to that of her husband.
3. Gifts made in token of love, that is, says katyayanna, those made through affection by her father-in-law and mother-in-law, and those made at the time of her making obeisance at the feet of elders.
4. Gifts made by the father;
5. Gifts made by the mother; and
6. Gifts made by the brother.

With every other development in stridhana was somewhere around these principles of manu. Till the time when English legislative authorities tinkered with it and amended it as to detriment of Indian hindu women which is manifested from following points: Stridhana which is exclusive women property and as such it devolved upon female heirs only of a female hitherto English law made male lineage an equal in stridhana. Stridhana was later made limited to include minimal property in its purview and major part of it was amended so as to come under inheritance.

Above mentioned rules of smritis were applicable only to upper 3 levels of hindu caste hierarchy the last community which was shudras had their own law which was customary in nature which accorded to women more liberty. Regarding women almost in every part where they resided the custom for marriage was that they had monogamy system of marriage in which divorce was allowed though it was a consequence of economic necessity as women of shudra community were mainly wage who had the responsibility to keep intact the financial stability in house second marriage was allowed but before the termination subsisting marriage another radical custom as it had entail a more valid claim for a subsisting marriage to help the cause of a woman. Maintenance was a practice which was not present in shudras as economic viability was not sufficient to pay amends for a woman. With practice of second marriage among women been prevalent it was appropriate that there exist some rule on fulfillment of which second marriage can take place some logical principles were that spouse must remain absent from matrimonial home for considerable period minimum 7 years, violence on perpetual basis inflicted on a

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474 Manu, IX, 194.
woman and even the termination of marriage on mutual consent was prevalent. As for property devolution system in shudras women had their own share in property. In region of Malabar succession was based on matrilineal system. There are several other instances of equal share of property for women in shudra caste. This explicitly explains the fact that laws were not applied any other rationale but according to the region where subject resided. One such incidence is of parsi community where parsi were accorded with status as state subjects after they accepted the stipulated local custom as binding on them.

Flip side of this entails some region where women were not conferred with even minimal economic and social rights, that is there rights with respect marriage and property is next to none. Instances where economic feudal system inherently patriarchal in nature had such customs. In Punjab to save which dominantly agricultural had this where a woman if her husband dies has marry somebody in blood relation to the deceased such was the position of women marital rights coming to their property rights they did not even had nominal property rights.

Pitfalls in legal frame work of the period which existed before the British influenced the Indian legal system is that legal order was to informal, to meet out justice in a fair and singular manner. Though principles were quite clear the second reason behind demolition of legal order was English administrators arbitrary whim at first when the crown took over to ring directly over India an assurance was given that there will be no interference with religious and personal of British-indian subject this was a mere hoax. As to choose which subject could be included in personal law was to be decided by English authorities they gradually started legislating on such subjects as were necessary for their motive for viable and effective administration and to keep intact their sovereignty this is manifested by their enactment of Indian contract Act,1872 which at a point of time was included in personal law later they gradually encroached upon every other subject to be included in and legislated on.

While in later stage when the British government finally encroached upon laws which are strictly personal in nature by legislating upon various subjects which aim under a purview of personal law it started with named as object to eliminate or abolish various social issue such as sati system and then came to caste disability act which overhauled the whole legal order. Transition put in by the then legislation purport to change the personal law by two ways which were as follow. Firstly, it assured in the rigidity of the state intervention on pattern of English Legal System. Which meant that the law as to be more singular in nature or for that matter they must be uniform so they be specifically applicable to prescribed person. The rationale behind this preparation was that without these substantive work codes would find difficult to interpret and enforce the law. As is a historic fact that in the initial face court which included high court in presidency town found it difficult to adjudicate so they were aided by priest, bhramanpandit if parties involved were hindu and qazi in case of muslim, if in case...
one party was Muslim and other one was Hindu law of defendant was applicable. The second phase of transition which was put forth by the then Indian legislature and laws were started applying personal laws foregrounderg it on the basis of religion which have adverse effect till date. The previous principle to give effects to laws as per region was done away with. To adjudicate matters on personal laws including social regulation such as marriage laws, divorce, maintenance and economic regulation such as inheritance rights and rules of property dissolution.

The existing legal principle were translated in English which could help in codifying law duty was assign to Brahmins which colored them with inherent bias so as to cause of patriarchy system. To fit in to the rigid mould of English legal system total overall of adjudication process was done which caused serious injury to the cause of justice especially for women in existing Indian society.

Another impact which English law had on the Indian legal is that for the first time certain acts was recognized criminal offence which were against women. This had several effect first is that such acts being offence was hard to establish which from women perspective was a hindrance to their justice delivery system and other is that it entail a deterrent effect on perpetrators as well as on future offenders retribution was also a thought of while designing punishment for acts against women.

TRANSITION IN LAW WOMEN WITH REGARD TO POST INDEPENDENCE ERA

Law in post-independence era was kicked off by laying down constitution of India as its prime legal code to govern the country. Constitution had serious impact on women’s cause, some of them are enumerated below. It guaranteed a fundamental right to equality which says “Prohibition of discrimination on grounds of religion, race, caste, sex or birth place.” Article 14 &15 constitute right to equality while former embodies rule of law the latter place onus on law to disseminate equality on basis of gender of sex.

One sphere of rights which evolve in this period was right in political arena is to contest and importantly their quest to achieve their rights to vote and to elect which India gained voice through independence movement. In which luminaries such as Gandhiji, Sarojini Naidu, Pandit Jawaharlal Nehru voiced the opinion for more participation of women in political discourse and for their right in electing government.

Above mention rights explicitly talk about gender equality. There are several other rights which are expanded to further the cause of women.

Monumental work of transition which took place in this period was codification of Hindu law which had its own effect as- Firstly, was that it based codification of personal law on religion another was that it provided impetus communal voices and communal polarization in country.

Secondly, it prove to disadvantage of women belonging to every religion as the legal framework which had been retained had an English touch to it which inherently supported patriarchal system and prove to a disadvantage of women of all religion.

\[\text{475 Article 14, Constitution of India, 1950.}\]
Though overlooking some of its lacuna there are some radicals steps which purports to provide women their place in society through some social and economic reforms in law mainly in hindu law.

Let see what are the legal provision laid down by hindulaw and which among them stand out as to women empowerment in social and economic sphere of life.

As for personal law with regard to marriage transition done by codification of hindu law were some radical and many were conventional. The law concerning marriage as its existing presently :-

(1) It treats marriage as sacrament entailing bondage or a union which is to persist forever.
(2) The codification laid some rights or ceremonies which are pre-condition for a marriage to subsist.
(3) The main lacuna in law is that it applies to a large number of people i.e. it treats many people as hindus which for other practical purpose treat themselves as non-hindus.

The problem stems in here because of the reason that the hindu law postulate the essential ceremonies which are to be performed. Those in reality are not even ceremonies of secondary nature in many sects in this bunch of hindus as specified by Hindu Marriage Act 476. The effect of this flaw entails a detriment to women whose rights under a marriage are curtailed because of non-subsisting marriage. Loop holes aside some radical provision which the hindu marriage act brought in effect are as follows:-

(1) Irretrievable breakdown of marriage-contemplation of marriage ought to break.
(2) Instrument to terminate a marriage which cannot subsist.

Concept of divorce as introduced by marriage act give a big relief to hindu women. Though conceiving an idea as of divorce in a society where marriage was considered an unbreakable union was per se laudable but also timely, as it was well known fact that in Indian society social sphere of life is always a dominating one for woman, as such marriage has to seen in practicality. Though it was an alien concept but as soon after years of its operation it well suited in Indian society, in especially for Indian women.

For maintenance- the codified law provides or maintenance to be provided by husband to his estrange divorced wife in form of monthly alimony.

The most clearing reform for women was in legal rights in property. Abolition of prevailing law and codification paving way for new law relating to succession. The new law conferred substantial rights for women in respect of inheritance of property. Salient features of Hindu Succession Act 1956 are as follow:-

(1) Equal rights of women in property
(2) Abolition of limited right of women in property.
(3) As for succession to property of intestate deceased husband women is given an equal share in property.
(4) Women are entitle to equal share of property in their father’s property.

476 Section 2, 1955.
(5) Women are conferred with status as first priority of coparcener. These were some radical provisions from a women reformative perspective. Now we will look at some provisions which had detrimental effect on prevailing rights of women which are as follows:

Certain region of the then Indian society such as Malabar region where system of inheritance was matrilineal which means property devolved upon female heirs and other southern region area where same system of inheritance was followed was dealt a blow. Apart from property rights economic domain of rights was also enlarged with mammoth advance in Indian economy which had certain effects on women rights regime which are, with a large industrial development underway women were expected to join the workforce with which the need of law in this regard arouse. With such demands many legislation got passed which had aspect of women right to them. Such as factories Act,1947.

With the advance in social development there develops new evils in process. Though the period of independence more autonomy for women yet they remained majorly in household where developed new distortions such as violence against women already prevailing practice of child marriage dowry death bride burning. For these social evils and grave issues concerning women legislative and judicial measures have taken.

TRANSITION IN LAW CONCERNING WOMEN OF MINORITY COMMUNITY

All this while in preceding chapters research was mainly centered on religious majority it was apt address a chapter dealing with transition in law concerning women of minority sects. To start with, among minority muslims are prominent minority in India and the one to draw attention towards Muslim law is regulated by shariat but it mainly contains ethical principles. It is fiqh which contains legal and jurisprudential aspect of islam, fiqh is body of law which consist of major sources of islamic law. Koran, sunna, Ijma and Qiyas Koran is divine revelation of prophet through caliph particularly through third caliph Osman it is the touchstone upon which every other principle is tested and forged after that. Sunna has many meanings but in contemporary times it means traditions and customs of schools. Third is Ijmawhich means consensus among legal school to carve out a new legal doctrine to cope with changing times. Qiyas is drawing new legal principle through making an analogy from Koran. There are other things which are not formal source of Islamic law yet are instrumental in its formation such as Fatawas and judicial decisions.

Coming to schools of muslim law they are divided under two heads sunni and shia which are further divided in hanafi, maliki, shafii and hanbali they come under sunni school while ithnaashari and ismaili school are of shia school of law.

Advent of Islamic law in India is of a later date then those who belief in islam religion as first migration to India of Islamic followers was through trade routes of Arabian sea to coast of Malabar they did not follow the shariat law. They followed the local customs of Malabar region. Islamic law came India through the sultanates of Afghan and Turkish rulers. The muslim
sultan who invaded were hanafis. They relied upon ullamas to be religious and legal arbitrators. The new sultanates followed the basic law of islam, the shariat, as interpreted by the royal court. Qasi were appointed to adjudicate law.

Women’s right in Muslim law are far more then what they are in Hindu law starting with marriage in Muslim law it is considered as a contract between two parties which had it’s own effects.

Though there is a right of polygamy under Islamic law yet if there exist already subsisting marriage contract another marriage cannot take place without termination. With marriage being a contract women has a Valid proof of marriage and there is no other requirement to be fulfilled like ceremonies or rites to make a valid marriage. Another safeguard for women under Muslim law is that before a marriage certain amount is stipulated under the contract to be paid by husband in case of termination of marriage which is called mehar. There are several other rights which were briefed by ameerali477:

1. The husband will not contract a second marriage during the subsistence of the first;
2. The husband will not remove the wife from conjugal domicile without her consent;
3. The husband will not absent himself from the conjugal domicile beyond a certain period;
4. The husband and the wife will live in specified place;
5. Certain amount dower will be payable immediately after marriage or within a stated period;

6. The husband will pay the wife a fixed sum of maintenance;
7. The husband will maintain the children of the wife from her former husband; and
8. The husband will not prevent her from receiving visits from her relations whenever she likes;

Rule regarding inheritance is not more than one third share can be given to a woman either through testamentary or intestate succession.

Transition in Muslim law through legislation has not been much except those which included larger public interest change in Muslim law in India is more by judicial interpretation in some landmark cases.

In contemporary times there is opinion in general that to reduce the plight of women there must be an overhaul of personal law replacing them with a code which could be applicable on every one. Apart from fact that much would depend upon the substance that would it affect rights of women The idea entails one law for the minority community that is they would be at loss because what is manifest from various case till date is that to establish that a valid marriage subsists is the most contentious issue and by effectuating monogamy we jeopardize interest of woman whose task is to establish that she is the second or third wife which if not found valid will have its grave consequence on those women.

CONCLUSION
while writing at length about this topic which is so glaringly manifested to anyone. One comes across that is inherent in nature that there always be a male dominant society and we come across of civilizations in which women had a say at the highest level.

477 DIWAN,P., Law of marriage and divorce, Allahabad: wadwa&company, p62
Changes are inevitable and must be made to curb infirmities which impede development of any particular. In consequence it also hinders development of whole society. To testify this a survey conducted in 2018 shows there exist extreme inequality in India which if cured can add up to 770 crore to annual GDP by 2025.

Collective interest aside every human individual is entitled to fundamental right which must be conferred and be made to realize it effectively could add welfare in its real sense.

Institution which have contributed till now to women’s cause must keep that spirit alive. One such institution is judicial system which has contributed to women’s cause irrespective of religion or caste.

Though transition has taken place it is safe to say there is much to be covered to it a equal society

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BASEL BAN AMENDMENT: A PROTOCOL TO SAFEGUARD THE WORLD

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ABSTRACT

With passing time it has clearly become evident that the developed countries are trading their hazardous waste to the developing countries and many by illegal means under the objective to either recycle it or to properly dispose it off. This is all happening because with all the upcoming regulation it has become difficult for any business to survive moreover the process to dumping the waste in correct manner have become expensive hence the developed countries find a cheap way to get rid of the waste. This process of getting rid of hazardous waste does have negative effect on many of the developing nations moreover it is morally wrong to do so. This was the reason why the basel convention in first place came up but with coming time it is concluded that it is becoming weak in its implementation. Hence the main objective of this study is to examine that whether the Basel convention is even capable to taking care of countries that are being affected by the illegal dumping of the hazardous waste. The study would help in strengthening the awareness of the topic moreover it would try to point out the points which could help the convention to become successful in its implementation.

INTRODUCTION

With all the innovation and development taking place, with new technology and production of goods and services, there has been an increase in hazardous waste which is the threat to the environment as well as the population of the world. 478 The waste produced is expensive and difficult to dispose for the industries and hence the burden significantly lies on the government to dispose of all the waste produced. 479 This is usually carelessly handled which in turn lead to environmental degradation. To cut down the expense and to get rid to this waste developed countries used to send the waste to the developing country. So as to prevent such exports and prohibit all such activities a convention was adopted in 1989, "The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal". The treaty came into effect in 1992 with the major goal of “restriction of transboundary movements of hazardous waste except where it is perceived to be in accordance with the principles of environmentally sound management”. 480

The major objective of this study is to see whether the Basel Convention is able to achieve its objective in preventing the world to become the dumping ground.

The outcome of this paper would strengthen the cause of this topic and would try to give the suggestions or change in strategies which could lead to effective implementation of this Convention.

The first part of the research paper deals with the legal framework within which this Convention works with the history of the Convention.

The second chapter tries to analyse the amendment which took place in 1995 and was popularly known as “Basel Ban” and how it changed the positioning and applicability of the treaty.

The third chapter will focus on the existing literature that is relevant to the research that proposes the question as to whether the Basel Convention can adequately protect the developing world from the rich nation's hazardous waste.

The fourth chapter tries to find the question whether the treaty was able to establish a liability mechanism.

The fifth chapter deals with proposing some suggestions which can help its better implementation.

CHAPTER I: THE LEGAL FRAMEWORK WITHIN WHICH THIS CONVENTION WORKS WITH THE HISTORY OF THE CONVENTION

This treaty was framed because of the incidents happened on 31st August, 1986 known as khian sea waste disposal incident where the ship was carrying incinerator ash from Philadelphia in the United States and was alleged to dump half of its load on a beach in Haiti before being forced away.

Another such incident happened in 1988 which was known as the koko incident wherein five ships were carrying 8000 tonnes of hazardous waste were transported to Nigeria in exchange of $100 rent to use a Nigerian farm land.

After all the negotiation the treaty was concluded in 1989 on 22nd March where 32 states became the signatory.

But during second conference in March, 1994 because of the disagreements between the parties an amendment in the provision of treaty was discussed which is known as the Basel ban amendment.

CHAPTER II: THE BAN AMENDMENT

The convention without the ban amendment is just a regulatory body which regulates the import and export of hazardous waste but with the amendment it prohibited the export and import of hazardous waste.

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But the complete ban was incorporated as amendment but could not be put in force because it could not gain the required majority.

During the negotiations and meeting it was seen that African countries and industrialized countries were not at par.\textsuperscript{484} It was debated and with time it was made clear that both the countries would be bringing the political and economical viewpoints.\textsuperscript{485} This gradually took turns into north south debates where the developed countries were using developing countries to excel.

During the meeting the African countries made they very clear that they were looking for a complete ban on export of hazardous goods with that they also needed a liability clause which would penalize the country who tried to illegally export the hazardous waste.

African countries were seeking this kind of help from the external sources because they have realized the fact that there are many countries which do not have the technical, economical and administrative means to enforce the complete ban.\textsuperscript{486}

It is believed by many scholars that the complete ban would lead to better implementation of the convention. Jim Vallette said, “\textit{Banning the international waste trade is one very important step in stopping the contamination of our water, ground and air. Providing waste makers with escape valves, such as export, is moving us in the wrong direction. The only real solution, if these countries decide against becoming party to the toxic crisis, is to reduce waste at the source to stop it before it’s ever produced}.”\textsuperscript{487}

\section*{A. Reason why it is not yet incorporated}

It is said and concluded by several scholars that the north south debate is one of the reason why the ban is not yet into force. The negotiations are happening for numb roof years and will continue to take place because there is no mutual consensus till yet. The economic interest of the members is the one which always overrides the goal and objectives of the convention.\textsuperscript{488}

Moreover there were many industrialized countries which argued that the ban should not affect the ongoing or pending bilateral or multilateral projects and the developed countries directly stated a NO to this amendment because they claimed all their projects were of economic significance.\textsuperscript{489}

There were some countries which were neither supporting African countries and nor supporting the industrialized countries because they believed that the import and export actually helped them to grow economically and bring more opportunities to develop themselves.\textsuperscript{490}

There was theory of \textit{POLYTHINK} given by Redd and Mintz, in which they defined

\begin{footnotesize}
\begin{enumerate}
\item Chasek P.S., Downie D.L. and Brown J.W. Global Environmental Politics. Westview Press, 2014
\item Patricia Nemeth. \textit{Why has the Basel Convention not adequately addressed the transboundary movements of hazardous waste to the developing world?}, Report on UN Sabbatical Leave 2014
\item Ibid.
\end{enumerate}
\end{footnotesize}
polythink as many or different ways to seeing a problem or a goal. And it is because of this polythink there are so many conflict on the enforceability of the ban.491

There are many interpretations of how this amendment could be useful example many developed countries want that convention should allow trade of waste through the process of consent and there are many developing countries which says that there should be no ban when trade of technology or opportunity takes place where there is any scope of development for the countries who are importing. And it is because of this the endless debate is still going and not reaching a conclusion.492

CHAPTER III: WHETHER THE BASEL CONVENTION CAN ADEQUATELY PROTECT THE DEVELOPING WORLD FROM THE RICH NATIONS’ HAZARDOUS WASTE.

The most sincere technique for evaluating the achievement of the Convention would be a measurable investigation looking at worldwide patterns in the volume of global exchange risky waste when the usage of the Convention. Such an analysis of global hazardous waste exchange is however a long way from straightforward because of the trouble of acquiring precise information on volumes, sorts and goals of perilous squander, and is in any occasion past the extent of this paper. But the 2006 Abidjan disaster is one of the occurrences which state the failure of the convention.

B. REASONS FOR FAILURE

1. PRIOR INFORMED CONSENT (PIC)

There are various issues involved when we talk about exporting the waste from the developed countries to the developing countries through the procedure of PIC. The procedure establishes verification of adequate waste management facilities by the importing countries.493 All though this obligation to verify is on both the countries but it does not describe the procedure in which that has to be done.494

In the first place, developing countries regularly do not have the specialized and authoritative ability to lead an exact evaluation of the level of hazard to human living and the condition postured by a specific shipment of waste. Furthermore, survey whether their offices are reasonable. Subsequently they may agree to the importation of a shipment of waste in view of a real however mixed up conviction that they have satisfactory facilities for it’s disposal.495

Second, by putting duty on the experts inside the developing countries to confirm the sufficiency of transfer facilities makes the PIC strategy is powerless against

492 Supra note 9.
manhandle by degenerate officials. In these conditions the PIC strategy is fail to forestall government authorities from intentionally exaggerating their ability to adapt to dangerous waste imports is just a method to secure fundamental income.

2. THE COMPLIANCE COMMITTEE:

The foundation of an effective compliance committee was seen as one of the key points of the Vital Implementation Plan decided at the 6th meeting in 2002. The Conference of the Parties appropriately embarked a Mechanism for Promoting usage and Compliance in 2002. The convention built up an effective compliance Committee which came into force on 19 October 2003.

The reason for failure of this committee is same that of any international convention which is the Committee does not have a command to force corrective measures against defaulting party. The Committee's destinations are to furnish help to Parties to agree to their commitments under the Convention and to encourage, advance, screen and plan to secure the execution of and consistence with the Convention.  

The Committee's powers are restricted to making nonbinding proposals to the non compliant Party with reference to what steps they have to take to guarantee consistence what's more, making suggestions to the Conference of the parties of extra measures it supposes the non compliant needs to take. This is peaceable and community way to deal with requirement is with regards to a general accentuation in multilateral ecological understandings towards arrangement and accord.

3. THE RECYCLING LOOPHOLES:

A basic failure of the Convention is that the meaning of waste is restricted to 'substances or items which are discarded or are proposed to be arranged of or are required to be discarded by the arrangements of national law'. The Basel Action Network, is a critic of what it portrays as the 'recycling loophole', contends that most waste exchange to developing nations that is guaranteed to be bound for reuse or recycling is either 'sham' reusing, where it isn't generally for reusing by any means, however will be dumped or consumed by the importer, or 'dirty' reusing, where the recycling procedure itself will include contamination of nature and hazard to the well being of workers. This has been progressively uncovered by the development in the export of 'e-waste': utilized electronic gear, for example, PCs also, cell phones.

4. THE DEFINITION CLAUSE:

498 Supra note 9.
The Basel Convention defines "waste" as substances or articles that are required to be discarded and in addition the methods for their disposal.

The refinement is expressed on the grounds that there was no genuine distinction between the two classifications of waste in the arrangements of the Convention. The author argued that the class of "different wastes" was included as a trade off between the contradicting parties amid the arrangements. some of the Member States kept up that household waste should not be considered equivalent to the hazardous waste while, others contended that these waste ought not be viewed as dangerous as they were not distinguished as such. It is ought to be noticed that the Convention prohibited the radioactive waste and "waste which get from the scrap of a ship" in view of the way that they are secured by other universal instruments.

CHAPTER IV: FAILURE TO ENFORCE THE LIABILITY MECHANISM

The article 12 of the convention requires the parties to adopt a framework which provides liability and compensation for the damages which arises from the trading of the hazardous waste. The Basel convention did came up with the Basel protocol on liability and compensation at the fifth conference of parties on December, 1999 but till date it is not being enforced.

The Protocol still can't seem to be confirmed as it is a trade off that suits neither the developed nor the developing world. From the point of view of the creating scene, it contains various provisions, which would permit developed nations to escape risk for harm caused by sending out waste to developing countries.

From the point of view of the developed world, the Convention is unsuitable in light of the fact that the base obligation limits it forces are unreasonably high and on the grounds that it copies residential risk administrations, which makes a danger of disarray and high regulatory costs. So while the Convention provided for the foundation of a risk structure, by conceding concurrence on its points of interest it made ready for the current political impasse, leaving a basic component of the lawful structure unrealised.

CHAPTER V: MEASURES TO IMPROVE THE IMPLEMENTATION OF THE CONVENTION

1. Reforming the PIC Procedure

Reforming the Convention should be founded on an understanding that Prior Informed Consent is an deficient strategy with regards to north-south exchange hazardous waste. the answer for this issue

503 Supra note 21
504 See Basel Convention, Article 14.
would be the foundation of an independent body, which would be in charge of reviewing trade or checking the facilities preceding any transboundary development and having energy to concede or deny grants for universal exchange in view of the sufficiency of these offices to agree to ESM requirements.

By ensuring an independent inspecting body seems to be a fair and just way to secure implementation but this method is not enough to safeguard the interest of the developing countries because it does not deals with the problems where in the exporters mislead the importers about the nature of waste which they are trading. The answer for this issue is assessment and accreditation of e-waste before send out, in view of a presumption that all e-waste is in actuality hazardous waste.  

2. **Strengthening the compliance committee:**
At present the committee is not at all successful in achieving the sole objective of facilitation the compliance with the convention hence it is required to be strengthened.
First of all the committee needs adequate funding to carry out its sole objective. The present financial model is based on voluntary contribution which should be replaced by the compulsory contribution. The effectiveness of the compliance committees is not able be achieved because of lack of funds and through this process it could be achieved.

3. **The liability protocol**
The effectiveness of the Basel convention would highly depend on the enforceability of the liability protocol because after such there could be certain enforceability of the convention at present it is just a regulatory provisions which cannot reach any conclusion but can only give guidelines and cannot impose fines and penalties.

**CONCLUSION:**
At present the convention is completely failing in achieving its objective. Moreover the world is being used as a dumping ground by many countries to get rid of their hazardous waste by giving some money. An amendment which implemented the complete Ban was a good idea but it was not able to achieve its enforceability. It did not enjoy the majority support even by the developing countries which are getting affected but do not understand it because of the opportunity which they think they are getting to develop. The how can we expect the support from the countries that are causing this trade of waste. Further the preposition provided in the paper would provide better implementation of the Basel convention the change in PIC procedure would help to ensure that the genuine import and export takes place moreover the independent body would make sure that nobody is fooling about the nature of the waste so that proper disposing facilities can be looked into. The liability protocol would give convention the some weight as no rules can be properly implemented unless there is no penalty clause behind them.

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FEMINIZATION OF POVERTY: HOW ‘PATH DEPENDENCE’ OBSTRUCTS COMBATING GENDERED POVERTY

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ABSTRACT

‘Path Dependence’, i.e., the inclination of Homo Sapiens to continue with traditional methods and measures despite the existence of more effective ones, has long plagued Indian policy making. And so is the case with policies and measures relating to ‘Feminization of Poverty’. This paper attempts to draw attention to the inadequacies of the existing and widely used parameters and policies that are used for the measurement, study and combat of gendered poverty while suggesting substitutes for the same.

This paper is structured into three parts. Part one analyzes the flaws in the existing methods of measurement of poverty in terms of the household as the unit of analysis and argues for individualization of poverty measurement. ‘Tracking the number of people in poverty, as well as those close to poverty and those who move out of or fall into poverty, reveals the success of efforts to overcome poverty. Being able to accurately measure how poverty impacts differently on women and men matters greatly.’ The feminization of poverty is generally seen as an incidence of increase in the number of poor female headed households (FHH). This traditional approach is problematic. Equality of distribution within the household is not an assumption we can afford to make, especially in a patriarchal setup like India. Hence, household income may not serve as an effective tool to measure feminization of poverty as women may not have access to that income. This might lead to ‘secondary poverty’ amongst women in male headed households (MHH) too. The Theory of Cooperative Conflict by Amartya Sen also has a bearing on the issue at hand.

Part two ponders upon the definitions of gendered poverty such as those in terms of income poverty and deprivation of material resources and points out their inadequacies. At the same time, it emphasizes on the need and merits of viewing poverty as human poverty. ‘Women seem to have progressively less choice other than to assume the burden of dealing with poverty and their growing responsibilities have not been matched by a notable increase in agency or personal reward.’ This has been described by Sylvia Chant, a notable researcher in this field, as the Feminization of Responsibility and Obligation and is central to our understanding of gendered poverty.

Also, Amartya Sen’s capability approach becomes extremely important for the comprehensive study of feminization of poverty. Causes of Women’s ‘poverty’ in the capability approach go beyond the lack of income to deprivation in capabilities, such as lack of education, health, and the channels to participate in economic life and in decision-making. While lately, there has been increasing sympathy for viewing poverty in terms of capability deprivation,
and hence the Human Development Index which includes Gender Related Development Index Gender Empowerment Measure and now the Gender Inequality Index, it has not managed to gain the attention of policy makers in India. Besides, even these indices are aggregate indices and hence, manage to hide the flaws in the condition of women and may provide a picture not in sync with reality. We seek to define a better index in this paper. Such an index should include parameters such as consumption and expenditure by the females of a household and should be calculated for various age related and other groups among women too.

