EDITORIAL TEAM

Editor-in-chief
Birinder Singh
(Advocate, Punjab & Haryana High Court)

Co-Editor-in-chief
Prateek Mahajan
(Advocate, Punjab & Haryana High Court)

Managing Editor
Ivan Khosa
(Advocate, Punjab & Haryana High Court)

Senior Editor
Praduman Garg | Shivali Garg | Malkiat Singh Hundal
Advocate | Advocate | Advocate
P&H High Court | P&H High Court | P&H High Court

International Advisory from Other Streams

www.supremoamicus.org
Adishail Gupta | Akhil Gupta | Nisha Ajmani
MBA, UIAMS, PU | MIM | M.PHIL
University of Maryland USA

Associate Editors

National Executive | International Executive | Student Assistance
Mansi Singh | Manisha Ajmani | Rohit Singla
BA.LLB (HONS) | M.PHIL | LL.B
UILS, PU | Glasgow Caledonian University | Dept of Laws, PU

Student Editors

Sanya Singh | Surinder Singh | Sumit Verma | Shubham Gupta
5th year | 2nd Year | 4th year | 4th year
UILS, PU | UILS, PU | UILS, PU | UILS, PU

Ajay Pratap Grewal | Asmita Chakraborty | Sativ Bhalla | Aakash Negi
4th year | 2nd year | 4th year | 2nd year
UILS, PU | CNLU, Bihar | UILS, PU | UILS, PU
# Student Editors (2018-2019)

<table>
<thead>
<tr>
<th>Pooja Kapur</th>
<th>Gaurav Hooda</th>
<th>Sarthak Makkar</th>
<th>Rekha Kumari</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amity Law School</td>
<td>Army Institute of Law, Mohali</td>
<td>Gujarat National Law University</td>
<td>Dept of Laws Bhagat Phool Singh Mahila Vishwa Vidyalaya, Sonipat</td>
</tr>
<tr>
<td>Amity University Noida</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Siddharth Baskar</th>
<th>Jatin Budhiraja</th>
<th>Pranav Kumar Kaushal</th>
<th>Kiffi Aggarwal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amity University Noida</td>
<td>Amity Law School Noida</td>
<td>Bahra University Shimla</td>
<td>BPSMV, Sonipat</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Dixita</th>
<th>Mayank Vats</th>
<th>Leepakshi Rajpal</th>
<th>Adarsh Pandey</th>
</tr>
</thead>
<tbody>
<tr>
<td>Banasthali Vidhyapith School, Hyderabad</td>
<td>Symbiosis Law School, Hyderabad</td>
<td>Symbiosis Law School, Hyderabad</td>
<td>City Academy Law College, UP</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Abhinav Verma</th>
<th>Maahi Mayuri</th>
</tr>
</thead>
<tbody>
<tr>
<td>Campus Law Centre, Faculty of Law, University of Delhi</td>
<td>Bharati Vidyapeeth Deemed University, Pune</td>
</tr>
</tbody>
</table>
DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of Supremo Amicus. The Editorial Team of Supremo Amicus holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of Supremo Amicus. Though all efforts are made to ensure the accuracy and correctness of the information published, the Editorial Team or the Publisher of Supremo Amicus shall not be responsible for any errors caused due to oversight or otherwise.

© Supremo Amicus, All Rights Reserved
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.
# TABLE OF CONTENTS

1. **MURLI S. DEORA V. UNION OF INDIA AND OTHERS (AIR 2002 SC 40)**  
   By A. Sajida Meera Rumana

2. **LIFTING THE CORPORATE VEIL CORPORATE CRIMINAL LIABILITY**  
   By Ajay Bainar & Gourav Gulati

3. **THE RULE OF LAW IN INDIAN POLITY**  
   By Anand Prakash

4. **LAW AND SOCIETY: A SYMBIOTIC RELATIONSHIP AND ITS INFLUENCE ON THE RECENT TRENDS IN INDIA**  
   By Ankita Shaw & Pragya Srivastava

5. **CRIMINAL AND FORENSIC PSYCHOLOGY FOR CRIME FREE INDIA**  
   By Anuja Jalan

6. **DIGITAL RIGHTS MANAGEMENT AND RIGHT TO FAIR USE: A CRITICAL ANALYSIS ON RELATED LAWS OF INDIA AND UNITED STATES**  
   By Archana .K

7. **LEGAL ISSUES REGARDING SURROGACY**  
   By Arisha Azhar & Farheen Haider

8. **FUTURE OF BLOCKCHAINS AND CRYPTOCURRENCIES: GLOBAL AND NATIONAL PERSPECTIVE**  
   By Deepshikha Shandilya & Suryakant Maithani

9. **INDEPENDENCE OF JUDICIARY AS A PILLAR OF DEMOCRACY UNDER THREAT**  
   By Deevanshu Jaswani & Kartik Singh

10. **CYBER CRIME: A NEW SPECIES OF CRIME**  
    By Dhanesh Desai & Naireen Khan

11. **IN DEPTH ANALYSIS OF EMERGENCY ARBITRATION- THE INDIAN POSITION VIS-À-VIS THE GLOBAL POSITION**  
    By Ishan Sharma
12. IMPACT OF ANTI-DUMPING DUTY ON SOLAR ENERGY INDUSTRY
   By Kalyani Karnad & Archita Rao.................................................................105

13. PROMOTER
   By Kanchan Kalwani.......................................................................................115

14. REDUCING THE ORIGINAL JURISDICTION OF THE SUPREME COURT
   By KJ Chendhil Kumar..................................................................................121

15. STATELESSNESS AND NATIONALITY: A PRIMITIVE PUNISHMENT FOR
    INVISIBLE POPULATION
   By Mohit Vats...............................................................................................130

16. SECTION 377: A WIDER CONCEPT
   By Muskan Gupta............................................................................................141

17. LAND TRIBUNAL UNDER THE TAMIL NADU LAND
   By N. Ilakkiya.................................................................................................147

18. EVOLUTION OF DUE PROCESS IN INDIA
   By Navneeta Shankar.....................................................................................155

19. IS THE INDEPENDENCE OF JUDICIARY AS A PILLAR OF DEMOCRACY UNDER
    THREAT
   By Neelesh Meena..........................................................................................161

20. POVERTY AND ENVIRONMENTAL DEGRADATION IN INDIA
   By Pranjali Jha...............................................................................................168

21. DOMESTIC VIOLENCE AGAINST WOMEN – AVAILABLE REMEDIES
   By Pratima Mishra..........................................................................................173

22. PREVENTION, REDUCTION AND TREATMENT OF JUVENILE DELINQUENTS
    THROUGH REHABILITATION
   By Ravi N. Soneja............................................................................................182

23. FEMALE GENITAL MUTILATION: A HUMAN RIGHTS PERSPECTIVE
   By Riddhi Mahesh Jangam.............................................................................187

24. DEFENCE OF STATUTORY AUTHORITY
   By Ritvik Maheshwari & Dhruv Sirpurkar....................................................193
25. MEDIATION: AN EFFECTIVE TOOL IN THE PURSUIT OF JUSTICE  
   By Samarth Khanna.....................................................................................................................202

26. THE FIVE SENSES AND NON TRADITIONAL TRADEMARKS  
   By Sanya Kapoor & Riya Gupta................................................................................................214

27. SUBRAMANIAN SWAMY V. UNION OF INDIA  
   By Shivam Mishra......................................................................................................................232

28. CITIZENSHIP (CONSTITUTIONAL IDENTITY AND DUAL CITIZENSHIP)  
   By Shraddha Chirania...............................................................................................................234

29. WILDLIFE BEARS THE BRUNT-IMPACT OF HUMAN INTERVENTION ON WILDLIFE IN INDIA  
   By Shubhra Sotie & Aman Singh............................................................................................240

30. SECTION 377: EVOLUTION AND RELEVANCE  
   By Souranil Mondal...................................................................................................................250

31. THE EVOLUTION OF PRINCIPLES OF NATURAL JUSTICE  
   By Swarnika Gupta....................................................................................................................261

32. CORPORATE INSOLVENCY IN INDIA  
   By Tapan Sharma & Abhishek Mohan Goel.........................................................................267

33. UNIFORM CIVIL CODE  
   By Tushar Bhardwaj & Abhinav Mohan Goel......................................................................271

34. CULPABLE HOMICIDE AND MURDER  
   By Amritha Priya PV...............................................................................................................278

35. THE INFLUENCE OF SALES PROMOTION ON CONSUMER BUYING BEHAVIOUR IN THE TELECOM INDUSTRY; THE CASE OF VODAFONE  
   By Varun Joshi.........................................................................................................................293
MURLI S. DEORA V. UNION OF INDIA AND OTHERS (AIR 2002 SC 40)

By A. Sajida Meera Rumana
From School of Excellence in Law, TNDALU

ABSTRACT

“Smoking Kills. If you’re killed, you’ve lost a very important part of your life”

- Brooke Shields

The case of Murli S. Deora V. Union of India had a great impact over the right to life of the passive smokers. Where there was a time when smoking in public places deprives the life of non-smoker in those public places. The Hon’ble Supreme Court looking into the life of the non-smoker who is affected because of a smoking did by a person in public places which undoubtedly deprives the life of a non-smoker in those public places. It further observed that Why should a non-smoker be afflicted by various diseases, including lung cancer or of heart, only because he is required to go to public places? Is it not indirectly depriving of his life without any process of law? Article 21 of the Indian Constitution provides that no person shall be deprived of his life without due process of law, but in this case, a non-smoker is deprived of his life not because of law alone because of the reason that he has to come into the public places. So, realizing the gravity of the situation and considering the adverse effect of smoking and also to protect the public health at mass. The Hon’ble Supreme Court directed and prohibited smoking in public places and also issued directions to the Union of India, State Governments, as well as the Union Territories to take effective steps to ensure prohibiting the smoking in public places. This case comments aims at bringing out a critical analysis over it.

KEY WORDS: Passive smoking, Non-Smoker, Non-communicable diseases, Environment health

I. FACTS OF THE CASE:

✓ Murli S. Deora – A famous politician

Murli S. Deora was a famous politician. He was also a social activist who is very much concerned about the society.

Effects of tobacco

Tobacco related diseases caused an estimated eight hundred thousand deaths in India per year with treatment of tobacco caused diseases resulting in a loss of Rupees 13,500 crores annually. The World Health Organization estimated that upto seven million deaths, worldwide per year were attributable to tobacco related diseases, of which sixty million deaths occurred in developing countries during the previous fifty years.

✓ Lack of legislation

During those time only one act was in force called Cigarettes (Regulation of production, supply and distribution) Act,1975. The Tobacco Products (prohibition of advertisement and regulation of trade and commerce, production, supply and distribution) bill,2001 was pending. The objects of both Acts detailed the concern of tobacco smoking on public health, but did not establish a ban.
Petitioner Approached Hon’ble Supreme Court
The Petitioner, Murli S. Deora has approached the Supreme Court by filing a Public Interest Litigation on the basis of the right to life, and liberty espoused in Article 21 of the Indian Constitution.

ISSUES IN THE PRESENT CASE:

i) Whether smoking in public places deprives the right to life of a non-smoker under Article 21 of the Constitution of India?

ii) Whether smoking has to be banned in public places?

ANALYSIS OF ARGUMENTS
The Petitioner pointed out that tobacco contains harmful contents including nicotine, tar, potential carcinogens, carbon monoxide, irritants, asphyxiates, and smoke particles which are the cause of many diseases including the cancer. It was alleged that three million people die every year as a result of illness related to the use of tobacco products of which one million people belong to developing countries like India. The World Health Organization have estimated that tobacco related deaths can rise to a whopping seven million per year. Tobacco smoking also adds air pollution. Besides cancer, it is also responsible for various other fatal diseases to mankind. The petitioner submitted that article 21 of the constitution of India provides that no one shall be deprived of his life without due process of law. But the smoking in public places affected a non-smoker in the those places with diseases like lung cancer or of heart.

It was further submitted that The Cigarettes (Regulation of Production, Supply and Distribution) Act, 1975 inter alia provides, “Smoking of cigarettes is a harmful habit and in course of time can lead to grave hazard”. Similarly The cigarettes and other products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Bill, 2001 provides that cigarette smoking leads to various health hazards. Both of them are not prohibiting the smoking in public places. So, it was prayed from the petitioners side that, considering the adverse effect of smoking in public places, the court in the interest of the public should prohibit smoking in public places until the statutory provisions is made and implemented. The Attorney General as well as the counsels for respondents submitted that considering harmful effect of smoking, smoking in public places is required to be prohibited. Learned counsel Attorney General also submitted that appropriate order banning smoking in public places be passed. The counsels for other respondents also supported the stand. It was further submitted that statutory provisions are being made for prohibiting smoking in public places and the bill introduced in the parliament is pending for consideration before a select committee. The State of Rajasthan claimed to have passed Act No. 14 of 2000 to provide for prohibition of

1“No person shall be deprived of his life or personal liberty except according to a procedure established by law.”

2 THE RAJASTHAN PROHIBITION OF SMOKING AND NON-SMOKERS HEALTH PROTECTION ACT, 2000
smoking in place of public work or use in public service vehicles for that state. It was stated that in Delhi also there is a prohibition of smoking in public places.

IV. OBITER DICTA:

The main issue in this case was whether smoking in public places deprives the life of non-smoker in those public places. The court observed that smoking done by persons in public places undoubtedly deprives the life of a non-smoker in those public places. The court observed that Article 21 of the Constitution of India provides that no one shall be deprived of his life without due process of law, but a non-smoker is deprived of his life not because of law. But only because of the reason that he has to come into the public places.

V. HON’BLE COURT VERDICT:

The Supreme Court held that smoking in public places deprives the Right to life of the passive smokers. Upon Realising the gravity of the situation and considering the adverse effect of smoking on smokers and passive smokers, the Supreme Court directed and prohibited smoking in public places. And it also issued directions to the Union of India, State Governments as well as the Union Territories to take effective steps to ensure prohibiting smoking in public places namely:

- Auditoriums
- Hospital Buildings
- Health Institutions
- Educational Institutions
- Libraries
- Court Buildings
- Public office

- Public conveyances including railways.

VI. CRITICAL ANALYSIS:

In earlier days there was only one legislation to regulate tobacco products in India, It was the Cigarettes (Regulation of Production, Supply, and Distribution) Act, 1975. This Act mandated the display of health warnings on cigarette packages, cartons and advertisements. It gave power to the law enforcement agencies to regulate the production and commercialization of tobacco products. However this legislation was strongly criticized for two reasons, Firstly, it did not encompass any provisions to regulate the production or use of non-cigarette tobacco products such as beedis, gutka, cheroots and cigarette. Secondly, the law was predicated on the beedis that as the tobacco industry accounted for a substantial share of public revenue. Law enforcement agencies should interfere in the working of the industry only if it is was necessary to do so.

In 1990, the central government by its executive order prohibited smoking in some public places where a large number of people could be present. In 1992, the manufacture and use of tobacco products in tooth pastes and tooth powder was banned vide an amendment to the Drugs and Cosmetics Act, 1940. The Supreme Court in Murli s. Deora V. Union of India, prohibited smoking in public places like auditoriums, hospital buildings, health institutions, educational institutions, libraries, court buildings, public offices and public modes of transport including the railways. In 2003, The cigarettes and other Tobacco products (Prohibition of Advertisement and Regulation of Trade and

3 AIR 2002 SC 40
Commerce, Production, Supply and Distribution) Act, 2003 was passed which includes the Provisions of the Act of 1975, but also included within its fold provisions governing the use of non-cigarette tobacco products, ban on public smoking, advertisement of tobacco products, sale of tobacco products in certain contexts, etc. Section 4 of COTPA seeks to curb the menace of smoking in public places. This desire finds expression in Prohibition of Smoking in Public Places Rules, 2008 which came into force on 2nd October, 2008. As per the new regime, Smoking is prohibited in auditoriums, health institutes, educational institutes, cinemas, modes of public transport (planes, buses, taxis, trains, airports, bus stops/stations, railway stations, hotels and restaurants, all kinds of offices, libraries, shopping malls, canteens/refreshment rooms, post offices, amusement parks, courts, discotheques, pubs, bars and coffee houses. The Railway Act, 1989 also prohibits smoking in trains.

VII. CONCLUSION:
Thus, from the Analysis of this case, it is clear that the Supreme Court through the process of “JUDICIAL ACTIVISM” has banned the smoking in public places. The seed for the prohibition of smoking in public places was sown by the Judiciary respectively. In this present case, Judiciary plays a major role for banning smoking in public places this which has been resulted in decrease of death annually. It had not only banned smoking in public places but it is also one to the extent of saying that Right to healthy environment is a fundamental right guaranteed under article 21 of the Constitution of India. Only after the steps taken by the Judiciary, the legislature come forward and taken steps to ban smoking in public places. Even though the measures taken by the Indian Government have yielded substantive results, a lot more still remains to be done for fanning the flacks of progress that these measures have generated.

BOOKS REFERRED:

WEBSITES REFERRED:

ARTICLES REFERRED:

*****

www.supremoamicus.org
LIFTING THE CORPORATE VEIL
CORPORATE CRIMINAL LIABILITY

By Ajay Bainar & Gourav Gulati
From Symbiosis Law School, Pune

Abstract
The concept of corporate criminal liability has gained a socio-economic relevance in today’s world, as governments over the world increasingly turn to companies to boost their GDPs. Along with the increasingly free rein given to companies comes an increased responsibility towards the society that is a major stakeholder in their business, and consequently increased liability on the company in cases of breach. The question then arises before the courts: how should a company be punished for criminal acts?

This paper seeks to answer this question by first explaining a company’s special status in law, then comparing the concepts of lifting the corporate veil and corporate criminal liability while giving a brief idea of the legal development of each, and then examining how judges have dealt with this dichotomy. It then goes on to propose the concept of joint liability as a measure of punishment that would effect punishment upon the company as well as its members.

I. Introduction
A company as a juristic person receives most of the rights of a natural person: Indian law recognises a “person” to mean a company as well. Hence, logically, it must be made to receive the same punishment as a natural person when it commits an act that would make a natural person criminally liable. However, the caveat is the word “most” used above: a juristic person cannot practically be given the exact punishment as a natural person for certain offences, and hence the imposition of criminal liability upon offender companies becomes an area of law with much controversy.

II. Company as a Legal Entity
It all began in 1897 in the landmark case of Salomon v. Salomon & Co.5, in which the House of Lords held that because they were two separate legal entities, the debts of the corporation were not the debts of Mr. Salomon himself. The court held that once the juristic person has been created, "it must be treated like any other independent person with its rights and liabilities appropriate to itself." Lord Macnaghten explained,

“The company is at law a different person altogether from the subscribers to the memorandum, and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them.”

The House of Lords used the same principle in Macaura v. Northern Assurance Co. Ltd.6 and held that the required insurable interest lay with only the company, as the legal owner of the property insured, and not


4 Section 11, Indian Penal Code, 1860.
the plaintiff, who held all the fully-paid shares of the company and who had insured the property in his own name. The plaintiff did not have any legal or beneficial interest in the property of the company merely because he was a shareholder.

Then, in the case of Lee v. Lee’s Air Farming, the Privy Council held that Lee, as a distinct legal entity from the company in which he was the majority shareholder, could be an employee of that company, and allowed Lee’s wife to claim damages under the Workers' Compensation Act when her husband died in the course of employment. Even in the case of holding and subsidiary companies, the sanctity of the separate legal entity concept is preserved. In the case of Industrial Equity v. Blackburn, this principle was used to stop a holding company from considering the profits of a wholly-owned subsidiary as its own.

The Supreme Court of India also stated that a corporation in law is equivalent to a natural person having a legal entity of its own, which is completely separate from that of its shareholders. The corporation has its own name and seal, and separate assets from its members.

III. Lifting of the Corporate Veil
Black’s Law Dictionary says that, “piercing the corporate veil is the judicial act of imposing liability on otherwise immune corporate officers, Directors and shareholders for the corporation’s wrongful acts”. The concept of lifting of the corporate veil only came into being once the need was felt for the courts to look past the artificial façade of the separate legal personality of the offender company in order to affix liability on the natural person or persons who were responsible for the offence being committed.

The basic principle behind this is that a creditor should not be made to incur more liability for the debts of the company than his investment value. Judicial discretion and legislative action allows the separate entity principle to be disregarded where some injustice is intended, or would result, to a party other internal or external to the company with whom the company is dealing.

III.A. Development of the concept in USA and UK
In 1906, the Circuit Court in Wisconsin, USA, held that "a corporation will be looked upon as a legal entity as a general rule but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime the law will regard the corporation as an association of persons.

In the case of Sea-Land Services v. Pepper Source, the plaintiff sought to pierce the corporate veil in order to hold the sole shareholder and other corporations he controlled personally liable. The American

---

8Industrial Equity v. Blackburn, (1977) 52 ALJR 89.
11Harshit Saxena, Lifting the Corporate Veil, JJBR (2010).
12United States v. Milwaukee Refrigeration Transit Company, 142 F 247 (1906).
courts relied on their decision in Van Dorn Co. v Future Chem. & Oil Corp.\textsuperscript{14}, and decided in favour of the plaintiff by disregarding the corporate personality.

In the USA, the simple principle was developed that if the shareholder has complete domination over the corporation used to commit fraud, which becomes a proximate cause of a plaintiff’s injury, the veil will be pierced. This principle is applied keeping in mind the different complications arising in every case.\textsuperscript{15}

In England, in the case of Daimler Company Ltd. v. Continental Tyre & Rubber Co.,\textsuperscript{16} the House of Lords said that the corporate veil must be lifted to look at the realities of the situation and to verify the bona fide intention for its incorporation. The German company was managed and owned by German nationals, and as this would amount to trading with an enemy, the lifting of the corporate veil was justified in this case.

In 1969 Lord Denning commented that the process of incorporation does not ‘cast a veil over the personality of a limited company through which the courts cannot see. The courts can, and often do, pull off the mask. They look to see what really lies behind.’\textsuperscript{17} In Woolfsan v. Strathclye\textsuperscript{18}, it was held the corporate veil could be lifted where there are special circumstances indicating that the company is a mere facade.

In Creasy v Breachwood Motors Ltd\textsuperscript{19}, it was held that,

“The power of the court to lift the corporate veil exists. The problem for a judge of first instance is to decide whether the particular case before the court is one in which that power should be exercised recognising that this is a very strong power which can be exercised to achieve justice where its exercise is necessary for that purpose, but which misused would be likely to cause not inconsiderable injustice.”

In 2011, the defendant was director of an English company and chief executive officer of a Swiss company, both of which were used to carry out a fraudulent scheme. The defendant gave false financial statements and did not disclose his criminal record to the investors. By undertaking fraudulent trading and other statutory offences, he was sentenced to seven years of imprisonment.\textsuperscript{20}

In 2015, in the case of Prest v. Petrodel Resources Ltd. & Ors.\textsuperscript{21}, the court differentiated between piercing the corporate veil and peeking behind the corporate veil. While peeking, the economic characteristic of a company may be looked at without lifting the corporate veil. However, when piercing the veil, the standard is much higher, for example, when a company acts

\textsuperscript{14}Van Dorn Co. v Future Chem. & Oil Corp., 753 F.2d 565, 569-70 (7th Cir. 1985).
\textsuperscript{15}Walkovsky v Carlton, 18 N.Y.2d 414 (1966).
\textsuperscript{17}Littlewoods Mail Order Stores Ltd. v. IRC, (1969) 1 WLR 1241, 1254.
\textsuperscript{18}Woolfsan v. Strathclye, (1978) SLT 159.
\textsuperscript{19}Creasy v Breachwood Motors Ltd., (1992) BCC 639.
\textsuperscript{20}R. v Terrence Freeman, (2011) EWCA Crim 2534.
\textsuperscript{21}Prest v Petrodel Resources Ltd. & Ors., (2013) AC 415.
fraudulently. The court further distinguished between two principles called the concealment principle and the evasion principle, to determine what a ‘relevant wrongdoing’ could mean. When using the concealment principle, Lord Sumption argues that the corporate veil is not pierced at all. In fact, it is just the concealment of the real actors in a company that the Court tries to unravel. The evasion principle, on the other hand, uses the piercing of the corporate veil to ascertain whether there exists a legal right or obligation on part of the member or the shareholder independent of the company.  

III.B. Development of the concept in India
The Supreme Court has stated that, “the doctrine of lifting of the veil postulates the existence of dualism between the corporation or company on the one hand, and its members or shareholders on the other.” Therefore, lifting of the corporate veil is an exception to the separate legal identity of the company.  

The Indian courts also applied this doctrine to prevent fraud. It has been held that a company cannot be used for illegal or improper purposes. The veil can be lifted in cases where the company has been used to evade taxes or to violate welfare legislations. In the case of CIT v. Sri Meenakshi Mills Ltd, it was laid down that in matters relating to economic offences, courts can use this doctrine to shed light on the economic realities behind the shadows of the legal façade. This principle was also applied, in the case of Santanu Ray v. Union of India to prevent tax evasion of any form. Courts could only lift the corporate veil if the tax departments could prima facie establish that the corporation was a sham, and did not fall within the purview of the law.

In 2015, in the case of Sunil Bharti Mittal, the court observed that the directors could be prosecuted for an offence committed by the company only in two circumstances: there should either be active involvement and sufficient evidence to adduce the criminal intent of that person, or the legislation should itself impose the liability.

---

26Sir Dinshaw Maneckjee Petit, Re, AIR 1927 Bom.371.
on the director or person in charge of the affairs of the company.

**IV. Corporate Criminal Liability**

There are two basic models of corporate criminal liability. The doctrine of identification holds the corporation directly liable only for the acts of its Directors or other senior officers, as they represent the corporation and are its “directing mind”\(^{33}\), while the doctrine of vicarious liability holds it derivatively liable for the acts of anyone acting on its behalf.\(^{34}\) Identification liability differs from vicarious liability in that it does not cause the shift of liability from one person to another; instead, because the directing mind is equated to the corporation itself, the two persons are deemed to be merged.\(^{35}\)

**IV.A. Development of the concept in UK, USA and Canada**

English courts did not initially recognise the concept of corporate criminal liability at all, based on three grounds. Firstly, as a corporation is a legal fiction, it can do only such acts as it is legally empowered to do, as per the *ultra vires* rule. Secondly, a corporation could not possess the required *mens rea*. Thirdly, it was difficult to devise an alternate punishment for corporations. Apart from these theoretical objections, practical difficulties hampered the imposition of criminal sanctions. Personal appearance was required at the Crown Courts or assizes, which was impossible for a corporation. A second practical difficulty arose with regard to punishment: as all felonies were at one time punished by death or deportation, it was simply not legally possible to punish a company.\(^{36}\)

Corporate criminal liability began as a punishment imposed upon quasi-public corporations, such as municipal corporations, for nonfeasance that resulted in public nuisance.\(^{37}\) Then, as the corporate footprint grew, the scope of liability for companies was increased to all crimes that did not involve the mental element of *mens rea*, the reasoning being that a company could not think on its own. In 1842, a company was held liable for breach of statutory duty.\(^{38}\) Subsequently, Lord Denman in *Queen v. Great North of England Railways Co.* \(^{39}\) held that corporations could be held guilty for misfeasance,\(^{40}\) as well, which came to be followed by American courts\(^{41}\) as well.

Until previously, a corporation could only be held liable to pay compensation under the law of torts. Then in 1909, in the case of *New York Central & Hudson River Railroad*...

---


\(^{37}\) People v. Corporation of Albany XII Wendell 53 (1834); The King v. Inhabitants of Lifton, 101 ER 280 (KB 1794); R. v. Inhabitants of Great Broughton, 9B ER 418 (KB 1771); Case of Lanford Bridge, 79 ER 919 (KB 1635).

\(^{38}\) Birmingham & Gloucester Railway Co., (1842) 3 QB.

\(^{39}\) Queen v. Great North of England Railways Co., 115 ER 1294 (QB 1846).

\(^{40}\) State v. Morris Essex Rail Road Co., 23 Zabrinski’s N.J.R. 360.

\(^{41}\) Commonwealth v. Proprietors of New Bedford Bridge, 68 Mass (2 Gray) 339 (1854).
Co. v. United States, the court for the first time held that it could impute to a corporation the knowledge of unlawful conduct by its agents, acting within the scope of their designated authority, where their actions are towards the profit of the corporation; thus any criminal liability for such actions of the agents could also be attributed to the corporation itself. 

Corporations were subsequently convicted of theft by deception, unworn falsification to authorities and deceptive business practices. A company was held to be a person under a legislation criminalizing homicide, and was hence convicted for homicide. The Ford Motor Company was also indicted for criminal homicide as it had acted deliberately to endanger human life.

In 1909, Canada introduced the concept of corporate criminal liability in the Canadian federal Criminal Code by providing that, when a corporation was found guilty, a fine could be substituted for the prescribed sentence of imprisonment. In 1941, a court fully acknowledged that a corporation could commit a crime.

In 1915, the House of Lords used the doctrine of identification to impose criminal liability on a company for an offence requiring mens rea. This received further approval in 1944, when this doctrine was used in three landmark cases to impose culpability on the company, where the mens rea of certain employees was considered that of the company itself. This opened the floodgates for companies to validly be held criminally liable.

Lord Denning in 1956 postulated the Organic Theory, likening a company to the human body: the servants and agents of a company who do its work are its hands, and the directors and managers represent the directing mind and will of the company. As the state of mind of the directors becomes the state of mind of the company as well, the fault of the directors becomes the fault of the company as well.

In Tesco Supermarkets v. Nattrass, the court created an artificial distinction between members of the top echelons of the company, such as the board of directors, with whom the company is identified, and others who are mere servants and agents of the company. This received criticism as it was impractical to make culpable a director, who may have no direct connection with the offence, rather than the actual employees or agents involved in the commission of the offence.

American courts ignored the Tesco Supermarkets principle and said that a corporation is said to be liable if it placed the agent in a position of sufficient authority with respect to only the particular business,

---

48 Bolton Engineering Co. Ltd. v. T.J. Graham and Sons Ltd., (1956) 3 All ER 624 (C.A.).
operation or project he was engaged in, and not with respect to the entire corporation as a whole. Corporations have even been convicted of crimes requiring knowledge on the basis of “collective knowledge” of the employees, though no single employee possessed sufficient information of the crime being committed.51

IV.B. Development of the concept in India
The Indian judiciary was slow to recognise this area of jurisprudence, but the process here began in the same fashion as it did in the West 52, with imposition of criminal liability on corporates initially only for offences not requiring mens rea. A 1951, the Calcutta High Court held that a company can be held criminally liable only in cases where the culpable act is envisioned in the Charter or Articles of corporation as being capable of being performed by the corporation, or must be ultimately connected with its statutory or legal obligations; additionally, it must also be possible for the court to pass a sentence of fine.53

Similarly, in Ananth Bandhu v. Corporation of Calcutta 54, the Court observed that a limited company cannot be proceeded against if something in the definition or context of particular section in the statute prevents the application of the section to it, or where it is physically impossible for a company to commit the offence. For example, rape cannot be committed by a limited company. The court also clarified that a limited company will not be tried for offences which require mens rea and where the only punishment prescribed is imprisonment, because it is not possible to send a corporation to jail.

Following this, the courts began to apply the doctrine of identification to companies. In the case of State of Maharashtra v. Messrs Syndicate Transport Co. (P) Ltd.55 the Court held that a corporate body acts through its senior officers like Managing Directors, Board of Directors or other authorised agents, and hence the criminal act or omission of such an agent, done in pursuance of the objectives of the company, including his state of mind, intention, knowledge or belief ought to be treated as that of the company as well. The Organic Theory proposed by Lord Denning was adopted in India in the case of Gopal Khaitan v. State56.

Then in 1970, for the first time the Supreme Court of India in Aligarh Municipal Board v. Ekka Zonga Mazdoor Union57 held that there is no doubt that a corporation is liable to be punished for contempt by imposition of fine and by attachment of assets for disobedying orders directed against them by the competent court. A command to the corporation is in fact a command to those

54 Ananth Bandhu v. Corporation of Calcutta, AIR 1951 Sind 142.

www.supremoamicus.org
who are officially responsible for conduct of its affairs. If they intentionally fail to comply with the court orders, they, along with the corporate body, are both guilty of disobedience and may be punished for contempt of court. However, even in the 1990s, courts were reluctant to impose criminal liability upon corporations for offences requiring mens rea due to their being legal persons.  

After the development of the Tesco Supermarkets principle, the Supreme Court decided the Iridium case based on two main points: firstly, that a company is capable of possessing requisite mens rea, and secondly, that the rigid test of identification of the directing mind of the company had to be followed in determining the requisite mental element.

However, it was held in the case of Sunil Bharti Mittal that mens rea is attributed to the company on the principle of alter ego, and it does not apply in reverse where vicarious liability is imputed on the persons dealing with the business of the company.

V. What punishment should be prescribed?
The courts had no trouble sentencing corporations for offences that prescribed a fine as punishment, especially where the offence did not require mens rea. Where the offence prescribed imprisonment, the courts used to take the easy way out and declare that a corporation could not even be tried for such offences. The problem arose when a company was found guilty of offences mandating punishment as well as fine.

The courts have the prerogative to interpret statutes, but are not permitted to limit the minimum punishment provided for under the same. The rules of strict construction require the courts to decide in the favour of the accused when there are two possible absurd interpretations. Hence, where the statute prescribes imprisonment as well as fine, the courts have chosen to impose lesser punishment and sentence the company only to a fine.

Using the mischief rule of interpretation, the courts should construe provisions in a way that prevents the mischief and advance the remedy according to the true intention of the makers of the statute, which would be to impose punishment regardless of whether the offender is a juristic or natural person. If the rule of reading conjunctive words disjunctively is applied, “and” can be construed as “or” in cases where it would facilitate the intention of the legislature, especially when it would avoid absurd or impossible consequences or operate to harmonise the statute and give effect to all

60Sunil Bharti Mittal v. Central Bureau of Investigation and Ors., AIR 2015 SC 923.
61Modi Industries Ltd. v. B. C. Goel, (1983) 54 CompCas 835 (All).
its provisions.\textsuperscript{66} This has been done in the case of criminal statutes as well.\textsuperscript{67} Therefore, where the offence prescribes imprisonment \textit{and} fine, the “and” can be read as “or”, and hence a punishment of only fine can be imposed upon a company.

The court made the position on this clear in \textit{Standard Chartered Bank and Ors v. Directorate of Enforcement}.\textsuperscript{68} The court explained that the intention of the legislature with regard to prosecuting a company could not be to prosecute corporations only for minor offences, which impose fine, and not for graver offences that require compulsory imprisonment, as companies cannot be jailed. It was held that companies could be tried and held liable for offences providing for compulsory imprisonment by simply imposing fines on them as sentence.

In order to simplify the task of the judiciary when it came to the question of what kind of punishment to impose, the Law Commission recommended that “the following provision should be inserted in the Penal Code as, say, section 62:----

\begin{quote}
(1) \textit{In every case in which the offence is punishable with imprisonment only or with imprisonment and fine, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine only.}
\end{quote}

\textsuperscript{66} Earl T. Crawford, \textit{The Construction of Statutes} (1940).
\textsuperscript{67} Williams v. State, 137 SW 927; People v. Lyttle, 7 Ap. Div. 553.

\textsuperscript{69} Law Commission of India,\textit{47th Report: Trial and Punishment of Socio-Economic Offences}, para 8.3.
\textsuperscript{70}Gilford Motor Co. v. Horne, (1933) Ch. 935.
\textsuperscript{71} Jones v. Lipman, (1962) 1 WLR.
\textsuperscript{72}Trustor AB v. Smallbone,(2001) 2 BCLC 436.
The concept of joint liability of company and its agents as discussed above was incorporated in S.93 of the Gold Control Act, 1968, which reads as follows:

93. Offences by companies.
(1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:
Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.
(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect of, any director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to he proceeded against and punished accordingly.\(\text{(Emphasis supplied)}\)

Though this Act was repealed in 1990, it is interesting to note that Indian legislators accepted the idea of joint liability.

The Law Commission of India, recognizing the problem of insufficient Indian jurisprudence on the topic, the suggested the following:

Since a Corporation has no physical body on which the pain of punishment could be inflicted nor a mind which can be guilty of a criminal intent, traditional punishments prove ineffective, and new and different punishments have to be devised. The real penalty of a corporation is the diminution of respectability, that is, the stigma. It is now usual to insert provisions to the effect that the Director or Manager who has acted for the corporation should be punished. But it is appropriate that the corporation itself should be punished. In the public mind, the offence should be linked with the name of the corporation, and not merely with the name of the Director or Manager, who may be a non-entity. [...] it is necessary that there should be some procedure, like a judgment of condemnation, available in the case of an anti-social or economic offence committed by a corporation. This will be analogous to the punishment of
This concept was applied while imposing liability on the corporation responsible for the Bhopal Gas Tragedy. It is proposed that the punishment in such a scenario consist of monetary fine on the company, and imprisonment or fine on the agents of the company who were physically involved in the criminal act, as well as upon the senior employees or officers of the company on whose orders they acted. There can even be mandated issuance of the company’s shares to the victim of the criminal act as a means of compensation for the losses they have suffered, which would lower the share value of the other shareholders, and bring disrepute and loss of goodwill and business to the offender company, preventing them from enjoying any profits accrued from the criminal act. This punishment would act as sufficient deterrence.

VII. Conclusion
In order to ensure more effective deterrence by involving a human element, the courts have looked past the corporate veil to focus liability on individuals in charge of the affairs of a corporation. This concept has also been incorporated into Indian legislations such as the Essential Commodities Act, the Employees’ Provident Fund Act, the Monopolies and Restrictive Trade Practices Act, the Foreign Exchange Regulation Act, and the Prevention of Food Adulteration Act, as well as the Companies Act.

As governments over the world increasingly offer benefits and incentives to foreign as well as local business houses in the hope that they will contribute positively to their GDPs, they must also recognise the threat that these corporations may pose to the society at large, and make provisions to safeguard it accordingly.

So far, the liability imposed on corporates has merely been a modification of what is imposed upon natural persons, in a clumsy attempt to fit them into the existing legal framework. This has led to further complications due to a company’s special status as a juristic person. It would be far more beneficial in the long run to formally amend existing provisions, or insert new provisions where required, in order to clearly lay down the extent of liability of a company for wrongs committed by it, instead of leaving it to the judiciary to develop the relevant jurisprudence on a case-to-case basis.

The spirit of justice demands that corporations be tried and punished as

73 Law Commission of India, 47th Report: Trial and Punishment of Socio-Economic Offences, para 8.1.
74 Union Carbide Corporation v. Union of India, AIR 1990 SC 273.
sincerely as human offenders in order to ensure equitable enforcement of equality, which would inspire more faith in the social, political and economic institutions of a country.

Bibliography

Statutes
1. Companies Act, 1956
2. Employees’ Provident Fund Act, 1952.
5. Indian Penal Code, 1860.

Books

Case Laws
5. Birmingham & Gloucester Railway Co., (1842) 3 QB.
7. Case of Lanford Bridge, 79 ER 919 (KB 1635).
16. DPP v. Kent and Sussex Contractors Ltd., (1944) 1 All E.R.
22. Jones v. Lipman, (1962) 1 WLR.
24. Kusum Products Ltd. v. S.K. Sinha, (1980) 126 ITR 806 (Cal);
33. People v. Corporation of Albany XII Wendell 53 (1834);
35. PNB Finance Limited v Shital Prasad Jain, (1983) 54 Comp.Cas. 66 (Delhi).
42. R. v. Inhabitants of Great Broughton, 9B ER 418 (KB 1771);
47. Dinshaw Maneckjee Petit, Re, AIR 1927 Bom. 371.
54. The King v. Inhabitants of Lifton, 101 ER 280 (KB 1794);

60. United States v. Milwaukee Refrigeration Transit Company, 142 F 247 (1906).

61. Van Dorn Co. v Future Chem. & Oil Corp., 753 F.2d 565, 569-70 (7th Cir. 1985).


64. Williams v. State, 137 SW 927.


Journal Articles


Other Authorities
Law Commission of India, 47th Report: Trial and Punishment of Socio-Economic Offences.

*****
THE RULE OF LAW IN INDIAN POLITY

By Anand Prakash
From Symbiosis Law School, Pune

"Be you never so high, the Law is above you."84

INTRODUCTION – RULE OF LAW

The dictionary meaning accorded to rule of law is the principle that all people and institution are subject to and accountable to law that is fairly applied and enforced i.e the principle of government by law. The first impression casted by the term rule of law is that a system which is governed by Law. Law being an instrument plays an inseparable role in forming of legislature, its implementation and also in keeping a check on powers and functions of every organ of state in the whole process. Thus on that note any system of government following rule of Law would function according to and avoid rule at individuals discretion. The same is seen as operating principle for rule of law where it envisages Law as supreme and avoids room for arbitrariness. The evolution of rule of Law finds its roots from various literary sources all around the globe. In India the evolution can even be traced from the Upanishads.

EVOLUTION OF RULE OF LAW

Professor A.V Dicey in “Introduction to the study of the law of the constitution”, published in year 1885 gave a comparative analysis of droit administrative prevailing in France and the system of law in Britain to establish that there was rule of law in Britain. The principle grounds of comparison were supremacy of law, equality before law and predominance of legal spirit. The set up of Dual courts under the napoleon code was criticised as it offering chances of personal as well official biases to the public servants in the administrative courts.

1. **Supremacy of law** – Dicey claimed that in Britain people were ruled by law. He said that rule of law is opposed to the influence of arbitrary and wide discretionary powers. If there is wide discretionary powers and arbitrariness there is no supremacy of law.

2. **Equality before Law** – this principle subjects all classes to the ordinary law of land administered by the ordinary courts of Law. He criticised the system of droit administratif in France which gives a set up for separate administrative tribunals for deciding cases involving government and public servants.

3. **Predominance to legal spirit** – Dicey criticised the restricted scope of judiciary in France which restricts it in the process of delivering complete justice as opposed to rule of law. He laid down that the spirit to deliver justice shall be predominate in minds of judges even if they need to go beyond by way of interpreting laws or even forming new laws.