Part Three suggests policy alternatives that can be considered and researched upon for designing efficient and holistic policies and institutions for combating gendered poverty. India lacks sex disaggregated numbers and when trends or policy measures are not backed by numbers, there is no benchmark to measure progress and hence, formulation and use of such statistics is the need of the hour. This paper is by no means a complete guide to such statistics but contributes for research on the same. As a first step, age specific poverty rates must be calculated so as to know whether gender gaps are widening among the young or is it a phenomenon that takes place once they age. Also, an Individual Deprivation Measure as against the Household Measure, Gender Sensitive Budgets, greater inclusion for the more disadvantaged women are some solutions that have been given attention in the paper and these merit extensive debate and deliberations among the policy makers.

PART ONE
In this part, the paper underlines the problems with the traditional household approach and the over emphasis on female headed households, which is still widely used as an indicator of feminization of poverty in India.

INADEQUACY OF THE HOUSEHOLD LEVEL APPROACH
The household-level approach assumes that all resources are shared equitably, and all household members enjoy the same level of well-being. This is an assumption which is unrealistic, especially in a patriarchal setup like India. Inequality in the distribution of resources and access to health services is evident in India. It fails to capture the intra-household dynamics of resource allocation and distribution, which may depends on socio-cultural relations of gender, age, race, etc.

‘Based on household-level measure, if in the same household, women consume or spend less than is needed to function properly physically and socially, while men consume what is needed or more, both are still considered to have the same poverty status, either poor or non-poor, depending on the average consumption estimated at the household level. Therefore, the simple disaggregation of poverty counts by sex will lead to underestimated gender gaps in poverty, because additional poor women might be found in some non-poor households.’ This is also known as secondary poverty.

For the well being of women, the capacity to command and allocate resources is as important as the actual resource base in their
households. Therefore, incorporating a perspective on how poverty may be experienced by female members can aid policy makers in the design and evaluation of anti-poverty and livelihoods creation programmes. Since individuals within households can experience different kinds of deprivations, a household level analysis does not give enough information about the interventions that might be most suitable for individuals based on gender, age etc. A measure which captures the intra household dimensions would include the measurement, at the individual level, of asset ownership, and individual access to formal financial services, amongst other parameters. This paper will suggest a measure with certain such parameters in Part Three.

THEORY OF CO-OPERATIVE CONFLICT

The nature of intra-household interaction and their command over resources can be also be explained through Amartya Sen’s Theory of Co-operative Conflict. The members of a household cooperate so far as cooperative arrangements make each of them better-off than non-cooperation. However, many different cooperative outcomes are possible in relation to the distribution of goods and services amongst the members. The outcomes depend on the relative bargaining power of household members. A member’s bargaining power would be defined by a range of factors, in particular, how well-off s/he would be if cooperation failed. Women do not voluntarily forego leisure, education, food and their share of other commodities and opportunities in favor of male members, but do so due to their inherent weak bargaining positions in the household. It obstructs their means to achieve.

To exit from a marriage is more costly for women than for men in the Indian society, a fact which weakens women in intra-household bargaining over division of labor, consumption rights, freedom of movement and freedom from domestic violence. More significantly, it suggests the possibility of women facing everyday lives in which their work is devalued and where their exit options are limited. The resources that men and women are entitled to often are rights that have been long recognized by the traditional society.

PROBLEMS WITH OVEREMPHASIS ON FEMALE HEADED HOUSEHOLDS AND THE ASSUMPTION THAT THEY ARE LIKELY TO BE WORSE OFF THAN MALE HEADED HOUSEHOLDS

For the lack of other data or otherwise, there has long been an emphasis on Female Headed Households in the study of Feminization of Poverty and they have been seen as the poorest of the poor. There is not enough empirical evidence that suggests a strong correlation between the two. Female Headed Households are not a homogenous group and requires further disaggregation for any policy consideration. They differ in size, composition situations, from one-person households, households of lone mothers with children and households of couples with or without children where the woman rather than the man is reported as the household head. Also, female-headed households tend to show-up as poorer on account of their smaller size when in per-capita terms they may actually be better off. Also, when poverty is seen as a decrease in well being of an individual, may females...
who choose heading their households do so after exiting from an abusive relationship so that they may be able to exert more influence over their lives, exercise more personal freedom, more flexibility to take on paid work, enhanced control over. Female heads may be empowered in that they are more able to further their personal interests and the well-being of their dependants. Studies have shown that the expenditure patterns of FHHs are more biased towards nutrition and education than those of male households.

The chances of secondary poverty among women in female headed households are much less. In India, many more female headed households fall into the relatively higher consumption expenditure quintiles. It is true that the proportion of female heads working compared to the overall female work participation rates is higher, since in most cases the female head is the active earner of the family. Hence, connotations of powerlessness associated with female headed households are wrong. Therefore, headship analysis cannot and should not be considered an acceptable substitute for poverty analysis.

PART TWO:
It deals with the inefficiencies of the definition of poverty as income or consumption poverty and argues that Amartya Sen’s definition of poverty as human poverty and capability deprivation is more apt. It also makes a case for viewing the phenomenon of feminization of poverty as the feminization of responsibility and obligation, as argued by Sylvia Chant. In this Part, the paper further underlines the flaws in the existing indicators and indices that are widely used to measure poverty, namely, the Gender Development Index (GDI), the Gender Empowerment Measure (GEM) and the Gender Inequality Measure (GII).

POVERTY IS MUCH MORE THAN LACK OF INCOME
Income or money represents the means to better living conditions but it is not the better living condition in itself. Poverty, if viewed only in terms of income deprivation, will not capture many important aspects such as access to land and credit, decision-making power, legal rights, vulnerability to violence, and (self)-respect and dignity. Poverty would be viewed as human poverty. Poverty can be deemed as the denial of the opportunities and choices most basic to human life – the opportunity to lead a long, healthy, and creative life, and to enjoy a decent standard of living, freedom, dignity, self-esteem, and respect from others. This has an important bearing for policy makers in combating gendered poverty as it aids them in taking action to eradicate poverty for they focus on the deep-seated structural causes of poverty and lead directly to strategies of empowerment as many times it is gender roles and not income deprivation that pushes women towards poverty.

POVERTY AS CAPABILITY DEPRIVATION
According to Amartya Sen’s Capability Approach, poverty represents the deprivations of important capabilities to function i.e. obstructions in what a person can do and can be. For women, lack of income isn’t just the only thing that hinders their well being. The lack of agency, lack of participation in the decision making process...
also contributes to the same. The idea of agency is also about demanding rights in decision-making. This can be individual in form: for example, the ownership of personal assets would empower women to demand their rights within the household. But it is also about collective agency in the public sphere and in a political process. Further, women who do not necessarily lack income may also be vulnerable to poverty. Even for the wealthy, individual agency is often circumscribed by gender, age, marital status etc. For example, married women who are not participating in paid labor or have productive assets may be vulnerable to poverty in case of widowhood, divorce or separation even if they are not “poor” by a variety of criteria.

From the view of capability deprivation, women are indeed poorer in most societies in many dimensions of capabilities such as education and health, but not necessarily in terms of life expectancy, etc. Resource allocation within households is often biased against girls and women. In addition, it is harder for women to transform their capabilities into incomes or well-being, such as due to not being able to transit from education to jobs or their mobility being constrained. Gender inequalities in the distribution of income, access to productive inputs such as credit, command over property or control over earned income, as well as gender biases in labor markets and social exclusion that women experience in a variety of economic and political institutions make them poorer.

**FEMINIZATION OF RESPONSIBILITY AND OBLIGATION**

Growing numbers of women of all ages are working outside the home, as well as performing the bulk of unpaid reproductive tasks. Women allow themselves minimal time for rest and recreation. Men, on the other hand, feel it in their right to go out with friends, drink, etc. The economic and social reproductive realms which women are expected to tread, do enlarge their life choices but limit them, hence making them poorer. Men, on the other hand, despite their lesser inputs, have retained their traditional privileges and prerogatives. This presents a rather puzzling scenario in which investments are becoming progressively detached from rights and rewards, and creating a new and deeper form of female exploitation. This is known as feminization of authority and responsibility and has not been captured by sex disaggregated data.

Women are prone to poverty due to their double roles, i.e. their productive and reproductive role. Incorporating women in income-generating programmes, without understanding and addressing the role and responsibilities of the women in the home (care of children, domestic work, water and fuel collection, etc.), would just add to the burden of women. Women’s position in the labor market, the significance of women’s role in the household and in the reproductive field, as well as the interaction between production and reproduction must be analyzed. Any decrease in income tends to increase the work of women on both fronts i.e. their domestic activities as many women would now undertake those activities instead of hiring someone to do it and they would have to fulfill their productive duties too. Thus, the invisibility of their reproductive work is a bottleneck for effective policies.
It is important for policy makers to assign value to unpaid domestic work and the rewards/rights received for it so that an input-output analysis can be done and at the same time, value of women’s unpaid work and a time use analysis can be done.

INADEQUACIES OF THE GDI, GEM AND GII
The Human Development Index’s Gender Empowerment Measure (GEM) and Gender Development Index (GDI) were important developments in the measurement of gendered poverty. But, the fact that these are aggregate indices has rendered them unsuitable for many kinds of gendered analyses. They can reduce the visibility of poor women. One of the most important parameters of the Gender Empowerment Measure is political participation. But the positive impact of participation of women in formal political life, on poor women is ambiguous as women in public office are generally educated and elite women whose class interests may well override their gender interests, and who might do little to advance the social or economic status of their poorer counterparts. Also, the income component leaves out the sector where the majority of women work i.e. the informal sector. And the women who work in the formal sector are generally the better off ones. Hence, the top down development approach on which these indices are based is in itself problematic.

Further, another index called the Gender Inequality Index was also introduced. But this too, is faulty on many counts.

(i) It penalizes low-income countries for poor performances in reproductive health indicators that are not entirely explained by the gender-related norms or discriminative practices against
(ii) It allows deteriorations in women’s education and economic participation to be compensated by equivalent deteriorations in those of men.
(iii) It completely disregards men’s average health statuses which are also essential pieces of information that should be incorporated in a comprehensive assessment of gender inequality levels.

PART THREE
Part three suggests some solutions to the problems that have been discussed in Parts One and Two. It makes a case for sex disaggregated data. This paper also elaborates on an Individual Deprivation Measure. While it is in no way a guide to the same, it contributes to the ongoing dialogue and discussion on the same. The report concludes with certain policy solutions that the policy makers, researchers and other stakeholders can ponder upon for designing effective policies for combating feminization of poverty.

THE CASE FOR SEX DISAGGREGATED DATA
It is well known that poverty affects men and women differently and that sex aggregated data is scanty. Aside from the general problem of scant sex-disaggregated data on poverty, data which are disaggregated along other lines are also lacking. Since women are not a homogeneous group and capability deprivation differs amongst women too, on the lines of age, region, class, rural-urban
divide, etc, further disaggregation of data is essential. For example, the necessity to work compels poor women to take up paid employment, while it may be an exercising of an option for the relatively better-off women. This is reflected in the nature and type of jobs undertaken by the women, which has policy implications. Except for gender headship, lack of breakdown according to other axes of difference has prevented any dedicated investigation of which particular groups of women, if any, might be especially prone to privation. The provision and access to such data is extremely important as it serves as a tool to measure the effect and efficiency of policies formulated and implemented to combat gendered poverty.

An essential starting point is:

1. Improve the coverage of sex disaggregated data on poverty. Measurement of women and men in households below the poverty line, but also involve comparative poverty assessments of household headship based on per-capita and/or adult equivalence scales rather than aggregate household income. Intra household inequality analysis can be achieved through the collection of data on actual personal consumption of individuals.

2. A sex-disaggregated database of “asset poverty” comprising land and property ownership should be generated. Lack of personal ownership can impact in various ways on women’s poverty, such as inhibiting the use of property for income-generating activities and restricting access to credit in the event of divorce or widowhood.

3. Improve data on the economic returns to female labour related to concerns around time and inputs.

4. Try to assign a monetary value to reproductive labour as much of women’s work is dedicated to investment in future generations and the invisibility of sexual division of means that women are overloaded with work whose value is not socially or economically recognized. This is important for policies aiming to affect their participation in the labor market.

5. Collect data not only on what women and men in poor households have access to but also what they spend their money on.

TOWARDS A BETTER MEASUREMENT OF GENDERED POVERTY: INDIVIDUAL DEPRIVATION MEASURES

An international, interdisciplinary team, funded by an Australian Research Council Linkage Grant, has worked towards ‘The Individual Deprivation Measure (IDM) which offers a new way of measuring poverty that takes the individual as the unit of analysis. The IDM provides the basis for anti-poverty policies that are able to respond to specific groups within a broader population and specific issues. The Individual Deprivation measure is based on a questionnaire to Households which included questions on the following 15 grounds. This measure will reveal intra household as well as other inequalities.’

The following are the 15 parameters that this measure uses
Such a measure has also been devised by a team at the Indian Institute of Management, Bangalore in association with Kolkata Household Asset Survey. They divided their questionnaire into four parts namely, education, living standards, productive assets and empowerment.

<table>
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<tr>
<th>Dimension</th>
<th>Indicators</th>
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<tbody>
<tr>
<td>Food/Nutrition</td>
<td>Hunger in the last 4 weeks</td>
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<tr>
<td>Water</td>
<td>Water source, water quality</td>
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<tr>
<td>Shelter</td>
<td>Durable housing; Homelessness</td>
</tr>
<tr>
<td>Health Care</td>
<td>Health status, health care access; For women who are pregnant or have been pregnant in the past 3 years, access to pre-natal care, trained health care worker in attendance at birth</td>
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<tr>
<td>Education</td>
<td>Years of schooling completed; Basic literacy and numeracy</td>
</tr>
<tr>
<td>Energy/Cooking</td>
<td>Source of cooking fuel; Health impacts; Access to electricity</td>
</tr>
<tr>
<td>Sanitation</td>
<td>Primary (toilet), secondary (tub)</td>
</tr>
<tr>
<td>Family Relations</td>
<td>Control of decision making in household; Supportive relationships</td>
</tr>
<tr>
<td>Clothing/Personal Care</td>
<td>Protection from elements; Ability to present oneself in a way that is socially acceptable</td>
</tr>
<tr>
<td>Violence</td>
<td>Violence (including emotional and physical violence) experienced in the last 12 months; Perceived risk of violence in the next 5 months</td>
</tr>
<tr>
<td>Family Planning</td>
<td>Access to reliable, safe contraception; Control over use of contraception</td>
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<tr>
<td>Environment</td>
<td>Exposure to environmental harms that can affect health, well-being and livelihood prospects</td>
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<tr>
<td>Voice</td>
<td>Ability to participate in public decision making in the community; Ability to influence change at community level</td>
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<tr>
<td>Time-use</td>
<td>Labour burden; Leisure time</td>
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<tr>
<td>Work</td>
<td>Status of and respect in paid and unpaid work; Safety and risk in relation to paid and unpaid work</td>
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(adapted from: "Lifting the Lid on the household: Introducing the Individual Deprivation Measure. www.prectomatters.org)
These measures go beyond the ones we have traditionally used in India and measure dimensions of poverty other than monetary dimensions too and hence seem to be a policy idea whose time has come in terms of effective measurement and analyses of gendered poverty

OTHER POLICY CONSIDERATIONS
In conclusion, I would like to briefly mention some measures that should be given specific attention in order to target our policies better and find solutions to gendered poverty
1. Focus on improving girls’ school-to-work transition;
2. Address women’s obstacles to access labour market (gender-based discrimination in recruitment, women’s time burden, etc);
3. Address gender dimensions of land reform and inheritance laws;
4. Strengthen women’s producer’s organizations. Eg Lijjat papad;
5. Address gender dimensions of land reform and inheritance laws;
6. Improve women’s participation in decision making and public-private dialogue forums;
7. Moreover an important solution that needs consideration is preparation of gender sensitive budgets. “Gender budget initiatives analyze how governments raise and spend public money, with the aim of securing gender equality in decision-making about public resource allocation; and gender equality in the distribution of the impact of government budgets, both in their benefits and in their burdens. The impact of government budgets on the most disadvantaged groups of women is a focus of special attention.” (IDRC, 2001)

It is important for the country to not only work for the betterment of women but also tap on their under-used potential. This paper has attempted to draw attention to the fallacies in the existing methods of analyses and data collection in relation to feminization of poverty. We tend to depend on them only because they seem familiar and have been used for a long period of time, not without reason though. But, this paper also recommends that it is time that policy makers in India use the more comprehensive measures available and base their policies on them. While many of them are still being researched upon, they merit the attention of Indian policymakers as they might completely change our perspective on the subject at hand, ‘The Feminization of Poverty’.

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DELINinating Rape LAWS IN INDIA: EVOLUTION, ISSUES AND RESPONSES

By Sarthak Mehta and Apoorva Maheshwari
From DES Law College, Pune

Abstract:
Our nation designates the women as ‘Goddess’ which implies that the society must respect them and its norms must protect them, whenever the need arises. On the failure of such protection whereby the dignity of the woman is crushed by the means of rape and other forms of sexual abuse, law becomes the saviour. The evolution of rape laws in India has been rapid and substantial and has passed through the brutal period of the Sultanate to the progressive British Raj which eventually settles in the text of Indian Penal Code.

However, there are times when the law fails as the defender and then the need of another renaissance arises. Despite of enhancement in the Indian rape laws, the loopholes are still persistent. In presence of such lacunae, provision of justice to every individual is a mere dream.

This research article deals in redefining the Indian rape laws. It highlights the meaning and definition of rape and the history and evolution of rape laws in India. Further, it emphasises on the grey areas like consent to intercourse, marital rape, same sex rape, etc. along with suitable case laws and lastly, it provides enumerated suggestions to improve the situation in India.

1. Introduction
The Republic of India in the nature of existence is an Independent nation. Denoting the principles of its great constitution, the citizens here enjoy the liberty and other imperative freedoms too. With the advancement of time, the nation as a whole grew significantly, but also witnessed an amplified rate of crimes. One of the most heinous crimes is rape, whereby for the satisfaction of lust within, the human being torments and agonizes the other being and ends up doing an inhuman act, thereby devastating the life of the sufferer. A total of 38,947 rape cases across the nation were reported to Rajya Sabha in its recent session of 2018 by the National Crime Records Bureau keeping aside the unreported ones.

The problem related to enforcement of laws, disposal of the cases and implementation of the court verdicts is increasing which is affecting the rape statistics of the country. As a result, India was most recently ranked as the most dangerous country for women in a study conducted by the Thomson Reuters Foundation 507, however the same was rejected by the National Commission for Women stating that the sample size taken for the study was too small to represent a large country like India508.

508 NCW rejects ‘most dangerous country’ survey, Times of India (June 27, 2018, 7:38 IST), https://timesofindia.indiatimes.com/india/ncw-
This research paper makes a deep analysis of the ancient legal practices, definitional ambiguity, comparative statistics, legislative evolutions, judicial analysis, evaluation with global legislations, and lastly, the need for changes.

2. **Definition and Scope**
The Indian Penal Code, 1860, defines rape u/s 375 of Indian Penal Code and punishment to which is mentioned in the subsequent section.

As per the cumulative meanings of various general lexicons, rape is the sexual intercourse between a man/man and a woman whereby the consent of the woman doesn’t exist. Rape can also mean to plunder or strip something of resources. It is the act of coercive sexual intercourse by one person with another against his/her will.

As per the definition of Black’s Law Dictionary rape means, ‘The unlawful carnal knowledge of a woman by a man forcibly and against her will.’

But the scope of rape is not only limited to such unwelcomed intercourse and it has a broader facet to it. The definitional flaws of rape in the Indian law and the vague approach by the legislature increase the number of unreported rape cases across the country which include rape of man, marital rape, rape of a sex worker etc.

3. **History**
Prior to the independent India, when the Akhand Bharat was under the rule of the Sultanate and thereafter the British, the Muslim criminal law was followed in the Moffusil and Sadar Adalats. Ours being a patriarchal society, made it quite difficult for women to report and prove this odious crime.

Ancient Muslim Criminal Law, in the Rule of the Sultanate:
Rape was completely forbidden in Islamic law, and was a crime punishable by death. In Islam, capital punishment is still reserved for the most extreme crimes which not only harms individual but also destabilizes the society. Rape falls in this category.

Islam takes very seriously the honour and protection of women. The Quran repeatedly reminds men to treat women with kindness and fairness. During the lifetime of the Prophet Muhammad, a rapist was punished based on only the testimony of the victim.

There have been various historical interpretations of Islamic law, but the most common legal practices followed in earlier times were that the crime of rape may be proven by:

- **Witness testimony** - The testimony of four eye witnesses to the act itself is traditionally the requirement to prove rape under Islamic law. Also, the testimony of two females was considered to be equal to that of one male.
- **Confession** - The full and complete confession of the perpetrator is accepted as evidence under Islamic law.
- **Physical evidence** - Even in early Islamic history, many Islamic jurists accepted physical evidence to prove a woman's lack of consent. As forensic science becomes more adept at providing physical evidence of sexual assault, such evidence has
become commonly accepted in Islamic courts.\(^{509}\)

Under British rule:
Before the codification of colonial laws, Muslim criminal law was followed even under the British rule. But after the codification and consolidation began in 1833, the draft of the IPC was prepared by the First Law Commission chaired by Lord Macaulay in 1835 and was submitted to Governor-General subsequently in 1837. However, it was passed in 1860. Since then, the offence of rape got a definition and punishment thereof.

4. **Evolutions in the Indian law**
The laws relating to rape and sexual assault have gone through various reforms and amendments over the time as per the needs of the society. These reforms were much needed due to lacunae in the existing laws, which were more than 150 years old. The judgments on the basis of which the contemporary strict and appropriate law has evolved are as follows -

- In **Tukaram v. State of Maharashtra\(^ {510}\)**, in March 1972, a 16-year-old tribal girl was raped by two policemen in the compound of Desai Ganj police chowky in Chandrapur. Her relatives, who had come to register a complaint, were patiently waiting outside meanwhile the heinous act was being perpetrated in the police station. The rationale for acquittal was that the victim had not raised an alarm and there were no visible marks of injury on her body. The judgment did not distinguish between consent and forcible submission.

- In **Mohd.Habib v. State\(^ {511}\)**, the Delhi HC allowed a rapist to go scot-free merely because there were no marks of injury on his penis- which the Court presumed was an indication of no resistance. The most important facts such as the age of the victim (being seven years) and that she had suffered a ruptured hymen and the bite marks on her body were not considered by the HC. Even the eye-witnesses, who witnessed this ghastly act, could not sway the High Court’s judgment.

Resultantly such judgements, the first major reforms came in the year 1983, whereby the Legislature indicated that it considers aggravated rape (including gang rape) deserving of higher punishment. The change in rape laws in 1983 improved the law significantly. The four step evolution of rape laws have been discussed below-

**FIRST STEP:**
Earlier, the punishment prescribed u/s 376 of the IPC, provided for no least amount of punishment for the wrongdoer. Though the legislature failed to increase the maximum sentence to capital punishment as was vehemently demanded, it prescribed a minimum sentence of seven years imprisonment in it.

Besides, an important provision, section 376(2) was added to the IPC which introduced the concept of some special kinds


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of rape and prescribed a minimum of ten years imprisonment for these cases.

SECOND STEP:
Later, in 2000, the law commission released its 172nd report on ‘Review of Rape Laws’. The report came after the PIL filed in the case of Sakshi v. Union of India. This report recommended replacing the word ‘rape’ with the term ‘sexual assault’ which levied on the fact that in case of happening of such an atrocious act on any part of the body should be construed as rape. The commission also recommended altering the existing laws and making them gender neutral. Another approval to seek punishment for ‘unlawful sexual conduct’ under Section 375E and Section 310 whereby the occurrence of the offence is in related to the sexual intent was also solicited. An additional suggestion was to consider marital rape equally as an offence just as any physical violence by a husband against his wife was also sought.

The majority of the above suggestions was duly accepted and was adjoined to the existing definition.

THIRD STEP:
The gruesome ‘Nirbhaya’ gang rape case was the driving force behind the passing of the biggest reform in the criminal legislation, i.e., Criminal Law Amendment Act, 2013. The offences of voluntarily causing grievous hurt by use of acid or its attempt (S.326A and S.326B) were incorporated by the Act. The offence of Sexual Harassment against a woman was added under Sec. 354A with alike subsections covering offences of voyeurism, stalking and disrobing. Another provision under Sec. 370A dealing with trafficking of persons for exploitation was inserted.

Definition of rape in Sec 375 was modified covering the themes which were covered by the dark loop for long, the word ‘consent’ to sexual intercourse was elucidated and the ‘age’ of consent was also raised from 16 to 18 years. Other changes included:

- Death penalty was added as the punishment for rape but only in two provisions, namely, 376A (punishment of causing death or resulting in persistent vegetative state of woman) and 376E (punishment for repeat offenders previously convicted u/s 376 or 376A or 376D).
- Separate provision Sec 376D for gang rape was incorporated providing minimum

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imprisonment of twenty years extending to life.

- The judicial discretion available to impose a reduced sentence (lesser than the required minimum) was deleted by the Amendment.

FOURTH STEP:
A series of inopportune events towards the women led to the most recent amendment in the rape laws in India. The Criminal Law Amendment Act, 2018 is an outcome of the crashing of the humanity whereby a number of cases subsisted to the sin of lust. These cases mainly included the Kathua rape case wherein the girl child of 8 years was abducted, sedated, gang raped for days and murdered. In another case in the state of Uttar Pradesh wherein an MLA was accused of raping a 17-year old minor alarmed the situation leading to the mass agitation across the nation. Thereafter, recently, Chennai witnessed the gang rape of an 11 year old girl by 22 men for seven months.

Resultantly, The Amendment Act of 2018 brought an imperative change in the quantum of punishment and inserted death penalty as the punishment for rape of girl less than 12 years of age with minimum imprisonment of twenty years u/s 376AB. The Act also enhances the punishment of rape u/s 376 (1), rape of girl less than 16 years of age u/s 376 (3) and gang rape u/s 376DA and 376DB.

5. The Ambiguous Areas: Need of change
The Indian law has evolved multiple times and so have the provisions of rape. However, even after 70 years of independence, there are few vital areas concerning rape laws which are still ambiguous. Such legislative vagueness is discussed below:

a. Consent and Not Consent
Consent can either be implied or express. In a case, when such consent doesn’t fall under the above two kinds and the derived consent is subjected to any form of fraud, coercion, or misconception, the act of sexual intercourse is concluded as a non-consensual act.

Examination 2 to the Sec 375 IPC states, “Consent means an unequivocal agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by reason only of the fact, be regarded as consenting to the sexual act.”

Additionally, Sec 90 of the Code also defines consent negatively. It states that a consent is not a consent if it is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception.

Consent on promise of marriage:
Consent to sexual intercourse may be derived through making a false promise of marriage and if it is obtained through ‘misconception of fact’, ‘fraud’ or ‘coercion’, then Sec. 90 IPC is attracted, i.e., it amounts to no consent.

However, this general rule is not absolute. Reliance is placed on the SC judgment in
**Uday v. State of Karnataka**\(^{515}\). The court observed:

“If a full grown girl consents to sexual intercourse on a promise of marriage and continues in the activity it is an act of promiscuity on her part and not an act induced by misconception of fact. S. 90 IPC cannot be called in aid in such a case to pardon the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her.”

The ruling has been held unanimously by various courts and recently in the case of **Akshay Jaisinghani**\(^{516}\), the Bombay HC observed that if girl is major, educated and has a choice of saying no and she doesn’t say no at the time of sexual intercourse, then it would be considered as mutual consent.

Therefore, the courts have taken into consideration prudence and maturity of the woman giving consent. The malicious intention of the man, if any, has to be gathered from different evidences varying in each case. Conclusively, the courts have been cautious enough in preventing false allegations of rape and hence have taken a neutral stand.

**b. Marital Rape**

Marital Rape refers to unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or in any other condition when she does not consents to the act of sexual intercourse. It is a non-consensual act of violent perversion by a husband against the wife where she is physically and mentally abused.

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18 years. On the same lines, a PIL was filed in the Supreme Court and subsequently, exception 2 to Sec. 375 was read down in the case of Independent Thought v. UOI\(^{517}\) whereby sexual intercourse by a man with his wife, the wife being less than 18 years of age, is rape. This ruling observed that the Exception needs to be struck down because:

(i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Article 14, 15 and 21 of the Constitution of India;
(ii) it is discriminatory and violative of Article 14 of the Constitution of India and;
(iii) it is inconsistent with the provisions of POCSO, which must prevail.

Arguments: The lawmakers argue that deleting marital rape exception will potentially destroy the institution of marriage due to the factors like poverty, illiteracy and the perception of marriage being a sacrosanct. There may also be a number of false cases in the same regard, however, better implementation of such laws not only would decrease the number of false cases, but also would protect the interest of true victims.

Present condition: Therefore, based on the present circumstances, the wives who are sexually assaulted by their husbands are left with only two options of either filing a suit under Domestic Violence Act for protection and a restraining order or under Sec 498-A for charges of cruelty. However, the Delhi HC recently observed that marriage doesn't mean that wife is always consenting for physical relation with her husband\(^{518}\).

c. Rape of Sex Worker

The history regarding rape of a sex worker can be traced back to the 18\(^{th}\) century whereby the British law recognized that a prostitute could be the victim of rape. From 1829, evidence of the complainant’s actual or rumoured occupation in prostitution was accepted as relevant evidence in a rape trial. Rules of evidence reflected the widely held assumption that unchaste women were untrustworthy. Thus in rape trials, the complainants’ sexual reputation and past sexual experiences were deemed to be relevant to her veracity and reliability as a witness. In India, being a colony to British, followed the same set of rules. Because of the lack of credibility of complainants, it became difficult for the prosecution to prove sexual assault beyond reasonable doubt. This is an important development the implications of which remain largely unaddressed in the fields of law and public policy.

Global position:

In Britain, Canada and Australia, there have been numerous examples when the past sexual experience of the complainant has been taken into evidence in the rape trials thereby leaving the accused unpunished and the justice unserved.

In R v Krausz\(^{520}\), the complainant was a 22-year-old woman who said she had been assaulted and raped by a man she met in a pub in 2011. She was asked whether she was raped by her husband, a police officer who was also the complainant in the marriage case. She said that this was the first time she was assaulted by her husband for which he was arrested. However, the court rejected her case due to her past sexual history.


\(^{518}\) Marriage doesn’t mean consent for sex: Delhi High Court on marital rape, The Economic Times, July 18, 2018.

\(^{519}\) Henning and Bronitt, 1998, p. 77.

\(^{520}\) R v. Krausz, (1973) 57 Cr App R 466.
public house. The accused claimed the woman had consented to sex, demanded money after the sexual intercourse and then refused to leave the flat until she had been paid. Krausz’s conviction for rape was subsequently quashed by the Court of Appeals.

However, it would appear that this situation has changed significantly in the last 20 years. In the United Kingdom, Australia, New Zealand and Canada rape law reform has at least limited the admissibility of evidence relating to a complainant’s sexual reputation and past sexual history.

Condition in India:
Sex workers remain in the twilight of legal policies and legislation in India, wherein the silence of law on their identities has resulted in more violence. In addition to this, societal standards that forcefully fit women into a binary system, in which women are either idolised or demonised pervade through all structures and institutions with the judiciary writing them off as "women of loose morals". Unfortunately, this thinking leaves sex workers no representation.

Section 114-A Evidence Act that deals with prosecution of rape cases under clauses (a), (b), (c), (d), (e) or (g) of S. 376(2) of the IPC, where sexual intercourse by the accused is proved, and the question before the Court is whether such intercourse was with or without the woman’s consent. In such cases, if the woman, in her evidence, states before the Court that she did not consent, the Court must presume that she did not so consent.

However, the SC very recently pronounced a verdict in a case whereby it neither considered nor debated the above provision. The Bench seems to have removed the issue of presumption of consent from this gang rape because the woman was of "questionable character".

In Budhadev Karmaskar v. State, the apex court stated that sex workers have a right to live with dignity under Article 21 of the Constitution of India "since they are also human beings and their problems also needed to be addressed".

The plight of the sex workers in rape cases, hence, remains baffling. It is high time that the country recognises rights of sex workers, and devises policies to systematically address the problem of growing sexual violence against them instead of brushing the issue under the carpet.

d. Sexual harassment at workplace:
The brutal rape of Bhanwari Devi in 1992 led to the filing of several PILs in the Supreme Court under the banner of ‘Vishakha’ to champion the cause of working women of the country. The Supreme Court then framed the guidelines while acknowledging legislative inadequacy in regard to laws protecting women and preventing sexual harassment at workplace. The Court defined sexual harassment while laying down the duties of the employer, preventive steps and procedural mechanism for filing complaints and disciplinary action. The legislation was brought in force in the

year 2013 in the name of ‘Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013’. The Act deals with the concerned issue in detail but Sec. 14 of the Act provides for action to be taken against the complainant if the complaint is found to be false. Such provision deters women to report the harassment faced by them.

The number of reported cases has increased significantly after the Act has come into force but it also shows that women are not safe at workplaces. Recently, in Saket District Court chamber, New Delhi, a Senior Advocate was accused of committing rape of his junior lady lawyer. It is unimaginable that the guards of law are involved in such offenses. Hence, it is the immediate need of the country to have better implementation of the laws because the time when women were used to be confined to their households has been long gone.

e. Rape of a Man:
The numerous cases, stories and myths surrounding female penetrative and non-penetrative rape result in dismissal and even mockery of male victims of rape. The general perception in the society pictures men only as the perpetrators of rape and not the victim. But in realism, a man can also be raped. The rape of a male is not limited to him being raped by the opposite gender but also includes sexual abuse by other males. The Indian law is silent on rape of man but an inclination towards the unnatural intercourse is made u/s 377 of IPC.

A presumption as to the mind of the society has been developed that for the lawful sexual intercourse, only the consent and desire of the woman is necessary. Consent of a man in any sexual activity is taken as implied from the inception which in a sense results in the violation of right to choose to have/have not sex, of the male gender. Recently, three women raped a 23 years old man in South Africa after kidnapping and drugging him. He was made to drink an energy drink before raping and was raped continuously for three days.\(^{524}\)

While the POCSO Act, 2012 protects children of both genders from sexual abuse, rape law doesn’t. This scenario results in miscarriage of justice and hence male victims of rape in India are still searching for justice.

f. Rape by Women:
Sexual assault is perceived as a straight issue, perpetrated by men against women. But there exists a scenario, which is less frequent but equally damaging to the victims—rape between women. There are numerous cases in which the offender of rape is a female, however, very few (almost nil) are reported because of picturing a male as a rapist always.

This picturization is the result of definitional flaws of rape of various countries which define rape as penile penetration. But, when the statistics are given a closer look, it is found that women are committing sexual assault and rape and are roaming scot-free

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because there is no law to charge them with. According to the National Crime Victimization Survey (USA), 35 percent of male victims who experienced rape or sexual assault reported at least one female perpetrator. Not only this, a 2005 survey by the California Coalition Against Sexual Assault (CALCASA) concluded that one in three lesbian-identified participants had been sexually assaulted by a woman, and one in four had experienced violence within a lesbian relationship. It was also found that lesbians and gay men experience higher rates of partner violence than straight-identified population.

India: Sec. 375 of the Indian Penal Code starts with words “A man is said to commit rape if...”. The drafters of the Penal Code have completely neglected the point that except of the penetration of the penis the rest, which includes the penetration of any object in any of the mentioned body parts of a woman, manipulation for the occurrence of any such penetration and oral stimulation can also be preceded by another woman.

Sadly, India’s condition is no different than the rest of the world. Rapes and sexual assaults by women on men as well as women go unreported because of the flawed laws. There have been cases where a woman (e) is involved in gang rape in enticing or threatening the victim or filming the act but she is not considered as the accomplice in commission of rape and gets done with mere charges of assault or harassment.

Law enforcement and others usually refer to women raping women as "lesbian rape" even though one or both parties involved might not consider their sexual orientation as lesbian. Women raped by other females report perpetrators forcing digit (finger) masturbation, digital penetration, and stimulation of clitoris and vulva using the tongue or inserting foreign devices, such as vibrators, into the vagina or anus.

Regardless of the genders involved or the setting in which the rape occurred, it is still rape – a violent, brutal crime centred on the perpetrator’s need for power and control and satisfaction of the lust. Rape is never the fault of the victim, regardless of sexual orientation or circumstances.

6. Suggestions

Enhancement of Punishments:

- Even after recommendations by the Law Commission numerous times, the legislature has failed to increase the maximum punishment for the offence of rape to death penalty. Rape is punishable with death only u/s 376A, AB, DB and 376E, after the Criminal Law Amendment Act, 2018. While countries like Iran, China, and Saudi Arabia punish rapists with death, India falls short of this provision despite of the increasing crime rate.

- Gang rape of a girl under sixteen years of age cannot be punished with death, howsoever gruesome it is.


Gang rape must be made punishable with death.

**Validity of consent to sexual intercourse:**
The Indian judiciary has not taken a uniform stand in the cases dealing with ‘consent on promise of marriage’. The courts have sometimes ruled that consent on false promise of marriage shall be counted as no consent. Contrarily, in other cases, it has been observed that if the girl is educated and mature, then consent on promise of marriage would be a valid consent.

Hence, the judiciary must come up with a precedent which provides for guidelines as to when the consent would be valid and when not, in such cases.

**Criminalisation of Marital Rape:**
A legislature must be established which must criminalise marital rape with proper guidelines dealing with the admissibility of evidence in such cases. The guidelines should also deal with the misuse of law so as to prevent frivolous and malicious complaints.

Reliance upon the methods followed by countries like Australia, USA, UK, South Africa, Norway, etc. which have already criminalised marital rape shall be sought which include circumstantial and medical evidence, testimony of victim plus witness (if available) and admission by husband through electronic means.

**Rape of sex workers:**
Previously, the SC has stressed upon the rights and dignity of the sex workers but, disappointingly, the judiciary has failed to comply with the said rules. No matter what the profession of an individual is, the definition as to ‘consent’, ‘rape’ and ‘victim’ cannot be changed. The past sexual history of a woman must not be considered or even admitted as evidence in cases dealing with rape and sexual assault.

**Gender neutralisation of rape laws:**
Due consideration should be given to the male’s right to live with dignity and his consent should be examined. Though, the POCSO Act, 2012 protects the children of both the genders from sexual assault, but the IPC fails to do so. The legislature should take inspiration from countries like South Africa, China, USA, etc. which criminalise rape of man and make the offence gender neutral.

**Rape by women:**
Lastly, Sec 375 of IPC criminalises rape only when committed by a man on a woman. It forgets to take woman into the ambit as the perpetrator of rape and sexual assault. There are several experiences of being sexually assaulted by women and they need to be reported. Society and the law need to catch up with reality.

### 7. Conclusion

The world has evolved to this day where the whole universe is accessible in a single touch, but what hasn’t changed is the greed and lust of the human. Rape is another way to satisfy a part of this long perpetual greed, in way of which the rules and regulations of the society become vague. The crime of such ghastly nature shall in all possibilities be punished. The consequences, conditions and other factors which lead to the crime shall be on the back seat and the sole fact that the rape was committed shall be of primary concern.
Therefore, in the light of the above raised issues and the solutions thereafter provided, it would be unjust to say that Indian law regarding rape is flawed. Society as an impediment has just slowed down the wave of enhancement of the laws, but it is the judiciary which has, time and again reminded the nation that a crime can never go unpunished. This duty shall be continued by the judiciary and if not perfect but the better laws shall be brought before the service of the nation. Legislation is the ruler, Democracy is the rule and judiciary is the saviour.

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DOMESTIC VIOLENCE AGAINST MEN IN INDIA

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Abstract
Domestic violence, being an intrinsic part of our society, can be best described as the violent or the aggressive behavior within the home, typically involving the marital spouses. This form of violence is mostly faced by the woman in such a relationship. To prevent atrocities against women at national and international level, efforts are being made so that such crimes could be controlled. However, spousal abuse is a serious problem that is not just faced by women. Doubt domestic violence directed against women is a serious and big problem, but the domestic violence against men is also increasing gradually in India. The supremacy of men in the society makes one believe that they are not vulnerable to domestic violence. Battering of men by their spouse and family members has become an important issue and is another form of domestic violence under the sense of judiciary. In comparison to violence against women, violence against men in India is less frequent but it has already taken a dreaded shape in most of the countries of the world including India.

While news of dowry-related harassment and crimes against women are reported extensively in the media, there are a growing number of men who are at the receiving end of harassment, and face physical and psychological abuse at the hands of their wives. Moreover the humiliation and shame of this act going public forces them to keep quiet. In the recent years, there has been a spurt in the number of men who have been physically abused by their wives. Although the trauma may be the same, the methods of inflicting abuse may vary.

The researchers, in this paper, have mainly dealt with three prominent questions. First- What are the dynamics related to violence against men? Second - Why such cases are not usually complained? and third - What are the laws in the country that deals with such an issue?

In order to reach a definite answer to the above mentioned questions, the researchers have primarily given a brief introduction to the concept which involves the emergence of such a situation. Next the topic of violence against men in nexus to its consequences has been discussed. The paper also discusses the need for gender neutral laws especially in a country like India. Next the biasness of the Domestic Violence Act towards the women has been discussed. The judicial perspective regarding the same has also been inculcated to heighten the essence of the research paper. The researchers have been finally provided conclusion to the paper and provided suitable recommendations accordingly.

Keywords: Domestic, Violence, men, India

Introduction

"A gender-equal society would be one where the word 'gender' does not exist: where everyone can be themselves."
-Gloria Steinem

Domestic violence is today’s reality in many parts of the world. It has been recognised across the world as a form of violence that affects a person’s life in every way – physically, mentally, emotionally and psychologically – and is a violation of basic human rights. Various countries have identified it as a serious threat to a person’s overall wellbeing thus providing relief in various forms.\(^{527}\) There is no such physical act which characterizes domestic violence but it encompasses behaviours of abusing, false imprisonment, sexual abuse, etc. The literal meaning of the word “Domestic Violence” is any violent or aggressive behaviour within the home. Typically, involving the violent abuse of a spouse or partner. It arises when one intimate partner uses physical force, violence, coercion, threat, intimidation, isolation or emotional, sexual or economic abuse to maintain power and control over the other intimate person. However, the word is made synonymous with violence against women. The entire focus of domestic violence is on women as it is perceived notion that definitely men will be the perpetrator and women will be victim but the domestic violence against men is also increasing gradually in India. However, for both men and women, domestic violence is among the most underreported crimes worldwide.\(^ {528}\)

The supremacy of men in the society makes everyone believe that they are not vulnerable to domestic violence. Domestic violence against men deals with domestic violence experienced by men or boys in an intimate relationship such as marriage, cohabitation, dating, or within a family. Domestic violence against men by their spouse and family members has become an important issue in today’s generation and became an integral form of domestic violence under the judiciary. In comparison to violence against women, violence against men in India is less frequent and less reported but it has already taken a drastic shape/change in most of the countries of the world including India. As with domestic violence against women, violence against men may constitute a crime, but laws vary between jurisdictions. The paper focuses on the phenomenon of domestic violence against men with the women as perpetrator with a view towards gender balancing. The paper shows the need for a law of gender equality. Researchers have demonstrated a degree of socio-cultural acceptance of aggression by women against men and a general condemnation of aggression by men against women, due to male violence causing significantly more fear and severe injuries than female violence. This can lead to men not considering themselves as victims, and/or not realizing the violence they are experiencing is a crime.

Research Methodology

The methodology adopted is largely analytical and descriptive. Focus has been placed largely on secondary sources like books and articles. The lectures and classroom discussion have been rich with valuable pointers and gave direction to the research. The sources of this paper are cases on this subject. The method used in making

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\(^{527}\) Scribd.com article on Misuse-of-Domestic-Violence-Act-A Study

\(^{528}\) US Today e-report (Indian...Men...Protection-Domestic-Violence-57169900)
the paper and the information which has
been gathered are from various sources such
as The Bare Act, legal sites which deal with
case laws and also newspaper articles.

(A) Chapterization
This paper has been divided into 7 chapters. The first chapter covers the introduction to
the concept which involves the emergence
of such a situation. The second chapter of
the paper deals with dynamics related to
violence on men. The next chapter states the
consequences of violence against men. The
following chapter discusses why such cases
are not reported. The next chapter discusses
the need for gender neutral laws which is
followed by the next chapter which deals
with the judicial perspectives. The next
chapter highlights the biasness of the
Domestic Violence Act, 2005. The final
chapter provides with conclusion and
suitable recommendations.

(B) Research Problems
1. What are the dynamics related to
violence against men?
2. Why such cases are not usually
complained?
3. What are the laws in the country that
deals with such an issue?

(C) Mode of Citation
Uniform mode of citation is used throughout
the project.

Dynamics related to violence against men

The word “violence” is generally referred in
the terms of cognitive interpretations. Male
violence can be in terms of economic
empowerment, superiority or dominance. Violence against men is just not restricted to
their household. Men face violence in
professional field also. However, there are
no absolute principles for understanding the
emotional differences between men and
women and the dynamics of violence. Nevertheless, there are principles that
provide interpretation of individual
situations. Norm violation theory is one
such principle that can be used to explore
violent reactions and the underlying factors. Norm violation theory looks at the cycle of
conflict-dynamics and predicts whether it is
going to follow the cycle of escalation or de-
escalation. The precipitating factor is taken
as a norm violation. It is in this context that
norm-violation theory can be used to
understand how a certain action on the part
of the male/female may be regarded as
malevolent which lead to a violent or
retributive reaction by the partner. Male
victims of domestic violence deserve the
same recognition, sympathy, support, and
services as do female victims.

Domestic violence mostly leaves the victim
depressed and anxious irrespective of
gender. Consequently, male victims should
be listened to and cared for. Male victims
must be prepared to speak out their
situations because men are traditionally
thought to be physically stronger than
women, they might be less likely to talk
about or report incidents of domestic
violence in their heterosexual relationships
due to embarrassment or fear. Men should
start telling someone about the abuse and
not hesitate about the same, whether it’s a
parents, friend, relative, health care provider
or other close contact. At first, it might be

529 De Ridder and Tripathi (1992)
difficult due to the male ego, but in the end, it is likely to bring about relief and the much-needed support.

Consequences of violence against men

Domestic Violence has been identified across the world as a form of violence that affects a person’s life in every way – physically, mentally, emotionally and psychologically. It is a violation of basic human and legal rights. The consequence and effect of this violence against men in India is largely emotional and psychological in nature. The physical harassment resulting from domestic violence, also affects their lives and productivity but it is still more inclined towards the emotional problems which men face in India. It is largely because many such cases go unreported or men feel hesitated to report, as compared to the matters of physical assault of women.

Voice has been raised against the freedom and equality of women but we forget that men can also be victims of the same. Unfortunately; Indian Legislation has failed to accept that men can also be victims of sexual violence and physical assault. The very Section 375 of IPC dealing with rape and legal provisions against it mentions no rapes or sexual assaults against men in fact it states that if rape has been committed then women is the victim and men is the perpetrator. Indian Penal code Act (1860) Sections 354 A, 354 B, 354 C and 354 D, new amendments in (2013) deal with sexual harassment, disrobing, stalking and voyeurism accept women as victim and men as the executor. There is only one IPC Section 377, crippled in itself that records the sexual violence against men but it incorporates only penile sexual intercourse; non-penile abuse victims are not served by this law. It won’t be wrong to say that these sections work as the mirror to the way of thinking which the society carries. The situation of crime and abuse against men is in need of urgent attention and calling for serious consideration. The figures recorded for crime against men are disturbing, not because they are huge figures but because of the number of cases where men as victims, go unreported. Men in India are facing all kinds of abuse and “men don’t cry” is a mentality that’s needed to die530.

May Indian Family Foundation, an organization is working on men’s rights, and according to its reports when men tries to talk about their problems, tortures, struggles, and harassment of marriage and family, no one is ready to listen; instead they laugh at him. Many men feel ashamed to talk when they are beaten at home by their wives and her family. There are many laws to protect women against crime but there is no law to protect husband and his family members against the crime of women (wife). The report further states that like women, men also worry for leaving their spouses; they fear their children will be left unsafe without them. Taking care of children is always challenging for fathers, as it is the prospect of raising them alone531.

According to psychologists it’s mostly mental torture for men; but Indian judiciary has no provisions what-so-ever to consider domestic violence of women against men.

530 http://www.indianyouth.net/crime-against-men-in-india/
531 http://www.indianyouth.net/crime-against-men-in-india/
When the suffering people are asked about this menace, many of them refuse to comment, as they feel hesitation and insult to talk on such matters.  

**Resistance from reporting such issues**

Most of the cases of domestic violence go unreported so it is difficult to get exact number on domestic violence and it is even more difficult to figure out that how many men are suffering from abuse or domestic violence. The main reason that most of the violence against the men are remain to be unreported is the traditional gender roles in society and the stigma of the perceived weakness to admit or confess of falling victim to a woman.

Although some research suggest that the domestic violence committed by men and women are equal in numbers but the reported victims are mainly female. The reason for the difference in reported victims are many. The most crucial one is fear of police. Due to the present norms and stigma of the society, men face the fear of getting arrested for offences they have not even committed. The second reason for the same is the word man is itself a gender-biased which denotes power, full of masculine behaviour, appearances and control of emotions. It is a common perception that distinguishes male and female in terms of expression of their feelings. It could be harder as well as a matter of shame for men to disclose their suffering in a male-dominated society. It can be perceived as a “feminine behaviour” in the society. The third reason is the inadequacy of legal provisions to deal with such matters. Proper enactment of law for male as there are for female under IPC and CrPC, counselling services, institutional support, family support, help lines, etc. are some of the factors that needs immediate focus and attention. As long as the common misconception that men are always the abuser and women are always the victim prevails in our society, reporting about domestic violence in case of men will always be an issue.

**The need for gender neutral laws**

The POCSO Act, 2012 defines a child as “any person below the age of 18 years” in the there is no specification of gender and the word ‘any’ denotes the equality to all genders. The Justice Verma Committee Report of 2012 has underlined the need of India to recognize different sexual orientations and recommended inclusion of transgender along with other genders, i.e. men and women while drafting gender-neutral laws. “However each of these requires to be codified distinctly and separately as victims and not clubbed together in a gender-neutral term, ‘person’”. The female dominated laws can be terminated only if; men as well as women in India understand equality. It’s possible only

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536 Vrinda Grover, a lawyer and a human right activist
when their voice which will sort out this issue. It’s true that women were sexually harassed, it’s true that they were manhandled, subjected to dowry, etc. But in today’s scenario the men also face sexual harassment and domestic violence by their spouse, so the laws need to be changed as the society is progressing. "Crime has no gender and neither should our laws. Women commit crime for the same reasons that men do. The law does not and should not distinguish between criminals and every person who has committed an offence is liable to punishment under the Code,"

Therefore, the laws should be gender neutral in the case of Domestic Violence in India. Women rights has been protected in Protection of Women from Domestic Violence Act, 2005. Similarly, there should be law were men rights should be protected under the ambit of law.

Judicial Perspectives

If we talk about India, we can hardly find any legislation that aims to protect men against domestic violence. It is a grave social issue violating the human rights. Many countries have laws to protect both men and women from domestic violence but in India it seems that the government has not addressed the issue properly. These men are at the mercy of their abusive wives or other female relative, facing physical, mental and emotional distress. Such violence also leads to death in some cases. Men who are at the receiving end of this harassment remain numb out of fear that they will be trapped in a false dowry case or separated from their children.

In 2016, the Supreme Court Justices Kurian Joseph and Rohinton F Nariman struck down the words, “adult male person” from Sec. 2(q) of the Domestic Violence Act, 2016. It was held that, “We, therefore, strike down the words ‘adult male’ before the word ‘person’ in Section 2(q), as these words discriminate between persons similarly situated, and far from being in tune with, are contrary to the object sought to be achieved by the 2005 Act,” This will include women as offenders from then onwards.

In 2017, it was clear from a judgment in the court of Karnataka in case of Mohd. Zakir v. Shabana & Ors. The Court held, “If the said sub-section is read after deleting the expression ‘adult male’, it would appear that any person, whether male or female, aggrieved and alleging violation of the provisions of the Act could invoke the provisions under the Act. In that view of the matter, the petitioner’s complaint could not have been trashed on the ground that the Act does not contemplate provision for men and it could only be in respect of women.”

On 2 July 2014, the Supreme Court said that the law is being used by some women to harass their husband and in-laws. The court prohibited the police from making arrests on the mere basis of a complaint. The court

537 Harish V Nair, Parliament can make law on rape gender-neutral, says Supreme Court
538 Monalisa Das, Should Rape Laws in India be Gender Neutral? Experts weigh in
539 Ashok KM, SC Strikes Down Words ‘Adult Male’ From The Definition Of “Respondent” Under Section 2(Q) Of DV Act; Relief Possible Against Minors, Women, Live Law
540 CrL, P 2351 of 2018
asked the police to follow Section 41 of the Code of Criminal Procedure, 1973, which provides a 9-point checklist which must be used to decide the need for an arrest. The court also said that a magistrate must decide whether an arrested accused is needed to be kept under further detention. The decision was in response to a Special Leave Petition (SPL) filed by one Arnesh Kumar challenging his arrest and of his family under this law. The decision was welcomed by men’s right activists but was criticized by women rights activists. However, due to lack of communication to police stations, the guidelines of Supreme Court of India are still not getting followed. 

Domestic violence against men in India is not recognized by the law. The general perception is that men cannot be victims of violence. This helps women get away scot-free. So, presently there is no law regarding domestic violence against men in India, and the time has come to make gender neutral laws.

**The Domestic Violence Act, 2005**

Domestic violence can be defined under four broad categories—Physical Abuse, Sexual Abuse, Verbal and Emotional Abuse and Economic Abuse. In this Act, physical abuse means—causing bodily harm, danger to life, limb or health or development of the aggrieved person. This includes assault, criminal intimidation and criminal force. The definition of sexual abuse explains—“conduct of a sexual nature that abuse, humilates, degrades or otherwise violates the dignity of a woman”. This definition clearly denies justice to men and indirectly says that abuse, humiliation or violation of dignity cannot happen to a man. This definition includes—“Insult, ridicule, humiliation, name calling or specially insult for not having a child” or “repeated threat to cause physical pain to any person to whom the aggrieved person is related”. The definition of economic abuse under this law is—“deprivation of all or any economic or financial resource to which the aggrieved person is entitled under any law or custom”. On the one hand if the husband earns and he doesn’t pay to his wife it is domestic violence. But if the wife earns and she does not pay to the husband it is not regarded the same majority of women do not have to bear the responsibility of household affair.

This act is purely in favour of women. It provides protection to wives and female live-in partners from domestic violence carried out by husbands and male live-in partners or their relatives. In this way the Domestic Violence Act should be made gender neutral.

According to family counselling centres in Jabalpur, the share of harassed husbands was 70 percent among complainants as per data recorded between 2013 and 2015. About 4,500 husbands are missing from family court records in the region. A local stops the police from going after men who have left marriage and become sadhus.

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543 Dhawani Desai, When Husband are Victim of Domestic Violence, Times of India, May 10,2017
544 http://themalefactor.com/2014/02/18/almost-every-indian-husband-is-subjected-to-domestic-violence/
It is important to have a look on the results of Suicide, Depression and Divorce in the Indian society. A survey conducted by the National Family Health Survey which throws light on unprovoked violence against men by women is evidence in this reference. Notwithstanding the fact that double the numbers of men commit suicide as compared to women. It should not be a surprise to go for a law to protect men as such a law for women already exists. In fact, it would be preposterous in this age of gender equality, not to have such a law. Such a law to protect men from domestic violence would act as preventive relief to millions of those men who feel victimized and left out. It would also provide them with a legal platform to come forward and share their pain and get some semblance of relief. The Supreme Court has said in a recent order that IPC Section 498A has “dubious place of pride amongst the provisions that are used as a weapon rather than a shield by disgruntled wives.”

The government is now planning to make IPC Section 498A compoundable, which means the couple would have privilege of reconciliation and settlement, if the court allows. At present, the offense is non-bailable and non-compoundable. Husbands and in-laws are immediately arrested once a case of dowry harassment or domestic violence is filed against them. The Ministry of Home Affairs is learnt to have sent a draft note for the Union Cabinet to amend Section 498A of the IPC to the Law Ministry for drawing up a draft bill. Under the amended law, there will be a penalty provision of Rs. 15,000 as against Rs. 1,000 now if the case is found to be false. However, the move won’t be as easy as Women and Child Development Minister Maneka Gandhi and women’s rights activists have vociferously opposed it. They argue that any dilution of the law will affect millions of women whose cases may be genuine. But the law should not be changed since this is the only law that gives women protection. “It should stay as it is,” suggested Maneka Gandhi. Human rights lawyer Sudha Ramalingam says, “The Supreme Court has already amended the act. Now, husbands and in-laws cannot be arrested immediately after a complaint is registered against them. The police will have to be satisfied first about the need of the arrest. With the proposed amendment, the fear will also go.”

The fact is that domestic violence is a serious problem and a neutral and unprejudiced law is needed to protect the genuine victims of domestic violence, irrespective of gender. The perpetrators of domestic violence need to be appropriately punished and dealt with. At the same time, protection cannot be withheld from real victims for any reason whatsoever. One can be certain that there is something sinister about a law, when it intimidates and instils fear in innocent people. When a person who has not committed any crime, begins to fear punishment under the provisions of a law, it is not a law anymore – it is state of sponsored terrorism.