**RULE OF LAW IN INDIAN POLITY**

The Indian constitution imbibes the concept of rule of law through many of its provisions. The most valuable fundamental rights in Part

---

III ensures equality and liberty. The dicey principle of absence of arbitrariness is aided by provisions such as Art 245-248, which makes legislature to act under law of the land. India has an independent judiciary to keep check and balance on the acts of legislature and executive.

**Supremacy of law** – The constitution is the supreme law of land. As per kelsons pure theory of law the constitution is the Grundnorm from which every other law derives its authority. Every Law need to be evaluated on the touchstone of Constitution to be declared as valid. In *Keshavanand Bharti case* the supreme court stated that our constitution postulates Rule of Law in sense of supremacy of constitution and laws as opposed to arbitrariness. For example, the legislative powers of parliament and state are clearly embarked under Art 245. Apart from it Art 246 mentions the subject matter of legislation beyond which the parliament and the state legislature cannot legislate. It implies the constitution is supreme as against legislature from where it derives its authority. Also it embarks the absence of arbitrariness as far as legislature is concerned. On the same line the Supreme Court has observed in that absence of arbitrary power is the primary postulate of rule law.

Article 13 – Any law which is inconsistent with the provisions of part III shall be void to that extent. Part III enshrines the fundamental rights and any law which abridges such rights, the courts are empowered to declare it unconstitutional.

**Powerful and Independent judiciary** – Both the Government and individual person are subject to the ordinary courts of law. In *Union of India v. President, Madras Bar Association* , the Supreme Court held that “Rule of Law has several facets, one of which is that disputes of citizens will be decided by Judges who are independent and impartial; and that disputes as to legality of acts of the Government will be decided by Judges who are independent of the Executive.

The judiciary is the basic structure of the Indian constitution as held in *Minerva mills* and *L Chandra kumar case*. The primary purpose of judiciary can be seen as to deliver justice and protect individuals against arbitrary use of power. In *Raman Dayaram Shetty v. International Airport Authority of India* , the Supreme Court held that the great purpose of rule of law is the protection of individual against arbitrary exercise of power.

The constitutional provisions such Art 32 and 226 empowers courts to keep a check over the abridgment of fundamental as well as prevent arbitrary actions of other actions of government.

86Keshavanand Bharti Sripadagalvaru and ors. V. State of kerala and Anr., (1973) 4 SCC 225
87Keshavanand Bharti Sripadagalvaru and ors. V. State of kerala and Anr., (1973) 4 SCC 225
88Som Raj AndOrs. Etc V. State of Haryana And Ors. Etc, 1990 SCR (1) 535.
89 Union of India v. President, Madras Bar Association, Writ Petition ( C) NO. 1072 of 2013
90 Minerva mills v. union of India, AIR 1980 SC 1789
91 L Chandra Kumar v. union of India and others, Appeal (civil) 481 of 1980
92 Raman Dayaram Shetty v. International Airport Authority of India, 1979 AIR 1628
**The Predominance to legal spirit** in Indian context can be seen by referring to Art 142 and Sec 482 of the Code of Criminal Procedure, under which supreme court and high courts respectively has inherent power to do justice. This complies with the 3rd principle of dicey which talks about predominance to legal spirit. Another aspect in predominance to legal spirit can be referred from *Vishakha and others V. State of Rajasthan* 93, where the supreme court went beyond from the legislature made laws to the International conventions and norms in order to do complete justice which implies the legal spirit to be predominate in minds of judges.

**Rule of law as the Basic structure and its Amenadability** – The constitution lays down provisions for amending its provisions under Art 368. The scope of amendment has been a issue of interpretation by the courts as in *Shankari Prasad* 94, *Sajjan Singh* 95 and *Golaknath* 96 cases. But the landmark decision on this issue came by the majority decision in *Keshavanand Bharti* 97 case, where the court held that the amending powers of parliament is not unlimited, although it extends to all the Articles (overruling *Golaknath* case), but it do not includes power to abrogate or destroy the basic structure. The rule of Law has been declared as the basic structure of the constitution99.

The Rule of Law as defined in the **International congress of Jurists**, held in New Delhi in 1959 where it was defined in context of individuals rights in a free society. It goes on to say that the function of legislature in a free society under rule of law is to create and maintain the conditions to uphold dignity of man as an individual. Further it laid down that legislature shall establish such social, economic, educational and cultural conditions for full development of individuals.

As far as it talks about dignity of man under the purview of rule of law, the following provisions relate to it :-

1. **Preamble** – The constitution used the term “dignity” in its preamble where it reads as “assuring the dignity of the individual and the unity and integrity of the nation”. It says “we the people”, as the highest source of constitution which complies it with the social contract theory of law.

2. **Article 21** – Under this head the state ensures that no one shall be deprived of life and personal liberty except under procedure established by law. It is widely recognised as highest fundamental right. Rights under this article have very wide scope as interpreted by the courts. As interpreted by the courts in *Oliga tellis V. Bombay Municipal*

---

93 Vishakha and others V. State of Rajasthan, AIR 2013 SC 324
94 Shankari Prasad V. Union Of India, AIR 1951 SC 455
95 Sajjan Singh V. State Of Punjab, AIR 1964 SC 464
96 L.C Golaknath And Others V State of Punjab And Others, 1967 AIR 1643
97 Keshavanand Bharti sripadagalvaru and ors. V. State of kerala and Anr., (1973) 4 SCC 225
98 L.C Golaknath And Others V State of Punjab And Others, 1967 AIR 1643

99 Indira Nehru Gandhi V. Raj Narain, AIR (civil) 887 of 1975
100 Indian Journal of International Law Vol. 51, No. 03, July/Sept. 2011, P. 408

www.supremoamicus.org
Corporation and others and in Corlie Mullin V. Administrator and Union territory of Delhi, right to life under Art 21 includes a dignified life.

3. Article 14 – The constitution grants equality and equal protection of laws to everyone as a fundamental right. As per Dicey’s doctrine reflected that discretionary power would be incompatible with rule of Law. 101 Dicey’s doctrine reflected that discretionary power could be incompatible with rule of Law. 101 but this dogma cannot be considered in totality today. Rule of Law in present scenario do not asks for complete absence of discretionary powers but rather that the law should control its exercise.

Now, getting to the scenario of rule of law in India, it ranks at 59th in the Rule of law index, 2015 released by the World Justice Project (WLP). The principles of Rule of law underlines the absence of discretionary powers in administration. It is said that where there is discretion there is room for arbitrariness. In India, there is a large amount of discretion involved in the administrative work in some cases. For e.g.: for the purpose of national planning the executive is armed with vast powers in respect of land ceiling, control of basic industries, taxation, mobilization of labour etc. Even Parliament passes acts which are opposed to personal liberty such as.

Dicey’s doctrine reflected that discretionary power would be incompatible with rule of Law. 101 but this dogma cannot be considered in totality today. Rule of Law in present scenario do not asks for complete absence of discretionary powers but rather that the law should control its exercise.

Now, getting to the scenario of rule of law in India, it ranks at 59th in the Rule of law index, 2015 released by the World Justice Project (WLP). The principles of Rule of law underlines the absence of discretionary powers in administration. It is said that where there is discretion there is room for arbitrariness. In India, there is a large amount of discretion involved in the administrative work in some cases. For e.g.: for the purpose of national planning the executive is armed with vast powers in respect of land ceiling, control of basic industries, taxation, mobilization of labour etc. Even Parliament passes acts which are opposed to personal liberty such as.

CRITICAL ANALYSIS
As we have seen the basic principles upon which rule of law is based. On the note of Analysis it can be specifically made that when we analyse the Indian context with the different principles of rule of law when can conclude that India is governed by rule of Law. As we have already related the Indian context with Dicey principle or the definition of rule of Law in Delhi Conference (1959), it also goes on to match the requirement put up by Joseph Raz in his literary work, “The Rule of Law and its virtue” 103. Indian government being bound by fixed rules which is announced or published and has fair certainty (not ambiguous). For example, Sec 66 of Information Technology Act, 2000 was ambiguous and hence held unconstitutional. But the matter of concern is whether these principles exist in strict sense to comply with the requirement of a society governed under rule of law. At the outset the dicey principles which are credited to a great extent for evolution of rule of law has also been subject to criticism on several grounds. The major points of criticism by Wade and Forsyth 104 suggested that dicey failed to distinguish arbitrary powers from discretionary powers. Also he failed to underline the Counseild’Etat, where appeals could be made as suggesting that French administration was not totally immune from the Judicial scrutiny. Also the principle that “The king can do no wrong”, negatives the presence of Equality and absence of arbitrariness in strict sense.

101 Oligatellis V. Bombay Municipal Corporation and others, AIR 1986 SC 180
102 Corlie Mullin V. Administrator and Union territory of Delhi, AIR 1981 SC 746
103 Joseph Raz, “The rule of law and its virtue”, 1977
104 Christopher Forsyth and William wade, Administrative Law, 1961

www.supremoamicus.org
preventive detention act or maintenance of Internal Security act 1971, national security act 1980. Even the simplest thing like discriminate payment of employees can be termed as inequality, as opposed to rule of law. The case Frank Anthony Employees’ Union v. Union of India 106 is concerned with discrimination in payment to employees, which was held to violate the person’s right to equality and unreasonable classification of pensioners was held to be arbitrary in the case Nakara v. Union of India 107.

Rule of law implies fairness and Non Arbitrariness in governance. India ranks on 83 out of 133 Countries in the Corruption perception index 108 as per the report of Transparency International in year 2003. Corruption at every level, in every section of society defeats the very spirit of a democratic nation and thus it kills the rule of law in a free society.

The major principle under Rule of Law is of Equality. The Constitution has Art 14 for the same but, in realistic note there are few provisions which creates inequality. Although it is maintained under the head of it being a positive discrimination but in context of Rule of Law it can be treated as inequality. For example :-

1. Immunity to the Beauraots and diplomats in India.
2. No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor of a state, in any court during his term of office. No process for the arrest or imprisonment of the President, or the Governor of a state, shall issue from any court during his term of office.

3. The privileges granted to the members of parliament in respect of legal actions against them.

4. There are separate tribunals for administrative cases called administrative tribunals which are not bound by the Rule of Evidence 109.

On basis of these points one can conclude that equality is not observed in stricter sense and so is rule of law. But it can be justified as the principles of rule of law which originated long back cannot be applied in stricter sense in present scenario. Legal theories need to evolve with time and requirement. Constitution in practical is said to be organic or living constitution which means the provision shall be subject to evolution as per the changing needs except for the portions which constructs the very Basic structure.

The Judiciary has a vital role to play in a democracy while interpreting the statutes or Judging the validity of the acts of legislature and executive. One such occasion was before courts in Adm Jabalpur 110 case, which is popularly known as habeas corpus case. The primary issue concerned in the case was whether there is any rule of law when fundamental rights like Art 21, 14, 19 etc. are suspended. Only jus. Khanna in his

106 Frank Anthony Employees’ Union v. Union of India, 1989 SCR (1) 238.
107 D. S. Nakara V. Union of India, 1959 SCR 279
108 Transparency international, berlin 2003 report.
109 Durga das basu , administrative law.
110 A. D. M Jabalpur V. Shiv Kant Shukla, AIR 1976 SC 1207
disencting opinion could give a way to the existence of rule of law even though the fundamental rights are suspended. In my view, at this point this opinion stands upto the requirement of rule of law as internal morality\textsuperscript{111} as propose by Joseph Raz. The majority of the bench which restricted itself from going into the validity of the MISA Act\textsuperscript{112}, which provided a large room for arbitrariness is against the rule of law. And for this reason this judgement is called as the darkest hour of Indian Judiciary.

CONCLUSION
The primary question concerning this literary work – What is Rule of Law and how far it is administered in Indian polity based on its principles. After taking note of several principles pronounced across the globe it can be said that Rule of Law is the basic to good governance, what distinguishes a civilized society from an uncivilized one is rule of law. The concept of rule of law has seen its evolution from many literary sources but the core of the principle which remains common among all is that it requires Law to be supreme and absence of arbitrary powers in administration of these laws. M.C. Chagla, in his autobiography “Roses in December”, mentioned that: If there are three prime requisites for the rule of law, they are a strong Bar, an independent judiciary and an enlightened public opinion\textsuperscript{113}.

As far as administration of Rule of Law in Indian polity is concerned, Principles of the rule of law is seen to be embodied in our constitution, which establishes an independent Judiciary and guarantees fundamental rights and defines roles for the legislature and the executive separately. The distinctiveness of Indian rule of law lies in providing space for a interaction between among four notions: “rights”, “development”, “Governance” and “Justice”. The concept of rule of law has been in question in courts many a times and It is a matter of pride that Indian judiciary has succeeded in keeping alive the spirit of rule of law. The landmark judgment by supreme court declaring rule of law as basic structure underlines the importance of rule of law in Indian governance\textsuperscript{114}.

\textsuperscript{111}Joseph Raz, “The rule of law and its virtue”, 1977
\textsuperscript{112}Maintainance of Internal securities Act, 1975
\textsuperscript{113}M. C Chagla, Roses in December, 1994
\textsuperscript{114}Indira Nehru Gandhi V. Raj Narain, AIR 1975 SC 2299
LAW AND SOCIETY: A SYMBIOTIC RELATIONSHIP AND ITS INFLUENCE ON THE RECENT TRENDS IN INDIA

By Ankita Shaw & Pragya Srivastava
From School of Law, KIIT University, Patia, Bhubaneswar

“All collective human life is directly or indirectly shaped by law. Law is like knowledge, an essential and all-pervasive fact of the social condition.”

- Niklas Luhmann

Abstract
The relationship between law and society has been accepted both in the jurisprudential concept and the various practical disciplines’ aspect. Therefore, the discipline of Law in itself cannot be considered as an autonomous discipline instead it has to be studied in the context, the context of the society and social relationships. Studying the “Black Letter Rule” of any Criminal Law or Civil Law cannot happen in isolation. The author through this paper emphasizes on how studying of the black letters of law simultaneously with the study of society is equally important. The paper analyzes the socio-legal influence on the recent trends that persists in the India. Furthermore, the author traces the recent trend in the balance-cum-disbalance in the inter relationship between the two separate yet interconnected disciplines that is Law and Society. The analysis is done through emphasizing the concept of both law and society. There exists a deep nexus between both law and society and is considered to be interconnected in such a way that one cannot exist without other subject. The paper emphasizes on the importance and influence of the inter relationship between the law and the society, its impact on the intra state affairs(India) and the further understanding that is required both for the law makers and the social opinions.

1. Introduction
The inter-influential standing of law and society marks the current trend in the modern sociology specifically after the Second World War. There is a very much needed clarification regarding the study of the relation between law and society, as against only studying the “black letter laws” . Therefore, the analyzing and understanding of the relationship between law and society in both the legal and sociological perspective is very much important.

2. Conceptualizing Law and Society
The Federal Republic of Germany faced with the problems of the individuals who conformed to the defeated regime of Nazi regime headed by totalitarian dictator Adolf Hitler in post Second World War scenario. In one of the famous instance, a woman, with an intention to pursue a sexual liaison, had reported about her husband for making remarks against Hitler, i.e. violating

15Niklas Luhmann, A Sociological Theory Of Law 1 (Martin Albrow eds., Elizabeth King-Utz & Martin Albrow trans., 2nd ed. 2014).
the Nazi Laws. The husband was sentenced to death but later sent to the war frontline.118 After surviving the war he complained against his spouse. A West German appellate court, reflecting the natural law philosophy, convicted the spouse and reasoned that the Nazi Law was contrary to “sound conscience and sense of justice of all decent human beings”. 119 The case of vindictive spouse marked a question on the meaning of law, as well as of society and their prevailing nature over each other if contradiction arises.

As the establishment of societies came first and the existence of so called man-made laws came into play after that, in order to sustain the society adequately, the conceptualization should be done in a deductive process, i.e. study of society of study of law.

A. Society

From when the forming of human society started that is still unknown. It is to be noted that even before establishment of a civilization and society in a strict and general sense, there were groups of the ancestors of now humans. The only difference was that they used follow the rules of nature as they didn’t establish laws to govern themselves. As soon as human started forming civilizations like Mesopotamian Civilization (3500 BC – 500 BC)120 and Indus Valley Civilization (3300 BC – 1900 BC)121, formulation and imposition of man-made laws started.

I. Definition and Meaning

There are two theories regarding the definition of society. One is the ‘structure theory’ by renowned British sociologist MacIver. He said “Society is a system of usages and procedures, of authority and mutual aid, of many groupings and divisions, of many groupings and divisions, of controls of human behavior and of liberties. This ever-changing, complex system we call society. It is the web of social relationships. And it is always changing”.122 The other one is ‘function theory’ given by American sociologist C. H. Cooley, “Society is a complex of forms or processes each of which is living and growing by interaction with the others, the whole thing being so unified that what takes place in one part affects all the rest”.123

II. Social Basis of Law

In order to understand the social perspective of law, the necessity to understand social origin of law, i.e. Mores, Norms, Folkways, is undeniable.

Values are the foundations to understand the substance of moral and immoral, good and bad, acceptable and unacceptable.124 Norms are the “action

---

118 Criminal Law-In General-German Citizen Who Pursuant to Nazi Statute Informed on Husband for Expressing Anti-Nazi Sentiments Convicted Under Another German Statute in Effect at Time of Act, 64 Harv. L. Rev. 1005, 1006 (1951).
119 Ibid.
121 Ibid.
122 MACIVER & PAGE, SOCIETY: AN INTRODUCTORY ANALYSIS 5 (1957).
aspect” of values and provides us the idea the modus operandi to act. ‘Folkway’ is one of the classifications of informal norm. Folkways can be phrased as customs that guide our daily actions and behavior, e.g. our style of dress, use of language etc. Another informal type of norm is Mores. These are said to be the norms regarding the righteousness of something. Violation of a More results strong condemnation, as against lesser strong condemnation of, upon violation of one’s Folkways and Values. An example of Mores in context of India is the dressing code for a job interview where the law has not been laid down for dressing in interviews however individuals still follow these mores. Mores are not binding on individuals but if not followed may lead to strong condemnation. It is also to be noted that important Mores may land up being laws due social sanctity.

Norms often become the foundation of laws, e.g. the More against taking the life of an individual is termed as the sin of Murder in legal system in every country. While in contrast Laws are legally binding rules which if violated may be enforced in the Courts. Laws are inclusive of formal norms enforced by external controls, i.e. the Government having the sole authority of imposing sanctions. Folkways, Mores are more likely to be considered as informal ways of establishing social control by a Non-governmental body. However, when the complexity of the society increases, formal mechanism to control the society through law is more likely to be relied upon.

B. Law

Law is an instrument of social change, or in simple words, it is the means to achieve justice in the society. Due to the subjectivity and dynamicity of legal perceptions, it has been defined in various verbatim.

I. Definition and Meaning

The great positivist Austin defined it as “Command of sovereign” reflecting a conspicuous support to the principle of Gesetz. Salmond channeled it through the way of justice administration, saying “Law is the body of principles recognized and applied by the State in the administration of justice”. The statement of Woodrow Wilson, i.e. “Law is that portion of the established habit and thought of mankind which has gained distinct and formal recognition in the shape of uniform rules backed by the authority and power of the government.” The eminent scholar of sociological school, Roscoe Pound, defined


125 Id. at 16.
126 Ibid.
127 Ibid.
131 Law is law.

www.supremoamicus.org

27
law as “social engineering which means a balance between the competing interests in society” 134. Therefore to analyze all the definitions of Law as discussed above following can be inferred that –

- The law is the set of rules, accepted by the state, in a frame of command.
- The command is be given by the sovereign authority, i.e. the politically superior group to govern the subject, i.e. politically inferior group.
- The motive of the command is to avoid conflict between competing interests and to uplift those which are just and proper.
- As a result of failure to the compliance of the command, sanctions will be imposed on the individuals, at the discretion of the Sovereign.

II. Functions of Law

Law, being an integrative mechanism, functions of to accomplish social control, dispute resolution and social change inclusively.

a. social control

The very process of ensuring individuals that they engage in the “right conduct” is known as social control. In a homogenous type of society social control may be achieved through the social pressure from friends, relatives, neighbors. 135

However, in a heterogeneous and larger type of society law is required to maintain social control. Though implementing a law does not mean that all the deviant acts will be controlled. In those cases, the picture of Courts, Jury, Lawyers, Police and other law enforcement bodies comes into play.

b. dispute resolution

Dispute Resolution is considered to be the second most important function of social control. Friedman defines dispute as “assertion of inconsistent claims over something of value” 136. Disputes can be “dangerous” because they can easily go boisterous, leading to retaliation and violence. Negotiation is one of most effective methods to resolve Dispute and Conflict. A complaint in court is nothing but the dispute or conflict, transformed into legal disagreement.

c. social change

The third function of Law, in relevancy, is Social Change. Social Change means a change in the system of social relationships where a social relationship is understood in terms of social processes, social interactions and social organizations. Thus, Social Change indicates changes in social institutions, social processes and social organizations. In other words, it can be explained that social change leads to structural changes in the society.