Conclusion and recommendations

547 http://indiatribune.com/section-498a-it-is-unfair-domestic-violence-is-often-a-two-way-affairfeel-harassed-men/
548 http://www.498a.org/domesticViolence.htm
Determining the rate of intimate partner violence against males can be difficult, as men may be reluctant to report their abuse or seek help. Male victims of violence may face socio-cultural issues pertaining to hegemonic masculinity such as judgement by male peers or having their masculinity questioned. Violence against men is generally less recognized by society than against women. For a man to admit he is the victim of female perpetrated violence necessitates the abandonment of the veneer of machismo which society expects from men, and to admit being submissive to a female partner. For some men, this is an admission they are unwilling, or unable, to make.

Terming this as “legal terrorism”, the judiciary almost always favours the woman. Society is changing with time and so are the values. Men has started facing torture and harassment by women/spouse so the time has come to address their issues and problems as a social issue and develop appropriate strategies and interventions to cure this problem. They are no longer stronger than women now, but women come at the same footing as the men are. This is the reason they need a help in crisis and violence particularly violence by spouse/wife. Male victims of the domestic violence can be helped through the appropriate intervention such as recognition of violence against men by women; enactment of relevant piece of legislation; helpline for the male victims of violence; and education, awareness, and legal safeguards. Effective legislations to curb domestic violence against men must be put in place and enforced. Law enforcement agents should accept that domestic violence against men is a reality, from which men should be protected. The brutality of a man by his wife should not be seen as a trivial domestic matter. The trials of women who batter or kill their husbands must be given wide publicity in order to serve as deterrence to others who may have such tendencies. There should be greater advocacy to enlighten the public about the existence and reality of the evil of domestic violence against men by government agencies, religious groups and civil rights organizations. This will help in balancing the gender discourse on domestic violence and bring about better families in the Indian society.
REFERENCE OF PARTIES TO ARBITRATION IN INDIA: A PRACTITIONER’S PERSPECTIVE

By Shanu Jain
From Associate, Samvad Partners

Introduction
Often a situation arises during ongoing legal battles, where one party tries to expedite the procedure of dispute resolution while the other party leaves no stone unturned in using any or all of the dilatory tactics to gain undue advantage of the crawling legal proceedings. Such tactics may involve anything and everything including but not limited to procedural loopholes or getting the matters adjourned from one date to another by purposefully skipping a given date or filing applications raising unnecessary objections.

With a view to give a solution to this legal quagmire the Republic of India enacted the Arbitration and Conciliation Act, 1996 (“Act”) and earlier enactments, which enabled the parties to a dispute to privately resolve their disputes in a court like setup, as per the procedure of their choice expeditiously.

Though the legal scenario has changed in India due to the introduction of this new scheme under the Act but not the intentions of the parties of keeping the proceedings pending and getting undue advantage of such delay. With such intentions parties even after executing the arbitration agreements go through the fine-tooth comb to take benefit of any loophole to delay the dispute resolution. Such tactics not only delay the proceedings but sometimes make the objective of the expeditious settlement of disputes redundant.

One such tactic often utilised by the parties is to refer the matter to the jurisdiction of the courts even after executing arbitration agreements to resolve the disputes through arbitration. Fortunately, the legislators while drafting the Act, were wise enough to anticipate use of such dilatory tactics by the litigants and therefore provided a weapon in the form of Section 8 of the Act for the benefit of the exponents of expeditious resolution of disputes to enable them to seek the courts to understand the issues and have the parties directed to the forum of dispute resolution chosen by them in the first place.

Why Section 8
India has adopted Section 8 of the Act, for reference of the parties to the arbitration tribunals by the courts, from Article 8 of the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration, 1985 (“Model Law”). The drafters of the Model Law had very well anticipated the dilatory tactics which the parties may utilise to make the whole dispute infructuous or gain undue advantage of such delays. Hence, the Model Law insists that the UNCITRAL parties (various nations) should adopt a similar provision in their domestic legislations.

As a result, Section 8 of the Act, reflects the objective behind Article 8 of the Model Law. However, it must be noted that, some deviations have been made in Section 8 by the Indian legislators keeping certain specific Indian practices in mind, which have made the provision tailor made for the

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needs of Indian judiciary. Hence, at this juncture, it is expedient to compare these provisions under the Model Law and Section 8, and analyse why these deviations are made under the Indian laws to appreciate the law better in the following section of this paper.

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<td><strong>Article 8 of the Model Law: Arbitration agreement and substantive claim before courts</strong> - 1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. 2) Where an action referred to in paragraph (1) of this article has been brought, arbitral</td>
<td><strong>Section 8 - Power to refer parties to arbitration where there is an arbitration agreement - 1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists. 2) The application referred to in sub-</strong></td>
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<td><strong>proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.</strong></td>
<td><strong>section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court. 3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an</strong></td>
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arbitration may be commenced or continued and an arbitral award made.

Analysis of deviations from Article 8 of the Model Law under Section 8 of the Arbitration Act:
The deviations have been made in the provision by the legislators in India to broaden the ambit of the provision and to give proper opportunity to the judicial authorities to examine the arbitration agreements prior to passing any verdict. The following deviations in Section 8 of the Act from the Article 8 of the Model Law are enumerated and analysed below:

1. Replacement of the term “Court” with the term “Judicial Authority”: Drafters of the Act, have purposefully used the term “Judicial Authority” instead of the term “Court”. Section 2 (e) of the Act defines the term “Court”, however it has a narrow interpretation of the term and includes only “Principle Civil Court of Original Jurisdiction in a District” and the “High Court having Original Civil Jurisdiction”, exclusively to be understood and known as “Court” as per the Act. Therefore, use of the term “Judicial Authority” despite the term “Court” makes it possible for the applicants to challenge under Section 8, not only the matters filed before the “Principle Civil Court of Original Jurisdiction in a District” and the “High Court having Original Civil Jurisdiction” but also any other subordinate courts and even any proceeding having judicial character. It must be noted that, onus of proving that any proceeding had judicial character would be upon the party filing application under Section 8 of the Act before the court.

2. Addition of the phrases:
   (i) “unless it finds that prima facie no valid arbitration agreement exists”—This is the only test which the courts have to apply before accepting an application under Section 8 of the Act. However, the “validity check” enshrined through the phrase gives a leeway to the parties to delay the proceedings.
   (ii) “or any person claiming through or under him”: The expression “any person” clearly refers to the legislative intent of enlarging the scope of the phrase beyond “the parties to the arbitration agreement” who was signatory to the arbitration agreement. However, such applicant who was not a party to the agreement would be bound to prove that he somehow claims through the party to the arbitration agreement (a good example of such scenario could be assignment agreements, wherein a party assigns all of its rights and obligations to another party under an agreement). Hence, once this link is established, then the Court would be bound to refer such parties to arbitration. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. As explained above, such arrangements may put courts and parties in a state of confusion, but certainly, these are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, is very much possible between a signatory to an
arbitration agreement and a third party but heavy onus lies on that third party to show that, in fact and in law, it is claiming “through” or “under” the signatory party as contemplated under the law.

(iii) “Presentation of original arbitration agreement or a certified copy thereof”– The said provision gives an opportunity to the court to examine the arbitration agreement once it is presented before the court. However, there are certain recent precedents which have relaxed this condition and now it is not mandatory for applicant to present a certified copy or an original arbitration agreement, if the other party (the respondent) has also presented a copy thereof before the court. The reason behind adopting this practice is that, if both the parties produce the same arbitration agreement, it gives a reason to the court to understand that, certainly both the parties had agreed on the same agreement. Further, in case if the party cannot produce a photo copy of the arbitration agreement, such party can file an application to direct the respondent to produce the original/certified copy of the arbitration agreement executed between the parties.

Section 8 of the Act provides for the courts to observe the following mandates and then refer the parties to arbitration:

1. There must be an arbitration agreement between the parties;

2. Dispute must be subject matter of such arbitration agreement;

3. The party seeking to court to refer the parties to arbitration should present either the original arbitration agreement or certified copy thereof before the court; and,

4. The party seeking arbitration must file an application to refer the parties to arbitrate prior to filing its first statement on the substance of the dispute.

Even if the abovementioned grounds are prima facie proved by the party interested in referring the matter to arbitration several defences are taken by the opponent so as to keep the matter delayed and in the courts. This defences are discussed separately in this paper below.

Challenges to the reference to arbitration by the courts and defences thereof

1. Dispute is not covered/partly covered under the arbitration agreement: A common defence taken by the parties is, stating out the arbitration agreement does not cover the disputes hence the court cannot refer the parties to arbitration. On various occasions courts have analysed the arbitration agreements and have decided the matters accordingly. Hence, it is expedient that, the arbitration agreements so executed between the parties must be very broadly worded. A good example of a widely worded arbitration clause is as below:

“In case of any dispute or difference arising out of or in connection with this Agreement whether during its subsistence or thereafter between the Parties or any third party claiming through any of the Parties, including any dispute or difference relating to the interpretation of the Agreement or any clause enshrined under the Agreement or understood/agreed otherwise by the Parties shall be settled by arbitration in accordance with the provisions of The Arbitration and Conciliation Act, 1996”

2. Copy of Arbitration Agreement is not certified: as discussed above it is one of the general defences which are taken by the
parties opposing Section 8 application as the word “certified” has not been defined in context of agreements between the private parties in India. However various courts have considered documents certified by notaries, directors, registrars etc, as certified agreements setting precedents in this regard. Also, as guided by the Apex Court in the case of Ananthesh Bhakta vs. Nayana A. Bhakta, if both the parties have submitted a copy of the same arbitration agreement relying upon the agreement, the court can rely upon such copy of the agreement and dispense the parties from producing the original or a certified copy of the arbitration agreement before the court.

3. **The party has already accepted the jurisdiction of the courts:** This is a critical aspect to be kept in mind while filing an application under Section 8 of the Act. Mostly, because of the fear of running limitation period, parties in hurry file written statements first and then prefer application under Section 8 before the Court. In such cases, defendants/respondents get an opportunity to convince the court by stating that the other applicant has already accepted the jurisdiction of the court. Hence, in such cases Section 8 application should always be the first document to be filed before the court with the vakalathnama.

It is worth noting that, certain parties have gone to the extent of saying that as the other party has filed vakalathnama they have accepted the jurisdiction of the court however in various judgments courts have ridiculed such arguments and now it is a settled law that filing of vakalathnama does not necessarily mean that the party has accepted jurisdiction of the court and given away his right to request the court to refer the parties to the arbitration.

Also, in cases wherein parties have filed interlocutory applications prior to filing Section 8 applications, the other parties have made arguments before the court that the party has already accepted jurisdiction of the court and now the court should not entertain an arbitration application. In such cases also, the courts have taken a strict view that filing an interlocutory application does not bar a party from filing an application under Section 8, requesting the court to refer the parties to arbitration.

4. **Arbitration Agreement is not valid:** This may be a challenging defence in cases where fraud is committed or in the cases where arbitration can be barred by the special legislations (for example Consumer Protection Act, 1986). In such cases parties have to get their disputes resolved through the adversarial mechanisms as prescribed by the courts and forums established as per such special legislations. However, in cases where the validity is not challenged on such clear grounds as stated above the court will be obliged to refer the parties to the arbitration.

5. **The arbitration agreement is not duly stamped/registered:** This may be another though less preferred defence to a Section 8 application, where the defendant/respondent may argue that, as the arbitration agreement is not stamped/registered, it is not duly executed and hence the court should not rely upon it. In such circumstances, it is easy to get the unstamped agreement stamped by paying the fine as provided under the

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549 Ananthesh Bhakta vs. Nayana A. Bhakta, (2017) 5 SCC 185

stamp legislations of the State/Union Territories wherein the agreement was executed/performed and then present the agreement before the court. However, in the cases relating to non-registered arbitration agreement, as there is no corresponding provision under the Indian registration legislation for getting a document registered on a later date by paying any fine for curbing/compounding the error, the courts cannot oversee such errors and would not refer the parties to the arbitration on the basis on non-registered arbitration agreements.  

**Power of courts under Section 8**

As guided and interpreted by various judgments passed by various High Courts and the Supreme Court, Section 8 is not a power but a command to the courts, it is *pre-emptory* in nature.  

Hence, once an application is filed for seeking the court to refer the parties to the arbitration, the court would upon satisfying itself as provided under Section 8 be bound to refer the parties to the arbitration. The court cannot go into the merits of the case and after *prima facie* satisfying itself has to refer the parties to the arbitration as mutually agreed between both the parties as per the arbitration agreement.

The courts have to primarily satisfy themselves about whether there is an arbitration agreement between the parties or not. If the court finds that there is an arbitration agreement then the courts have to refer the parties to arbitration irrespective of the validity of the arbitration agreement or validity of any agreement containing such arbitration clause.  

However, in cases wherein there is no arbitration agreement between the parties, courts cannot mandatorily refer the parties under Section 89 of the Civil Procedure Code, 1908 upon request of one of the parties to the suit to arbitration. The said position has been clarified by the Supreme Court recently in a judgment, wherein the court held that, “**Courts cannot under the veil of Section 8 of the Act invoke Section 89 of the Code of Civil Procedure when application for seeking the court to refer the parties to the arbitration was made.”**

**Conclusion**

In light of the above discussion and analysis, it is fair to conclude that Section 8 is a guarantee of the Indian legislature to the citizens/non-citizens, who have executed arbitration agreements to have their disputes resolved as provided under the Act. Further the role of the court is as per Section 8 is of the executive, to enforce this guarantee, as and when a litigation is initiated before it undermining the arbitration agreement vis-à-vis the will of the parties to an agreement.

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552 The Branch Manager Magma Leasing and Finance Limited AndAnr v. Potluri Madhavi Lata And Anr. (2009) SCC 103
553 P. Anand Gajapathi Raju and Ors. v. P.V.G. Raju (deceased) and Ors. (2000) 4 SCC 539
554 Sundaram Finance Ltd v. T Thankam(2015) 14 SCC 444
555 Kerala State Electricity Board and Anr. v. Kurien E. Kathilal and Anr. (2006) 6 SCC 293

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RAPE : SOCIAL AND LEGAL PERSPECTIVE

By Shubham Yadav
From Indore Institute of Law

ABSTRACT

The study has to show that how the sexual offence is increasing and how it is increasing day by day. The whole study revolve around the loop holes of the government department and the government because they are unable to made the policy which are effective for stopping this crime or they are not executing or interpreting the law properly and they also find the safe side of the law and misinterpreted it by getting bribe to change the case. This study also says about the loop hole in executing the Criminal procedure code sections departments find the safe side to fill their pockets. It also explain the meaning of the Rape and the definition of it and also explain the different sexual offences.

INTRODUCTION

This offence is happen when a person touch other person without his/her permission or consent or do coercion/undue influence or fraudulently get the consent of the other by putting a quasi condition in front of that person. Simply it means unwanted sexual or physical contact with that person by touching his/him or penetration etc.

Some major sexual offences are
- Grouping
- Sexual harassment
- Child sexual abuse
- Rape

Now we will discuss all this offences one by one but first got to know that in Indian Penal Code the sexual offences are given from Section 376 to Section 376 E.

Grouping
It means touching or fondling another person in an unwelcome sexual way using the hands i.e. touching the person private areas of body that private part of women are buttocks, breast, valve & thighs and in men Penis, Testicles. This happen only when person touch by hands not do anything else. Now a days this offences or assault is increasing because of people political relations and by other things boy touch a girl private parts in a bus, train and other transport but the girl didn’t says anything because of fear. Because of the strong political support they do this freely without any fear or the punishment for this offence is not very much or more. The same problem also arises with boys also the women touch there parts and molest them by threatening in the name of society. The big offences is always start with this small things then they are free to do the big crime or major offence.

Sexual harassment
Sexual harassment is request for sexual favors, sexual advance or sexual conduct by dominating the other person. It will be oral or written form both.

Major element
1. Unwanted sexual statements
2. Unwanted personal attentions
3. Unwanted physical or sexual advancing

In recent era this generally happens in between the servant and the boss or employees and employer to get the increment. Employees fulfill sexual need of
high post official of work place this is known as harassment at workplace to stop this every company placed a human resource department under his office to solve the problem and harassment of the high officials The offence is happen when a person touch other person without his/her permission or consent or do coercion/undue influence or fraudulently get the consent of the other by putting a quasi condition in front of that person . Simply it means unwanted sexual o physical contact with that person by touching his/he o penetration etc.

Child sexual abuse
Child sexual abuse is a form of child abuse that includes sexual activity with a minor. A child cannot consent to any form of sexual activity, period. When a perpetrator engages with a child this way, they are committing a crime that can have lasting effects on the victim for years. Child sexual abuse does not need to include physical contact between a perpetrator and a child. Some forms of child sexual abuse include:

- Exhibitionism, or exposing oneself to a minor
- Fondling
- Intercourse
- Masturbation in the presence of a minor or forcing the minor to masturbate
- Obscene phone calls, text messages, or digital interaction
- Producing, owning, or sharing pornographic images or movies of children
- Sex of any kind with a minor, including vaginal, oral, or anal
- Sex trafficking

- Any other sexual conduct that is harmful to a child’s mental, emotional, or physical welfare

In IPC the major focus on the sexual offences which is rape.
Now what is rape and hat punishment is given for this and is this punishment is sufficient and women are using this provision in right way or misusing it? Is this right to provide so much power to women?

According to Indian Penal Code 1860 S375 says Rape is
Rape.—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

(First) — Against her will.
(Secondly) —Without her consent.
(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
(Fourthly) —With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the

556 https://www.rainn.org/articles/child-sexual-abuse
nature and consequences of that to which she gives consent.

(Sixthly) — With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Paragraph) — Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.] STATE AMENDMENT557

In general sense rape is sexual involved with person without his/her consent. If her/his consent, If he/his consent not present then it comes under the offence sexual assault. There is the thing which gives in above given section of Indian Penal Code.

In report of al jazera media network they said 34651 cases of rape were reported by the National Crime Record Bureau (NCRB) has reveled in year 015 at India and 4437 cases are reported as attempt to rape in 2015 and the report of India Today (sep 4 2014) 92 women’s were raped on average every day in India and National capital with 1636 cases recorded the highest no. in 2013 558

In report of the Indian Express no. of rape in Delhi registered a rise in 2015 with data suggesting a average of six cases every day as many 2095 cases of rape were reported in 2015 till December 2015 compare to 2085 in 2014.

If the capital is unsafe then hat is the condition of the other stated obviously there are more cases reported in the head.

Why this Crime increasing day by day?

Because of the mentality of people this crime is increasing a d also because of less punishment for this brutal crime and also because of management or government carelessness.

As I see this is increasing also because of fear of losing respect in society so people didn’t open this type of cases and police don’t take action against them after this they became braver and do these things again. Police blame girl or do question wrong questions to victim. If the punishment is fully rigorous then may be this crime get decrease there is need of some more policy or law to put stop or reduce on no of cases against women. one more major reason behind this is corruption and the carelessness of police department there is some recent example of unawareness of police recently one rape case was happen near police station in Bhopal (capital of Madhya Pradesh) but the police didn’t know anything they know the things after victims come to laugh FIR. Fact of this case The daughter of a Railway Protection Force (RPF) assistant sub-inspector was allegedly gang-raped, robbed and abandoned near a railway track in central Bhopal on Tuesday evening, police said on Thursday.

All the four accused, identified as rag pickers, have been arrested.

The FIR was lodged 24 hours after the crime was committed because of an intra-police dispute. Though the woman — a civil

557 https://indiankanoon.org/doc/623254/
558 https://www.indiatoday.in/india/story/india-rape-92-women-every-day-4-delhi-statistics-207241-2014-09-04
services aspirant — was allegedly raped barely 200 meters from the Habibganj government railway police (GRP) station, they insisted that the crime scene fell in the MP Nagar police station limits.

When relatives of the victim approached the MP Nagar police station on Wednesday morning, they were reportedly told that the area falls in the Habibganj police station limits.

If this crime happen near the station then obviously other areas are not safe for the people and there is so many cases of corruption in which Police and other department take bribe and involve an innocent person in case and made charges against them or threatening to cancel the corruption.

**Is the provision are misusing by people or not ?**

There is a 50 : 50 chance of this some people are misusing it and some are not so many take advantages of this and make false charges on innocent person for that act which he not do with her/his. Main cases are of the rape or people who didn’t do the rape of that person by with malice intention he/she do this type of things.

When the victim goes to police station the officer didn’t follow the procedure as given in the Criminal procedural code according to CRPC S-154. IF the offence is cognizable (Rape) the officer should react promptly but in real they ask unnecessary question which are are not needed to ask on that time and spend or waste the time and also the victim not file the complain because of this the accused are free to do the act again only because of the mismanagement of the authorities.

The investigation done by then was not according to S-157 of CRPC they got the bribe and change the evidence and the actual statement which are given by the witnesses and the victim an at the time of investigation they didn’t search properly the crime scene. the actual procedure is follow only on those case which are highlight in eye of general public like Nirbhaya rape case, Kathua rape case and other famous or rare case of rape but the other infamous case not investigated properly because of carelessness of department. If there is deficient in the evidence then the accused is released according to S-169 of CRPC because the investigation of case by office is not up to the mark according to S-157. Sometimes the report of investigation completed because of corruption that report also change which presented under S-173 of CRPC.

One more problem is also arises that the crime which are happen in area are not related to concern area then the police officer say no to record FIR by saying that this case is not of our area but to cope up from this problem the concept of ‘Zero FIR’ introduce i.e. Zero FIR means the victim can file the FIR at any police station irrespective of that the area in which the things happen. the police office lodge FIR under the head Zero either of any numeric and after this the FIR is transfer to the concern police station. this concept is introduce because there is too much delay in the investigation and the accused is escaped from the area.

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www.supremoamicus.org

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INTRODUCTION
In today’s techno-savvy environment, the world is becoming digitally sophisticated and so are the crimes. Cybercrime cases such as online banking frauds, online share trading fraud, source code theft, credit card fraud, tax evasion, virus attacks, cyber sabotage, phishing attacks, email hacking, denial of service, hacking, pornography etc. takes place. To combat these crimes IT ACT came into existence in the year 2000. But what were the reasons for existence of these crimes? People not familiar with the use of internet also termed as “cyber illiteracy” is the primary reason for cybercrimes. When a person chats with a stranger online, gives bank details online, posts a thing only for fun which might defame other party leads to cybercrimes. Posting about you private life constantly on social media, inclusion of common man via comments on social media leading to political war can also be charged for felonies. The burning issue (mob lynching) which caused so many killings was the result of cyber illiteracy and irresponsibility through social media. Initiative has been taken by government to enact laws for cybercrimes but the concern is not the law it is the implementation of law. Though technology cannot be banned and it is next to impossible but digital literacy can be promoted. A digitally literate person should possess both digital skills and knowledge to use computer networks, engage in an online community, and understand the societal issues which are raised by digital technologies. Every individual should also know the consequences of his every action and act accordingly.

- Political war on social media
  Revolution in social media has placed politics on a whole new level. Through Social media a political party not only attracts public at large but also knows what public wants because of the two way communication. But nowadays social media has become sole purpose of creating controversies and defaming others on a public platform. Young party workers who have built election war rooms keep up constant barrage of tweets, comments, posts on Facebook to promote their political party and to defame the opposition parties. Lately animated videos, memes, cartoon pictorial presentation of a political figure, trolls is trending on social media for attraction towards election campaigns. In some way or the other this is leading to political war on social media because not only the citizens observe such things but also have some say in it. Recently illogical hash tags have left no sanity on the platform. Indeed it is getting trended and getting more voice, but do such hash tags add any value? Social media is a double edged sword, it depends how a political party uses it and a perfect move can be really a game changer.

- Cyber Defamation
  In cyber defamation, internet or other electronic device is used as a method to defame the other person or lowering the reputation of a person on a public platform.
Cyber defamation can be categorized into libel form (written form) and slander form (oral form). Liability of cyber defamation in India is of two folds:

Primary writers-Person who has written the defamatory content and published it on the cyberspace
Service providers- The ISP or bulletin board service providers which authorizes publication of defamatory statement. In cyber defamation a person’s name is only damaged when the defamatory statement is disclosed to the third person.

Relevant statutes for cyber defamation are:
• Section 499, Indian Penal Code states that whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.
• Section 500, Indian Penal Code states that any person held liable under section 499 will be punishable with imprisonment of two years or fine or both.
• Section 469, Indian Penal Code, This section deals with the forgery, in this if anyone creates false document or fake account by which it harms the reputation of a person. The punishment of this offence can extend up to 3 years and fine.
• Section 66A, Information Technology Act, 2000, this law has been struck down by the Supreme Court in the year 2015. This section defined punishment for sending ‘offensive’ messages through a computer, mobile Thus the criminal liability of the wrongdoer can be fixed provided following two essentials are satisfied:
- Actus Reus i.e. Act
- Mens rea i.e. guilty mind tablet. Stand on the word ‘offensive’.

Therefore, a techno-savvy person who works in IT department or is well versed with technology cannot commit cybercrime. In cases where IT act is silent, provisions of IPC come into existence (i.e. actus reus and mens rea).

• Human trafficking
It is the third largest organized crime after drugs and arms trade across the globe. Basically, human trafficking is illegal commercial sexual exploitation or forced/bonded labor of the individuals in cyber space. Laws for anti-human trafficking in India are
1. Through the Immoral Trafficking Prevention Act (ITPA), the Indian Government penalizes trafficking for commercial sexual exploitation, with prescribed penalty of 7 years’ to life imprisonment.
2. India also prohibits bonded and forced labor through:
   • Bonded Labor Abolition Act,
   • Child Labor Act, and
   • Juvenile Justice Act.
3. Sections 366(A) and 372 of the Indian Penal Code, prohibits kidnapping and selling minors into prostitution respectively. Penalties under these provisions are a maximum of 10 years’ imprisonment and a fine.
4. Trafficking in Human Beings or Persons is prohibited under the Constitution of India under Article 23
5. Protection of Children from Sexual offences (POCSO) Act, 2012, which has come into effect from 14th November, 2012 is a special law to protect children from sexual abuse and exploitation.

6. The Immoral Traffic (Prevention) Act, 1956 (ITPA) is the premier legislation for prevention of trafficking for commercial sexual exploitation.

7. Criminal Law (amendment) Act 2013 has come into force wherein Section 370 of the Indian Penal Code has been substituted with Section 370 and 370A IPC which provide for comprehensive measures to counter the menace of human trafficking through social media platforms.

8. There are other specific legislations enacted relating to trafficking in women and children:
   • 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,
   • Punjab Prevention of Human Smuggling Act, 2012

9. Apart from specific Sections in the IPC,

State Governments have also enacted specific legislations to deal with the issue. (E.g. the Punjab Prevention of Human Smuggling Act, 2012)

In online sex trafficking, the traffickers will target the persons who are thinking of migration and youths from rural areas through their advertisement techniques. They use false photos in advertisements to hide the underage exploitation.

Lok Sabha has passed a comprehensive law to contain human trafficking; the bill covers "aggravated" forms of trafficking for forced labor, child bearing, begging and marriage and lays down stringent punishment for those who found guilty. In India the rate of human trafficking through social media platform is increasing due to cyber illiteracy.

Media trials

In India, media is considered as the fourth pillar of democracy. No democracy can work without an effective media in place. But media trial hinders the judicial system. It takes away the right of privacy and the right of free trial of accused and hampers his reputation. Recently in numerous cases the media has passed its verdict even before the court has passed the judgment. The best example is the murder case of Arushi Talwar, wherein it preempted the court and reported that her own father Dr. Rajesh Talwar, and possibly her mother Nupur Talwar were involved in her murder, the CBI later declared that Rajesh was not the killer.

Article 19(1) of the constitution states the right of freedom of expression but on the contrary Article 19(2) empowers the state to put reasonable restrictions on freedom given by Article 19(1). On the other hand media trial violates the Fundamental Right secured by Article 21 (right to life and liberty) of an individual. Right to Privacy has been recognized as a right “implicit in
the right to life and liberty guaranteed to the citizens of this country by Article 21.

• Online texting resulting cyber crimes

Nowadays, texting is the essential part of everyday life. It can be convenient sometimes and at times has serious consequences. A prudent man doesn’t know online texting can create a trouble in the eyes of law in unexpected ways. Online texting with strangers can lead to crimes like:

1. Cyber bullying– Wherein threats or harassment is done through send offensive messages or pictures.

2. Sexting– In this type of a crime obscene photos or vulgar texts is send to an innocent person.

3. Prank calls– This charge involves texts sent to another person with the intent to annoy or harass.

4. Extortion– Sending texts of threats of violence or other criminal means to obtain money or property is extortion.

In the above mentioned crimes the foremost step used by strangers is to gain the trust of the victims. Then they will make you fall for them through flirty messages and once you are caught in the trap they will eventually ask your for bank details, you residence number or ask for your private photos (in case of teenagers) or even send you obscene photos. They might even blackmail you by hacking your social media accounts like Facebook, Twitter, Snapchat and Instagram. Due to this crime many individuals have either committed suicide due to depression or have been killed by the stranger. Crimes like child pornography, trafficking, money laundering has also taken place. These crimes are seen more in teenagers because if they don’t get attention and acceptance in real life they seek for it online.