3. Inter-dependency between Law and Society

A. Effect of Law on Society

There were several means of informal methods through which social control in a society was maintained. However, law being a formal means of social control it immensely impacts the society as well. For instance, Shah Bano’s

134 DR. B. N. MANI TRIPATHI, JURISPRUDENCE LEGAL THEORY 49 (16th ed. 2014).
136 Id. at 12.
case was a milestone in the Muslim women’s search for justice. A 60 year old woman, who approached the court to ask for maintenance from the husband who divorced her, got justice from the Court. Furthermore, it brought about a social change in society even if it has to go against the established customs, traditions and religion.

Every society gets affected by the laws implemented in the Country, e.g. Criminal Law, such as prohibition of murder or theft ensures penalties for those who violate the law. The rule of law becomes fundamental in advancing the democracy in a particular. For example, law implemented in our country encourages the individuals to take part in the democratic system and be a part of the political affairs. The Law, in a country like India, also ensures to protect the rights provided to the individual by the state. Therefore, it must be said that the legislative principles laid down by the Legislature of the state and the democratic nature of the state is maintained by the Law imposed.

B. Effect of Society on Law

The degree to which law is impacted by the society in which it works is clearly evident through different pieces of legislative documents. The primary instance that law is affected by the society is the relationship between laws and traditions. Custom is considered to be a major source of law. For instance the Hindu Marriage Act, 1955 is a law which has its establishment within the traditions of the Hindu’s way of marriage. Hindu Succession Act also has cleared out the door open for the recognition of tribal customary laws and practices of “Scheduled Tribes.” Societal opinions can be an enticing reason for choosing a specific policy or deciding a case in a certain way. It was post Nirbhaya Rape case in December, 2012 that the mass movement for revising the laws for the individuals committing a heinous offence took place. This mass movement represented the public opinion and outrage and thus, this mass movement led to the passing the Juvenile Justice Bill in order to revise the laws which was enforced in the year 2015.

Therefore, what can be inferred from the above discussion is that Society also impacts the law in a larger way. Society in simpler understanding also influences the laws that are made. Laws at times are made on the basis of the societal opinions and influences.

4. Relationship between Law and Society

The legal system of the society reflects the very nature of the society. Laws are neither created nor applied in a way that does not fit with the very nature of the society.

---

138 PEN. CODE § 302.
139 PEN. CODE § 380.
vacuum. Laws intend the individuals to move in a certain direction that are assumed to be good, as well as to prohibit moving in a particular direction because it is considered to be bad.\textsuperscript{143}

It is the members of the society who make the Social rules\textsuperscript{144} which if not followed leads to ostracization from a group but doesn’t lead to any formal punishment. This is when the law comes into picture by making laws that can be enforced and the violation of which may lead to severe penalties.

Law and Society scholars tend to view the relationship between law and society from two perspectives.

A. Consensus Perspective

It views society as based on shared values. The scholars of this perspective consider that law is a mechanism through which the occasional disputes are resolved and also it maintains stability in the society. According to this perspective the central function of law is to help ensure that people will cooperate with one another and that society will operate in a smooth and integrated fashion.\textsuperscript{145}

B. Conflict Perspective

It views conflict as a central aspect of the society\textsuperscript{146}. It is the extreme opposite of the Consensus perspective. As well said by M. Lippman, “Society is viewed as composed of competing groups, and the law is an instrument of coercion that is employed by dominant and powerful groups to maintain their power and control”\textsuperscript{147}.

The debate between these two perspective has been a persistent theme which is unlikely to be resolved. These are the two perspectives which is extremely useful in understanding two different types of relationship between the law and the society.

Sociology helps law to better understand society for smoother regulation and formation of laws\textsuperscript{148}. Similarly, the law is important to regulate a society\textsuperscript{149}.

5. Recent Trend in Relation between Law and Society

There have been good laws which have been implemented by the state because of the societal demand and the public opinion. For instance, The Juvenile Justice Act (Care and Protection), 2015 is an amended version of the previous Juvenile Justice Act. The major amendment in the 2015 Act was that any individual above 16 years committing heinous offences may be convicted. This amendment happened because of the mass movement and also in the opinion of the majority individuals this has been a good law. In the similar instance the laws that are made for the protection of women is also a good law. However, the implementation of these good laws may not be of a particular standard to be called a

\begin{itemize}
  \item \textsuperscript{143}Ibid.
  \item \textsuperscript{144}Ibid.
  \item \textsuperscript{145}MATTHEW LIPPMAN, LAW AND SOCIETY 61 (2nd ed. 2017).
  \item \textsuperscript{146}Ibid.
  \item \textsuperscript{147}Ibid.
  \item \textsuperscript{148}Relationship between Sociology and Law, SOCIOLOGY GROUP (Oct. 1, 2017), http://www.sociologygroup.com/relationship-sociology-law/.
  \item \textsuperscript{149}Ibid.
\end{itemize}
good Law. For instance, there have been several non-constitutional bodies like Khap Panchayat and the Kangaroo Courts sanctioning violence against a particular women or curtailing women’s freedom in significant ways\textsuperscript{150}. The question that lies ahead of us is why is it that there have been legal expansion of women’s rights in India, and still the societal trends that maintain a violent order against women have remained intact?\textsuperscript{151}

At a time when the developing countries in the entire world are having an eye to become a developed nation, India’s lagging behind creates regarding the harmony of the relation between law and society. For instance, despite the legislations have been made to protect the women, still the statistics of rape and sexual assault goes on increasing per year\textsuperscript{152}. Another instance is, when U.K. from where the concept of exemption of men in committing marital rape\textsuperscript{153} originated has criminalized marital rape in its own country\textsuperscript{154} but India, which has followed U.K. in making laws has not criminalized marital rape, in spite of the demand of social opinions. Another such example is the existence of section 377 of Indian Penal Code where even the smaller countries have legalized LGBT\textsuperscript{155}.

The recent judgment, K.S.Puttaswamy v. Union of India\textsuperscript{156} is yet another aspect in which law and society both are evaluated equally claiming that the law related to privacy is as much important as any other right to freedom and liberty of an individual. Socially without these basic rights it becomes highly impossible for a peaceful society. At a time when the informational technology is rapidly increasing, it is also important that the right to Privacy of an individual exists where the data shared by the individual to any agency remains confidential and not remain available to the public. Aadhar card for a matter of fact is a scheme which collects all the data like both demographic and biometric data and it claims that the data remains confidential however, there have been cases where the data of one lakh individuals has been leaked and hence, it was considered to be a serious societal threat to the public in general. The societal opinion therefore, in this context, fails to recognize Aadhar Card scheme as a scheme which should be considered as mandatory for all the individuals. What can be evaluated that,

\begin{itemize}
  \item Ibid.
  \item Five Law Lords, in an unanimous judgment on 23rd October of 1991, held that English law does not permit a husband’s to get immunity from an accusation of his wife’s rape; see Kate Painter, Wife Rape In United Kingdom, AMERICAN SOCIETY OF CRIMINOLOGY: 50TH ANNIVERSARY MEETING, http://www.supremoamicus.org
\end{itemize}

\textsuperscript{151}K.S. Puttaswamy v. Union of India, Writ Petition (Civil) Nos. 494 of 2012 and 829 of 2013.
the societal opinion led to making of the Right to Privacy as a basic fundamental right and, it is because of this fundamental right that the Aadhar Card scheme is a matter that lies sub-judice in the Supreme Court.

What can be ultimately inferred is that it is not an ideal relationship between the law and the society. There are major differences in the existence of both the Law and the societal opinion.

6. Suggestions
India as a nation emphasizes on taking a step towards becoming a developed country. However, this has been considered to be impossible for various reasons. The opinion in the matter of interdependency of law and society on each other are the following. The individuals nowadays, have wider and broader connections throughout the world, hence they get accustomed with the practices all around the world. With the changing times in the society specifically, in a developing country like India, where individuals have a tendency to follow the developed western society it becomes highly difficult to maintain the already persisting values and nature of the society. The society automatically transform themselves into a rebellious group in order to amend or modify or make a new law altogether. This has been seen in the Post Nirbhaya Rape Case where the public came up on roads in order to amend and modify the laws then existing for rape. Furthermore, what the individuals of the society need to consider is that there are some laws which are made according to just not their perspective but also, keeping in mind the entire nation. And for such a large nation it become next to impossible to please and satisfy every individual through the laws of the society. The ultimate suggestion is that the law makers should consider the changing nature of the society and the society should also evaluate and understand the diverse nature of Indian society where not every individual or not every group can be satisfied.

8. Conclusion
In a time when the world is taking leap in the era of broadening the laws and considerations of people with regard to everything, it’s time for India to awake both in the societal frame and the administrative form. What is imperative for India as a nation is to actualize great laws in a better way possible; a distant better way and not as a awful usage of a great law. For instance, if protection of women laws have been made and which is considered to be a good law it is essential that legitimate execution of these laws take place which isn’t happening in the present society of India. Another critical viewpoint that’s considered to be vital for reciprocal relationship between the law and the society which is vital in India is not to overlook the demand and the opinions of the people within the society, conjointly, not to encourage the opinions which cannot be considered to be great for the welfare of the society.
CRIMINAL AND FORENSIC PSYCHOLOGY FOR CRIME FREE INDIA

By Anuja Jalan
From Jamnalal Bajaj School of Legal Studies, Banasthali Vidyapith

ABSTRACT
Is crime free nation a myth? To come to a definite answer we need to explore the scope of “CRIMES”. If we peep into the older pages we would eventually realize that it is very difficult to trace out the first crime committed on land. Was it the act of Adam and Eve, or it came into being with the advent of society as provided by Hobbes, Locke-Rousseau. The approach towards curbing crime in India or elsewhere has been changed with the concept of psychology being interrelated with the same. The article focuses upon the possibility and impossibility of attaining the prospective goal of crime free India. It is a comparative analysis with respect to various nations status upon our goal. The role of various forensic psychological techniques used is also a matter of great concern. The cultural base of a nation plays a vital part in determining the extent of acceptance and utilization of the novice modes in almost every field. Ultimately the perspective is the key to every discussion.

INTRODUCTION
The world comprises of stairs. Each nation symbolizes and occupies a step. A state has to begin from the bottom and rise to the top stepping upon the following stair. This is a personification of the status of the countries of this world. The thought which forms the core of this theory is that every country has to pass through a cycle of development, initiating from being a backward or underdeveloped nation to the most developed one. But this cycle cannot be created with one-way routes only. Therefore those reaching above must fall down as well. Now, this is a question of time that whether the rising nations slides down to zero or falls freely under gravity. This above stanza makes us wonder as to the relevance of this explanation in our theme of concern. This cycle also takes with itself the phenomenon of crime commission and its transitions. This is a mere observation. At each level of development some new kind of crime gets introduced and also new techniques come to our knowledge to fight with them. Therefore in the subsequent discussion we’ll be dealing with one such technique in relation to the prevailing criminal behaviour in the Indian society or elsewhere. Criminal and Forensic Psychology hasn’t come to its utmost developmental age but is still exploring new arenas of itself. One such evolution recently made is in the field of prediction as to the brain activity pattern. In such scenario when there’s a continuous growth in any field then it becomes more and more necessary to analyse the concept and make the maximum out of it. The approach is not restrictive to the abstraction of our theme as the ultimate solution and mode of realization of our dream country but it is critical as to the extent it can be helpful and the limit to which it is suffice. The comparison between the countries concerned in this regard enables us to frame the best policy for our country complimenting its uniqueness.

METHODOLOGY:
The methodology adopted in this paper is comparative in nature and the technique involved is deduction from already known and prevailing scenario. It is a compilation in brief of the evolution of the psychology in the field of law and its showcases in past, the aspect of crimes has also been included to an extent, further the role our topic of concern can play taking into consideration the various notions it convey. Moreover, the approach which one would eventually derive reading this paper is generalised. That is to say it is analysing the overall basis upon which the Criminal Psychology and Forensic Psychology rests and owe its emergence thereby an historical perspective can also be sensed. This paper is merely a perspective and not conclusive at all. The world is a large entity and experiments would never yield same results throughout. It will vary with place, people and perspective. The computers we use today were rubbish for olden periods as there were no resources or conditions to allow its usage. Similarly, we do not have such infrastructure to make possible the new Chinese bus run on our roads, we cannot adopt it now. Therefore, time plays a key function. The techniques seeming to be helpless today would be revived later.

DISCUSSION
Our theme suggests the reflection upon the idea of a Crime Free Country. It is a matter of great discussion. There may be clashing views as it being an abstract notion or can it be brought to reality. Crime is an inherent characteristic of society since the advent of it. There are various theories about the first crime which was committed on the land i.e. Planet Earth. A close view of these differential perceptions reveals that all these are more or less similar in nature. They all depict the birth of human on earth and thereby he being compelled by his desires or greed committed an unworthy act which then evolved into CRIME. One such is the story of Adam-Eve in the Garden of Eden. Also taking into consideration the version of Islam about Habil and Qabil, the sons of Adam. Where Eve pluck the fruit from the tree of wisdom on the influence of the serpent, Qabil hit his brother Habil with a rock and he got killed, both the instances shows the result of man’s desires. One similarity which we miss here in the two stories is that the act leading to crime was done accidently and not deliberately. Like many other inventions which took accidental crime also took birth by mistake of Man. The western view also inter-mixes the formation of society and origin of crime, as the Social Contract theory given by thinkers: Hobbes-Locke-Rousseau. They talk about the state of nature, in which either the criminal environment existed since the beginning or was created with the sense of property possession. All the above makes it evident that crime is such a feature or part of society which comes with the society. And this may be a valid argument that being so intrinsically related to human establishment it cannot be evicted out totally.

But this is the scenario when we only glance at the “Disputed Act”. The moment we engulf the other aspects of the developing human civilization in our purview the argument does not hold good. With the evolution of criminal activities also evolved the techniques and mechanisms to curb them. Therefore, a new possibility of getting rid of this evil seems to peep out. Here comes the significance of “Criminal
Psychology” and “Forensic Psychology”. The acts or omissions which are forbidden and punishable by law are termed as Crime. It has a very wide scope. And is a difficult task to define crime in its entirety as it has many aspects and varied attempts has been made to define it but none can be considered to encompass the complete scope of it. There are numerous acts which are characterised as crime in the society, and the enumerating list is enlarging ever since the first entry. With the advancement in the technologies the crimes like the ones in cyber space, the ones involving new methods of commission etc, have evolved. In the primitive society there was not much association among the population with those of some other area, therefore such criminal activities were bound within the boundaries of each establishment but slowly these scattered civilizations merged or come to know about one another and the mediums to connect them were developed thereby allowing the spread of these offensive activities. Due to this, these acts was given a momentum to grow and adjust according to the differential conditions prevalent in the varied societies. The difference in the nature and circumstances led to the advent of new crimes, and even the same crimes were now committed by new methods. In spite of the absence of any account of the prevalent crimes in the ancient societies there are instances depicting application of the sealing materials upon the sacks to prevent any tampering with them. This appeals that there were some or the other kind of crimes being committed in those period of time as well. Also the Indian rulers employed officials who were specialised in the criminal investigation and the rulers used to penalize the criminals. All this reflects that there were systems present to tackle such actions. Hence the attempt to discard these evils is been made since time immemorial and it continues till now. Despite of various attempts for the same, these crimes persists in our society. Many penalising doctrine came up as to deter crimes but the varied strategies providing for the heinous punishments (retribution), reformation, exile etc none could yield the desired result.

Further invention of advancing psychological techniques took place and again the hope for the attainment of the prospective goal rejuvenated. The discipline of “Forensic Psychology” was propounded. Etymologically Forensic is made up of the Latin term ‘Forensis’ which thereby relates to forum and it conveys a sense of meeting, gathering and consorted attempt upon something. In other words it means to come to a definite conclusion via a combined discussion or effort. Its meaning has transformed to an extent owing to the time lapse and its use, now one connects to court or a legal notion with the word forensic. As the term forensic indicates application of more than one field of knowledge to the justice delivery system similarly when we add an approach to it, which is psychological in nature, the concept which comes into being is Forensic Psychology. Forensic psychology is the culmination of the psychology with the legal, moreover judicial setup. It is often wrongly assumed that only some of the forensic psychological techniques like the Polygraph test, Narco-analysis, Brain-mapping etc forms part of it but it engulf everything which relates to psychological analysis in the field of law. Each and every interrogation method of the suspect or the witness which involves the
study and direct impact upon the subject’s psychology can be characterised as one of it. It has been defined as “all forms of professional psychological conduct when acting, with definable foreknowledge, as a psychological expert on explicitly psycho-legal issues, in direct assistance to courts, parties to legal proceedings, correctional and forensic mental health facilities, and administrative, judicial, and legislative agencies acting in an adjudicative capacity”\(^{157}\). The first case involving the use of it is ‘The Three Women Murder Case’, in Germany were the psychologist Albert von Schrenck-Notzing was considered to be the expert witness and his testimony was admitted \(^{158}\). On the other hand Criminal Psychology as the name suggests is the psychological analysis of the person committed the crime. In this the study of the thought process of such a person is done. His mental wellbeing is made out as to ascertain the sanity and insanity of the criminal. Also the study takes into consideration the probability of reformation of such a criminal. Today’s scientific temper, not only projects its impact upon defaulting party but also is readily accessible by the correcting agencies i.e. the investigation mechanism. But the issue behind the practicality are majorly two:

- Although it is accessible but whether or not one access it, makes a difference. This depends upon factors such as:
  - The sanction by the state’s legal infrastructure
  - The scientific temper i.e. the mind set to adopt such a technique for the purpose
  - The culture of the concerned state

- The question as to its conformity with the rights and duties of the populace derived from the principles of Justice.

The principles of Forensic Psychology are considered to be an intrusion in the privacy of the accused also as it amounts to give testimony against oneself. These repercussions of the same as posed a doubt upon the applicability of these techniques in India for analysing Criminal Psychology. Therefore, again two points of concern are raised. Firstly, is this pair of Criminal Psychology and Forensic Psychology has the potential to curb the crime rate to nil in India? Secondly, if the first is affirmative then do the Indian legal system and our societal structure would verify it? Let us analyse both the above queries simultaneously.

For the former, we need to look upon the other countries and their status upon our goal. To start with the comparative analysis, the figure 1 depicts the countries at the two extreme edges of the indexing, India and U.S. due to its contribution to our theme.

\(^{158}\) Prof Dr. Vimla Veeraghavan, “Inter-Relation Between Forensic Medicine And Forensic Psychology”.

www.supremoamicus.org
South Korea: Here, the whole authority as to prosecution is laid upon the prosecutor itself, unlike many other countries like America, they have the sole decision making power as to prosecute or not. This decision is based upon investigation. And therefore there has to be a precise procedure for the same. For this, the complete study of the suspect is done whether it is the history sheet of him or the behavioural pattern. Also police has minimal say in this trail excluding the chances of ignorance and corruption to an extent. The system as a whole is very stringent and in a way inescapable.

United States of America: the first probable research upon the subject was conducted by James McKeen Cattell in 1893 at Columbia University. Since then there are many studies been conducted in this regard and various publications were done. This discipline is evolving in USA and if we analyse the present, forensic psychology has been applied there at a wide stretch. Not only in criminal field but also in matters of employment to ascertain the honesty standards and also upon agents as to get the truth about the leakage of the confidential information. Therefore, it is a great source of reference about our theme.

India: Here, although these techniques are applied but our judiciary has time and again reminded of the restriction upon them. The results of such scientific methods are of no legality until done with the consent of the subject. There is no mention regarding such techniques anywhere in the Constitution or other statutes. This hinders the ability of

---

such methods to grow and contribute in this environment.

Figure 2 International Statistics on Crime and Criminal Justice

The figure 2 denotes the discrepancies in the criminal justice system clubbed. There’s a huge gap between the offenders prosecuted and thereby a further gap is noticeable as to their conviction. The major reason behind the non-conviction is lack of evidence to prove the accused guilty of his offence. This is a loophole which can act as a passage for forensic psychology to seep in. It would aid in gathering reliable evidence facilitating the ratio of conviction. For apprehension the utilization of criminal psychology can also be done.

Countries have made various legislations organising the conduct of forensic and criminal psychological tests upon people. As for example: Employees Polygraph Protection Act, 1988 of United States. Crimes(Forensic Procedures) Act, 2000 of Australia. Criminal Justice (Forensic Evidence and DNA Database System) Act, 2014 of Ireland, etc. Still there is a longer way to travel. Forensic psychology enables to unravel many facts which create a gap in the whole picture of crime. It sometimes discloses such mysteries which become impossible to crack in the absence of any like mechanism. But its scope is not restricted to the area of bringing out truth from the subjects mouth but also helps the court in various matters, to name some: estimating the mental condition of the person while he committed the crime or at time of the trial to ascertain whether he can stand trial or not, “Psychological Autopsy” is also a part of it, also there is a method which saved the principle of Natural Justice or to rephrase it, these methods if adopted also has potential to save from miscarriage of justice. They suggest the mental status of the convict as to mitigating factors of the sentence provided. As suggested by Reid the interrogation technique must involve two steps. In the first, the motive must be to ascertain whether the subject lying or not, the criminal or not. In the second step, as per the results of the first one, the interrogation must continue or be suspended. If it is found that the person is the culprit then the object in the step two must be his confession. This is to avoid false confessions. The study as to the real application of these proposed techniques were not satisfactory. An interview of the prisoners revealed that the humane and supportive approach of the investigator results in greater chances of

---

160 The various aspects of the deceased is studied through interviewing the persons involved i.e. family, friends etc and other factors as to rule out the reason of suicide or homicide. Investigation is conducted considering the social, physical, psychological etc possibilities.
confessions rather than the cruel and self-presumption based questioning.\textsuperscript{161}

It is not an all new discipline but can be found in the stacked paper of history. Such methodology was applied even in the world war periods to study the psychology of the army men as for their counselling the facts which did not spill out of their mouth can be traced out and utilised for their own mental treatment. The warriors coming back from the war ground alive were so much traumatised that the state had to consult the psychologist to bring out the essential details required and also to revive their compose. Further the spies if caught were subject to such analysis either to make them confess the confidential data they intruded into or to prove their guilt.

There’s an instance of 1951, as provided in the article by C.W. Muchlberger: He stated about a French case which attracted controversy in 1948, Mr. Raymond who was accused of being a Nazi Collaborator. He contented to be suffering from Apoplectic stroke causing memory loss. The psychological analysis was conducted upon him and was revealed that he is fit and fine as a horse and was thereby convicted. Also his subsequent attempt to frame the psychologist failed as it was held a mere routine check and not an assault or illegal search. Therefore there are numerous examples which indicate the adoption of these techniques in curbing crime in ancient time period.

To get rid of the crime commission in a country we need to work out the reasons behind there occurrence at a broader strata.

This would eventually lead us to come to some conclusion as to the effect which forensic psychology would bring to picture. Crimes according to various criminologists like Lombroso etc have its roots in the socio-economic conditions of the country, the physiological conditions, the biological traits and many such factors. They all are not absolute but only suggestive as the studies backing these conclusions date several years back to what conditions prevailed then. Also, the research covered a portion of criminals to rest upon the data, but it can never be denied that each man i.e. each criminal is distinct and individualistic. Therefore a generalised principle can only be regarded as a reference and not ultimate. Each and every study reveals not more than a perception so is this paper. Hence, application of the above approaches in today’s scenario majorly to India appeals that the crimes observed here are caste related crimes, or due to poverty, due to lack of education people get carried away by the instigations, influence of drugs and alcohol etc. The rate of crimes like murder, robbery, riots are increasing (National Crime Records Bureau). Places as Pondicherry, Kerala occupies the topmost positions in crime rate, although Kerala has the highest literacy rate as per 2011 census and Pondicherry is somewhere around 7\textsuperscript{th} in the list. This contradicting fact makes us ponder upon the real factor perpetrating crimes in India. My mind suggests me a possible reason behind this. India is in a phase of Westernisation. Indigenously the culture we belong to, is Indian, but we are struggling to fit into the shoe of some other regions on the globe. And the repercussions following such imitation are known by all. Either the new shoe will eventually fit in our feet or we will

\textsuperscript{161} Swedish Study in 2002.
discard it. But the time period between the two possibilities is huge, by this time we will injure our own selves. People of India or anywhere else carry with them an inevitable essence of their native place, and so it can be modified or amalgamated with other cultures but it can never be favourable to shed off it altogether. Same is happening in India. India is suffering with the same phase of transition. We are adopting characters without any modulation. Live-in relationships are prevalent in western countries but at this stage Indian society is not positive towards this change pertaining to the moral, culture and education status of India. This is giving birth to crimes like adultery, homicides etc. Alcohol, how readily are we welcoming this drink? But we have forgotten as to the reason behind the prevalence of alcohol in western countries. It is due to the weather conditions of those places, but India is itself so warm that it does not require such beverages. And its intake in such conditions is resulting in various crimes here.

Here the contention is that a gradual and moulded adoption of a trait can yield positive outcomes but those ‘as it is’ and against the time would always be harmful for the society. After framing out the basic reason behind increasing crime rate in India we can also pen down the measures which can curb it. The first and foremost of it is Need of Education that too through a proper system, uprising the living standards and elimination of poverty etc. There can be various methodologies to curb crime:

- By eliminating the reasons facilitating, as stated earlier. This can be termed as social or community reformation.
- By adopting strict deterrent methods in other words by introduction of stringent punishments or may termed as deterrence mechanism,
- By strengthening and developing the mechanism to tackle such uproar, under this head we can incorporate the utilization of Criminal and Forensic Psychology. Indication is towards enhancement of probabilities of being caught & convicted.

For instance, when a student opts for selective study basing his judgment as to questions in the exam upon the emphasis the paper-setter posed, and on the D-day if the table turned its edges and his judgment went in vain. He will be trapped. Similarly, the criminal minded persons try to escape the law enforcement agencies by deducing the routes which can lead them to him. Thereupon he changes his course accordingly. This is a subject matter of Criminal Psychology. Now if the apprehenders act as the paper-setter and avoid doing task as is expected by the criminal his attempt would also go in vain as the student. The contention is that application of criminal psychology must be of great help if utilised judiciously. At the next step would enter the discipline of Forensic Psychology. Often some threats in the form of religious myths are associated with some trees or animal species to preserve them from ill conduct of humans, these techniques assuring the conviction of criminals can be applied to reduce the criminal activities. Culture plays a vital role in the acceptance or rejection of any novice technology or concept. When it comes to India we can
carve out many stories providing the link of psychology to ancient India. Glancing back at our ancient mythology and fantasies we see numerous occasions when the minds of people were peeped into by others. As lord Krishan analysing the thoughts of evil minded demons, episode of Sudama, the narration by Sanjay of the War Of Mahabharata were also psychological phenomenon. The children comics almost everyone read, depicts various specimens which come to reality after decades. They depicted creatures which sucked in all the memories out of one’s mind, the sadhus or learned men can read the mind of the others and also confessions through hypnosis were stated. This provides us a definite background and root on which we can base our application of new methodology and work prospectively for the attainment of our goal.

RESULT:
It is quite evident now that the Criminal Psychology and Forensic Psychology can be made one of the pillars to support the criminal justice delivery system of India or any other nation. But also it is obvious that no architecture can subsist only with the aid of a single pillar. It will require some more of its kind. A sound societal structure combined with its acceptance of the new method of tackling issues, an encouraging legal spine and a flexible outlook are the minimal requirements. India in not diverse just in theory but it is even more diverse than one can imagine from outside. It is the virtue which serves as India’s jewel. Another jewel is its population. I don’t agree to people who consider it as a problem. If we make it our strength then no other country will have the potential to surpass the human capital of India. With the huge population comes the diversity owing to the varied religions, sects etc. This has a twofold impact upon the subject. Firstly, the conflicting interests and the cultural differentiated norms which may withhold the growth of new incorporations. Secondly, the positive impact would be the number of brains which we have to work upon not only on our theme but the new emerging trends, each will have a distinct idea and approach pertaining to their culture. And such a method will be the one accepted by majority as would engulf in it every part of India. Also the former if transformed can be favourable for us as a close look reveals that every culture in India culminates to the same destination, the conflicts that exists is not emerged but deliberately created. If we deduce the possibility of a Crime free nation after all the above overlook of the system, we come to a conclusion that yes, the crimes can be mitigated or its rate can be suppressed but it cannot be eliminated from any society as a whole. And the reason being the very first man on earth. Every unit on earth has two faces, and depending upon the perception of the onlooker, one seems him to be good and which is left is bad. Hence, both these properties come with the thing itself and it can never escape the attributes associated with it.

But the attempt to create a crime free nation is not futile it is the medium to attain the end of reduction in crime. The fundamental behind is that the goal which is to be achieved must always be higher. And in the exercise of its attainment, the rest automatically comes in hand. Munsterberg in his treatise\textsuperscript{162} has elaborated the numerous

\textsuperscript{162}On The Witness Stand”1908.
ways a psychologist can aid the legal system. Mere sanction, acceptance and use of criminal and forensic psychology are also not enough. If it was so, U.S. must have occupied some other position in the crime indexing list. But it definitely facilitates our purpose.

I would suggest the incorporation of strict personalised penalties for the perpetrators and a strict adherence with the established rules. This does not deny the need of flexibility in the system. Observing South Korean projects viability of providing the authority to a body with no intrusion in their exercising of such power, but still the mechanism of check & control must be present. It ensures the fulfilment of the objective. Always a perfect balance is favourable, a slightest tilt at one side has the potential to rotate the disc a 360 degrees towards itself. So is the case with flexibility and rigidity.

I have not been a student of psychology but studying some of the aspect of it for this paper made me realize the role of the discipline of psychology in the human society. This discipline has unfolded many mysteries and unknown scientific facts about the human species. It is the non-working brain which leads to one’s death and it is the brain which makes possible the realization of life. Therefore only the real functional unit of a living body is the brain, which is the subject of psychology. The argument here is that the reason for crime commission and withdrawal is itself the subject-matter of psychology. And hence there is no dilemma as to the crucial prospective part which criminal and forensic psychology would play in this field.

*****
DIGITAL RIGHTS MANAGEMENT AND RIGHT TO FAIR USE: A CRITICAL ANALYSIS ON RELATED LAWS OF INDIA AND UNITED STATES

By Archana K
From Amity Institute of Advanced Legal Studies, Noida

ABSTRACT

Digital Rights Management is a system which provides an additional protective measure to copyrighted works along with the conventional protection given to it. When a double protection is given, the access to such works are completely denied, which tends to affect the well recognized copyright law principle of ‘fair use’. Laws of various countries also recognise DRM system. The primary purpose of this paper is to analyse legal provisions relating to DRM systems and bring out the threat it poses to ‘right to fair use’. As a part of the said analysis, the paper will look in to the laws relating to DRM in India and United States. There is a need to balance the rights of fair users and copyright owners. The paper thus includes certain suggestions to ensure the rights of copyright owners as well as the claimants of right to fair use.

Key Words: Digital Rights Management, Copyrights, Fair Use

1. INTRODUCTION

Intellectual properties are intangible properties made out of specialized skill, knowledge and ability of human mind and human intellect which includes rights relating to literary, artistic and scientific work, as well as performance of performing artists, inventions in all fields, scientific discoveries, trademarks etc. Copyright is a part of Intellectual Property Rights and means the exclusive right to do or to authorise others to do certain acts in relation to literary, dramatic, musical and artistic works; cinematographic films, and sound recordings. The main object of copyright is to protect the creator of original work from the unauthorized reproduction or mistreatment of the creator’s works. With the advent of internet, the copyright owners were perceived with the fear of their works being vulnerable to piracy, as internet makes it possible for any person to widely disseminate a work. Technology has provided the copyright owners a system by which they can limit the access and use of their works. Digital Rights Management is a system for protecting the copyrighted data circulated via the internet or other digital media by enabling secure distribution and/or disabling illegal distribution of the data. DRM can come in many different forms. They are embedded in physical media (i.e. CDs or DVDs) and in content distributed online, such as music files, e-books, texts, images and games distributed online etc. Now, there are various legislations across the world that gives legal validity to the DRM system. The legislations validating DRM are based on two international instruments namely: World Intellectual Property Organization Copyright Treaty, and World Intellectual Property Organization Performances and Phonograms

163 Article 2 (viii), WIPO Convention.
Debate over the DRM system started with the culture clash between the copyright owners and the claimants of right to fair use of data, facts or information. A fair use is use of a copyrighted material for purposes like commenting, criticizing, or making parody etc. Using copyrighted works for academic purposes, media reporting, scholarly utilization etc are also fair use. Such uses can be done without permission from the copyright owner. Fair use is also a defence against a claim of copyright infringement. If use of a copyrighted work qualifies as a fair use, then it would not be considered an infringement.\textsuperscript{165}

Claimants of right to fair use believe that the access to knowledge must be free and unrestricted whereas, copyright owners believe that access to their works be controlled and use of their works must be paid for. The legal provisions as to DRM pose threats to this well established principle of copyrights law- the right to fair use. Enforcing rights of one class of people should not be at the cost of the rights of another class of people. When a double protection is given to the works of copyright owners, it should not affect the rights of fair users of the work. Hence there is a need to set right a balance between the DRM system and Right to Fair Use. Realizing the right to fair use in a digital rights management environment will require some technical mechanism to allow public access and reclaim the privileges equivalent to those deemed fair earlier.

2. \textbf{DIGITAL RIGHTS MANAGEMENT – AN OVERVIEW}

In the context of laws relating to copyrights, the intellectual properties of the owners of copyrights are managed and controlled by them also through a technological mechanism apart from the conventional copyrights protection. DRM is an additional protective measure which one applies to his/her intellectual property. DRM systems can take the form of software packages or hardware technological restraints that limits the use of digital files as a part of copyrights. DRM systems are equipped to restrict access to files such as number of views and extent of views. The system can also control modifying, copying, saving, printing of a copyrighted work. These technologies may be contained within the operating system, program software, or in the actual hardware of a device. There are mainly three approaches to the DRM systems. One approach is where the work of a copyright owner is encrypted in a crust and the access to the same is provided only to the authorized users. Another approach is where the work of a copyright owner is ‘marked’ or an ‘encrypted header’ is used. This approach includes the practice of pacing a water mark, flag, XML (Extensible Mark-up Language) or XrML (Extensible Rights Mark-up Language) tag on the work. Such marks on the contents serves as an indicator that the content is copyrighted. The third approach is where copyrighted work is placed on a secured and dedicated reading device. Microsoft’s Windows Media Rights Manager (WMRM), IBM’s

\textsuperscript{165} Section 52 of Copyrights Act, 1957; Sec.107 of Title 17 of U.S.Code
Electronic Media Management System (EMMS), Inter Trust’s Rights System and Real Network’s Real Systems Media Commerce Suite (RMCS) are some among the promising DRM software. Companies like Adobe, IPR Systems, Liquid Audio, Sealed Media provides DRM Solutions too.\textsuperscript{166} By this system of Digital Rights Management, the copyrighted works may remain out of the reach of the public. The use which is otherwise permitted by the laws of land also cannot be done by the general public.\textsuperscript{167} Thus, this system tends to affect the well recognized principle of copyright law- Right to fair Use.

3. **LEGAL PROVISIONS RELATING TO DIGITAL RIGHTS MANAGEMENT**

Even though the deployment of DRM is still at an early stage, they are recognized by law. The advent of new technologies had boosted copyright infringement in many ways. Availability of copyrighted materials in digital form or in internet had facilitated faster and easier copying and exploitation of copyrighted materials. This issue had paved way for formulation of international treaties and national legislations ensuring protection of copyrights. Use of technology in copyright protection was thus recognized and circumvention of such technologies was considered as offence under the law. However, no law till date recognizes the term ‘Digital Rights Management’ as such.

### 3.1. INTERNATIONAL LAW

In order to cope up with the problem of infringement of copyrighted digital materials, the WIPO came up with two international treaties. WIPO Copyright Treaty (WCT) and the WIPO Performers and Phonograms Treaty (WPPT) now regulate digital copying. The anti-circumvention provisions under these treaties prohibit circumventing a DRM system (i.e. hacking) or assisting others in so doing. The parties to the treaties are obliged to have an ‘adequate and effective’ legal remedy to prevent the circumvention against effective technological protection measures of copyrights.\textsuperscript{168} The treaties also vest obligation on the parties to have adequate and effective legal remedies against the unauthorised tampering of rights management information which is provided by the owner and also dealing knowingly with the copies of tampered rights management information.\textsuperscript{169}

### 3.2. INDIAN LAW

Even though India is not a party to the WIPO treaties, it has incorporated the provisions relating to DRM as in the treaties. By an amendment in 2012, Sections 65A and 65B was included to Copyright Act, 1957. The said provisions deal with protection of technological measures and tampering of rights management information respectively. One of the reason why India


\textsuperscript{168} Article 11 of WCT & Article 18 of WPPT

\textsuperscript{169} Article 12 of WCT & Article 19 of WPPT
brought DRM provisions in to its copyrights law is because of the continuous Listing of India in United States Trade Representative’s Special 301 Report, which lists the countries which do not provide ‘adequate and effective’ protection to the intellectual property into their country. 170

According to Section 65A(1) any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights s conferred by the Copyrights Act, with the intention of infringing such rights, shall be punished with imprisonment which may extend to two years and shall also be liable to fine. Clause (2) of Section 65A provides for certain exceptions to clause (1). The exempted activities where circumvention is allowed includes encryption research, lawful investigation, security testing of a computer system or a computer network with the authorization of its owner or operator, protection of privacy, and measures necessary in the interest of national security. 171

According to Section 65B any person intentionally removes or alters the Rights Management Information from the digital content or sells and distributes the content with the knowledge that the same has been tampered or removed shall be punished with 2 years of imprisonment and fine.

The Information Technology Act, 2000, under Sec.65 172 also provides for punishment for tampering with computer source documents. Vakul Sharma opines that the idea behind the section is to protect the “intellectual property” invested in the computer programmes. 173 As circumventing DRM system amounts to tampering with computer source documents, the provision under IT Act can also be applied in such cases.

3.3 UNITED STATES

Copyright Act, 1976 is the first legislation of United States that introduced laws relating to DRM. In order to cope up with the rapid advancements in digital technology, amendments were made to the Act. Provisions relating DRM as proposed under WIPO treaties were incorporated under US laws through Digital Millennium Copyright Act, 1998, amending the Copyright Act. Under Title one of the Act, it is provided that it is illegal to circumvent technological measures taken to prevent accessing or copying of a work which is protected under the law. The title also prohibits the public from developing any device or software which facilitates circumvention of technological protection measures. The title itself enumerates certain exceptions to these anti-circumvention provisions. The exceptions mean that under certain circumstances, circumvention of technologically protected copyrighted

any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force, shall be punishable with imprisonment up to three years or with fine which may extend up to two lakhs or with both.

170 Supra 7
171 Ibid
172 Section 65 of IT Act deals with Tampering with computer source documents and states that whoever knowingly or intentionally conceals, destroys, or alters or causes another to conceal, destroy or alter

www.supremoamicus.org
materials is permitted. The exceptions includes access to copyrighted works by non-profit libraries and educational institutions, reverse engineering to check compatibility of two different software, encryption research to determine the flaws of a copyright protection technology, circumvention when the copyrighted work tends to affect personal privacy, circumvention to test the security of the protection technology. However, permission of owner is necessary for reverse engineering and security test. The title further makes it illegal to alter the Copyrights Management Information (CMI) attached to digitalized copyrighted works without the permission or to knowingly distribute works in which the CMI has been illegally altered. CMI includes things like the title, the author, and terms and conditions for use of a technologically protected copyrighted work.\textsuperscript{174} Under Title Two, the Internet Service Providers are not responsible for the actions of their clients that infringe any copyrights. For this title to be applicable, the ISPs need to meet a number of provisions stated within the Act.\textsuperscript{175} According to title three, even though the owner of a computer can fully exploit any computer application installed legally for the purpose of maintenance or repair of the computer, it must be destroyed after the purpose is served.\textsuperscript{176} Title four contains miscellaneous provisions. It allows technological protection and prevents circumvention in various fields like motion pictures and webcasting. Title Five of the Act deals with protection of original designs.

3.4 \textbf{ANALYSIS OF THE LAWS}

On analysing the provisions relating to DRM, it can be understood that the parties will be penalized on circumventing technological protection, only if it is done intentionally and with the knowledge that it is illegal to do so. The activities that amount to circumvention are only the acts prohibited explicitly by copyright law and not any other activities. Moreover, the provision provides for certain exceptional activities, though in the nature of circumvention, will not amount to circumvention. The provisions relating to punishment for tampering or altering copyright protecting technologies are more rigid as it do not provide for any specific exception in the law for such acts. Further, it provides for availing civil remedies under the copyright law for infringement of copyrights along with criminal remedies under provisions relating to DRM to the copyrights owner which also shows a stricter approach.

It can be understood that the copyright owners are vested with more rights than ever. It poses a threat to the development and use of digital technologies. The laws are framed in such a way that it restricts even the access to copyrighted works apart from restricting the use of copyrighted works. The laws also prove to be detrimental in some aspects. It affects the well settled doctrine of Fair Use of copyright law. The provisions will be creating a Para Copyright regime and provides relatively higher protection to the works, totally forgoing the rights of the public to access information and also these

\textsuperscript{174} Title one deals with WIPO treaties Implementation
\textsuperscript{175} Title Two delas with Online Copyright Infringement Liability Limitation
\textsuperscript{176} Title Three deals with Computer Maintenance or Repair

www.supremoamicus.org

47
provisions are against the very notion of collective administration of rights which in particular is prevalent in the Indian legal system of copyright.\textsuperscript{177}

On comparing the laws of India and United States relating to DRM, the first thing that needs to be considered is vastness of the laws. In India, when it is just two provisions that deals with DRM, United States has an Act that provides for provisions relating to DRM. India is not a signatory to the WIPO treaties where as US is a signatory to the same. When the Indian law provides for ‘anti-circumvention’ provision generally for all the areas, the law of United States provides provision relating circumvention of technological protection in different fields separately. It has been more than a decade since US had incorporated DRM provisions in to its laws. The provisions suit their economic conditions and the nature of piracy taking place in the country. The situation is different in India as it is still a developing country. The law relating to DRM is not incorporated on the grounds of proper economic analysis and the nature of piracy in India is still mainly through offline modes and not using internet as in other developed countries.\textsuperscript{178} Thus, the provisions relating to DRM in India is prospective in nature to meet the needs of future.