The traditional law dealing with obscenity (including pornography) in India is contained in sections 292-294 of the IPC. Section 292, IPC prohibits sale, letting on hire, distribution, public exhibition and circulation etc., of obscene material. Section 293 provides enhanced punishment for sale etc. of obscene material to any person under the age of twenty years. Even an offer or attempt to do so is punishable. Publishing as well as circulating of obscene photographs of women is also punishable under sections 3 and 4 of the Indecent Representation of Women (Prohibition) Act, 1986. These provisions can also be used for punishing people who circulate obscene material in electronic form. In view of the above, though sec 66A of the IT Act has been held unconstitutional by the apex court but still a victim of cyber offence would not be rendered remediless and could invoke the appropriate section and law to get desired relief.

• Mob lynching due to false news

Fake news travels faster than the real news and its impact is deeper. The real cause behind mob lynching is the misinformation forwarded on Whatsapp. Rumors were spread through Whatsapp that a group of people In India are suspected for child trafficking and since any suspicious activities by any person has led to killing of the suspected target even if he is innocent. These rumors have led to mob lynching and killings of innocent people. There’s also simmering tensions over Hindu vigilante groups who’ve targeted and killed Muslims. It takes the right of life under the article 21 guaranteed by the constitution of India. Explicitly, the Supreme Court directed the police to register an FIR under Section 153A of IPC and other such provisions of law.
against those who indulge in these kinds of activities. In an attempt to make the trial process quicker, the Supreme Court has proposed day-to-day trial in fast track courts and additionally, maximum punishment to the accused in mob lynching cases. Explicitly, the Supreme Court directed the police to register an FIR under Section 153A of IPC and other such provisions of law against those who indulge in these kinds of activities. In an attempt to make the trial process quicker, the Supreme Court has proposed day-to-day trial in fast track courts and additionally, maximum punishment to the accused in mob lynching cases.

Basically, the problem is the bad prosecution and unfair investigation. In one of the cases in Uttar Pradesh was that the police ignored the cause of justice by claiming that the attack was caused on account of a dispute arising out of a road accident. Therefore, there is a need for a free and fair investigation and prosecution. Recently Government has introduced the feature of Whatsapp, wherein the admins of the groups can control what the group members circulate. There are sections under IPC and CRPC for murder, unlawful assembly and rioting but nothing that takes cognizance of a group of people coming together to kill (a lynching mob). But merely enacting law is not sufficient implementation is the real task.

CONCLUSION

With the revolution in the cyber world a prudent man has to be alert and think twice before any step to be taken. As abovementioned crimes i.e. political war on social media is often due to inclusion of comments on political posts which leads to war, a man doesn’t know just a comment will make such a big difference. This where cyber illiteracy and social media responsibility comes into picture. Another issue is media trials it not only hinders the judicial system but also puts a wrong impression on the viewers and since everyone has faith in media they blindly follow and accept the opinions and suggestions given in media trails. To combat such cyber illiteracy or social media crimes Government should ban such trials or find alternatives like including cyber literacy subject, the laws and training for the same from schooling itself. And the adults or teenagers should know how to distinguish what is real and fake, be more alert while sharing details on social media or for that matter online, teenager should be more cautious while texting some stranger. Social media is a double edged sword because every like, shares, post, comments might be taken friendly by some and offensive by many. There are laws for cyber-crime but implement by an individual is quite a task.

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MARITAL RAPE: MARRIAGE IS NOT CONSENT

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Abstract

Equal rights, equal importance or equal opportunities this is what we call gender equality. Both men and women are pillars of humanity, but women have always been subjected to humiliation. The dignity of women is always hampered by men, rape is one of the appropriate example of violation of dignity of women by men. Marital rape is a crime undefined in India, is one of the most debatable and controvertible issue. In a country where development is determined by the progress of its women, how come there is no law or no legislation against such violent and brutal crime. If state can make laws for domestic violence then why can’t it make laws for such a heinous crime? There is a need for protection of women against their husband who is the perpetrator and the woman is the silent victim. What can be more painful for a woman and violative of her self respect and dignity if an offence like marital rape takes place within her marital relationship? Lack of laws and social stigma present in our society is one of the primary reason why offence like marital rape is not criminalized and not seen as offence. There is an instant need of criminalisation of marital rape in India via proper legislative approach and gender sensitivity should be created among the people. Thus, ultimately this paper focuses on the plight of the married women who are subjugated in this trap and its high time that one thing need to be taken into consideration, that non consensual sex with wife must be considered as rape.

Keywords: Marital Rape, Gender sensitivity, India, society

Introduction

Stop telling Yourself You Can Fix Him.

He’s been this way for a long, long time

And he doesn’t intend to change.

Don’t be a sacrificial lamb

on the altar of this rage.

Don’t play the martyr to his hate.

You can never save someone by letting them destroy you.

That’s not love, its relational suicide.

Save yourself instead.

Get out while there’s still time.

John Mark Green

Marriage is a sacred union of man and woman that accords status to them as husband and wife. The origin, concept and purpose of marriage can be very well traced out in the religious books. According to the Veda, marital bond is a union between a masculine and feminine entity with

commitment to attain dharma (righteous way of living), artha (possession), Kama (physical and other desires) and moksha (the liberation) in unison. A good and successful marriage is an effort of both husband and wife. Marriage is a sacred bond, but what if husband is humiliating the dignity and self respect of his wife by doing rape. It doesn’t mean that it gives husband the license to rape his own wife under the veil of law. So many wives have been victim of marital rape. Marital rape is a bitter truth behind the iron curtain of marriage. It doesn’t give right to control over the sexuality of the wife. It is a kind of abuse on day to day basis. So many wives got victimized due to marital rape since years and so many husbands have turned into legal rapist from lover. In India where husbands are given the status of god by their wives it doesn’t mean they have no right to say no. A woman need to have all right to find justice if her husband rapes her within the ambit of marriage. In such kind of situation there should be no immunity for the Husband. Wife too has full marital autonomy. All the major democracies around the world has criminalized marital rape. Marital rape is a breach of trust and confidence.

A wide range of Gender based violence is taking place in the family like domestic violence, sexual abuse of female children, battering and even marital rape. These are kind of Gender violence which ends up in causing physical as well as psychological pain to women.

An Understanding of marital rape
Rape can be defined in its simplest term, as ‘the ravishment of woman’ without her consent, by force, fear or fraud, or as “the carnal knowledge of a women by force against her will” . ‘Rape’ has been extracted from its generic term “Raptus” which means violent theft applied upon both property and person in Roman Culture or an act done by one man which damages or destroys the property of another man. Marital rape or Spousal rape can be defined as an act which includes unwanted sexual intercourse, that is with one’s partner(spouse) without the consent of the other partner. This kind of unwanted intercourse by a man upon his wife is obtained by force and physical violence or when the wife is unable to give consent. The victims of marital rape usually don’t realize that they have been raped as they are under this wrong impression of that partners do don’t rape each other. However, this is totally false and sexual acts without consent even among intimate partners will constitute the offence of rape. Marital Rape in which women are subjected to extreme level of violence and undue influence also shows grave human rights violation.

562Margaret Schaus, Women and gender in medieval Europe: An Encyclopaedia, 695 (Routledge revival, 2006)
Violence can be generally conceptualized in terms of physical force or a behaviour that inflicts injury on a person or to a property. These kind of sexual violence happening against women too has its various determinants such as:

- Control of women’s sexual behaviour.
- Women as an object of physical pleasure.
- Unequal power relation present in the society.

Types of marital rape-

- Battering rape – This is a kind of marital rape which involves the use of force and aggression against the wife. The women experience both physical and sexual violence during sexual assault.\(^{563}\) The beating may also occur before the sexual assault so as to compel her into sexual intercourse\(^ {564}\).

- Force only rape – In this kind of marital rape, the husband usually does not necessarily batter the wife, but also uses much force which is necessary to enter into sexual intercourse with the unwilling wife.\(^ {565}\)

- Obsessive/Sadistic rape – This is a form of marital rape which involves the use of force sexual assault complied with perverse act against the wife.\(^ {566}\) It involves a kind of sexual sadistic pleasure enjoyed by the husband.\(^ {567}\)

**Historical perspective:**

Historically many cultures have considered Marital rape as a sin, different religious text has very well traced out the rights of women in marital bonds before any code of law was formed in any country.

**Concept under Hinduism**

It is stated in *Mitakshara* about the unlawful coming together of a man and a woman for sexual enjoyment which is called *sangrahana*. It says that Sinful *sangrahana* is of three kinds which are brought about by deception, desire or force.\(^ {568}\)

The first kind (which is rape) takes place when intercourse happens in a isolated place against the will of a woman, or with a woman who is of

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\(^{564}\) *Fundamentals of Criminal Justice: A Sociological View*, 83 (Jones & Barrett Learning, 2011)

\(^{565}\) Janet A. Sigal, *Violence Against Girls And Women: International Perspectives*,137 (ABC-CLIO, 2013)

\(^{566}\) *When Bedroom is The Crime Scene: Contextualizing Intimate Partner Rape*, ProQuest, 2018

\(^{567}\) *Family Violence: Legal, Medical And Social Prospective*, 355, (Routledge, 2015)

unsound mind, intoxicated or is under a fallacy or who she raises a cry. 

- the second kind (which is rape) happens when a woman is brought to one's house by some ploy or deceit, an intoxicant is administered to her or her mind is brought under control (by chants or otherwise) and then sexual intercourse takes place.

- the third kind (which is rape) happens when the intercourse takes place by conveying (passion) to each other through eyes (glances) or by employing a go between and when the parties are attracted to each other by the temptation of beauty or of wealth.

The first is characterized by smiling at a woman, winking at her, touching her ornaments or clothes. The second one can be characterized by the delivering of things such as flowers, incense, food, clothes and indulging in private talks. The third is characterized by way of his action such as by lying on the same bed, kissing or embracing her. **Strisangrahan** by force (which is rape) is very much included under **sahasa** as stated by **madanaratna**.

### Concept under Islam

Allah has described marital bonds as a relationship of mercy, kindness and love. Allah commands men to deal with their wives in a righteous way. Any kind of harm or violence be it verbal or psychological such as abuse or rape are completely unacceptable in such a relationship. The Qur'an describes this relationship as compassion and love and also to seek solace in each other.

The Quran is very much conscious and sensitive towards woman’s rights, welfare and their individuality. This is why non-consensual sex in marital bonds is subjected to what is called in modern day jurisprudence as ‘marital rape’. Thus in the light of Quranic value system, it must be prohibited and sanctioned.

The Qur'an describes **‘man and his wife as libas (apparel, garment) for each other’**. Therefore it implies that marital bonds is much more than fulfilling a natural instinct like hunger or thirst. It conveys much more higher end, and a marital contract which is a mode of protection, comfort and adornment for each other; this is what an apparel or garment is meant for. Thus Qur'an has beautifully explained this relationship by describing husband and wife as each other’s libas.

### Marital Rape and laws in India

In India laws regarding rape continues to be of patriarchal mindset, considering women to be the property of men and therefore she has no autonomy or agency over her body. Marital rape has been criminalized in many countries and is documented as a desecration.

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569 The Qur’an 30:21

570 The Qur’an 21:87
of human rights. Although various countries in the world have taken such progressive steps, India is among one of those countries where marital rape is still not a criminal offence and it is left untouched by the legislature.

Section 375 of Indian Penal Code defines the Offense of Rape and its various instances\textsuperscript{571} followed by two exceptions, in this issue only exception 2 plays the vital role, as it says —*Sexual intercourse or sexual acts by a man with his wife, the wife not being under fifteen years of age, is not rape.*\textsuperscript{572}

This section dealing with rape clearly describes rape as a crime in a very restricted scope which states that the offence of rape is only committed within matrimonial bonds when the wife’s age is under fifteen years, this means there is no immunity in legal protection given to wife when she crosses the age of fifteen. It is a kind of satire on Indian legal administrative, which states that the legal age for marriage is eighteen and the very protection should be granted only up to sixteen who faces sexual assault! There is no answer to this as the legislature and judiciary is as always silent to this.

Under Protection of Women from Domestic Violence Act, 2005 if a women had undergone martial rape, she can approach to the court and obtain judicial separation from her husband \textsuperscript{573}. But as the act didn’t identified marital rape as a crime the passing of the much awaited act of Protection of Women from Domestic violence Act, 2005 didn’t gave much relief to the suffering and pain of the women. Under section 13 of the Hindu Marriage Act 1955, it has clearly provided the grounds for divorce which includes cruelty both physically and mentally. Rather than defining it in a proper way, it is applied in the terms of human conduct to behavioral relation towards marital duties and obligations. Under section 498A of the Indian Penal Code the word cruelty is defined. To bring the case within the ambit of this section, the degree of cruelty must be causing serious harm and pain to the wife, both mentally and physically.

**Constitution of India and the Marital Exemption To Rape**
The Constitution is the law of the land and the very heart and soul of the nation. According to the constitution any law passed which is inconsistent with the principles enshrined in the constitution will be ultra virus and unconstitutional. The Indian Constitution lays down and guarantees the right to *equality, freedom, liberty* life of dignity to its citizens irrespective of what gender race or sex the citizen belongs to. Then why the married women facing rape by her husband are not able to live a life of dignity and choice? Does the marital exemption to rape fulfills the principles laid down in Article 14 and Article 21 of the Indian Constitution?

\textsuperscript{571} Indian Penal Code,(45 of 1860) Section 375
\textsuperscript{572} Indian Penal Code(45 of 1860) Section 375,exemption(2)

\textsuperscript{573}Protection of Women from Domestic Violence Act,2005 Section 3 Explanation 1(2)
Equal Protection of Law

Article 14 guarantees and provide every citizen a fundamental right of equality before the law and right of equal protection of laws. Section 375 of the Indian Penal Code make a classification in terms of an exemption and does not regard a forceful sexual intercourse within a marriage as a rape. This section only provides immunity to statutory rape and not marital rape. Thus, it is considered that when a women is married she becomes the property of her husband and thus her consent does not matters and is considered as permanent consent to the sexual relationships with her husband.

Right to Life and Personal Liberty

Article 21 clearly defines life is “something more than mere animal existence” as very well traced out in Munn v. Illinois. Marital rape violates right to privacy, right to bodily self-determination and right to good health which forms an essential part of article 21. It also violates the right to live with human dignity. There are also cases in which judgment are given in contradiction to article 21 among them one of the most leading case of Harvinder Kaur v Harmendra Singh stated that “introduction of constitutional law in the home is most inappropriate.” It is like introducing bull in china shop. It will be a ruiner of the marriage institution and all that it stands for, thus resulting in weakening the marital bond. Later this was contradicted in the case of Sareetha v T Venkata Subbaih failed to advance the situation. The Supreme Court had also elucidated upon this in the case of Saroj Rani v Sudarshan Kumar Chadha by stating that “the introduction of equality clause within the marriage will destroy the institution of marriage”. With rendering these judgment it left us to ponder upon that are the laws not applicable behind the closed doors? or are they not encroaching the privacy?

Right to Privacy includes the right to be left alone. Any form of force sexual intercourse violates the right to privacy which is very well stated in State of Maharashtra v.Madhkar Narayan.

Right to bodily self-determination is based on the view that an individual is the utmost decision maker in matter firmly related with his/her body and welfare. Approval to sex is one of most intimate and personal choice that a woman reserves for herself. There is a concept called body autonomy. No person other than himself have full control over whom or what use their body. It is generally considered as basic human right which a person possesses. That is why one can’t be forced to donate blood, tissue, or any of its organs. It’s like the same that no one can touch you, have sex with you, or use your body in any way without your consent.

References:

574 Munn v. Illinois, 94 U.S. 113.
577 Saroj Rani v Sudarshan Kumar Chadha, 1984 AIR 1562.
578 State Maharashtra v.Madhkar Narayan, AIR 1997 207.
International Scenario

Marital rape has been recognized as a crime in various international laws as it is a grave violation of human rights. In United Kingdom many judicial decisions were given such as in R.v.Graham L\(^{579}\) and in R.V.C\(^{580}\) that a man can be absolutely accused for raping his own wife even though the rape incident took place much earlier and it do not offend section 7 of the European Convention which bars the retrospective of the penal provision. Thus United Kingdom laws have gone judicial innovation and recognized marital rape as a crime.

International Convention on the Elimination of all forms of Discrimination against the women (CEDAW) in combination with General Comment no.12 it is stated that the focus is on state as a obligation towards the protection of women from brutality which include both sexual abuse and the abuse faced by them at home. Marital rape is criminalized in a numerous countries such as UK, Turkey, Canada, USA.\(^{581}\)In 1979, the United Nations’ General Assembly had adopted a Declaration of Elimination of Violence against Women which particularly incorporated marital rape as a crime against women.\(^{582}\) India too is a part of various International committee and is regarded to provide laws and provisions to enshrine basic human rights. Thus India has obligations to provide laws which would protect and safeguard women from marital rape. The ‘United Nations Committee Declaration of Elimination of Violence against Women’ has also recommended India to criminalize marital rape.

Justice Verma Committee also constituted in 2013 and gave recommendations on marital rape:\(^{583}\)

- Rape and sexual assault as an offence was not only identified as crimes of desire but also as a manifestation of authority. The act of rape should not be limited to penetration of the vagina, mouth or anus, any non-consensual sex should be included within the definition of rape. The Committee recommended that the marital exception to rape should be deleted as the Indian Penal Code differentiates the rape which takes place within marriage and outside marriage.

- The law need to determine that the marital bonds or other fiduciary relationship between the victim or the perpetrator is not a valid plea for heinous crime like rape and sexual violence.

- The relationship between the accused and the complainant should not to be taken into consideration as relevance to


\(^{581}\)UK’s Criminal Justice and Public Order Act, 1994 and the Sexual Offences Act, 2003; Article 102, Turkish Penal Code, 2004; Criminal Code of Canada, 1970; In 1993 all states in the United States of America had ended their penal laws to delete the exception to marital rape.

\(^{582}\)Article 1, Declaration of Elimination of Violence against Women

\(^{583}\)Justice Verma Committee Report available at : http://www.prsindia.org/UPLOADS/MEDIA/JUSTICE%20VERMA%20visited%20July%2024,2018

www.supremoamicus.org
the enquiry whether the complainant consented to the sexual activity.

- The very fact that victim and the perpetrator shares a marital bond and intimate relationship must not be regarded as a mitigating factor for justifying the lower sentence for rape.

**Justifications to Marital Rape Exemption**

**Irrevocable Consent Argument:** According to this, Implied consent of wife by way of their mutual matrimonial consent is always present. Thus there exists no marital rape because sexual intercourse between the partners is always considered consensual.584

**Blackstone’s Common Law Unity Doctrine:** Husband and wife after marriage unify into a single entity and thus husband holds the joint ownership.

**Marriage Preservation Theory:** From the very early times marriage is considered as a sacrosanct foundation of the society and nuptial obligations are important to be fulfilled by the spouses. Thus concept like marital rape will lead to destabilizing the institution of marriage.

**Privacy Argument:** It is considered that by prosecuting husbands for marital rape will infringe marital privacy.

**Probability of Misuse Argument:** It is considered that the husbands can be subjected to false charges by their wives.

**Plea to Criminalize Marital Rape**

Apart from all the traditional and modern justifications to marital rape exemption, the very fact do not change that a rape is rape whether it happens with married or unmarried women. Married women possesses same rights and full dominances over her body as an unmarried woman has. Women’s constitutes half of the society’s population which gives rise to other half. Then why women still continues to be victimized by men in the society? The very argument that marriage is the social unit of a family it do not justify the act of greatest brutality. It will be as foolish as saying that if a relative kidnaps you or someone in a family is kidnapped by a relative will not be an act of kidnapping. What does the act of rape has to do with whether it is done by a married man to his wife or an unmarried man to a stranger? How does the violence committed is change. If various legislation's and enactments has been passed regarding violence against women in India like dowry, cruelty, domestic violence and female infanticide then why not marital rape has been passed In the light of *Sakshi v Union of India and others*585, sexual assault on part of the body should be constructed as a rape. It was stated in *Queen Empress v. Haree Mythee*586 that even if the wife is above the

584Marital Rape And The Laws In India by Ankita Sen available at: https://blog.ipleaders.in/marital-rape-law-india/ (visited July 28,2018)

585*Sakshi v Union of India and others* 2004(5) SCC 518.

586*Queen Empress v Haree Mythee* (1891) ILR 1 .Cal .49
age of 15 years, husband has no right to disdain her bodily security. Marital rape should be criminalized in India as

- Marital rape exemption in law is taking away the rights of the wives to say "no"
- Marriage is an institution which establishes a partnership between the equals
- Subjection to extreme level of coercion and violence
- Violation of basic human rights
- Ultra virus and unconstitutional in accordance to the principles enshrined in the Indian Constitution.

In 2015, a survey in India has disclosed that one in five men have compelled their wives to have sexual intercourse. More than two-thirds of Indian married women between 15, and 49 years old asserts to have been beaten or forced into sex by their husbands. Around 665 cases have been reported in 2015 in NGOs by women who faced domestic violence and marital rape, but the cases registered with court are very few.\(^{587}\) The plea is for punishment, the punishment for an act of rape is not granting of divorce as judicial separation. But over here too the provision do not recognize the said offence as rape.

According to article 15 of the Indian Constitution, it is clearly stated that state shall take steps for welfare of women and children. Thus criminalisation of marital rape as in protection and welfare of women should be done.

**Conclusion**

Marital Rape is one of the worst kind of sexual abuse which is taking place in the family. Patriarchal mindset has led to gender discrimination which in result has led the laws to close its eyes in doing justice towards the misery of the abused wives by not recognizing Spousal rape as a crime. The legislature recognizes the rape of a minor wives in a very loud terms and even the Apex court has delivered landmark judgment, but why the major wives have still not been able to gain judicial sympathy and justice in getting Marital rape recognized as a crime by the judiciary. By not criminalizing Marital rape as an crime it is paving an escape hatch for many offenders of sexual violence and the hunt for justice remains unquenched. When a women says “NO”, the word itself is a sentence which needs no elaboration or any kind of justification. When a woman go through Marital rape it is only the woman who suffers, children also faces the impact of it. Law is no static and always need to be much more dynamic and flexible with a change in time and society. So, it’s high time that Marital rape should be criminalized and our legislature should be reviewed. After all how long women will be facing torture and subjected to victimhood? How long women will be victimized by the men and the society? Does a woman loses her right to give consent after marriage?

AN EVIL IN NEED OF BROADER VIEW

By Tanushree G L
From Sastra University

ABSTRACT:

This paper primarily deals with untouchability as a whole and its influence in the society in a wider perspective. The Caste system is a social stratification based on various reasons like birth, occupation, color etc. The root cause for untouchability when it came to Hindus is Caste System. It is trite that Caste system among the Hindus has been structured on grades of the hierarchy of Chaturvarnya and the Dalits and the Scheduled Tribes among Sudras occupy the last rung in the social ladder. It has to be noted that though untouchability is sanctioned by dominant religion of Hinduism, the present era has the untouchability spread its roots to various religions. The Constituent Assembly left it to the Legislature to define “Untouchability” which has not been done paving the way to construe untouchability in a narrow perspective. Since untouchability is not defined, it results in ambiguity of the legislations passed as the legislature is not clear about what kind of issue they are addressing. Moreover, the existing legislations are weak because there are plethora of false cases which makes the judiciary to dilute the provisions of the legislations. There is need for a legislation which would in no way deprive seriously affected people at the same time avoid false cases.

INTRODUCTION:

An understanding about the origin of caste system is very essential to know the concept of “Untouchability” and why it was practiced. To note the Caste system has not only been followed in India but also in many European countries and also in some parts of Japan. Each and every country follow some kind of caste system in one form or the other. For example, Africa has many ethnic groups and each ethnic group has number of castes. Caste System is said to have originated in India after the arrival of Indo Aryans which happened to be around 1500 B.C. So Caste system laid foundation for the untouchability in India. But taking an in-depth view it can be clearly understood that untouchability is practiced not only against Hindu Dalits but also other religions practice and experience untouchability. The impact of the legislations in abolishing Untouchability needs a scrutiny as the Untouchability rate keeps growing day by day.

DEFINITION OF CASTE:

Basically, the English word “Caste” is derived from Spanish word “Casta” which means race, breed, lineage or complex of hereditary qualities. The term ‘Jati’ was used by Indians to denote Caste.

Sir Henry Maine came up with an explanation as to that Castes had their origin as natural division with respect to
occupation later with the help of religious sanction got the present form. He also explained that caste system comes into play when integral part of religious dogma divides the people into superior and inferior group with different standards of living, functions etc. This definition by Sir Henry Maine throws light on an important aspect that caste system was influenced by many factors. There are various theories about the origin of Caste system. Each theory dealing with different perspective. Political scientists like Risley believed varna laid foundation for caste system.

To sum up, basically any definition relating to caste system would rely on one basic word that is “division” or “social stratification”. It also embraces various other features like social and religious hierarchy, endogamy, segmental division of society and also lack of unrestricted freedom to choose occupation. So from this, an analogy can be drawn whenever there is stratification as superior and inferior there tends to be some form of untouchability.

**WHO ARE DALITS?**

The word “Dalit” derives its origin from the Sanskrit word dal- and means “broken, ground-down, downtrodden, or oppressed.” “Dalit” basically refers to Caste . Dalits are ‘outcastes’ falling outside the Varna system consisting of the hereditary Brahmin, Kshatriya, Vaishya, and Shudra classes. Dalits are considered impure and polluting and so they are secluded and isolated from the society.

The term is a British innovation from an article written by Annie Besant in the Indian Review (1909) with the caption ‘the uplift of the Depressed Classes’. The word Dalits denotes poverty and their oppressed condition. But if that is the point almost all castes have poor people and also they are subjected to untouchability so even they must be considered as Untouchables but our system views just the SC and ST as oppressed class of people. There are people who converted to Christianity or Islam to escape untouchability. Though due to present condition they are regarded as BC but they are still in the condition of SC/ST and experience all forms of suppression but excluded from the term benefits. It is very clear that the word “Dalit” requires a new definition encompassing all the aspects of untouchability like poverty, oppressed condition, caste, religion etc.

**LAWS AGAINST UNTOUCHABILITY:**

The Preamble to the Constitution provides,

"We, the People of India, having solemnly resolved to constitute India into a sovereign, socialist, secular, democratic Republic and to secure to all its citizens-Justice: Social, Economic and Political, Liberty of thought, expression, belief faith and worship.

Equality of status and of opportunity, and to promote among them all fraternity, assuring the dignity of the individual and the unity and integrity of the nation.”

As Preamble is part of the Constitution, it forms the key to interpret the Constitutional provisions. So whenever Constitutional provisions are interpreted they must confirm to the principles embodied in the Preamble. Equality provides protection against

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588 Kesavananda Bharati vs. State of Kerala, (1973) 4 SCC 225
discrimination. Egalitarian society to all the citizens is to be provided. The stress is on the words “all citizens” which makes equality available to all sections of the society. From this it can be inferred that even if a citizen who is not an SC/ST is being subjected to untouchability then equality should be restored to him. Liberty is no longer the privilege of the few, but a social conduct and right of all, high and low, men and women, irrespective of religion, caste or creed.  

Dr. B.R. Ambedkar, in his famous speech on 25th November, 1949, on conclusion of deliberations of the Constituent Assembly, stated that in a trinity, liberty, equality and fraternity cannot be functioning separately. One cannot be divorced from other. He also believed that to be united as a nation, eradication of anti-national elements like castes which bring about separation is necessary. Fraternity shall be there only if there is nation and without that the rest two i.e. equality and liberty shall be a namesake existence. 

The laws against untouchability derive heart and soul from Article 17 and it is self-operating and if read with Article 39 (a)(ii), it would follow that untouchability has been abolished and its practice in any form is forbidden.  

Article 17 deals with abolition of Untouchability and provides, “Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law”.  

Article 17 draws attention to two most important things

i) The first part of the Article is addressed not only to State but also private individuals
ii) Though untouchability is not defined, the word “any form” gives wide ambit to the prohibition.

The untouchability (Offenses) Act, 1955 had been comprehensively amended by the Untouchability (Offenses) Amendment and Miscellaneous Provision Act, 1976 which came into force from 19 November 1976. With this amendment the name of principle Act has been changed to the Protection of Civil Rights Act, 1955. Offenses under the Protection of Civil Rights Act are cognizable as well as non-compoundable. It has not only created an offense but has provided to the victim an enforceable civil right after declaring the disability caused by untouchability as void.  