**DRM AND FAIR USE**

DRM system, beyond doubt is an appreciable innovation with regard to additional protection of copyrights. There are certain advantages to the DRM systems and for giving legal validity to the same. There will be no unauthorized use of any intellectual property in digital form as DRM protected contents can be accessed only by un-tampered components created by official DRM system developers. In cases of music, videos and movies, having such a system would ensure that the end users get only good quality, virus free contents through the authorised dealer of such contents. The need for developing DRM system arose when there were numerous instances of unauthorised use of copyrighted works and the law came in to force to support DRM system when there were instances of tampering the DRM system itself. Rigid protection to copyrights was mandated when the works were misused instead of fairly using it.

However, the laws relating to DRM create is its effect on the principle of right to fair use. Fair use plays an important and role in the dissemination and transmission of cultural products. However, the well recognized principle of fair use is threatened by a newly developed technologies and the legal protection granted to those technologies. The DRM system tries to protect a work from being accessed by public and unlike other form of copyright protection; DRM restricts the privileges earlier enjoyed by the consumers by way of fair use. It allows the pubic to use the copyrighted works only for the exceptions provided under the DRM law provisions. It had literally become impossible to avail this right of fair use with the legal recognition given to DRM systems. Another issue that need to be considered is that when a consumer purchases a copyrighted work, he enters in to a unilateral contract with the copyright owner which

\textsuperscript{177} Supra 7

\textsuperscript{178} Arul George Scaria, “Does India Need DRM provisions or better digital Business Management Strategies?”, Journal of Intellectual Property Rights, Volume 17, September 2012, PP 463-477

www.supremoamicus.org
makes him unable to exercise his right to completely exploit the product. Thus the rights available under the copyright law will vanish replacing the rights of a consumer with contractual obligations and limitations.\textsuperscript{179} It is not possible to enforce right to fair use in DRM system as the technologies as of now are not made as to distinguish between authorized and unauthorized access and use of protected works. This also have an impact on the works available in the public domain.

When DRM is used to block public access to copyrighted works in public domain or otherwise, and/or to block fair uses of such works is equivalent to the unauthorized fencing of public lands.\textsuperscript{180} There were laws to prevent unauthorized fencing of public lands. But the anti-circumvention provisions does not provide for anything to ensure that the public continues to enjoy their right to fair use like the "easements" or "rights of way" under law of property. This reveals that the public rights are no longer recognized. However, in the opinion of Burk Dan L and Cohen Julie E,\textsuperscript{181} the current laws as to DRM give no indication of such public access rights having repealed or annulled. To the contrary, the statutes explicitly state certain limitations as to the scope of conventional copyright continue to be in force even in digital media. Yet the current language of the statutes makes no provision for such fair access and use of copyrighted works.

The efficacy of any DRM system for protecting fair use depends in large measure on the extent to which such system grants the public, any individual use, or category of uses. Currently, the DRM technologies offer poor or no protections for fair use because the determination of such uses is largely at the discretion of copyright holders or their assignees. Although the most widespread DRM implementations available today adopt a "closed universe" approach in which any right not described by the system is deemed not to exist, proposed alternative systems would establish different default behaviours that may better accommodate fair use rights.\textsuperscript{182}

4. BALANCING DRM AND FAIR USE

Enforcing the right of fair use in a DRM environment will also require some technical mechanism to allow public access and use of copyrighted and technologically protected works. It is also necessary to reuse the privileges equivalent to those deemed fair prior to the invention of technological protection. On a broader view, there are two possible ways to design such systems. First, the DRM system can itself be designed to detect and regulate fair access and use. A framework can be created to assert the rights of users whereby the power to access or use

\textsuperscript{181} Ibid.
the protected work in any fashion they wish without the necessity of prior approval by an outside decision maker can be acquired. Second, there can also be an external decision maker to the DRM system that authorizes would-be fair users to override the controls instituted by DRM systems. There can also be a ‘fair use infrastructure’ that combines elements of both approaches. There are chances that these approaches do suffer some demerits. It can however be overcome. For an instance, the rulemaking authority can institute a set of exemptions to the ban on circumvention of DRM system that preserves the conventional principle of fair uses. However, to question the constitutionality of DRM provisions would be a heinous step.

CONCLUSION

When technology protects only the interest of one class of people, it departs more from the law. Law relating to copyrights conceptualizes copyright as a balancing of interests, with the ultimate goal of promoting creative expression as well as making the creations available to the public. However, the current scenario reflects a perverse situation. The technological inventions and measures are being allowed to supersede the laws and especially the fair use doctrine. There is no explanation from the part of the law makers as to why there fair access and use of a copyrighted work differs in online and offline world. Only by recognizing and accommodating the rights of parties on both sides of the fair use equation, ie., copyright owners and claimants of fair use, the "digital rights management" will be truly worthy of the name. Further, implementing strong laws against circumvention of DRM systems may stop piracy completely and can promote creativity but will in turn deprive access to information, knowledge and entertainment to the public. Because of the non-divisible nature of the Internet and the web, it cannot be divided like land into different territories in order to make different rules for different countries based on the development status of the country. Under such a situation, a system that would be beneficial to the world as a whole should also be adopted.

REFERENCES

BOOKS


ARTICLES


www.supremoamicus.org
• Dipinn Verma, “Anti-Circumvention Law of Copyright in India”, Vol.6, Issue 1, IJIPR, June 2015
• Unanza Gulzara, “Copyright Protection under Trips”, Vol.4, Issue 1 IJIPR, 2013
• Ayush Sharma, “Indian Perspective of Fair Dealing Under Copyright Law”, Vol.14, JIPR, November 2009
• Kalyan C. Kankanala, Anti-Circumvention laws to protect Digital Rights: An Indian Perspective Available at: http://www.nalsarpro.org/CL/Articles/digitalrights.pdf
• Ben Fernandez, “Digital content protection and fair use: what’s the use?”, Available at: http://www.jthtl.org/content/articles/V312/JTHTLv3i2_Fernandez.PDF
• Dr. Sabuj Kumar Chaudhuri, Digital Rights Management –A Technological Measure for Copyright Protection and its Possible Impacts” Available at: http://eprints.rclis.org/13110/1/Digital_Rights_Management-Impact_on_Libraries.pdf

*****
LEGAL ISSUES REGARDING SURROGACY

By Arisha Azhar & Farheen Haider
From Faculty of Law, Jamia Millia Islamia

ABSTRACT
Through this article title “Legal Issues regarding Surrogacy”, the authors have covered the various dilemmas related to Surrogacy and worked upon the laws being placed in the world.

The author has firstly defined what surrogacy is and what is not and defined various terms associated with Surrogacy such as Donor, Fertility Clinic, In Vitro Fertilization, Intended Parent, Surrogacy Agency and Surrogate.

The authors have briefly described the history of surrogacy from biblical times to 2008 and how it has developed and now the surrogate children are given legal status and citizenship of the country they are conceived in.

Then the authors have covered the four types of Surrogacy mainly:-
  i. Traditional Surrogacy
  ii. Gestational Surrogacy
  iii. Commercial Surrogacy
  iv. Altruistic Surrogacy

Also, the authors have covered all the reasons why people opt for surrogacy and why this form of reproduction is getting famous. They are mainly:-
  ➢ LGBTQ Couples Looking to Become Parents
  ➢ Mother and Father are Faced with Genetic Challenges
  ➢ Complex Adoption Procedure
  ➢ Infertility Problems

The authors have covered the legal issues related to the surrogacy and the trends in various parts of the world and special emphasis is given on the position in India.

The authors have covered the 2005 ICMR Guidelines, Assisted Reproductive Technology(Regulation) Bill, 2014 and India’s Draft Surrogacy (Regulation) Bill, 2016 to highlight the need of a legislative authority in the country to address the issue of Surrogacy.

I. WHAT IS SURROGACY?
Merriam-Webster Dictionary defines surrogacy as “the practice by which a woman (called a surrogate mother) becomes pregnant and gives birth to a baby to give it to someone who cannot have children.” In a nutshell, that’s your basic definition of surrogacy.

However, within that broad definition, there are many ways to define surrogacy — by the way the embryo is created, by whether the surrogate is compensated or not, by which professional you work with, and more.

In addition to understanding the definition of surrogacy, the various terms that are associated with the process are:
  • Egg or Sperm Donor: In cases where the intended parent cannot create an embryo on their own, this is the person whose gamete they use to complete their embryo. This could be someone they know, or they may
find a donation from an anonymous person through a gamete bank or fertility clinic.

- **Fertility Clinic:** This is the medical organization that completes the IVF and embryo transfer processes. Both intended parents and surrogates will need to work closely with their fertility clinic to complete their surrogacy.

- **In Vitro Fertilization:** This is the medical process used to fertilize an egg outside of a woman’s uterus. In surrogacy, a fertility specialist will collect eggs and sperm from the intended parents (or from a donor), fertilize the egg in a test tube or culture dish and then implant this embryo into the surrogate’s uterus.

- **Intended Parent:** This is the person who cannot carry a baby to term and hires a surrogate instead. Their egg or sperm may be a part of the transferred embryo, and they may be a single parent or married.

- **Surrogacy Agency:** This is the organization that helps intended parents and prospective surrogates through every step of the surrogacy process, from screening to matching to mediating contact and more.

- **Surrogate:** This is the woman who carries a baby to term for the intended parents. Usually, she is between the ages of 21 and 35, has had a successful pregnancy and already has children. Surrogates are sometimes also called gestational carriers. “Surrogacy” is a word that can be applied to many other situations. Some of these other terms below:

- **Political Surrogate:** Also known as a campaign surrogate, this person acts on behalf of a candidate running for office — often by appearing at events on their behalf or using their influence to bolster the image of a candidate.

- **Health Care Surrogate:** In situations where a person cannot make medical decisions themselves, a health care surrogate will be the one to do so. Usually, this is a friend or relative of the person in medical distress.

- **Legal Surrogate:** This is another term for a health care surrogate. However, when you hear the word “surrogacy” in regard to childbirth and pregnancy, you can be reasonably sure the surrogacy definition that applies is the first one listed in this article.

II. **FROM THE BIBLE TO TODAY: THE HISTORY OF SURROGACY**

Surrogacy, as we know it today has only been around for the last 30 years. However, the idea of surrogacy has been around for a lot longer tracing back to Biblical times.

- **Biblical Times:** The first mention of surrogacy can be found in “The Book of Genesis” in the story of Sarah and Abraham. Sarah and Abraham were married but could not conceive a child of their own, so Sarah turned to her servant Hagar to be the mother of Abraham’s child. This is a case of traditional surrogacy, where the surrogate uses her own egg in the child she’s carrying for intended parents.

- **1884:** The first successful artificial insemination of a woman was completed, although in an ethically questionable way. This paved the way for future artificial inseminations used in the surrogacy process.

- **1975:** The first ethically completed IVF embryo transfer was successful.

- **1976:** The first legal surrogacy agreement in the history of surrogacy was brokered by lawyer Noel Keane. This
was a traditional surrogacy, and the surrogate did not receive any compensation for the pregnancy.

- **1978**: The first baby conceived through IVF transfer was born.
- **1980**: The first compensated surrogacy agreement was arranged between a traditional surrogate and the intended parents. Elizabeth Kane (a pseudonym) received $10,000 to carry a baby for another couple.
- **1984–1986**: Perhaps the most famous case in surrogacy history is the “Baby M.” case, involving a traditional surrogacy. This case marked a huge turning point in the history of surrogacy. The case demonstrated how often for intended parents to complete the process. Almost 5,000 children were born via surrogacy in the United States. Clearly, surrogacy has come a long way from where it was before the late twentieth century. Today, the combination of rapidly advancing medicine and the different types of surrogacy available make it easier than ever for intended parents to complete their family and for prospective surrogates to change the lives of others forever.

### III. WHAT ARE THE TYPES OF SURROGACY?

#### i. Traditional Surrogacy

In traditional surrogacy, the surrogate mother uses her own egg and is artificially inseminated using sperm from the intended father or a donor. The surrogate carries and delivers the baby, and then, because she is the child’s biological mother, must relinquish her parental rights so that the child can be raised by the intended parents. The disadvantages are traditional surrogacy is sometimes also called partial surrogacy or genetic surrogacy because of the surrogate’s biological link to the child she carries. Single men, same-sex male couples and women who cannot produce healthy eggs may choose traditional surrogacy because they will need a donor’s eggs anyway; in traditional surrogacy, the surrogate doubles as the egg donor. Because the surrogate is the child’s biological mother, many traditional surrogates are close friends or relatives of the intended parents.

The advantages are traditional surrogacy is usually less expensive than gestational surrogacy and intended mothers do not need to undergo medical procedures because their eggs will not be harvested to create the embryo.

The disadvantages are traditional surrogacy is banned in many states and the surrogate is the biological mother of her child, meaning she has parental rights and the power to change her mind and keep the baby. The intended parents would then need to go to
court to gain custody of the child. In some cases, intended parents will need to complete a stepparent adoption to both be recognized as the child’s legal parents.

ii. Gestational Surrogacy
In Gestational Surrogacy, the surrogate is not related to the child she is carrying. It is the most common type of surrogate today. In gestational surrogacy, the child is not biologically related to the surrogate mother, who is often referred to as a gestational carrier. Instead, the embryo is created via in vitro fertilization (IVF), using the eggs and sperm of the intended parents or donors, and is then transferred to the surrogate.

This form of surrogacy is sometimes also called “host surrogacy” or “full surrogacy.” In most cases, at least one intended parent is genetically related to the child, and the surrogate is not. The following people might consider gestational surrogacy who have struggled with infertility, hopeful single parents, same-sex couples, who don’t want a genetic link between the surrogate and their child and who are unable to safely carry a pregnancy to term.

The advantages of Gestational surrogacy are it allows infertile couples, single parents and members of the LGBT community to complete their families. Gestational surrogacy allows intended parents to maintain a genetic link to their child. Surrogacy gives intended parents the opportunity to create a meaningful relationship with their surrogate. Gestational surrogacy is the least legally complicated form of surrogacy because the baby is not related to the gestational carrier.

The disadvantages are it is generally a legally complex and expensive process. It requires intended parents to relinquish some control as someone else carries the pregnancy for them. If the intended mother is using her own eggs in the surrogacy process, she will have to undergo fertility treatments and other medical procedures.

iii. Commercial Surrogacy
Commercial surrogacy refers to any surrogacy arrangement in which the surrogate mother is compensated for her services beyond reimbursement of medical expenses. Any surrogacy arrangement in which the surrogate mother is compensated for her services beyond reimbursement of medical expenses.

The advantages of Commercial surrogacy are that it allows women to be compensated fairly for their yearlong commitment to intended parents as well as the physical and emotional demands of pregnancy. In states and countries with well-defined laws, commercial surrogacy is legally regulated to protect the rights of the surrogate as well as the intended parents.

The disadvantages of Commercial surrogacy are that it is more expensive than altruistic surrogacy because intended parents will be responsible for surrogate compensation in addition to medical and legal costs. Some opponents of commercial surrogacy argue that it exploits vulnerable women.

iv. Altruistic Surrogacy
Altruistic surrogacy is when a surrogate carries a child with no additional base compensation. Altruism is defined as “unselfish regard or devotion to the welfare
of others” — a quality that all surrogates arguably must possess to make the physical and emotional sacrifices demanded by surrogacy. Many surrogacy supporters argue that all surrogacy is altruistic in nature, which can make it somewhat difficult to truly define altruistic surrogacy.

However, the term “altruistic surrogacy” generally refers only to those arrangements in which the surrogate does not receive compensation for her services beyond reimbursement for medical costs and other reasonable pregnancy-related expenses. Many of these arrangements are between family members or close friends and are completed as independent surrogacies. The alternative to altruistic surrogacy is commercial surrogacy, in which the surrogate is fairly compensated for her time and energy, the sacrifices she makes and the many physical and emotional challenges she faces throughout the surrogacy process.

IV. WHAT ARE THE REASONS BEHIND SURROGACY?

➢ LGBTQ Couples Looking to Become Parents

Surrogacy is a great option for gay couples that wish to have at least one parent biologically related to the baby. It is also a good option if you live in a state that prohibits adoption for same-sex couples. Gay couples seeking surrogacy have two options when deciding, the first option would be traditional surrogacy with artificial insemination. The second option would be using IVF, egg donation, and gestational surrogacy. Genetic research is advancing now to make it possible that in just two years a baby could have TWO biological Dad’s or Mom’s meaning that both potential fathers could be related to the baby.

➢ Mother and Father are Faced with Genetic Challenges

In some couples one or both potential parents may struggle with a genetic disorder that they do not want to pass down to any of their children. This could be something like Huntington’s disease, Cystic Fibrosis, Sickle Cell, Muscular Dystrophy, or even certain types of dwarfism. For these couples, they would want to explore the option of a traditional surrogate. In traditional surrogacy, the surrogate would be carrying a baby that would be from her eggs and donor sperm.

➢ Adoption is a complex process

Adoption is often mentioned to couples struggling to get pregnant as a means to an end. Adoption is also a very costly expense and comes with its own form of heartbreak. For a baby that is still you in a genetic sense looking for someone else to carry your baby may be exactly what you need to do.

➢ Infertility Problems

It is estimated that about 6.1 million couples in the US suffer from infertility. The causes of infertility can range from a number of different issues like a woman being unable to ovulate, hormonal disorders such as polycystic ovary syndrome, poor egg health, and blocked fallopian tubes. For some of these couples it is the man that struggles with a low sperm count or even poor sperm health. And it is estimated that 15% of these couples suffer from unexplained infertility. Typically, infertile couples have turned to IVF to get pregnant.

Other Reasons why the couple could opt for surrogacy might be:
V. WHAT IS THE LEGALITY OF SURROGACY?

The legal aspects surrounding surrogacy are complex, diverse and mostly unsettled. In most of the countries world over the woman giving birth to a child is considered as the Child's legal mother. However, in very few countries, the Intended Parents are being recognized as the legal parents from birth by the virtue of the fact that the Surrogate has contracted to give the birth of the Child for the commissioned Parents.

India is one country amongst the few, which recognize the Intended/ Commissioning Parent/s as the legal parents. Many states now issue pre-birth orders through the courts placing the name(s) of the intended parent(s) on the birth certificate from the start. In others, the possibility of surrogacy is either not recognized (all contracts specifying different legal parents are void), or is prohibited.

Australia

In all the states of Australia, the surrogate mother is regarded/considered by the law to be the legal mother of the child and any surrogacy agreement giving custody to others is void and unenforceable in the courts of Law. In addition, in all states and the Australian Capital Territory arranging commercial surrogacy is a criminal offence. Usually couples who make surrogacy arrangements in Australia must adopt the child rather than being recognized as birth parents, particularly if the surrogate mother is married.

Israel

Israel the first country in the world to implement a form of state-controlled surrogacy in which each and every contract must be approved directly by the state. In March 1996, the Israeli government legalized gestational surrogacy under the "Embryo Carrying Agreements Law." Surrogacy arrangements are permitted only to Israeli citizens who share the same religion. Surrogates must be single, widowed or divorced and only infertile heterosexual couples are allowed to hire surrogates.

United Kingdom

Surrogacy arrangements have been legal in the United Kingdom since 2009. Whilst it is illegal in the UK to pay more than expenses for a surrogacy, the relationship can be recognized under Section 30 of the Human Fertilization and Embryology Act, 1990 under which a court may make parental orders similar to adoption orders. How this came about is one of those occasions when an ordinary person can change the law.

United States

Many states have their own state laws written regarding the legality of surrogate
parenting. It is most common for surrogates to reside in Florida and California due to the surrogacy-accommodating laws in these states. With the accommodating laws of the State of California and the long overseas deployments of husbands, wives have found surrogacy to be a means to supplement military incomes and to provide a needed service. It is illegal to hire a surrogate in New York, and even embryonic transfers may not be done in New York. At this point, the laws surrounding surrogacy are well defined in the State of Pennsylvania, and surrogacy is beginning to become common in the state of Delaware.

Commercial surrogacy is illegal in Belgium, Canada, France, Hungary, Japan and Netherlands.

VI. WHAT ARE THE LEGAL ISSUES RELATED TO SURROGACY?

(i) What would be the remedy available to biological parent/s to obtain inclusive legal custody of surrogate children?

It can be stated that the biological parents would be the legal parents of the children by the surrogacy agreement executed between the parties and the surrogate mother. Under para 3.16.1 of the ICMR Guidelines, 2005, dealing with legitimacy of the child born through ART, it is stated that “a child born through ART shall be presumed to be the legitimate child of the couple, born within wedlock, with consent of both the spouses, and with all the attendant rights of parentage, support and inheritance”.

(ii) How can the rights of the surrogate mother be waived off completely?

A surrogate shall relinquish all parental rights over the child or children. The rights of a surrogate mother over the custody of the child can be waived off after 6 weeks of the birth of the child but she does enjoy the following rights which can’t be waived off completely.