But this gives rise to an important question that why only particular class of people are given enforceable civil right and not the others. Downtrodden are present in each and every community but it is unfair and discriminatory to provide enforceable civil right to particular class.

Owing to the inability of the PCR Act, 1955 to deal with serious issues, The Scheduled

589 Anup Chand Kapur and K.K. Mishra, Select Constitution (UK, USA, France, Canada, Switzerland, Japan, China and India) pg.99,(16 th Ed.,2006)  
590 Jai Singh vs. Union of India, AIR 1993 Raj 177.
591 INDIA CONS. art.17.  
Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 has been enacted with stringent provisions. The Statement of Objects and Reasons, it was stated, “Despite various measures to improve the socio-economic conditions of the SC and ST, they remain vulnerable. They are denied number of civil rights. They are subjected to various offenses, indignities, humiliation and harassment. They have, in several brutal incident, been deprived of their life and property. Serious crimes are committed against them for various historical, social and economic reasons.

DEFINITION OF UNTOUCHABILITY:
The word “Untouchability” has not been defined by any of the Acts dealing with untouchability. Though Article 17 of Indian Constitution prohibits untouchability, neither the Constitutional makers nor the Constituent Assembly took efforts to define Untouchability. It was left to Central legislature to define the term Untouchability, but it has been left undefined.

It was held therein that the word “untouchability” is put in inverted commas as such it is not “untouchability” is put in inverted commas, as such it is not “untouchability” in its literal or grammatical sense, but the practice as it has developed historically in India. The above decision was approved by the Supreme Court.

It is mistakenly taken to be an obsolete attitude practiced towards persons belonging to lower caste people, particularly Harijans. But it is important to note that there is no uniformity in the different parts of the country as to who would be regarded as an untouchable. It is evident from the fact the list of Scheduled Castes is made State wise, in the Constitution Scheduled Castes Order, made by the President.

The case of Charls Raj v. State of Maharashtra is an example of how emphasis is placed more on the caste rather than the commission of offense of untouchability. In this case the complainant, an SC in State of Tamil Nadu but not so notified in the State of Maharashtra filed a case on the ground of untouchability under PCR Act. The court held while referring to the Article 341 of the Constitution, which says that a caste would be deemed to be a Scheduled Caste only in relation to that State as notified in the list, that because the caste of the complainant is not notified in the State of Maharashtra, he cannot avail the protection of the PCR Act thus restricting the application of the Act not only to scheduled castes but also to scheduled castes of a particular State.

The above quoted case is a clear example as to how reliance is placed more on caste rather than the cruelty they have been subjected to. It is wrongly interpreted as to only SC/ST can be subjected to untouchability and the rest of the people are treated equally.

During discussion before the final draft of the Article 17 was made, a doubt was expressed whether the intention was to abolish “untouchability” among Hindus, Christians or other communities or whether it applied also to inter-communal

untouchability. It was generally agreed that the purpose of Article 17 was to abolish untouchability in all forms irrespective of whether within a community or various community. 596 The intention was never taken into account but rather it was narrowed down to one particular community.

DALITS –ARE THEY THE ONLY SUBJECTS OF UNTOUCHABILITY:

India has considerably higher amount of Dalits which is certainly about 200 million. The Christian and Muslim Dalits are not registered as ‘Scheduled Castes’. Some estimates shows that there are 15-20 million Christian Dalits in India and the number of Muslim Dalits may be as high as 100 million or more. 597 For decades it has been argued that when Dalits convert themselves to Islam or Christianity they have equality as those religion do not have any castes and this was quoted as a reason to deprive them of any statutory protection against untouchability. The legislations are particularly intended for SC and ST which means just Hindus.

Almost all the Christians and the overwhelming majority across India hail from the so-called Dalit community, the former "untouchables" relegated to the bottom of the Hindu caste hierarchy. The Dalits are conferred with various benefits under Indian Constitution which includes 15% of all government jobs, reservation in educational institutions etc. This provides them with a way to escape their traditional occupations and gives them equality and opportunity. The Dalits who are subjected to untouchability wanted to place themselves in a better position so their only way was to convert to other religion and get a higher status. But untouchability rested in the minds of the people and even after conversion they were not treated any better. As they convert, they get deprived of their rights and lose their right to report untouchability merely because of the fact they changed faith. At the same time, Constitution ensures every person right to practice religion of his own.

The graphs shown below are data collected by Indian Human Development Survey (IHDS).

596 Advisory Committee Discussion on Apr. 21, 1947.

IS IT A PROBLEM IF AN SC ENTERS THE KITCHEN AND USES THE UTENSILS?

<table>
<thead>
<tr>
<th></th>
<th>No</th>
<th>Yes</th>
<th>Total</th>
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</thead>
<tbody>
<tr>
<td>Brahmans</td>
<td>85</td>
<td>15</td>
<td>100</td>
</tr>
<tr>
<td>Forward Castes</td>
<td>93</td>
<td>7</td>
<td>100</td>
</tr>
<tr>
<td>OBCs</td>
<td>89</td>
<td>11</td>
<td>100</td>
</tr>
<tr>
<td>SCs</td>
<td>95</td>
<td>5</td>
<td>100</td>
</tr>
<tr>
<td>STs</td>
<td>93</td>
<td>7</td>
<td>100</td>
</tr>
<tr>
<td>Others</td>
<td>95</td>
<td>5</td>
<td>100</td>
</tr>
<tr>
<td>Total</td>
<td>91.47</td>
<td>8.53</td>
<td>100</td>
</tr>
</tbody>
</table>

Source: IHDS-II Data

DOES ANY MEMBER OF YOUR HOUSEHOLD PRACTICE UNTOUCHABILITY?

<table>
<thead>
<tr>
<th></th>
<th>No</th>
<th>Yes</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brahmans</td>
<td>56</td>
<td>44</td>
<td>100</td>
</tr>
<tr>
<td>Forward Castes</td>
<td>82</td>
<td>18</td>
<td>100</td>
</tr>
<tr>
<td>OBCs</td>
<td>74</td>
<td>26</td>
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</tr>
<tr>
<td>SCs</td>
<td>89</td>
<td>11</td>
<td>100</td>
</tr>
<tr>
<td>STs</td>
<td>83</td>
<td>17</td>
<td>100</td>
</tr>
<tr>
<td>Total</td>
<td>79</td>
<td>21</td>
<td>100</td>
</tr>
</tbody>
</table>

Source: IHDS-II Data

NOTE: ADDING SC AND ST’S WHO PRACTICE UNTOUCHABILITY WE GET 27.

The above collected secondary data is clear as to all caste practice untouchability to some extent and adding the people who practice untouchability in SC and ST is more than that of OBCs. The shift of focus is on SC and ST who have sub caste which has resulted in practice of untouchability. Reading the provisions of SC/ST Act, it very clearly expresses, “Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe”, so it excludes SC and ST from being punished for the offence of untouchability. It is a discriminatory treatment and the numbers prove that SC and ST taken together practice untouchability more than OBC. So this proves that the Act loses its significance because it is unable to address the evil called untouchability instead it is vague, ambiguous and discriminatory leading to poor implementation of the Act.

The IHDS-II Data also clearly shows that from various other graphs people who belong to all religion and income group follow untouchability at least to some extent. Mere 2.4% was the conviction rate under SC/ST Act, according to National Crimes Report Bureau (NCRB) report, 2017.

UNTACTHABILITY ON MUSLIMS:
A study was done by the Giri Institute of Development Studies (GIDS) under the project “Social and Educational Status of OBC/Dalit Muslims in Uttar Pradesh” to assess the practice of untouchability by non-Dalit Muslims and Hindus towards Dalit Muslims in Uttar Pradesh. The survey was conducted from October 2014 to April 2015. It was administered to a state representative sample of 7,195 households located across
14 districts in four regions of Uttar Pradesh. That survey revealed that 20 percent of Dalit Muslims are kept at a distance by upper caste Muslims itself while it was 24 percent when it came to upper caste Hindus. 46 percent are not given food or water in similar utensils used by upper caste Hindus. The above percent represents state average of the survey undertaken.

The data shown could be just the tip of the iceberg, as relatively well-off sections among Dalit Muslims report higher incidences of untouchability, and perpetrators admit to it even more so. It leaves no room for any confusion that the practice of untouchability is not confined to Hindus alone. It spreads far and wide, and perhaps no Indian religious community can escape it, including the Muslims.

FALSE CASES:

FALSE CASES REPORTED ON SC/ST ACT

<table>
<thead>
<tr>
<th>YEAR</th>
<th>SCHEDULED CASTE</th>
<th>SCHEDULED TRIBE</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>6144</td>
<td>1265</td>
</tr>
<tr>
<td>2015</td>
<td>5866</td>
<td>1177</td>
</tr>
<tr>
<td>2016</td>
<td>5344</td>
<td>912</td>
</tr>
</tbody>
</table>

Source: National Crime Records Bureau Report

The above table clearly reflects the number of false cases reported on SC/ST Act. The numbers are going down as judiciary has taken the matter into hands and pronounced judgements which dilute the Act in order not to be misused.

An article titled “Final Reports” in Economic and Political Weekly, under Sec 498 A and the SC/ST Atrocities Act indicates that sometimes cases, amounting to 50%, under the Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 1989 do not go to court and are closed by the police. The study also speaks about the misuse of SC/ST Act and also clearly mentions that the general discourse among the upper castes and men is that these laws are largely misused. Even the judiciary has expressed apprehensions and warned about the misuse of SC/ST Act. However the reality is a little different. There is every chance that upper caste members can misuse stringent laws by using SC/ST as proxies.598

In RiniJohar vs. State of Maharashtra599, the Supreme Court considered the issue of wrongful arrest and payment of compensation. It was observed that wrongful arrest violates Article 21 of the Constitution and thus, the victim of arrest was entitled to compensation. But the compensation cannot set right the loss of reputation of the accused. So preliminary investigation is necessary in order to protect the innocents. Presumption of innocence is a human right. No doubt, placing of burden of proof on accused in certain circumstances may be permissible but there cannot be presumption of guilt so as to deprive a person of his liberty without an opportunity before an

independent forum or Court. So in order to ensure public faith in judiciary it is very important that the innocents don’t get punished in any way.

SAFEGUARDS OF SUPREME COURT AGAINST MISUSE OF SC AND ST ACT:

In the case of SubhashKashinath Mahajan vs. The State of Maharashtra and others, the safeguards against misuse of SC and ST Act has been laid down:

1. There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide.

2. In view of acknowledged abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a non-public servant after approval of the S.S.P which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinized by the Magistrate for permitting further detention.

3. To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and the allegations are not frivolous or motivated.

4. Any violation of direction (2) and (3) will be actionable by way of disciplinary action as well as contempt.

SUGGESTIONS:

The Protection of Civil Rights Act, 1955 which was found to be ineffective and so Scheduled Castes and Scheduled Tribes Act was brought into force which instead of addressing the untouchability paves way for false cases. Based on the secondary data analysed and precedent cases referred following suggestions are put forth

1) Untouchability just like any other offense should be acknowledged to be practiced by any person. It is not that only Hindu high caste people practice Untouchability. The SC/ST Act leaves out untouchability if practiced by SC and ST themselves. So untouchability practiced by any person should be equally punishable. The Act should be in such a way that it should emphasis that Caste system is one of the reason for untouchability and not the only reason.

2) To eradicate Untouchability that there is a need for legislations which would encompass the Untouchability as a whole instead of just providing relief to SC and ST. As the data clearly reveals that not only Hindus but also Muslims and Christians are subjected to Untouchability. NCRB report also reveals that one in four member practices Untouchability. So it must be understood that it is a wide concept and narrow relief to specific people cannot eradicate this social evil.

3) The number of false cases are really high for which the survey is the proof. Recently

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Supreme Court diluted the provisions so as to not put innocent people under trouble. The first major aspect is that Sec.18 of SC/ST Act is very clear as to anticipatory bail cannot be granted to these offenses. But Judicial legislation states under genuine and reasonable circumstances, anticipatory bail available. Sec 18 should be given a careful interpretation and should not be allowed to misuse.

4) Normal rule in case of cognizable offence is that after the information is received, arrest has to be made. But under the Act preliminary enquiry must be done within 7 days which is a very short period where no such enquiry is conducted and merely cases are filed. When it comes to trial it is understood that there are lack of evidences and the accused is acquitted. A procedure has to be laid down and accordingly preliminary enquiry has to be done. The procedure must be very clear as to not let the offender threaten or influence the victim and due protection should be ensured to the victim. So the balance should be made by extending the days for preliminary enquiry and protection ensured to the victim.

5) Rather than recourse to Sec.499 and 500 of IPC, the Act itself must suggest a solution in case of false cases are reported. When a contention was put forth before the Supreme Court that in case of false information or false cases reported, it was rejected stating that recourse to IPC should be taken. It also stated that in case the relief is provided in the Act itself, it would go against the very nature of the Act. But the very same Supreme Court was under a situation to dilute the provisions of the Act due to increasing number of false cases. So the Act must itself state the punishment for false cases.

6) Instead of too many judicial legislations, legislature should take the matter into its hands and deal with the issue and provide solutions. As the law making power vests with the legislature, the legislation when made by the legislature gets its true nature and cannot be easily struck down unless it is in violation of any constitutional provision.

7) It is understood clearly that the particular legislation was brought into force to address the issue of SC/ST as they were suppressed and even now various instances prove that they are still suppressed. So special provisions may be laid down for them but neglecting the untouchability faced by other communities is discriminatory. SC/ST since they are mostly subjected to untouchability can be provided with special provisions.

**CONCLUSION:**

According to Dr. Ambedkar “untouchability is the notion of defilement, pollution, contamination and the ways and means of getting rid of that defilement. It is a permanent hereditary stain which nothing can clean”. But slowly stepping into an era with broad minded people, it is not a hereditary stain. With proper enforcement of laws it can be removed right from the root. All it requires is to find the root and clear the evil right from there. But the current situation is that it is vague and ambiguous and is not addressing the issue as a whole. When the law is flawless it can completely get rid of the social evil.

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BANK FRAUDS

By Vaishnav Shukla
From Indore Institute of Law

ABSTRACT

This paper analyzes the issue of cheats from the viewpoint of managing an account industry. The examination looks to assess the different causes that are in charge of banks cheats. It intends to look at the degree to which bank representatives take after the different extortion counteractive action measures including the ones endorsed by Reserve Bank of India. It intends to give an understanding on the view of bank representatives towards preventive component and their mindfulness towards different fakes. The examination connotes the significance of preparing in avoidance of bank fakes. A solid arrangement of interior control and great business hones anticipate fakes and moderate misfortunes. The examination uncovers that execution of different interior control components are not up to the stamp. The outcomes show that absence of preparing, overburdened staff, rivalry, low consistence level (how much methodology and prudential rehearses surrounded by Reserve bank of India to anticipate fakes are taken after) are the fundamental explanations behind bank cheats.

The banks should take the rising diagram of bank fakes genuinely and need to guarantee that there is no laxity in inward control component.

INTRODUCTION

Banks are considered as essential hardware for the Indian economy. This specific part has been hugely developing in the ongoing years after the nationalization of Banks in 1969 and the advancement of economy in 1991. Due to the idea of their day by day movement of managing cash, and even in the wake of having such a directed and very much controlled framework it is exceptionally enticing for the individuals who are either related the framework or outside discover blames in the framework and to make individual picks up by misrepresentation. A bank extortion incorporates an impressive extent of clerical violations being researched by the specialists. These fakes, not at all like common violations, the sum misused in these wrongdoings keeps running into lakhs and crores of rupees. Bank extortion is a government wrongdoing in numerous nations, characterized as intending to acquire property or cash from any governmentally guaranteed monetary organization. It is now and then thought about a white neckline wrongdoing.

Managing an account has been characterized under section 5(b) of the Banking Regulations Act 1949. As indicated by it managing an account implies tolerating, to lend or speculation, of stores of cash from people in general, repayable on request or something else.

602 https://www.nabard.org/pdf/India_Banking_BankingRegulationAct1949.pdf
To comprehend the idea of Bank Fraud, we have to comprehend the idea of misrepresentation what's more, the different sorts of cheats and the approaches to recognize the same and the counteractive action of the same.

CHAPTER 1
WHAT IS FRAUD?

Generally, an untrustworthy demonstration or conduct through which one individual picks up or attempts to pick up favorable position over another which brings about the loss of the casualty, specifically or in a roundabout way is called as misrepresentation.

Under the IPC, misrepresentation has not been characterized straightforwardly under a specific segment, but rather it accommodates disciplines for different acts which prompt commission of misrepresentation. Nonetheless, segments managing swindling, camouflage, phony, falsifying, misappropriation and breach of trust cover the same satisfactorily. The Agreement Act under section 17 states extortion implies and incorporates any of the demonstrations by a gathering to an agreement or with his intrigue or by his operators with the goal to cheat another gathering or his specialist or to initiate him to enter in to a contract:603

- The proposal, as a reality of that which isn't valid or by one who doesn't trust it to be valid
- The dynamic covering of a reality by one having information or conviction of the reality

- A guarantee made with no goal of performing it
- Some other demonstration fitted to bamboozle
- Any such demonstration or exclusion as the law uncommonly pronounces to be false.

By perusing the important IPC arrangements and Contract Act, the basic necessities for misrepresentation are:604.

ESSENTIALS OF FRAUD

- Representation of an act
- Fact believed to be false
- Inducement to act

BANK FRAUDS & ELEMENTS

As expressed before, the measure of misfortune supported as result extortion surpasses the misfortunes due some other crime(s) set up together. With the rising managing an account business, cheats in banks are also extending and the fraudsters are ending up being progressively intricate and keen. In an offer to keep pace with the developing circumstances, the managing an account portion has separated its business complex. Substitution of the hypothesis of class keeping money with mass saving money in the post-nationalization period has hurled a lot of troubles to the organization on obliging the social obligation with monetary sensibility. The four most critical components for constituting extortion are; the dynamic


604 Banking System, Frauds and Legal Control, RP Nainta
contribution of the staff, inability to take after the directions and rules of the bank by the staff, intrigue between specialist, officials and lawmakers to twist the guidelines and controls and some other outside variables.

LEGAL REGIME TO CONTROL BANK FRAUDS

- The Indian Penal Code, 1860
- Criminal Procedure Code, 1973
- The Negotiable Instruments Act, 1881
- The Reserve Bank of India Act, 1934
- SARFAESI Act, 2002
- The Banking Regulations Act, 1949

IMPACT OF FRAUD IN INDIA

"Offenses identified with saving money exercises are limited to banks as well as harmfully affect their clients and society at large."

Numerous ongoing misrepresentation occurrences announced are identified with settle stores, advance payment, and credit and platinum card fakes and ATM based fakes. Every one of these fakes demonstrate that not just they undermine the benefits, dependability of administrations and working efficiencies yet can likewise affect the general public and the association itself. With the expansion in the gravity of such occasions it is affecting the benefit of the part and there is an expansion in the NPAs. This ascent in the NPA is a genuine danger to the Indian Banking Industry as the strength of a nation's keeping money and monetary part decides the nature of items and administrations. It is likewise an immediate marker of the expectations for everyday comforts and prosperity of individuals. In this manner if there is abnormal state of NPAs in the keeping money framework, at that point it mirrors the trouble of borrower and the wasteful aspects in the transmission system. The Indian economy endures extraordinarily because of these occurrences. Misrepresentation has likewise hampered the development of this foundation/industry. It is a tremendous executioner for the business division and fundamental factor to every human undertaking. It likewise builds the debasement level of a nation. Indeed, even after there are different measures taken by the RBI to breaking point or diminishing the recurrence of fakes, the measure of cash lost is still on the ascent.

CHAPTER 2
CLASSIFICATION OF FRAUD AND PREVENTION

To keep up consistency in extortion announcing, fakes have been ordered based on sorts and arrangements of the Indian Penal Code, and the detailing rules for the same has been endorsed by RBI. The Reserve Bank of India groups Bank fakes in the accompanying categories:

- Misappropriation and criminal breach of trust.
- Fraudulent encashment through forged instruments, manipulation of


http://rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx?id=9808
books of account or through fictitious accounts and conversion of property.

- Unauthorised credit facilities extended for reward or for illegal gratification.
- Negligence and cash shortages.
- Cheating and forgery.
- Irregularities in foreign exchange transactions.
- Any other type of fraud not coming under the specific heads as above.

MECHANICS OF BANK FRAUDS

DEPOSIT ACCOUNT FRAUDS

The following types of frauds are generally committed

- Value inflation of cheques deposited
- Changing the nature of the cheques (Crossed to bearer)
- Operating a dormant account fraudulently
- Non deposition and misappropriation by agents

PREVENTIVE MEASURES

- Careful and systematic examination procedures of cheques and other transactions.
- Separation of book keeping and Cash handling operations.
- Using Black light, adhesive tapes and pathfinders to ensure that originality and prevent material alteration.

PURCHASED BILL FRAUDS

These are generally expensive and can take the following forms:

- Discount on Stolen or Fake Railways Receipts and motor receipts along with other necessary bills.
- Forged/ fake bills with inflated value, drawn on sister concern are discounted.
- Fake/ Forged bills for valueless goods are discounted.

PREVENTIVE MEASURES

- Examining the receipts properly and strictly by confirming from the concerned authorities.
- In case of auction, inform the authorities regarding the interest of the bank in the property so as to get information incase of non collection of goods.
- Establishing a better connection between the purchaser and the seller in case of dispatch of proceeds.
- Strict examination before discounting the bill.

HYPOTHECATION FRAUD

Cash advances, against pledged goods, as security are fertile field for frauds.

- Unauthorized removal of hypothecated good from the godowns.
- Some of the stocked goods in large quantity may have less value
- Inflation of stock statements.
- Valueless and meaningless stocks are offered as security.
- Hypothecating same goods in favour of different banks.
PREVENTIVE MEASURES

- Strict examination of the bank representative’s and borrower’s credential
- Only marketable goods to be accepted as security
- Proper evaluation of stocks
- Verification of statements of stocks

LOAN FRAUD

The following types of frauds are generally committed;

- Two different person taking loan on the same item or product
- People taking loan without providing actual address and disappearing at the time of repayment.
- Loan taken for one purpose but used for a different purpose i.e loan taken for agriculture but used for personal purposes
- Borrowing is denied when the particular person is alleged of non-payment.

PC RELATED FRAUDS

To give productive and quick administration, the greater part of the branches of the banks with the exception of the ones in the country and remote territories have been automated. Very few fakes identifying with PCs have yet been accounted for so far as computerization in the Indian banks is of late cause. In any case, in the western nations where for all intents and purposes everything is mechanized, an expansive number of digital violations in the managing an account area are accounted for all the time. There is a need to break down the idea of such wrongdoings with the goal that suitable preventive measures might be conceived. Regularly following sorts of cheats are submitted.

(a) Spy programming is concocted by the digital lawbreakers to split the passwords. They go into the PC arrangement of the banks and control the information to exchange the cash from other's records.

(b) Computer infection is made by the devilishness mongers who discover route into the PC framework by method for messages. These infections decimate the information put away in the PCs and back off the whole PC framework. It is once in a while charged that the makers of hostile to infection programming themselves make infection with the goal that their item might be sold in the market.

(c) Hackers are PC specialists who take the passwords and access the characterized data put away in the PC framework. They don't dread to "attack" the administration offices including military foundations to carryout their accursed plan to devastate and ruin the date put away in the PC frameworks. Such acts are conferred typically not for any
material pick up but rather to infer mental fulfillment out of other's sufferings.
(d) Wire tapping is a wrongdoing conferred by tapping the wire of the ATMs of the
banks to pull back cash out of other individual's record. The fraudster, for this
situation, appends a remote amplifier to the phone line associating the ATM with the
bank's PC and records motions through wire tapping while a client is utilizing the ATM.
These signs are later on used for pulling back cash.
The Government of India sanctioned the Information Technology Act, 2000 to
accommodate discipline and punishments in regard of cheats submitted in regard of PCs.
Segment 43 of the said Act accommodates robust harms upto rupees ten lakhs payable
by the guilty party to the individual influenced in the event that there are unapproved acts submitted in regard of someone else's PC framework like access, downloads or taking duplicates of the data or information put away, presentation of PC contaminant or PC infection, harm to the PC or its framework and so on. Further, the said Act also provides for punishment with imprisonment upto three years for tampering with computer source documents and for hacking the computer systems.

CHEQUE FRAUDS

This constitutes the biggest volume of bank frauds. This crime is done in the following forms:
➤ Cheques are stolen, filled and signed spuriously and encashed.
➤ The signed cheques are stolen and are encashed with alterations, if needed
➤ Cheques issued by organisations for employees are duplicated
➤ Alteration of cheques to increase the amount or change the beneficiary or add an additional beneficiary.
➤ Cheque Kitting: Cheque Kiting exploits a system in which, when a cheque is deposited to a bank account, the money is made available immediately even though it is not removed from the account on which the cheque is drawn until the cheque actually clears.607

PREVENTIVE MEASURE

➤ The instrument must contain a proper date
➤ The cheque must be checked thoroughly and the character should be verified
➤ Checking the signatures which should be genuine.
➤ The amount should be checked that it should be written in both numerical and words.
➤ Checking cheque kitting.

DISHONOUR OF CHEQUES

Shame of checks or check ricochets are an intense issue and it is winding up much greater. To adapt to this issue which was influencing the smooth business exchanges, the Government of India has presented the Negotiable Instruments Act, 1881 which accommodates arrangements to manage instances of check ricochet under section http://www.legalservice.com/article/1261-Bank-Frauds.html

607 www.supremoamicus.org
328
138 to 142. The Supreme Court of India in a point of interest judgement 608 has additionally given new rules to manage check ricochet cases. Section 138 of the Negotiable Instruments Act, 1881 “Where any check drawn by a man on a record kept up by him with an investor for installment of any measure of cash to someone else from out of that record for the release, in entire or to a limited extent, of any obligation or other risk, is returned by the bank unpaid, either in view of the measure of cash remaining to the credit of that record is lacking to respect the check or that it surpasses the sum masterminded to be paid from that record by an understanding made with that bank, such individual will be considered to have submitted an offense and will, without bias to some other arrangements of this Act, be rebuffed with detainment for [a term which might be reached out to two years], or with fine which may stretch out to double the measure of the check, or with both: Provided that nothing contained in this segment will apply except if - 
(a) the check has been displayed to the bank inside a time of a half year from the date on which it is drawn or inside the time of its legitimacy, whichever is prior;
(b) the payee or the holder at the appointed time of the check, by and large, makes an interest for the installment of the said measure of cash by giving a notice in composing, to the cabinet of the cheque, [within thirty days] of the receipt of data by him from the bank with respect to the arrival of the check as unpaid; and
(c) the cabinet of such check neglects to make the installment of the said measure of cash to the payee or, by and large, to the holder at the appropriate time of the check, inside fifteen long periods of the receipt of the said take note 609.

CREDIT AND DEBIT CARD FRAUD

The presentation of plastic cash likewise acquired the cheats as a characteristic wickedness drop out. As more number of individuals utilizing them there is an ever increasing number of odds of misrepresentation in the related part. The case is much more terrible in remote nations where the general utilization is considerably higher than in India.

The different methods of credit/charge card extortion are:

a) ABUSE OF GENUINE CARDS : The honest to goodness cards are stolen while in travel from the organization to the client or from the proprietors and now and again the card is stolen, and there is an abuse of the stolen cards. Indeed, even now and again the cardholders dishonestly report about their card being stolen and go on a shopping binge before the acquirer bank suspends the exchanges or square the card.

b) ALTERED CARDS: A modified card is a unique card just which is adjusted by the fraudsrer by giving another name and if replaces the mark strip likewise then he gets veritable record number from a bunco bankster. It is exceptionally anomalous and can harm the security highlights of the card gave by the bank.

608 (“MANU/SC/1391/2013”); Indian Bank Association vs. Union Of India


www.supremoamicus.org
c) WHITE PLASTICS : The copy fake cards are called as white plastics. They are the duplicate of the first bona fide cards. They have pictorial similitudes yet doesn't have the security highlights.

d) IMPERSONATION FRAUDS : These are likewise called as application fakes. The fraudster expect the name and address of some surely understand identity and gathers the card.

PREVENTIVE MEASURES

- Speeding up the transmission of data about the stolen or adjusted card through a committed site.
- Appointing prepared administrators to perceive and separate amongst certified and unique cards.
- Monitoring the working of the deal terminals intermittently to identify corrupt traders.

CHAPTER 3

CASE LAWS

VIJAY MALLYA BANK FRAUD

The flashy alcohol nobleman, Vijay Mallya, once hailed as the King of Good Times and Indian rendition of Richard Branson, is being pursued by relatively every establishment in the nation — the banks, controllers and, at long last, the legal — for the Rs 9,000 crores he owes to the moneylenders. How did Mallya tumble to his present situation, where he is by and by considered responsible for the disappointment of the aircraft business Kingfisher Airlines and postponed reimbursement of advances? The appropriate response lies in a choice constrained on him by moneylenders in 2010 to give a second rent of life to the carrier that was then on the precarious edge of a crumple.