This category includes following rights:

- Right of the husband of Surrogate Mother to give consent for Surrogacy
- Right of Surrogate to health
- Right to have legal advice for entering into Surrogacy Arrangement
- Right to resolve the disputes arising out of Surrogacy Arrangement at Pre-Litigation Stage
- Right to resolve the disputes arising out of Surrogacy Arrangement by Arbitration and Conciliation
- Right to companionship/visiting rights of surrogate mother to the child
- Right of surrogate mother to be aware of the psychological and medical risks involved in the surrogacy arrangement
- Right of surrogate mother not to refund any funds paid by the intended parents in event of miscarriage or abortion at the instance of the intended parents or by the attending expert physician
- Right of surrogate mother to fair compensation

(iii) How can the rights of the ovum or sperm donor be restricted?

A child or children born to a married couple using assisted reproductive technology(ART) shall be presumed to be the legitimate child of the couple, and the donor of both the sperm or ovum shall
relinquish all parental rights in relation to such child or children.

(iv) **How can the genetic constitution of the surrogate baby be established and recorded with authenticity.**

All information about the surrogate shall be kept confidential and information about the surrogacy shall not be disclosed to anyone other than the National Registry of Assisted Reproductive Technology Clinics and Banks in India of the Indian Council of Medical Research except by an order of a court of competent jurisdiction.

(v) **Whether a single or a gay parent can be the custodial parent of a surrogate child.**

It may be stated that a single or a gay parent can be the custodial parent by being the genetic or biological father of the surrogate child born out of a surrogacy arrangement. Japanese Baby Manji Yamada’s case, and the Israeli gay couple case who fathered the child in India are clear examples to establish that this is possible. However, the new Medical Visa Regulations, 2012 do not permit any entry to a foreign national as a single parent, gay couple or unmarried partners for commissioning fresh surrogacy arrangements in India.

(vi) **What would be the status of divorced biological parents in respect of the custody of a surrogate child.**

This will require determination in accordance with the surrogacy agreement between the parties. There would be apparently no bar to either of the divorced parents claiming custody of a surrogate child if the other parent does not claim the same. However, if the custody is contested, it may require adjudication by a Court of competent jurisdiction.

VII. **WHAT IS THE POSITION OF INDIA ON LAWS ON SURROGACY?**

Commercial surrogacy has been legal in India since 2002. Surrogacy in India is legitimate because no Indian law prohibits surrogacy. To determine the legality of surrogacy agreements, the Indian Contract Act would apply and thereafter the enforceability of any such agreement would be within the domain of Section 9 of the Code of Civil Procedure, 1908 (CPC).

Alternatively, the biological parent/s can also move an application under the Guardian and Wards Act for seeking an order of appointment to be declared as the guardian of the surrogate children.

Under Section 10 of the Indian Contract Act, 1872, all agreements are contracts, if they are made by free consent of parties competent to contract, are for a lawful consideration, are with a lawful object, and are not expressly declared to be void. Therefore, if any surrogacy agreement satisfies these conditions, it is an enforceable contract.

Thereafter, under Section 9, CPC, it can be the subject of a Civil Suit before a Civil Court to establish all/ any issues relating to the surrogacy agreement and for a declaration / injunction for the reliefs prayed for.

Surrogacy in India is relatively low cost and the legal environment is favourable. In 2008, the Supreme Court of India in the Manji’s case (Japanese Baby) has held that commercial surrogacy is permitted in India with a direction to the Legislature to pass an...
appropriate Law governing Surrogacy in India. At present the Surrogacy Contract between the parties and the Assisted Reproductive Technique (ART) Clinics guidelines are the guiding force. Giving due regard to the apex court directions, the Legislature has enacted ART BILL, 2008 which is still pending and is expected to come in force somewhere in the next coming year. The law commission of India has specifically reviewed the Surrogacy Law keeping in mind that in India that India is an International Surrogacy destination.

In the absence of any law to govern surrogacy, the 2005 ICMR Guidelines apply. But, being non-statutory, they are not enforceable or justiciable in a Court of Law. Under para 3.10.1 of the 2005 ICMR guidelines, a child born through surrogacy must be adopted by the genetic (biological parents). However, this may not be possible in case of non-Hindu foreign parents who cannot adopt in India.

India is emerging as a leader in international surrogacy and a sought-after destination in surrogacy-related fertility tourism. Indian surrogates have been increasingly popular with fertile couples in industrialized nations because of the relatively low cost. Indian clinics are at the same time becoming more competitive, not just in the pricing, but in the hiring and retention of Indian females as surrogates. Clinics charge patients roughly a third of the price compared with going through the procedure in the UK.

The treatment will be done only at registered ART Clinics in India recognized by ICMR and the foreign commissioning couple must produce a duly notarized agreement between them and the prospective surrogate Indian mother. After the surrogate baby is born, an exit permission by a commissioning couple before leaving India will be required from the Indian Foreigners Regional Registration Office (FRRO) to verify issuance of a certificate from the ART Clinic confirming discharge of liabilities of the Indian Surrogate mother and ensuring custody of the child with the commissioning parents.

India’s Draft Surrogacy (Regulation) Bill, 2016
The draft bill provides for surrogacy as an option to parents who have been married for five years can’t naturally have children, lack access to other reproductive technologies, want biological children and can find a willing participant among their relatives. This would come as a major blow to fertility clinics in India, as most of them have thriving commercial surrogacy practices, which would be outlawed under the current form of the bill. Commercial surrogacy will result in 10 years’ imprisonment.

The bill also seeks to clarify the legal position of such a child and ensures that a child born of surrogacy will have all legal rights as a citizen. It would also restrict overseas Indians, foreigners, unmarried couples, homosexuals, and live-in couples from entering into a surrogacy arrangement. The surrogate mother must be a married woman who has herself borne a child and is neither a non-resident Indian (NRI) nor a foreigner. Couples who already have biological or adopted children cannot commission a surrogate child.

As expected, the bill has generated a lot of debate around the country. Opponents have argued that by allowing surrogacy for select classes of citizens based on their lifestyle, sexual orientation, and life choices, the bill would violate citizens’ Fundamental Rights as laid down in Article 14 of the Indian Constitution.

However, the bill seeks to be in step with the legal issues now. Gay rights are still an evolving issue in India. While the Supreme Court is sitting on a review petition on Section 377 of the Indian Penal Code, pertaining to the status of gay rights, no clear legal stand on the issue has emerged. Hence at this point, conferring legal rights to a surrogate child to gay parents would endanger the rights of the child itself. The Surrogacy (Regulation) bill can clarify the rights for India’s gay population only once these larger legal questions (about the status of gay marriage, for instance) have been answered. Hence at this point, restricting surrogacy to relationships which have a clear standing in the eyes of law protects the rights of the child and ensures consonance with Article 14 of the Indian Constitution rather than doing disservice to it.

The second major issue relates to the question of disallowing commercial surrogacy and restricting foreigners from availing themselves of surrogacy in India. Since the inception of commercial surrogacy, many incidents have sparked unpleasant legal questions surrounding commercial surrogacy involving foreigners.

Meanwhile, the banning of commercial surrogacy can perhaps open doors for adoption as well. In a country like India, where one encounters frequent stories of children being abandoned by their parents out of poverty or social stigma, especially girls, banning commercial surrogacy could encourage parents to look toward adoption as a means of fulfilling their dreams of parenthood.

The draft Surrogate (Regulation) Bill seeks to comprehensively address the issue of surrogacy in India. While there are provisions that will evolve with time, the heart of the bill is undoubtedly banning...
commercial surrogacy. This is indeed a step in the right direction. Profiting commercially from a woman’s womb by exploiting her helplessness is a terrible crime. An evolved society is one that seeks to protect the right of all. A poor woman is undoubtedly among the most voiceless of India’s citizens, and the draft Surrogacy Bill 2016 seeks to protect her.

CONCLUSION

The Indian Parliament catching up to make a law to regulate the unscrupulous surrogacy trade, the new Medical Visa Regulations have stepped in temporarily to do what the law ought to have done. But, they also infringe on the rights of single foreign parents. Instead of permitting surrogate children to be born in India with the risk of being stateless persons and being denied entry into foreign countries where their commissioning parents reside, it is apt and necessary that such unethical practices leading to such disastrous situations must be pre-empted and prevented.

Recent instances of surrogate children from Germany, Japan and Israel born in India and leaving upon court intervention should well make legislators think of enacting a strict surrogacy monitoring law. The Assisted Reproductive Technology (Regulation) Bill, 2014 itself has legal lacuna, lacks creation of a specialist legal authority for determination and adjudication of legal rights of parties, in addition to falling in conflict with existing family laws. These pitfalls should not become a graveyard for a law which is yet to be born. Surrogacy needs to be checked and regulated by a proper statutory law.

Piecemeal administrative decisions cannot substitute legislation to override settled statutory rights conferred by laws made for inter-country adoptions to foreigners and non-resident Indians who have acquired foreign nationalities. The law makers must enact a law to put checks, controls and regulatory steps in place through a legislative mechanism. Surrogacy should be controlled by proper legislative methods as existing in the case of inter-country adoptions.

Anomalies in matters of foreign parents and single foreign parent surrogacy compared to foreign couple and single parent adoptions by foreigners must be resolved to be made monistic and uniform. The Assisted Reproductive Technology (Regulation) Bill, 2014 must be overhauled in the proper perspective for providing mechanisms to regulate, check and control unethical practices as also to grant protection to rights of parties who are at a disadvantage. The ART Bill, 2014 put in public domain to general public and stake holders needs to be discussed threadbare. Public opinion must be espoused and views of stakeholders should be deliberated upon.

Hence, the proper course would be a statutory law which looks at all perspectives and protects the rights of all parties without infringing on the claims of others. A fresh perspective is the call of the day for introspection.

*****
FUTURE OF BLOCKCHAINS AND CRYPTOCURRENCIES: GLOBAL AND NATIONAL PERSPECTIVE

By Deepshikha Shandilya & Suryakant Maithani
From Symbiosis law School, Pune

Abstract
Cryptocurrency has become a buzzword among millions of internet users throughout the world. It has widened the horizons of digital space by allowing people to enter into transactions without third party oversight. This paper seeks to analyze the evolution and functionality of Bitcoins. It discusses the methods of procuring Bitcoins and security issues existing in the blockchain technology highlighting the threats to a client’s personal data. It analyses the existing legal regime for the regulation of Cryptocurrency in various Jurisdictions in the world and compares the same with Indian regulatory measures. It also analyses the legal considerations for businesses and individuals dealing in bitcoins, tax implications of dealing in Bitcoins and the role of Merchant Service providers in the facilitation of Cryptocurrency in United States of America and compares the same with the situation of current Indian Businesses dealing in Bitcoins. The authors conclude with the thoughts that cryptoology, the root science underneath bitcoin and all cryptographic forms of money, might be the instrument behind the frontier for new and energizing digital developments.

Introduction

Cryptocurrency has become a buzzword among millions of internet users throughout the world. It has widened the horizons of digital space by allowing people to enter into transactions without third party oversight. Bitcoin, the most common and valued cryptocurrency was introduced in 2008 by a group of computer geeks, who called themselves “Satoshi Nakamoto”. The Bitcoin Network was established in 2009 and its development has been steady since then.183

Bitcoins are created by a process called “Mining”. The Miners or developers of Bitcoins participate in a complex mathematical calculation in order to add “blocks” to the “Blockchain”, which is a public ledger of all the transactions that has ever been executed in Bitcoins. Blockchain may also be considered as a chain of signatures, containing necessary information of a particular Bitcoin, so that the system may confirm its validity and transfer its possession from one user to another, if requested.184 The “Bitcoin Software”, which may be freely downloaded from the internet creates a “wallet” file for every user that can store their bitcoins.185 The user’s wallet

contains a “public key” and a “private key”. The public key enables other users to send bitcoins and the private key enables the wallet’s owner to send bitcoins to other users. The public key may be considered as your street address and the private key as your front door.

The main idea behind the creation of bitcoin, according to Nakamoto was to reduce transaction cost incurred when parties transact over the internet and to find a way to double spending problem. The double spending issue is the hazard that a person could pay for two unique things with a similar unit of money. This issue just emerges on the off chance that one needs to make a buy electronically (i.e., with an option that is other than money).

The part financial institutions play in an electronic exchange is to fill in as a confided outsider to identify the clients, to guarantee that the cash is spent just once, and to process the payment. So as to hold their confided third party status, financial institutions likewise end up involved if there is a dispute between the parties. This requires significant investments, for which financial institutions charge expenses.

Bitcoin's basic advancement is to forestall the requirement for a third party to be engaged in the transaction. It enables the parties to safely and secretly exchange cash to anybody and anyplace on the planet. How does bitcoin cut out the monetary agents? Bitcoin is a purely peer to peer version of electronic cash. It enables you to safely send money specifically to other client. The bitcoin organization is decentralized, which implies there is no central organisation regulating transactions. Bitcoin's innovator built up a sharp component to guarantee that bitcoins couldn't be replicated and spent more than once. Each bitcoin has a history connected to it—essentially a log of computational marks demonstrating the transaction it has been associated with. These logs are called 'blocks' and, when you set up them all together, they frame the 'block chain'. The block chain contains a record of the considerable number of transaction at any point made utilizing bitcoin as discussed above.

Procurement

There are primarily three different ways to get Bitcoins: (1) by "mining" them; (2) by buying them; or (3) by offering something and accepting payment in Bitcoins. New Bitcoins are only delivered through the procedure known as mining. Each time a Bitcoin is transferred from one wallet onto the next, an unpredictable mathematical problem must be solved to check that the transfer is genuine (i.e., that the sender is the


true proprietor of the coin and has not sent it to different others). Because there is no Central authority to attempt this activity, it is done in the different nodes of the distributed network that make up the Bitcoin system. These are just users, known as "miners" who run the important programming that attempts the fundamental computations to help the network. As payment, each time a task is effectively completed, the framework produces a set amount of Bitcoins and disseminates them to the triumphant miner. The trouble of the activity, and subsequently the rate at which new Bitcoins are produced, is consequently changed to achieve a steady and preordained results. To control inflation by constraining the aggregate number of Bitcoins in presence, the rate at which new bitcoins are created will split around in every four years so that the total number of Bitcoins in presence may never surpass twenty-one million. Thus, for the present, the system is upheld totally by the production of new Bitcoins.

The most uncomplicated approach to get Bitcoins is to buy them through a trade. In spite of the fact that there are numerous exchanges, the fundamental idea is straightforward: clients can exchange conventional cash (e.g., dollars, Euros) for BTC at the present exchange rate. Exchange rates are dictated by supply and demand. Users may then store their Bitcoins in a wallet files on their PC or on the exchange servers, enabling them to get to their Bitcoins from any computer.

Security and Privacy Issues

Blockchain can protect a specific measure of security through the public key and private key. Clients execute transactions with their private key and public key with no genuine identity exposure. Be that as it may, it appears, that blockchain can't ensure the

---

192 Supra note 7
193 Supra note 7
194 Supra note 3
195 Including Bitomat, Bitcoin, Intersango, ExchangeBitcoin.com, Camp BX, Bitcoin7, VirtEx, VirWox, and WM-Center. EUROPEAN CENT. BANK, supra note 3
198 See BLOCKCHAIN, http://www.blockchain.info (last visited Aug. 6, 2013), for one example of an online-hosted wallet.
value-based security since the values of all transactions and balances for every public key are freely available. In addition, the ongoing investigation\(^\text{200}\) has demonstrated that a client's Bitcoin transactions can be connected to uncover client's personal data. In addition, Biryukov et al\(^\text{201}\) introduced a strategy to connect client pseudonyms to IP addresses notwithstanding when clients are behind Network Address Translation (NAT) or firewalls. Every user can be exceptionally distinguished by an arrangement of hubs it connects with. However, this set can be learned and used to discover the source of a transaction. Various strategies have been proposed to enhance privacy of blockchain, which could be generally arranged into two kinds:

- **Mixing**\(^\text{202}\): In blockchain, clients addresses are pseudonymous. But, it is possible to discover user's real identity as a large number of clients make transactions with a similar address every now and again. Mixing service is a sort of administration which gives obscurity by transferring funds from numerous input addresses to various output addresses. For instance, client Alice with address A needs to send a money to Bob with address B. On the off chance that Alice specifically makes a transaction with input address A and output address B, connection amongst Alice and Bob may be exposed. So Alice could send the money to an entrusted mediator Carol. At that point Carol sends the money to Bob with numerous input sources c\(_1\), c\(_2\), c\(_3\), and so forth, and various output sources d\(_1\), d\(_2\), B, d\(_3\), and so forth. Bob's address B is also included in the output addresses. So it ends up difficult to uncover connection amongst Alice and Bob. However, the middle person could turn out to be exploitative and uncover Alice and Bob's private data intentionally. It is likewise conceivable that Carol exchanges Alice's money to her own address rather than Bob's address. Mixcoin\(^\text{203}\) gives a basic strategy to dodge deceptive practices. The mediator encodes clients' information including the money and exchange date with its private key. At that point if the middle person did not exchange the cash, anyone could confirm that the mediator swindled. Nevertheless, burglary can be identified but cannot be stopped. Coinjoin\(^\text{204}\) relies upon a Central Mixing server to rearrange output addresses to forestall burglary. Influenced by Coinjoin, CoinShuffle\(^\text{205}\) utilizes decoding mixnets for address rearranging.

---


\(^{205}\) T. Ruffing, P. Moreno-Sanchez, and A. Kate, “Coinshuffle: Practical decentralized coin mixing for bitcoin,” in Proceedings of European
Anonymous. In Zerocoin, zero-information proof is utilized. Miners don't need to approve a transaction with digital signature but to approve coins have a place with a list of legitimate coins. Payments's origin point is unlinked from transactions to avert transaction graph investigations. However, despite everything it uncovers payment destinations and sums. Zerocash was proposed to address this issue. In Zerocash, zero-knowledge Succinct Non-interactive Arguments of Knowledge (zk-SNARKs) is utilized. Transaction sums and the estimations of coins held by clients are not revealed.

Regulation of Cryptocurrencies
As Bitcoins turn out to be more important and accomplish greater attention, Governments are starting to pay heed. U.S. Representatives have voiced worry over the illicit substances being bought online in Bitcoins; an inner Federal Bureau of Investigation report with respect to Bitcoins, was spilled on the web; the European Central Bank report distributed a paper assessing virtual money plans including Bitcoin; and the Chinese government prohibited the utilization of Bitcoin by monetary organizations.

Global Perspective
United States' response

Bitcoin faces various uncertain regulatory issues in the USA. They include FinCEN, the U.S. Division of Justice, the SEC, and state controllers of Money Service Businesses. (MSBs). As specified before, FinCEN had issued administrative guidance characterizing digital payment systems like bitcoin as "virtual currency," on the premise that they are not legal tender under any sovereign ward. While opining that a client of virtual money isn't a MSB and henceforth not subject to government's MSB regulation, FinCEN went ahead to express that U.S. entities that produce "virtual money" (including bitcoins) could be regarded as MSBs if the virtual cash were sold for "real cash or its proportionate." Thus, miners of bitcoin inside the United States may need to enroll and follow government MSB regulations in case they offer bitcoins for dollars. American Banker online has affirmed that no less than three U.S. bitcoin trades elected to close down because of FinCEN's direction. FinCEN's chief expressed that its direction expects to shield.

digital currency systems from abuse and guarantee that information is accessible to arraign "criminal activities," and isn't aimed at regular bitcoin clients.

In May 2013, the Department of Homeland Security grabbed a record controlled by Mt. Gox on the hypothesis that the Japanese trade was working as an unlicensed MSB. Mt. Gox, as a result enrolled with the U.S. Treasury as a MSB. The various administrative issues encompassing bitcoin has incited bitcoin undertakings to frame a self-administrative group called the "Committee for the Establishment of the Digital Asset Transfer Authority," which intends to set specialized measures aimed at avoiding tax evasion and guaranteeing compliance with laws.

Fifty states likewise have laws controlling MSBs. A few, including California and New York, have supposedly cautioned companies associated with bitcoin that they might be in, disregard of such laws. In reality, the California Department of Financial Institution as of now has in its records a nitty gritty letter from a law office in the interest of the Bitcoin Foundation, contending that California's law, the Money Transmission Act, has no application to bitcoins.

The SEC claims the organization was "sham" where bitcoins from new financial investors were utilized to pay interest of up to 7 percent for each week to existing investors and furthermore to cover investment withdrawals. The SEC further affirms that the founder occupied investors' bitcoins to exchange for his own record on a bitcoin trade and to exchange for dollars keeping in mind the end goal to pay personal costs. Such acts are alleged to violate the anti-fraud and registration provisions of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and SEC Rule 10b 5.