"Mallya had his luck run dry. Banks demanded him to offer individual assurances for any further loaning," said a resigned broker, who was already with State Bank of India (SBI), on state of namelessness.

"Something else, there was no motivation behind why Mallya is by and by considered responsible for the reimbursement of the advance (Rs 9,000 crore presently including the gathered intrigue sum). There are greater focused on borrowers (organizations) around, the financier stated, giving cases like Bhushan Steel and Winsome Diamonds. The Kingfisher Airline, grounded in 2012, never made benefit in its eight long stretches of activities. At the point when Mallya moved toward the gathering of moneylenders for additionally loaning in 2010, there was not kidding contrasts of conclusion among the gathering of senior investors in SBI, and different banks in the consortium, on for what reason should they loan to the carrier once more. In any case, the dominant part choice was to go for broke again and loan to Mallya.610"

"It was, as it were, tossing great cash after terrible (since the KFA introduction was at that point focused on)," the financier cited prior said. "In any case, on the off chance that we didn't do that by then, the introduction till then would have turned sour in a split second. Nobody needed that to happen. There was no alternative before us," said the authority. Be that as it may,
everybody comprehended what was in the store, however nobody said anything in the discourse room. "The disposition was somewhat that of vulnerability and halfway positive thinking," the financier said. Financiers were idealistic on the grounds that Mallya himself was cheerful of pivoting the aircraft, despite the fact that the whole avionics industry was grabbing in murkiness. Amusingly, in any case, in spite of Mallya's good faith, everybody saw the written work on the divider.

MOUNTING LOSSES

In March 2012, Kingsiher ended its global activities to Europe and Asian nations and chop down neighborhood flights to 110-125 multi day with an armada of 20 planes from 340 flights prior to spare cash. By October 2012, the flying creature fluttered its wings for the last time. From that point forward, it hasn't seen the skies.

Kingfisher, once the second-biggest aircraft in India, had little odds of continuing its activities since the important administrative endorsements were not in sight and its asset report was dying. The organization's misfortunes had broadened to Rs 2,142 crore for its monetary final quarter finishing off with March 2013, contrasted and a net loss of Rs 1,150 crores every year sooner. The amassed misfortunes as of March 2013 remained at an incredible Rs 16,023 crore.

KINGFISHERS AIRLINES’ NET LOSSES IN RSCRORE

its contribution had mounted to over Rs 15,000 crores to banks, airplane terminals and others and its flying licenses terminated toward the finish of a year ago. The demise chimes were beginning to ring. In his distress to restore the carrier, Mallya twice submitted recovery wants to the flight controller, with parent UB Group conferring starting subsidizing, however with no luckiness. In its eight-year life, the aircraft never made benefit even once.

Mallya stayed hopeful however not to lose the carrier's permit. "We have not presented a goal-oriented arrangement. We have presented a holding design," Mallya told correspondents, while the legislature wasn't persuaded. "The issue is in the last a few months, he's given such a large number of plans and he's not clung to any of them," the then Aviation Minister Ajit Singh told journalists in New Delhi.

PANIC GRIPS BANKS
Frenzy was starting to set in the managing an account industry, particularly state-run banks, which were the dominant part in the saving money consortium. All things considered, banks needed to answer a great deal to investors not only for additionally loaning to Mallya in 2010, yet to offer liberal credit recast offices and changing over the obligation of Kingfisher to value at an enormous premium.

In mid 2011, the bank consortium including SBI had changed over obligation adding up to Rs 1,400 crore into value at a 60 percent premium to the overall market cost. Passing by the stock trade information, on March 31, there was particular distribution to SBI and ICICI Bank due for change of necessarily convertible inclination shares into value shares at a cost of Rs 64.48 each. Keep in mind, on that day, KFA shares shut at Rs 39.90 on the BSE.

"Inside a couple of months, the offer esteem had dissolved so much that banks were placed in a troublesome position," said the broker cited before. Kingfisher last exchanged at Rs 1.36 on the BSE on 22 June 2015. The whole credit rebuilding activity to Kingfisher was managed with no uncommon administration from the RBI, which implies that banks needed to make overwhelming provisioning on their books, trusting that the aircraft will restore at some point or another and pay back the cash. That never happened. At last, Kingfisher, was pronounced a NPA by most banks, including SBI, towards the finish of 2011 and start of 2012. The greater part weight of Kingfisher credits was on government-owned banks. The most brilliant in the part was ICICI Bank, which figured out how to offer its whole Rs 430 crore Kingfisher advance presentation to an obligation finance oversaw by the Kolkata-based Srei Infrastructure Finance Ltd in mid-2012. The sarkari banks were the genuine bakaras in the whole story.

Banks odds of recovering their cash from Mallya are less since Kingfisher scarcely has any benefits left for banks. Regardless of whether banks simply ahead and offer Kingfisher resources, for example, the Kingfisher House in Mumbai, it will bring just a small amount of what is in question. The main seek after banks is if Mallya himself have a difference as a primary concern and chooses to pay back banks from his own riches (Mallya has shares worth Rs7000 crore in different organizations and parcel more in settled resources).

"Yet, all that will happen on the off chance that he comes back to the nation and say he will pay back," the investor stated, including that financiers are more goaded by Mallya displaying his riches openly even now when

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**Bank loan exposure to Kingfisher Airlines**

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<th>Bank</th>
<th>Rs crore</th>
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<tr>
<td>SBI</td>
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<td>PNB</td>
<td>800</td>
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<td>IDBI Bank</td>
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<td>Corporation Bank</td>
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<td>Indian Overseas Bank</td>
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<td>Federal Bank</td>
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<td>Punjab &amp; Sind Bank</td>
<td>60</td>
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<td>Others 3 banks</td>
<td>603</td>
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<tr>
<td><strong>Total of 17 banks</strong></td>
<td><strong>6,963</strong></td>
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a large number of crores are in question. As indicated by reports Mallya effectively got $40 million of his severance pay from Diageo before his traveled to UK. Can the last fight between banks, drove by SBI, and Mallya in Supreme Court and Bangalore DRT result in moneylenders recovering their cash. Odds are less.

**NIRAV MODI BANK FRAUD**

On Feb. 14, Punjab National Bank (PNB), India’s second-biggest government-claimed moneylender, sent stuns waves around the nation when it proclaimed that it had been duped of about $2 billion (over Rs13,417 crore). Diamantary Nirav Modi and his uncle Mehul Choksi had supposedly siphoned cash for more than seven years through illicit bank ensures from a solitary branch in Mumbai, with the assistance of a couple of bank representatives. Following the revelation, the nation’s best investigative organizations, the Central Bureau of Investigation (CBI) and the Enforcement Directorate (ED), ventured in. A few bank representatives, including its previous CEO and official executives, have been accused of charged inclusion in the misrepresentation.

Very nearly a 100 days after the trick broke, here is the thing that we think about India’s greatest ever credit misrepresentation. The CBI first documented a body of evidence against the couple on Jan. 31, however both had just been on the kept running by at that point. Modi was first said to be in Switzerland and after that in the US. Presently, he is accepted to be in London going on a Singaporean international ID, as indicated by an India Today report. He is additionally allegedly investigating approaches to get political shelter in the UK. The ED, in the mean time, has appended Modi’s properties worth Rs171 crore. Choksi, as well, has declined to come back to India, refering to medical problems, the dread of a media preliminary, and wellbeing concerns.

The trick has managed a body hit to the moneylender. It detailed a net loss of Rs13,417 crore amongst January and March 2018. That is the most elevated ever quarterly misfortune by any Indian bank. Its gross non-performing resources (NPAs) additionally took off to Rs86,620.05 crore, or (18.3%) of its aggregate advances. After its poor execution, FICO score office Moody's Investor Services minimized the bank to “garbage,” proposing it does not merit putting resources into. Over the most recent few months, PNB has attempted a few endeavors to rescue its notoriety, yet financial specialists stay unmoved. The stock, exchanging at Rs78.20 as of May 21 on BSE, has lost a large portion of its incentive since Feb. 14.

A week ago, the CBI recorded two diverse charge sheets denouncing Modi and Choksi, and a portion of their workers, of incubating a criminal scheme against the bank. Previous overseeing chief and CEO, Usha Ananthasubramanian, and two official executives (EDs), have additionally been named by the CBI. Not long after the case was recorded, the two EDs were ousted, while Ananthasubramanian, the present CEO of Allahabad Bank, has been stripped of her official forces. The CBI has considered these authorities in charge of

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criminal rupture of trust, enabling Modi and Choksi to amusement the framework and control the Society for Worldwide Interbank Financial Telecommunications (SWIFT), an informing framework utilized all around for cross-outskirt support exchanges between banks. Amid Ananthasubramanian's residency at PNB in the vicinity of 2015 and 2017, the Reserve Bank of India (RBI) had raised warnings about the breaks in the SWIFT framework. These were supposedly disregarded by the administration. "... the misrepresentation was professedly executed notwithstanding the learning of senior authorities of PNB, who did not actualize the handouts and alert notification issued by the Reserve Bank of India with respect to shielding the SWIFT tasks and rather, distorted the true circumstance to RBI," the CBI said in a discharge on May 16.

The test organization has allegedly asserted that Ananthasubramanian was very much aware of the extortion and that she'd even met senior administrators from Modi's organizations routinely, including the CFO of Firestar International. Another inside test at PNB has brought about the suspension of more than 20 workers up until this point.

CHAPTER 4
CONCLUSION

These frauds are a creation of the experienced criminals, frantic customers or someone associated with the banking system or a bunco bankster or their collusion. Most of time with a strict vigilance and examination of various documents, their work can easily be detected. The preventive measures stated above in this module will surely help if followed correctly in combating the issue of bank frauds. Information of the conceivable avenues can keep the banker cautioned and subsequently help in battling the frauds.

These Frauds are now becoming more and more frequent and can be considered as one of the main reasons for damaging the economy of the country and with such high profile frauds happening all over the country, it has become necessary to put a check to these activities and if possible to create a more stringent legislation to deal with these issues.

Sticking to the rules and eternal vigilance is the basic preventive measure612.

612 Sharma BR; Universal Law Publishing; Bank Frauds – Prevention and Detection
IBC 2018 AMENDMENT, A VIABLE SOLUTION TO THE HOME-OWNERS PROBLEM?

By Varun Chora & Jishnu Meenakshi Veetil
From National University of Advanced Legal Studies

The introduction of the Insolvency and Bankruptcy Code (IBC) is considered as one of the most important developments in the history of Indian Corporate law. Before the inception of the IBC, there was a lack a single and unified law dealing with insolvency and bankruptcy of corporate working across different fields, which led to a distressed credit market. In fact, individual bankruptcy laws for different corporate sectors have existed in India since 1874. Some of the past legislations which aimed at regulating insolvency include the Transfer of Property Act, 1882, The Companies Act, 1956, The Sick Industries Companies Act, 1985, The Recovery of Dues to Banks and Financial Institutions Act, 1993 and the SARFAESI Act, 2002. By the year 2010, it had become clear that a single and comprehensive framework would be required to effectively tackle the delay which was being noticed in the insolvency and bankruptcy proceedings due to a lack of clarity on the applicable legislations and the processes to be followed. The average time to resolve an insolvency proceeding in India had reached 4.3 years, a record far worse than in any developed nation.\(^{613}\) As a result, the government of India introduced the IBC, which aims at consolidating and amending the laws relating to re-organization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner. It was first introduced in the Lok Sabha in December 2015 but was passed only by the 5\(^{th}\) of May, 2016.\(^{614}\) The president gave his assent to the code on the 28\(^{th}\) of May 2016.\(^{615}\) The Code has been touted as a uniform and comprehensive piece of legislation which guarantees a simplistic and speedy method for corporate insolvency.

This process of insolvency under the Code can be initiated by either a corporate debtor, a financial debtor or by the corporate debtor itself.\(^{61}\) The differentiation of creditors is done as per the definitions of the same laid down in section 5(8) and 5(21) of the Act. However, anyone outside of the definitions provided in the aforementioned section cannot initiate such proceedings, even if they have invested their hard earned money into the projects of any corporate debtor. Further, once the proceedings have been initiated under the IBC, the first step in the corporate insolvency resolution proceedings is the suspension of the board of directors and the appointment of the interim resolution professional, who would, from this point onwards, have total control over the activities of the company. Along with the handing over of the control to the IRP, a moratorium takes effect, prohibiting, among other things, the initiation of any suits

\(^{613}\) Ashish Pandey, *The Indian Insolvency and Bankruptcy Bill: Sixty Years in the Making*, 8(1) IMJ 26, 28 (2016).


\(^{615}\) The Insolvency and Bankruptcy Code, No. 31, Acts of Parliament, 2016. (Hereinafter “IBC”)

\(^{616}\) Id. at §§ 7, 9, 10.
against the debtor, the transfer of its assets and the recovery of any property form it by any known lessor.\textsuperscript{617} The IRP then verifies the claim made by the creditors and forms the Committee of Creditors within a month of his appointment. The Committee of Creditors consists of all the financial Creditors of the Corporate Debtor. This Committee of Creditors, along with a resolution Professional appointed by them then devises a resolution plan for the revival of the insolvent company which then needs to be approved by creditors holding at least 75\% of the financial debt. If the Plan is Accepted, it is sanctioned by the NCLT and is adopted, thus becoming binding on all the stakeholders involved in the CIRP. If the resolution plan is not approved, the distribution is made in accordance with a “priority waterfall” of creditors set out in Section 53 of the Act which provides for money to be returned to Secured creditors, wages, unsecured creditors and other financial and operational creditors, in that order.

As can be seen from the above process, the IBC is not a sectoral law i.e. it has a wide scope and application and doesn’t cater to the demands of any particular industry. This unique feature of the IBC has become a double edged sword. Since it caters to no particular industry, the models and practice of certain industries like the real estate industry has shown the existence of certain lacunae in the provisions of the IBC. This has forced the government to enact various amendments to the Code to cover the various grey areas that have surfaced since the inception of the code. Among these amendments are the 2017 amendments to deal with the issue regarding the eligibility if certain classes of promoters to bid for projects, which also put certain safeguards to prevent persons from misusing the provisions of the code. Another more recent amendment to the Code has been forced by the case of Chitra Sharma vs. the Union of India.\textsuperscript{618} The same was a PIL filed by thousands of aggrieved home owners against a decision taken by the Ahmadabad bench of the NCLAT in the insolvency proceedings initiated by IDBI bank against the Jaypee group for its Wish city project. The decision taken in these cases led to the recent amendments of 2018 which will be analysed in this paper. But before we get to an analysis of the amendment, it is important to understand the facts of the Jaypee case and problem in the IBC highlighted by the same.

In the aforementioned case, two subsidiary groups of the Jaypee groups had undertaken the Jaypee infratech project, aimed at the construction of its wish-town city project in Noida. The allocation letters were sent to homebuyers against the payment of an advance which totaled to approximately 15000 Crores from around 35,000 homebuyers. Even years after its inception, the project still remained in its early stages and this fact paired with the recent allegations that the project was just a means to psiphon money by Jaypee to its other projects led the IDBI bank, which had advanced to the company a loan of Rs. 526 Crores (approximately), to initiate Insolvency proceedings under Section 7 of the Code. Aggrieved by the slow pace of the projects, the homeowners aimed at getting their

\textsuperscript{617} Id. at § 24.

\textsuperscript{618} Chitra Sharma v. Union of India, Writ Petition (Civil) No. 744/2017 (Supreme Court).
grievances redressed through the National Consumers Disputes Redressal Commissions (NCDRC) which however, refused to adjudicate on the same since the issue raised did not come within the ambit of the jurisdiction provided to the NCDRC as a result of the moratorium declared by the NCLT under Section 14 of the Code. The same was the case with any relief promised to the home-owners under the RERA, 2016. Having all other recourses blocked, the home-owners finally approached the Supreme court under article 32 of the Constitution seeking an appropriate remedy. The Supreme Court ordered a stay on the insolvency proceedings of the Jaypee group acknowledging the fact that if the proceedings were allowed to go through it would be huge violation of the rights of the home-owners. The Supreme Court further ordered a committee to look into the issues being faced by the home-owners community as a result of the provisions of the Code. It was then realized and decided by the Supreme Court to consider the impact of merely looking the other way at a huge community contributing their life savings to a project and not being given justice. Taking a look at the present market, the growth of real estate projects are on a ever time high and if home buyers continued to be considered in the ambit of unsecured creditors, justice would not be adequately rendered to all.

The case of Chitra vs. Union of India619, brought forth two main issues in the provisions of the IBC with respect to the home owners as a community of investors. The first among these was the fact that even though most of the finance for the completion of such projects came through the advance payments made by the home owners, the community in itself is not included within the ambit of a creditor as defined by the IBC in Section 5. Section 5(7) of the Act defines a financial creditor as anyone to whom a financial debt has been owed. The act goes on to define financial debt in section 5(8) but this section does not account for advance payment by consumers hence keeping the home buyers outside the purview of a financial creditor. The rationale behind this was deliberated in the case of Pawan Dubey and Ors. Vs. J.B.K developers620 wherein it was held that the agreement between the home owners and developers was merely a purchase sale agreement and cannot be deemed as a loan or advancement of credit. Furthermore, the NCLAT621 held that the home owners could not be considered as within the definition of operational creditors either. This has a very adverse effect on the rights of the home owner’s community. The fact that they do not stand as either financial or operational creditors means that not only can the home owners not initiate insolvency proceedings against the builders622, but it also ensures that they have no representation in the Committee of Creditors which decides the resolution plan and votes on whether the company should be declared insolvent or not. This means that the community most affected by the outcome of the resolution process is given no say in the matter. Furthermore, the exclusion of the home-owners as creditors of the company ensures

619 Id.
621 Id.
622 IBC at § 7.
that they fall dead bottom in the waterfall envisaged for the distribution of assets once the company is declared bankrupt. Thus they would not only face severe haircuts, but would also lose the allotted units which would have to be sold off as assets of the construction company. The only exception to this is seen in cases of agreements where the unit is bought under as “assured return” plan. The NCLAT in the case of Nikhil Mehta vs. AMR Infrastructure623 ruled that the assured-return purchase is to be considered as an investment into the project being developed. Emphasis was laid on to the fact that the buyers were investors as they had “chosen” the committed return plan and as per the agreement, the developers had in turn agreed to pay a monthly committed return on such investments. The same was upheld by the NCLAT in the decision on Anil Mahindroo And Ors. Vs. Earth Iconic Infrastructure Pvt. Ltd.624 However, in both these decisions, no clarity has been given to the situation of home owners who have not included such clauses in their contracts thus holding up their exclusion from the realm of creditors under the IBC.

The second issue highlighted by the Jaypee case was the lack of representation provided to the community of home-owners against developers undergoing proceedings under the IBC. Before the inception of the IBC, even when insolvency proceedings were going on against developers, the home owners as consumers could approach forums like the NCRDC to safeguard their rights and interests. Apart from the consumer forums, the government had also enacted the RERA or the Real Estate (Regulation and Development) Act, 2016 which provided aggrieved home-owners with some security against defaulting developers. However, since the passing of the IBC, it has become impossible for the home-owners to take shelter under any of these legislations once insolvency proceedings begin against defaulting developers. Section 238 of the Act specifically states that “The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.” Further, Section 14 of the Code prohibits the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority. Under this section, at the onset of any insolvency proceedings, the NCLT orders a moratorium on the debtor’s operations for the period of the IRP. This operates as a ‘calm period’ during which no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, or termination of essential contracts can take place against the debtor. The provisions of section 14(1)(a) of the Code are very wide and appear to be a complete bar against the institution or continuation of suits or any legal proceedings against a corporate debtor on the declaration of moratorium by the adjudicating authority. This moratorium period is till the life of the resolution proceedings goes on or till liquidation

623 Nikhil Mehta v. AMR Infrastructure, Company Appeal (AT) (Insolvency) No. 7 of 2017 (July 21, NCLAT).
occurs. When read with one another, Sections 14 and 238 basically bar any other form of redressal that can be availed by the home-owners against such defaulting companies and as can be seen above, the IBC in itself does not provide any sort of representation to the home owners, thus leading to a lack of even basic remedy to the community. This provides the defaulting company a loophole to avoid a large chunk of their debt as whenever a suit is initiated against such a company, the debtor would just initiate insolvency proceedings which in itself will quash any cases faced by it in any other forum. Looking from another angle, the burden of the NCLT also multiplies as decisions that could be adjudged by another court that also has jurisdiction would reduce the burden of NCLT’s and increase the efficiency of the code in initiating insolvency proceedings. Whereas, here there is just a blanket provision provided under the code that makes the proceedings initiated under this code supersede any other proceeding initiated in another court of law. In most cases of insolvency the recovery rate of debts vary from case to case but predominantly all cases, the debts are all not cleared off. Unsecured creditors being last in line of the creditors to be paid upon passing of the resolution tend to lose all the money they were bound to be paid. With the moratorium in place and then extent of power given to it by the code under Section 14, no other recourse can be opted by approaching a different forum. The economy is taking a hit with home-buyers, ie, effectively a large chunk of the average income groups of the country investing in property and projects are losing out of their investments without even a scope of a considerable recovery which leads to drain of money from the hands of the people which directly affects the economy of the country. For money to remain in the hands of the people, their investments need to be protected and need to be given an effective redressal in cases where there is any infringement.

To overcome these issues brought up during Chitra vs. Union of India, the Government of India enacted the IBC amendment ordinance which was green-lighted by the president on the 24th of June 2018. The amendment aimed at tackling the issues faced by the home-owners by firstly changing the definition of financial debt under section 5 of the Code. The definition has been altered to include any amount raised from home-owners under a real estate project. This has been achieved by classifying the home-owners as a ‘allotees’ under ‘real estate projects’. These two terms have their respective meanings as defined by the Real Estate (Regulation and Development) Act, 2016 (RERA) \(^{625}\), according to which, any such amount raised will be deemed as having a commercial effect of a borrowing and hence, the allottee will now be treated as ‘financial creditors’. This change in itself was touted to be the solution for half of the problems faced by the home-owners as a community. Since they now come within the ambit of financial creditors, home-owner can now initiate the Corporate Insolvency Resolution Proceedings under section 7 of the code. Furthermore, it grants them the right to be represented at the Committee of Creditors and guarantees them the receipt of at least

the liquidation value agreed upon on the resolution plans. Though the ranking of the homebuyers have been upgraded, there is no clear demarcation as to if adequate representation will be provided to the homebuyers. Perhaps the initial dilemma of having representation is resolved albeit the extent of representation is not specified. The problem is a practical one. As per the IBC, the representation in the committee of creditors is based on the class of creditors. If more than 10 classes of creditors are there, then the IRP/RP must appoint three more Resolution Professionals to represent each class of creditors. With homebuyers being raised to the pedestal alongside other financial creditors, the representation of homebuyers will still be as a group of financial creditors and will not be specific. Each financial creditor can have voting rights in the committee of creditors depending upon the extent of financial debt owed to him.

There is no real clarity with regard to how the representation made in the committee of creditors, or how the voting rights are granted. The real reason the ordinance included homebuyers within the ambit of financial creditors is to increase the power of the homebuyers in the pecking order of creditors during the initiation of resolution proceedings, as mentioned in the preamble of the ordinance. If the insolvency proceeding is initiated against a developer, the financial creditors other than homebuyers would be significantly smaller. If the extent of representation is not clearly demarcated then the homebuyers again are put to a disadvantage. If the representation of homebuyers is as a whole, then again the representation would not be adequate in certain cases. When looked upon from a critical perspective, the Ordinance needed to do away with the evil of this ambiguity within the IBC, especially since the ordinance aimed at promoting the rights of homebuyers, a more clear, distinct and particular position of representation in the committee of creditors should have been a suggested inclusion.

In cases where the number of homebuyers is a huge figure, there is no relief or recourse that clearly states the safety protection provided to each homebuyer that his individual and personal rights will be upheld. Here again representation comes into the fore. When each and every homebuyer has distinct claim, each person’s right will not be adequately represented thereby not tendering justice uniformly. Furthermore, even though they have been included as financial creditors in the 2018 amendment, the class of financial creditors they belong to has not been mentioned. A look at section 53 of the Code shows us that in the payment waterfall, the first ones to get paid are secured creditors, followed by employees, unsecured creditors, operational creditors and sundry. In this scheme of events, unless the home-owners are not put into the class of secured creditors, they will be the community that faces the biggest haircut amongst all the creditors. Taking the Jaypee infratech insolvency case in hand, the company going through insolvency owed around 600 crores to secured creditors like the IDBI band whereas the home-owners community had advanced to them as much as 1500 crores. If the home-owners do not rank as financial creditors, they will receive the money due to them only after the insolvent company has paid back the money
owed to banks and their employees. The remainder of the assets left, will have to be shared by the home-owners as a return on their 1500 crore investment. This clearly shows that there isn’t much of an improvement in the situation of home-owners even after the enactment of the 2018 ordinance to the code.

The second issue, relating to the moratorium and alternate remedies available to the home-owners in case of liquidation proceedings has not been addressed by the amendment at all. The ordinance also merely excludes the corporate guarantors from the moratorium as per Section 14(3) but has avoided allowing the continuation of ongoing disputes in alternate forums. The only exception to this rule was provided by the appellate tribunal in the case of Canara Bank vs Deccan Chronicles Holdings Limited 626 wherein it was held that the moratorium will not affect any proceedings initiated or pending before the Supreme Court under Article 32 of the Constitution of India or where an order is passed under Article 136 of the Constitution of India. The NCLAT also concluded that the moratorium will not affect the powers of any High Court under Article 226 of the Constitution of India.

The one positive thing to take away from the amendment is that the ordinance has amended section 28 of the act to reduce the voting threshold for all activities during the insolvency proceedings from 75% to 66% of the total voting share.627 This comes as a welcome change keeping in mind that the main aim of the Code was to ensure that alternate solutions to winding up can be pursued. It also helps the home-owners avoid the haircuts they would face by allowing them to stop the defaulting company from going into bankruptcy proceedings. This amendment to section 28, when allied with the fact that home-owners will be a part of the Committee of Creditors and will have voting rights, gives a spark of power to the home-owners community to have a say in projects they have invested their life’s earnings in. However even this shred of power is shrouded in ambiguity regarding the amount of representation being actually afforded to the home-owners community.

A cursory look into the amendments brought about by the 2018 ordinance makes it clear that the same is nothing but an eye-wash, aimed at providing momentary respite to the government from the agitated home-owners community. The ordinance has barely improved the situation of the home-owners from earlier as, in effect, the only change that has been brought about is that now, home-owners can initiate insolvency proceedings against defaulting companies in the scope of financial creditors and a substantial hope for recovery of money. The rest of the changes brought about are either ineffective towards solving the problem or are shrouded in too much ambiguity to be of any actual help to the home-owners. The ordinance has failed to deal with any of the issues brought up in the Chitra vs Union of India in a scenario where finding solutions

626 Canara Bank v. Deccan Chronicles Holdings Ltd., Company Appeal (AT) (Insolvency) No. 147 of 2017 (Sept. 14, NCLAT).
627 Rahul Jain, An overview of the Insolvency and Bankruptcy Code (Amendment) Ordinance 2018,
to the problems should’ve been relatively easier with legislations like the RERA, 2016 already in place. One of the most basic solutions to the problems faced by the home-owners has already been provided in the IBC. As per the recent judgment in the dispute of Alpha & Omega Diagnostics (India) Limited Vs Asset Reconstruction Company of India Limited628, the honorable judges in the NCLT held that the term it’s used in the section would denote only those properties that are owned by the Corporate Debtor. Any properties that are not on the books of accounts of the Corporate debtor would not come under the ambit of the moratorium imposed under the IBC. One way of using this for the advantage of the home-owners is by treating the properties for which advance has been paid as properties owned by the home owners in possession of the corporate debtor. This would provide the home-owners with security against the abuse of the moratorium by the corporate debtors as litigations against the slow development of these properties can be initiated even after the initiation of insolvency proceedings against the corporate debtor. This would open the doors to allowing the home-owners the protection promised to them under acts like the Consumer Protection Act, 1986 and the RERA, 2016. Another small change that would go a long way in solving the problems of the home-owners would be to lay down a section governing the composition of the committee of creditors and clarifying the position regarding the representation of the same in a meeting thereof. The voting rights of each creditor should also be clearly demarcated and some light should be shed on the provisions of Section 21(6A) which talks about the appointment of a authorized representative appointed by the adjudicating authority who will be representing a class of creditors “exceeding the number as may be specified.”

Unless the aforementioned concerns regarding the moratorium, the representation and the classification of home-owners in the scheme of the IBC are dealt with in a better manner, the Code will not be able to achieve its objective of providing for a faster and more efficient method for dealing with corporate insolvency. Rather, these issues will lead to a backlog amongst the cases in the NCLT and other forums since the smooth and effective functioning of the NCLT will be hampered with corporate debtors trying to run away with a quick buck while the proceedings against them in all other forums are stayed. The changes introduced by the ordinance of 2018 was aimed at fine tuning some of these issues and ambiguities caused by the original provisions of the IBC, but, have failed to do so, especially in the context of the home-buyers. Having overburdened the NCLT with litigation, the legislation owed the duty to the judiciary to simplify its working by laying down a more certain and less ambiguous construction of the letter of the law but has instead gone for changes that seem to be nothing but an eye wash aimed at quick diffusion of an unstable situation.

628 Alpha & Omega Diagnostics (India) Ltd. v. Asset Reconstruction Company of India Ltd., Company Appeal (AT) (Insolvency) No. 116 of 2017 (July 31, NCLAT).

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PAWAN KUMAR VS STATE OF HIMACHAL PRADESH

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FACTS OF THE CASE
The appellant is Pawan Kumar while the respondent in this case is the State of Himachal Pradesh. The Hon’ble Sri Justice Dipak Misra presided over this case.

The appellant-accused was initially booked for the offenses punishable under Section 363, 366, and 376 of the Indian Penal Code, 1860 (IPC), it was consequently led to his acquittal. He later got obsessed with the idea of threatening the prosecutrix, and that continued and eventually eve teasing became a matter of routine. The situation gets worse, compelling the girl to think that her life is not worth living. Resultantly, she pours kerosene on her body, and her dying declaration was recorded during the course of investigation. The division bench of the High Court reversed the judgment of acquittal rendered by the Trial Court and convicted the appellant-accused under section 306 IPC. The appellant is of the view that the High Court should not interfere with the judgment of acquittal, whereas the respondents contended that the impugned judgment given by the High Court should be given the stamp of approval.

JUDGMENT GIVEN BY THE COURT
The appeal was subsequently dismissed. In the judgment, the court has relied on DY. INSPECTOR GENERAL OF POLICE v. S. SAMUTHIRAM, the Court has emphatically laid down “the right to live with dignity as guaranteed under article 21 of the constitution cannot be violated by indulging in obnoxious act of eve teasing. It affects the fundamental concept of gender sensitivity, justice and the rights of a woman under Article 14 of the constitution. That apart, it creates an incurable dent in the right of a woman which she has under Article 15 of the constitution.” The Court further added that she has an individual choice which has been legally recognized, and that has to be socially respected.

Additionally, it was mentioned that the High Court rightly gave credence to dying declaration while convicting the appellant as there cannot be an absolute rule that a person who has suffered 80% burning injuries cannot give a dying declaration.

Further in the judgment, the Court stated that it is clearly evident that conduct of accused was absolutely proactive as the instant case portrays deplorable depravity of appellant which led to a heart-breaking situation for a young girl who was compelled to put an end to her life. Therefore, the High Court has appositely exercised the jurisdiction by reversing the judgment of acquittal and appellant-acquittal.

ANALYSIS
The question in this case revolves around with the nature of jurisdiction the High Court exercises when it reappreciates the evidence, reverses the judgment of acquittal rendered by the Trial Court. The said Court
was expected to decide whether the High Court decision was obligatory.

In the case, Jadunath Singh v. State of U.P., a three-Judge Bench stated that “in an appeal against acquittal, the High Court has full power to review at large all the evidence and to reach the conclusion that upon that evidence the order of acquittal should be reversed. This power of the appellate court in an appeal against acquittal was formulated by the Judicial Committee of the Privy Council in Nur Mohammad v. King Emperor.”

In the case, State of Rajasthan v. Sohan Lal, the Court was of the opinion that the High Court had the jurisdiction to, only if the Court finds an absolute assurance of the guilt on the basis of the evidence on record. In the case, Chandrappa v. State of Karnataka, the Supreme Court culled out the general principles regarding powers of the Appellate Court while dealing with an appeal against an order of acquittal. Which includes, an Appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is found.

The next aspect which is required to be addressed is whether Section 306 of IPC gets attracted. Section 306 of IPC speaks about Abetment to Suicide. It states that “if any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either

description for a term which may extend to ten years, and shall also be liable to fine.” It can be perceived from the reading of Section 107 of IPC.

In the case, Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi), a two-Judge bench stated that “as per the section, a person can be said to have abetted in doing a thing, if he, firstly, instigates any person to do that thing; or secondly, engages with one or more other person(s) in any conspiracy for the doing of that thing, if an act of illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing, or thirdly, intentionally aids, by any act or illegal omission, the doing of that thing.” The court has similar opinions in the case, Randhir Singh v. State of Punjab.

In the case, Shaik Ibrahim v. State of A.P., learned single Judge of Supreme Court was of the opinion that instigation or abetment has to be understood in the context of age of the deceased, the society in which she lives, and the social acceptance of the nature of the words uttered by the convict and the attending circumstances.

Whereas, various High Courts have taken a view that, merely because a person committed suicide by feeling insulted or humiliated, due to the comments or utterances made by the accused, the accused cannot be said to be guilty of an offence under Section 306, IPC.

630 (1971) 3 SCC 577 : 1971 SCC (Cri) 726.
637 V. ADINARAYANA v. STATE OF A.P. 2000 Cri LJ 1182 .
In the case, Mahendra Singh v. State of M.P.\textsuperscript{639}, the Supreme Court held that merely because the deceased woman stated in her dying declaration that she was harassed by the accused, the accused cannot be held guilty of an offence under Section 306, IPC. In this case, the accused did get involved in eve teasing and threatening the deceased which has been witnessed by her family and acquaintances, which instigated her to take away her life. The dying declaration here can be reliable as there cannot be an absolute rule that a person who has suffered injuries cannot give a dying declaration.

**CONCLUSION**

After reviewing precedents and the judgment of the present case, I strongly believe that in this case the judgment was made in the interest of equity, justice and good conscious. Every individual has the right to live a dignified life; if another man’s act disturbs a woman’s life, instigating her to take away her life then it is rightly to convict him for the same under Section 306 of IPC. It is authentic of the court to dismiss the appeal.

\textsuperscript{639}1995 Supp (3) SCC 731 : 1995 SCC (Cri) 1157.
DATA PRIVACY: AN IMPERATIVE NEED

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ABSTRACT

Privacy is the core of personal liberty. J.S.Mill in his essay “On Liberty” gave expression to the need to preserve a zone within which the liberty of citizen would be free from the authority of the state. The main purpose of this paper is to identify the sanctity of privacy in relation with our data which is being given to the government and the protection of that data. In this paper we will be dealing with various Articles of constitution like 19, 21, as well as with informational technology act 2000 and Sensitive Information Rules, 2011. There are various laws and legislation which are yet to be introduced and various initiative taken by the government for setting up of committee to draft a bill on data protection law which will be a dream come true and a much awaited bill in today’s scenario. New challenges which have emerged in terms of constitutional understanding of where liberty places oneself in the context of social order like the present Aadhaar scheme in relation with the data privacy of individual. In the present Justice Ks puttaswamy case debates on privacy which has been analysed in context of global information based society. In an age where information technology governs every aspect of our lives the privacy of data is a quiet difficult task but yet a need of hour. Individual as citizen and consumers need to have the means to exercise their right to privacy and protect themselves and their information from abuse. This new emergence of privacy has built a foundation for new jurisprudence of civil rights the legacy of Puttaswamy case could become what it promises to be the foundation for a transformative civil rights jurisprudence or it could become only a rhetorical lodestar a beautiful and ineffectual angel beating in the void its luminous wings in vain.

INTRODUCTION:

“Privacy is a special kind of independent, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concern, if necessary in defiance of all the pressure of modern society this is an attempt that is to safe to do more than maintain the posture of self-respecting independence towards other men, its seeks to erects an unbreakable wall of dignity and reserve against the entire world”.

Clinton Rossiter, “The free man in the free society”, the essential of freedom.

The expression ‘data’ is very wide in ambit and scope it covers not only the personal aspect of individual but also commercial aspect. The preamble of the constitution of India has also kept the LIBERTY of thought, expression, belief, faith and worship, in Justice KS Puttaswamy case, the court discovered a gem that the Right to privacy is an inalienable part of Art 21 Right to Life and Personal Liberty. Therefore every action of government that affect the citizens must be examined through the lens of Right To privacy. The latter is protected in the form of privacy rights whereas the former is
The term privacy is the recognition of individual’s right to be let alone and to have his own personal space. Privacy primarily concerns the individual. The right to privacy also mean that the one’s control over the collection and disclosure of personal information and these personal information could be anything like habits, education record, and personal interest and in recent years there has been a fear of large amount of information of person in computer file which can be easily hacked. An individual could be easily harmed by the existence of this personal data which can be easily transferred at high speed. This growth in the use of personal data has many benefits but it could also lead to many problems. Further the convergence of technologies has spawned a different set of issue concerning privacy rights and data protection. Innovative technologies make this data easily accessible. There is an inherent conflict between right to privacy and data protection it should be reconcile. But the data of individuals and organization should be protected in such a manner that their privacy rights are not compromised.

**Concept of Privacy:-**

The term privacy and right can’t be easily conceptualized. It has been taken different ways in different situations. **TOM GAIETY** opined that “right to privacy is bound to include body’s inviolability integrity and intimacy of personal identity including marital privacy”.

**Jude Cooley** explained the law of privacy and has asserted that privacy is synonymous to ‘the right to be let alone’.

**Edward Shills** has also explained privacy as ‘zero relationship between two or more persons in the sense that there is no interaction or communication between them, if they so choose’. In modern society privacy has been recognized both in the eyes of law and in common parlance. But it varies in different legal systems as they emphasize different aspects.

The Indian Constitution provides a right to freedom of speech and expression which implies that a person is free to express his will about certain things. A person has the freedom of life and personal liberty, which

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642 Tom gaiety, “right to privacy” 12 Harvard civil right civil liberties law review 233
643 Thomas M Cooley, A treatise on the law of torts 29(2nd edition 1888)
645 Constitution of India , art 19(1) 2
646 Id., Art. 19(2).
can be taken only by procedure established by law. These provisions improbably provide right to privacy to individuals and/or groups of persons. The privacy of a person is further secured from unreasonable arrests; the person is entitled to express his wishes regarding professing and propagating any religion. The privacy of property is also secured unless the law so authorises i.e. a person cannot be deprived of his property unlawfully. The personal liberty mentioned in article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty. Article 21 as such protects the right to privacy and promotes the dignity of the individual.

Judicial Response of Privacy:

The judiciary has recognized right to privacy as a necessary ingredient of the right to life and personal liberty.

There were also many instance where right to privacy was highlighted as an important right under the Constitution through judicial activism like -:

Kharak Singh v. The State of U.P. (1962). In this case before the Supreme Court, a minority opinion recognised the right to privacy as a fundamental right. The minority judges located the right to privacy under both the right to personal liberty as well as freedom of movement.

Govind v. State of M.P. The Supreme Court confirmed that the right to privacy is a fundamental right. It derived the right to privacy from both the right to life and personal liberty as well as freedom of speech and movement However, the right to privacy is subject to “compelling state interest”

R. Rajagopal v. Union of India (1994). It was determined by the Supreme Court that the right to privacy is a part of the right to personal liberty guaranteed under the constitution. It recognized that the right to privacy can be both a tort (actionable claim) as well as a fundamental right. A citizen has a right to safeguard the privacy of his or her own family, marriage, procreation, motherhood, child-bearing and education among other matters and nobody can publish anything regarding the same unless (i) he or she consents or voluntarily thrusts himself into controversy, (ii) the publication is made using material which is in public records (except for cases of rape, kidnapping and abduction), or (iii) he or she is a public servant and the matter relates to his/her discharge of official duties.

KS Puttaswamy v. Union of India. The Court ruled that “right to privacy is an intrinsic part of Right to Life and Personal Liberty under Article 21 and entire Part III of the Constitution”. These are the above mentioned cases on the concept of privacy and now this right

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647 Id., Art. 21.
648 Id., Art. 22.
649 Id., Art. 25.
650 Id., Art. 300A.
651 AIR 1963 SC 1295
652 AIR 1975 SC 1378
653 AIR 1995 SC 264
654 AIR 2014 6 SCC 433
of privacy has been made as a fundamental right in the apex judgement of Justice KS Puttaswamy case.

**Informational Privacy**:-

Our’s is an age of information. Information is knowledge the old adage that ‘knowledge is power’ has stark implication for the position of the individual where data is ubiquitous an all-encompassing presence. Technology has made life fundamentally interconnected. Internet has become all pervasive as individual spend more and more time online each day of their lives. Every transaction of an individual user that he use to visit leave an electronic track generally without his knowledge. These electronic track contain powerful means of information which provides knowledge of all sort of person that the user is and his interest. For example – the book that an individual purchases online provide footprint for targeted advertisement of same genre. Lives of people are open to electronic scrutiny. To put it mildly, privacy concerns are seriously an issue in an age of information. This age of information has resulted in complex issues of informational privacy. Invasion of data privacy are difficult to detect because they can be invisible. Information collection can be swiftest theft of all. It is also an age of big data or data sets. The data sets are capable of being searched they have linkages with other data sets and the data gets leaked. The balance between data regulation and individual privacy raises complex issues requiring delicate balance to be draw between them. As it was held in the case of JUSTICE KS PUTTASWAMY that:-

“The sphere of privacy stretches at one end to those intimate matters to which a reasonable expectation of privacy may attach. It expresses a right to be left alone. A broader connotation which has emerged in academic literature of a comparatively recent origin is related to the protection of one’s identity. Data protection relates closely with the latter sphere. Data such as medical information would be a category to which a reasonable expectation of privacy attaches. Apart from safeguarding privacy, data protection regimes seek to protect the autonomy of the individual.”

One of the chief concerns which the formulation of a data protection regime has to take into account is that while the web is a source of lawful activity both personal and commercial, concerns of national security intervene. Since the seamless structure of the web can be exploited by terrorists to wreak havoc and destruction on civilised societies. Cyber-attacks can threaten financial systems.

Richard A Posner, in an illuminating article, has observed:

“Privacy is the terrorist’s best friend, and the terrorist’s privacy has been enhanced by the same technological developments that have both made data mining feasible and elicited vast quantities of personal information from innocents: the internet, with its anonymity, and the secure encryption of digitized data which, when combined with that anonymity, make the internet a powerful tool of conspiracy. The government has a compelling need to

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Posner notes that while “people value their informational privacy”, yet “they surrender it at the drop of a hat” by readily sharing personal data in the course of simple daily transactions. Hence Privacy has been held to be an intrinsic element of the right to life and personal liberty under Article 21 and as a constitutional value which is embodied in the fundamental freedoms embedded in Part III of the Constitution. The protection of the information from being leaked is a need of the hour, as today's scenario is a time where a person can be easily traced by a GPS can be a boon or ban it depends on us how do we handle it and the informational privacy of the person's data has got a new dimension after this case of JUSTICE KS PUTTASWAMY which has restored the citizen rights in the form of right to privacy in part III of the constitution of India.

Data Privacy and Aadhaar scheme—

“Right To Privacy” has multiple facets and therefore the same has to go through a process of case to case development as and when any citizen raises his grievances complaining of infringement of his alleged right in accordance with law. It is pertinent to note that in the judgement of Justice KS puttaswamy case the Supreme court did not decide upon the constitutionality of Aadhaar Scheme and instead examined the Right To Privacy in the abstract in around 545 pages of dicta the court placed the individual right at the heart of right to . The main question which needs to be determine is that as to What should be the extent of data privacy in Aadhaar case?

This answer can be determine in the case of Govind V State of Maharashtra

The SC recognized decisional autonomy, full development of personality, special privacy, in addition to informational privacy as an important element of Right To Privacy.

The present Aadhaar act possess serious threat informational privacy and endangering the liberty and dignity of individual. Right To Privacy of all the citizen is being put at stake in the name of state interest, which must be set aside. The state is the means and the individual is end.

Informational traces are also area which is the subject matter of huge debate in various jurisdiction falling within the realm of Right to Privacy, such data is as personal as that of the choices of appearance and apparels.

Over the last one year, there have been multiple instance of Aadhaar data leaking online through government websites or its mobile app. 210 government websites made the Aadhaar details of people with Aadhaar public on the internet. It takes, sometimes, a negative event to bring important issues on the debating table. The 4 January 2018 report alleging data breach of Aadhaar brings the larger issue of data protection,

656 Richard a posner, “privacy, surveillance and law”, 75 The university of Chicago law review 251(2008)

657 (1975) 2 SCC 148

658 Rachnakhaira, the tribute, 4 January 2018 available at http://www.tributeindia.com/news/nation/523361.html,

(last modified on 5 January 2018)
privacy and their protection back in public
discourse. The Right To Informational Self-
Determination Had Become A Crucial Facet
Of The Right To Personal Autonomy, And
Was Protected Under Articles 14, 19, And
21 Of The Constitution. The Principle Of
Informational Self-Determination Was
Specifically Comprised Because Data Was
Required To Be Handed Over To Private
Parties And Compelling The Handing Over
Of Personal Data To Private Parties With
Such Minimal Safeguards Over Their
Functioning Amounted To “A Complete
Destruction Of Personal Autonomy And
ADebasement Of The Right To
Informational Self-Determination.” That
point that is highlighted by the CSI
report “Information and data leak have
been occurring in India for a long time,
and the leak around Aadhaar are not the
first data leak. But with the scale and
design of Aadhaar, any information being
leaked is dangerous and its impact not
entirely reversible.” for example: “A
biometric identifier such as a fingerprint can
be effective and highly accurate, easy to
establish the identity of an individual but it
can also facilitate a much higher degree of
tracking and profiling then would be
appropriate for many transaction, the
problem which arises when Biometric
identifiers are compromised are severe, what
will happen at the point that your biometric
identifiers ‘No longer Identifies you.’ The
machine which can identify you if suddenly
doesn’t accept your detail what will happen?
Here we are lacking behind for this we need
a proper laws and regulation to regulate it.
Here we are not against the Aadhaar scheme
but against the lack of infrastructural
resources to carry out this scheme and in
today’s era where all of the information of
person is just a click away this scheme
without any protection of data with the
legislation could be very dangerous for
individuals.

Privacy and Data Protection:-
Data protection is legal safeguard to prevent
misuse of information of individual person
on a medium including computers. It is
adoption of administrative, technical, or
physical deterrents to safeguard personal
data. Privacy is closely connected to data
protection. Maintaining of data bases is not
as difficult as maintaining its integrity, so in
this era there is a growing concern of data
protection. Privacy and data protection
require that information about individuals
should not be automatically made available
to other individuals and organizations. Each
person must be able to exercise a substantial
degree of control over that data and its use.
An individual’s data like his name address,
telephone-numbers, profession, family, choices, etc. are often available at various
places like schools, colleges, banks,
directories, surveys and on various web
sites. Passing of such information to
interested parties can lead to intrusion in

[659] Rethink Aadhaar, available at:
http://www.rethink aadhar.com (visited on
March 7, 2018)

[660] The centre for internet & society India,
available at: http://www.cis-india.org/internet-
governance/news/times-of-india-aadhar-
number-leaked-claims-cis-report (last visited on
March 7, 2018)

protection in India critical Assement” 53(4)
journal of
Indiap law institute 671(2011)
privacy like incessant marketing calls. The main principles on privacy and data protection enumerated under the Information Technology Act, 2000 and Sensitive Information Rules, 2011 is defining it.

Individual as citizen and consumers need to have the means to exercise their right to privacy and protect themselves and their information from abuse. This is particularly the case when it comes to our privacy and protect themselves and their information from abuse. Data protection is about safeguarding our fundamental right to privacy, which is enshrined in international and regional laws and conventions. India being a welfare state must work for the welfare of individual. Individual's liberty should be kept at par and collection of data for impractical project without drawing the extent of privacy should be waived off. The protection of data and privacy has become a celebrated concept now days after the landmark judgement of Justice KS Puttaswamy Case. Earlier also certain legislation were there related to data privacy. But after this judgement this concept has been widened in its widest amplitude.

Data Protection and Current Legislation in India:-

With the advancement of technology in India the ratio of crime rate have also increased. In the present era most of the crime are being done by the professional through easiest way like computer and electronic gadgets. Just by the single click the criminal are able to get the whole of information, the lust of information is acting as a catalyst in the growth of cybercrimes. It is a very big headache for business houses, financial institution and the governmental bodies so as to give adequate protection to huge data bases. In the absence of any particular stringent Law relating to data protection the miscreants are gaining expertise in their work day by day. Though this word simplified our lifestyle but it left certain anomalies in procurement of its objective which resulted in involuntary disclosure of data.

For example –

1. On every login to the e-mail account in cyber cafes, the electronic trail of software remain left there unsecured.
2. Through hacking the hackers can whimsically alter anyone’s account

These are some of the examples that how easily we are providing room to the miscreants to enhance and simplify their acts and it is not safe is to avail the services of digital world.

The right to privacy is an important concept originated in law of torts under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised. And in India this concept is now widely accepted in the form of constitutional regime under art 21 of constitution which states as “No Person Shall Be Deprived of His Life or Personal Liberty except according To Procedure Established by Law.” There are following provision relating to data protection in India:-

In the year 2000, effort has been made by our legislature to embrace privacy issues relating to computer system under the purview of IT Act, 2000. This Act contains

662 Data protection law in India, available at: http://www.legal service India.com (last visited on march 7, 2018)
certain provisions which provide protection of stored data. In the year 2006, our legislature has also introduced a bill known as 'The Personal Data Protection Bill’ so as to provide protection to the personal information of the person. According to section 2(1) (o) of the Information Technology Act, “Data means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed or is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched tapes) or stored internally in the memory of the computer”. The IT Act doesn’t provide for any definition of personal data and, the definition of “data” would be more relevant in the field of cyber-crime. The idea behind the aforesaid section is that the person who has secured access to any such information shall not take unfair advantage of it by disclosing it to the third party without obtaining the consent of the concerned party. UNDER INFORMATION TECHNOLOGY ACT, 2000 sec 43, 65, 66, 70 and 72 deals with data protection laws.

Sensitive Information Rules, 2011
Section 43A of the Information Technology Act, 2000 read with the Information Technology (reasonable security practises and procedures and sensitive personal data or information) Rules, 2011 ("Sensitive Information Rules") requires every business in India, which collects, receives, possesses, stores, transmits, processes or can associate pretty much any other verb with 'personal information' directly under a contractual obligation with the provider of information 663, to have a privacy policy. Such privacy policy must provide the following 664:

1. Clear and easily accessible statements of its practices and policies;
2. Type of personal and sensitive personal data or information collected by it;
3. Purpose of collection and usage of such information;
4. Disclosure of information including sensitive personal data or information collected;
5. Reasonable security practices and procedures adopted by it.

The essential elements of a privacy policy as per the extant data protection laws of India are as follows:

1. **Consent**: The most crucial component of a privacy policy is 'consent'. In this regard the Supreme Court has in Puttaswamy case made the following observations:

"It was rightly expressed on behalf of the Petitioners that the technology has made it possible to enter a citizen's house without knocking at his/her door and this is equally possible both by the State and non-State actors. It is an individual's choice as to who enters his house, how he lives and in what relationship. The privacy of the home must protect the family, marriage, procreation and sexual orientation which are all important aspects of dignity. If the

663 Information Technology ( Reasonable Security practises data or Information ) Rules, 2011 (Act 21 of 2000) sec.43A
664 Sensitive Information Rules ,rule.4

www.supremoamicus.org
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individual permits someone to enter the house it does not mean that others can enter the house. The only check and balance is that it should not harm the other individual or affect his or her rights. This applies both to the physical form and to technology."

2. **Choice**: The other vital component is choice. It is not enough that users have been shown to have accepted the privacy policy through a click-wrap mode; they should have the ability to opt-in and/or opt-out of the information sharing requirements of the business. The present laws allow the data controller to withhold the provision of the goods of services for which the information is sought, if the provider of information does not provide or later chooses to withdraw his consent.

3. **Purpose of information collected**. The privacy policy needs to clearly specify the purpose of collection of the information. Only that personal information should be collected from data subjects as is necessary for the purposes identified for such collection, regarding which notice has been provided and consent of the individual taken. An omnibus purpose which ambiguously refers to future commercial usage may not be favourably viewed by Indian courts, especially if the other elements of the privacy policy have not been met. If there is a change of purpose, this must be notified to the individual. The information collected for a specified purpose cannot be retained for longer than it is required of the purposes.

4. **Disclosure of information**. The type of information collected must also be clearly informed to the information provider. Technological advancement is not equivalent to technological literacy. It is not audacious to assume that many of the internet users are still unaware of the perils of divulge. Therefore, it is vital that the information provider be informed about the nature of his personal information that is being collected. The data controller must also permit the providers of information, as and when requested by them, to review the information they had provided.

5. **Security practises** - the Sensitive Information Rule mandate every data controller to have comprehensively documented information security programme and Information security policies that contain managerial, technical, operational and physical security control measures that are commensurate with the information assets being protected with the nature of the business. This document is often confused by the business with their privacy policy which is not the case.

India does not have specific data protection legislation, other than the IT Act, which may give the authorities sweeping power to monitor and collect traffic data, and possibly other data. These are some of the prevalent means in today’s scenario by which we can safeguard our data but these laws are not specific in their nature. They can’t be imposed directly hence there is a need of

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665 Id. rule 5 (7)
666 Ibid.
667 Id. rule 5(5)
668 Id. rule5(3)
669 Id. rule 5(3)
670 Id. rule 5(4)
671Id. rule 5(6)
672 Id .rule 8
proper legislation in India as there is a growing concern of cyber-crime and leakages of personal and intimate matter of one’s life which can be used by anyone for their own benefit. Hence a need for proper data protection in relation with privacy is needed and after the judgement of justice KS Puttaswamy case the wings of data privacy seems to be flying up in the sky because this judgement gave a new scope to protect the data privacy of individual by which the sanctity of data privacy can be maintained in today’s scenario.

Conclusion:
"Digitalization has changed society. While data is becoming the "new oil", data protection is becoming the new "pollution control." The issue of data protection is important both intrinsically and instrumentally. Intrinsically, a regime for data protection is synonymous with protection of informational privacy. As the Supreme Court observed in Puttaswamy, “Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. 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.”

Privacy is a basic human right and computer system contain large amount of data that can be sensitive. However one can access any information related to anyone from anywhere at any time but this pose a new threat to private and confidential information. Globalization has given acceptance to technology in the whole world. As per growing requirement different countries have introduced different legal framework like DPA (Data Protection Act) 1998 UK, ECPA (Electronic Communications Privacy Act of 1986) USA etc. from time to time. In the USA some special privacy laws exist for protecting student education records, children’s online privacy, individual’s medical records and private financial information. In both countries self-regulatory efforts are facilitating to define improved privacy surroundings. But India being a developing country does not possess any separate law or data protection however the court on several occasion have interpreted data protection within the ambit of Art 19 and 21 of constitution of India. However the Ministry of Electronic and Information Technology has appointed an expert group headed by former SC judge BN Sri Krishna to draft a data protection bill

The terms of reference of the Committee are:

a) To study various issues relating to data protection in India;

b) To make specific suggestions for consideration of the Central Government on principles to be considered for data protection in India and suggest a draft data protection bill673.

Data privacy and protection by their very nature need to be dynamic constantly expanding and improving to deal with new impediments and hindrances. One such encouraging step towards data protection is

673 Justice k s puttaswamy v. union of India ((2015) 10 SCC 92)
the most apex judgement of Supreme Court of Justice KS Puttaswamy case. There is an unparalleled thrust to upgrade the data privacy and data protection standards in India as the country is heading towards being a prominent part of global economy with increase in foreign investment in India. With new beginning it is the need of the hour for the government to come up with a robust regime For data protection that would deliver a careful and sensitive balance between individual interest and legitimate concerns of the state. It would be interesting to follow the development in this area in the near future and observe the matter to its end.

Considering that the digital population in India has grown substantially, data privacy and data protection are key issues at the moment. Every internet user leaves his/her digital footprints in the form of personal data when browsing the internet. This may range from, knowingly or unwittingly, providing their IP address, name, mobile number to personal and sensitive information like their sexual orientation, medical records, etc. This leaves the internet users vulnerable to crimes like identity theft, breach of privacy and financial crimes. The pervasive question today is crafting a privacy policy that balances the privacy of the internet user with the burgeoning requirements of the businesses. Terms of use and privacy policy should be treated as an art form, rather than long form, i.e., craft the document carefully customizing it to the needs of the business and the general principles of law.

Drafting a data protection law for India is a complex exercise.

**But as the scriptures say “From each debate, there arises knowledge of the Ultimate Principle”**

Hence this committee will bring a robust regime for data protection law in India. As privacy is now intrinsic part for individual which will be rightly protected

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