**European regulatory response**

The circumstance in Europe and the U.K. is less uncertain than in the U.S. To start with, there is significantly more administrative acknowledgment for alternative currencies to those issued by Central banks authorities, and a for the most part sympathetic position for local currencies, for example, the Bristol Pound, Brixton Pound and Lewes Pound 209. These are small payment schemes where a couple of participating retailers acknowledge a note which acts more like a voucher and it is generally of extremely restricted course. While BTC is bigger by numerous degrees of extent, there does not appear to be any sign from controllers and central bank authorities in Europe that there will be a crackdown on Bitcoin over its legitimate status 210. Second, Europe has as of now already has a lawful system for the direction of virtual money, which would be utilized to cover cryptocurrencies, like Bitcoin. The Electronic Money Institutions

---


Directive 2009/110/EC\textsuperscript{211} contains rules for a wide range of electronic purses that can be utilized to store value, be it by means of a PC, a cell phone or on the web. The Directive characterizes electronic money accordingly:

1. electronically, including magnetically, stored monetary value;
2. as represented by a claim on the issuer which is issued on receipt of money to make payment transactions;
3. the transaction is an act, started by the payer or by the payee, of putting, exchanging or pulling back assets, regardless of any hidden commitments between the payer and the payee;
4. which is acknowledged by a characteristic or lawful individual other than the electronic cash guarantor.

In the event that payment framework satisfies these necessities, at that point it is viewed as electronic cash, and just electronic money institutions (EMI) can issue electronic value.\textsuperscript{212} There is a high limit for an electronic money institutions, as the EMI would need to satisfy a significant number of prerequisites. The thought behind this stringent direction is apparent, as what is occurring is the issuing of significant worth into the economy. Bitcoin would meet the lawful definition to a specific degree, with the exemption that it isn't cash that is issued as in is implied by the Directive. As there is no central authority, at that point it would be hard to imagine how financial services authorities accountable for regulating EMIs could intervene concerning Bitcoin.\textsuperscript{213} On the off chance that Bitcoins are not an EMI in Europe, their status as money is in question. The European Banking Authority (EBA) has opined that virtual currencies (VCs) don't satisfy a significant number of the prerequisites of a currency, and along these lines ought not be viewed as legal tender:

VCs are not legal tender, which means the following features are not fulfilled: (a) mandatory acceptance, i.e., that the creditor of a payment obligation cannot refuse currency unless the parties have agreed on other means of payment; (b) acceptance at full face value, i.e., the monetary value is equal to the amount indicated; and (c) that the currency has the power to discharge debtors from their payment obligations.\textsuperscript{214}

While it doesn't state specifically, the EBA supposition induces Bitcoin being a commodity that can be traded for fiat cash.

**National Perspective**

Reserve Bank has repeatedly through its public notices on December 24, 2013, February 01, 2017 and December 05, 2017, cautioned users, holders and traders of

\begin{itemize}
  \item \textsuperscript{211} https://eur-lex.europa.eu/collection/eu-law.html
  \item \textsuperscript{213} ibid
\end{itemize}
virtual currencies, including Bitcoins, regarding various risks associated in dealing with such virtual currencies.\textsuperscript{215}

In view of the associated risks, it has been decided that the Reserve Bank shall not deal in VCs or provide services for facilitating any person or entity in dealing with or settling VCs. Such services include maintaining accounts, registering, trading, settling, clearing, giving loans against virtual tokens, accepting them as collateral, opening accounts of exchanges dealing with them and transfer / receipt of money in accounts relating to purchase/sale of VCs.\textsuperscript{216}

The RBI and the Finance Ministry have made it clear that virtual currencies are not legal tender and such currencies have no protection. The government has not authorised any virtual currency as a medium of exchange. It has also not given license to any agency for working as exchange.\textsuperscript{217}

These instructions are issued in exercise of powers conferred by section 35A read with section 36(1)(a) of Banking Regulation Act, 1949, section 35A read with section 36(1)(a) and section 56 of the Banking Regulation Act, 1949, section 45JA and 45L of the Reserve Bank of India Act, 1934 and Section 10(2) read with Section 18 of Payment and Settlement Systems Act, 2007\textsuperscript{218}.

The Supreme Court (SC) of India refused to grant a temporary stay on the RBI’s banking restriction on cryptocurrencies. The SC heard the matter on July 3 and refused to grant any relief to cryptocurrency entities. As a result, Banks have now stopped extending their banking solutions to all cryptocurrency-related entities\textsuperscript{219}.

**Legal Considerations for Businesses and individuals dealing in Cryptocurrencies**

This part of the article examines the legal risks and issues that a business should evaluate before accepting bitcoin as a form of payment. It addresses potential registration and licensing issues, and examines the tax implications of accepting the virtual currency. It also discusses the use of bitcoin merchant service providers (BMSPs), which act as intermediaries between a business and a customer wishing to pay in bitcoin. The BMSPs provide a range of services including accepting bitcoin and paying the merchant in dollars, removing many of the barriers to accepting this new payment mechanism.

**Global Perspective**

In the USA, it is a requirement for companies involved with certain money related organizational activities to enroll or acquire a permit in case they wish to operate business inside the domain. While the

\textsuperscript{215} Shruti Gupta and Garima Nagpal, Cryptocurrency and Allied Services :Another Challenge for competition watchdog (2018) PL March 89

\textsuperscript{216} Bhumesh Verma and Somashish, Decoding The Bitcoin Conundrum (2018) PL (CL) February 88

\textsuperscript{217} Virtual Currencies and beyond : Initial Consideration at www.imf.org/external/pubs/ft/sdn/2016.pdf

\textsuperscript{218} https://news.bitcoin.com/indian-crypto-regulation-september/

bounding line of these laws are not for the most part as firmly delineated as corporate lawyers may like, it gives off an impression of being sensibly clear as of now that a business which just recognizes bitcoin only as a portion instrument purpose has no duty to enlist or obtain a permit. As is analyzed underneath, nevertheless, the law here is in a state of progress and merchants enduring bitcoin are urged to stay current with changes which may impact them.  

At the administration level, the Bank Secrecy Act (BSA) requires a substance which issues voyager's checks or money orders, performs check changing, partakes in money transmission, or gives certain organizations to enroll as a Money Services Business (MSB). Close by the commitment to enroll, a MSB is resolved to develop a bellicerent to unlawful tax evasion configuration, keep certain records, and report certain trades and distinctive suspicious development to the lawmaking body. The Financial Crimes Enforcement Network (FinCEN), the Government body which deals with the BSA, has issued clarification when a bitcoin business might be regarded to partake in cash transmission and thusly be asked to enroll.

For BSA purposes, money transmission is characterized as the acknowledgment of currency or other esteem that substitutes for cash from one individual, and the transmission of that cash or substitute to another location or another individual using any and all means. Currency is characterized to mean the lawful tender of the United States or any another nation. Under these definitions, bitcoin isn't a cash, yet it is something that can substitute for money, and in this manner its acknowledgment and transfer to some other place or individual would constitute cash transmission. A merchant that is mindful so as to restrain its utilization of bitcoin to its own particular purposes and does not provide bitcoin administrations to others ought to have no commitments under the FinCEN rules.

At the state level, numerous locales likewise require companies and individuals occupied with money transmission to get a permit and to meet certain obligations for wellbeing, soundness, and security of the buyer. While the idea of cash transmission at the state level is like that communicated in FinCEN's standards, there are contrasts between state and government law, and surely, a decent lot of difference among the state statutes. A couple of states have opined on the use of their cash transmitter laws to bitcoin related organizations. In April of 2014, Texas controllers affirmed that bitcoin does not constitute "cash" or "monetary esteem" as

221 http://www.coindesk.com/proposed-us-moratorium-Bitcoin-regulation/
222 http://www.coindesk.com/internal-revenue-service-treat-digital-currencies-property/
characterized in their Money Services Act, and accordingly bitcoin exchanges are not secured by the law. Kansas achieved a comparative conclusion under its statute. These controllers acknowledged, in any case, that bitcoin related organizations, for example, wallet suppliers, money trades, and ATM administrators which get official cash for specific purposes may at present be secured.227

Interestingly, the North Carolina Commissioner of Banks has expressed that bitcoin constitutes "financial esteem," and accordingly activities including the digital currency might be secured by the state's cash transmitter law.228 On July 17, 2014, the New York Department of Financial Services issued a draft variant of its "bitlicense" regulations for open remark. The guidelines would cover elements occupied with "Virtual Currency Business Activity" which incorporates receiving, putting away, and transmitting virtual currency. The run, in any case, would not cover merchants accepting bitcoin in consumer transactions.229

It seems reasonable at this stage to conclude that a merchant that accepts bitcoin or other virtual currencies for its own account in order to facilitate the sale of goods and services will not need to be licensed by or register with any governmental entity. 230

The merchant should be careful, however, not to provide bitcoin related services such as transfer or exchange to its customers. And finally, because this body of law will continue to grow and change, the prudent business will actively monitor regulatory developments in this area. 231

Tax Implications of accepting Bitcoins

At the point when a business or individual leads an exchange in a foreign currency, there are exceptional laws which represent how gains or losses from the trading of foreign currency are taken care of for tax purposes. 232 Numerous bitcoin clients accepted that those standards would likewise apply to virtual currencies. Such expectations were dashed by IRS direction issued in March 2014 which infers that, for federal tax purposes, bitcoin and other virtual currencies ought to be dealt with as property and not foreign currency. This interpretation by the IRS has huge business implications for vendors accepting bitcoins and has been censured by reporters.233

The IRS clarifies that for tax purposes virtual money ought to be dealt with as property and that general duty standards which apply to property exchanges will represent the tax treatment of bitcoin. 234 While acquiring property, one is required to record the fair estimation of the property which is regarded the proprietor's "premise" in the property. At the point when the benefit is later traded, if the fair esteem has increased, at that point the proprietor has a capital gain.235 On the off chance that the

230 Ibid

231 Ibid
232 Ibid
233 Ibid
234 Ibid
235 Ibid

www.supremoamicus.org
deal cost is not as much as the market value of the property, he or she has a loss. Connected to virtual money, this implies if a man acknowledges a bitcoin on Monday when the value is $400 and afterward makes a buy with that same bitcoin on Friday when the value is $410, he or she has a $10 gain. Envision a dealer that obtains bitcoin in different exchanges over a month amid which the cost of bitcoin fluctuates. Its premise in every individual bitcoin might be distinctive relying upon the market cost at the time of the transaction. At the point when the vendor chooses to money out a portion of its bitcoin for dollars, it should choose how much bitcoin to offer as well as which specific bitcoins to part with, in light of the fact that trading this bitcoin over that bitcoin will decide the measure of a reportable gain or loss. Obviously, the measure of record keeping important to track the premise in each bitcoin and register gains or losses makes it unrealistic for some, organizations to acknowledge bitcoin. A computerized methodology to deal with these exchanges would disentangle however not dispose of the trader's record-keeping obligations, despite the fact that making such a procedure would involve a huge investment in time and assets. Fortunate for merchants, third party service providers exist to offer only this kind of administration.

Using a Bitcoin Merchant Service Provider

Because of the expense of bookkeeping and record-keeping issues depicted above and other lawful and operational issues confronting merchants who wish to acknowledge bitcoin, another classification of specialist co-op has risen – the BMSP. Coinbase and BitPay are most likely the best known about this class of sellers, however a fast Internet look uncovers a developing number of players in this space. The BMSP basically goes about as an intermediary, accepting bitcoin from the client and giving dollars or some other currency to the trader. In an ordinary usage, the merchant adds a catch to the checkout page of its site named "pay with bitcoin." If the client picks this alternative, he or she at that point interfaces with the BMSP's servers to give data important to pay using bitcoin. The BMSP starts the bitcoin exchange and informs the dealer when the bitcoin exchange is finished. The merchant at that point finishes the transaction with the client and ships the products. The BMSP settles with the dealer on a prearranged plan, normally day by day, by electronically exchanging dollars or euros or some other bolstered money to a financial balance assigned by the trader. Some BMSPs likewise bolster settling in bitcoin or other virtual currencies. A conspicuous advantage of utilizing a BMSP is that a vendor can empower its clients to pay with bitcoin without ever really having to get or hold bitcoin itself. Such a game plan would lessen or take out the bookkeeping and record-keeping commitments related with the IRS direction, making virtual cash acknowledgment an altogether simpler and more alluring choice. Introducing a middle person into the association with a client, however, brings...

236 Ibid
237 Ibid
238 Ibid
new dangers which require watchful assessment.\textsuperscript{239}

**National Perspective**

Seven days before the RBI's boycott kicked-in, WazirX CEO Nischal Shetty uncovered shared exchange framework where the general population can purchase and offer crypto specifically with each other with no issue. "In P2P display, the purchaser and merchant can manage each other specifically while WazirX goes about as an escrow account holding the crypto amid the exchange with the goal that neither one of the parties cheats the other."\textsuperscript{240} The exchange will initially associate the individual hoping to purchase crypto for rupee with somebody who's hoping to offer crypto for rupee. At that point the vender should store the virtual cash with the trade. At that point the purchaser should pay rupee to the merchant straightforwardly. Once the dealer gets the installment and affirms to the trade, the crypto-exchange will discharge the cash to the purchaser. The other method for retaining investments into virtual currencies is to move your possessions in an Indian crypto exchange to a foreign one. For investors needing to trade long haul, they should take a gander at worldwide trades like Binance and Coinbase to keep trading for a more drawn out time. These trades bolster the vast majority of digital forms of money including bitcoin, litecoin and ethereum. They will obviously need to deal with the forex directions and universal settlement rules.\textsuperscript{241}

Prior to the RBI's boycott, the cryptocurrency investors were purchasing and offering bitcoins through exchanges in rupee. Be that as it may, after the boycott, all banks and other government organisations have halted their administrations to the digital currency trades. Banks have likewise begun sending notices to their clients cautioning against the virtual money exchange.

**Conclusion**

Digital currency appears to have move past the early selection stage that new advancements encounter. Indeed, even automobiles encountered this marvel. Bitcoin has started to cut itself a niche market, which could enable cryptocurrencies to encourage into getting to be mainstream; or be its fundamental driver in its failure.\textsuperscript{242} Digital forms of money are still in their early stages, and it is hard to check whether they will ever discover genuine standard presence in world markets. The Bitcoin group is endeavoring to push into the mainstream through advancement and taking care of old issues. Different types of digital money have

\begin{itemize}
  \item \textsuperscript{239} Stephen T. Middlebrook, Bitcoin for Merchants: Legal Considerations for Businesses Wishing to Accept Bitcoin as a Form of Payment, Business Law Today, (November 2014), pp. 1-4
  \item \textsuperscript{240} Federal Bureau of Investigation (FBI) Intelligence assessment (UNCLASSIFIED) ‘Bitcoin Virtual Currency: Unique Features Present Distinct Challenges for Deterring Illicit Activity.
  \item \textsuperscript{241} Yuthika Bhargava, Bitcoin — To Ban Or Not To, July 13, 2017, available at http://www.thehindu.com/todayspaper/tp-national/bitcoin-affords-anonymity-in-grey-area/article19267696.ece
\end{itemize}
just developed and have picked up followings of their own, and each somewhat unique in relation to Bitcoin and ostensibly as substantial. A few countries like Iceland have even started to begin their own national cryptographic forms of money (Hofman, 2014). It is conceivable that the future holds a place for cryptographic money as a noteworthy cash arrangement, and Bitcoin will be instrumental in preparing for those monetary standards to prosper. The European and Latin America markets are detonating with Bitcoin exchanges, implying true legitimacy. Broad examinations ought to be performed on the monetary impacts of Bitcoin on long standing fiat money and contrast the outcomes with nations that are starting to receive state-supported digital forms of money. The capacity for digital money to perform micro scale exchanges may enable it to connect an economic gap that conventional state supported fiat currency would not have the capacity to unravel, but rather requires a considerably more profound market and financial examination to decide. Additionally, the blockchain innovation that goes about as Bitcoin”s spine has potential uses in different routes, for example, smart contracts (Hileman, 2016). Finally, digital currency is a result of utilizing cryptography to make a computerized property. The outskirts of digital property was advanced by the music industry”s move to a cloud-based framework. This outskirts is still genuinely new and unexplored, primarily populated by various kinds of media. Different types of digital property may progress toward becoming as well known as music and digital currency. Eight years prior, digital cash was totally incomprehensible, and the maker of Bitcoin without any assistance changed that. Cryptology, the root science underneath bitcoin and all cryptographic forms of money, might be the instrument behind the frontier for new and energizing digital developments.

*****
INDEPENDENCE OF JUDICIARY AS A PILLAR OF DEMOCRACY UNDER THREAT

By Deevanshu Jaswani & Kartik Singh
From National Law University Odisha

ABSTRACT

Independent Judiciary: A Pillar of Democracy under Threat as the name suggests, the paper mainly focuses on the independence of the judiciary and its accountability, conflict etc. keeping an eye on the public confidence in the judicial system, maintaining its rigidity and transparency in the public domain. The main issues covered under this study are the interference from the other organs in the jurisdiction of judiciary, and how its decisions become biased.

This study involves brief analysis of conflicts and issues of the judiciary with other bodies such as executive, in different timeline, extending from ancient era to contemporary era and presenting the current issues related to it. Our thesis emphasizes mainly on explaining the current issues and providing with the analysis of the circumstances that led to these clashes. Certain illustrations have also been mentioned in order to fully understand and explain the problem in a concise and lucid way. Thus, our opinions on the topic are strengthened in view of these issues.

We have also done a comparative analysis and suggested ways how the threats on the Judiciary can be reduced and how judicial system in these countries are immune from any interference or control.

INTRODUCTION

“The bedrock of our democracy is the rule of law and that means we have to have an independent judiciary, judges who can make decisions independent of the political winds that are blowing”

----Caroline Kennedy

“Lawyers have rendered immense sacrifices for the restoration of democracy and free judiciary, and their role in this regard cannot be ignored.”

----Shehbaz Sharif

There are three organs of the government namely, Legislature, Executive and Judiciary. All the three organs are imperative for the working of a democratic country. Judiciary also plays its part; it is an independent organ which is commonly regarded as a tool to administer justice to the people of the country. It also protects rights of the people whether fundamental or natural. The governments also look to the courts to interpret laws and statutes.

Judiciary has always been one of the crucial parts of a democratic country. The importance of an independent judiciary cannot be undermined. The independence of this sacred institution has always been a point of discussion among different scholars, jurists and other eminent personalities regarding its functioning, questioning the discretion.

Over the years different jurists have expressed their contrasting opinions regarding the independent functioning of this institution from which we cannot fully
conclude whether the discretion of its functioning is under threat or not. From the historical perspective one can say that it’s always been under threat due to various reasons including executive interference, corruption among the judges, limitation of power, jurisdictional conflicts. Hence, it becomes extremely critical to examine and analyze the situations, existing previously and currently in order to arrive concrete conclusion.

Many questions are yet to be answered on the said topic such as whether the justice system can deliver an unbiased decision, whether the judgment delivered will create impact politically or socially etc. These questions and some more need to be answered in order to conclude whether judiciary is an independent institution or not. There’s a hierarchy in the Judicial System of India. The courts are divided according to the power and importance. The highest power is vested in one court known as Supreme Court of India whose decisions are binding upon all the lower courts.

Through this paper the authors seek to show the above mentioned threats and answering the unanswered questions with the help of various illustrations in historical as well as current scenario.

It assesses the law and practices which have been and are currently practiced in India to deal with numerous features of Judiciary involving the neutrality and answerability of judges. It discusses the antiquity and present condition of the judiciary by evaluating a variety of sources which include the constitutional and statutory law, public records, available statistical data and media reports along with secondary literature. The article also lays down the burliness and the shortcomings of the present system of Legislature and Judiciary in India and its effects on judicial sovereignty and judicial liability which involves the assignation, term and regulation of judges and examination of judges by the media and the bar. It put forwards different ways of conserving the burliness and providing appropriate remedies of the shortcomings to better the condition of judicial sovereignty, its accountability and the conflicts existing in our country. The objective of this thesis is to study the independence of the judiciary and its accountability, conflict etc. keeping an eye on public confidence in the judicial system, maintaining its rigidity and transparency in the public domain. The main issues of this study are the uncertainty between judicial independence and accountability and to overcome these uncertainties, we have articulated certain ways by which these issues or conflicts in the future may be obviated. In this way, the judiciary can restore the public faith and an effective judicial system will be developed to deliver unbiased decisions and also the independence of the judges will be maintained.

HISTORICAL BACKGROUND
The question on the Independence of Judiciary is not new. It has been in existence from the earlier times as well. This assertion can be verified from the circumstances existed in the British Era. Even then there were several conflicts and clashes between the Judiciary and other institutions. The then Judiciary alleged other institutions of encroaching upon its domain and that it impeded the decision making power of the
authority as a result of which the condition of the judicial system deteriorated and the common people were left to suffer.

These arguments are not vague and there have been several instances where the jurisdiction of the Judiciary has been encroached in one way or the other. Listed below are some of the examples from the British Era where we saw various conflicts between the Judiciary and other organs of the government.

OBJECTIVES

- What is Judiciary and its functions.
- To study the Historical Background and show the threats on the Judiciary from various organs.
- To verify the threats by Case Analysis.
- To compare the Judicial System of other countries with India and suggest ways of how the Indian Judicial System can be improved.

RESEARCH METHODOLOGY

The research work will be completed in adherence to the doctrinal method of research and will rely on both the primary and secondary sources. It shall be descriptive in nature and will also follow an analytical approach, i.e. use the analysis of the facts to reach out the conclusion based on logical reasoning. This research shall endeavor to review the existing format and establish a relationship with the subject format.

Literature Review

The study focuses on the threats encroaching upon the independence of the Judiciary. In order to study these threats, several subtopics have been created for better understanding of the subject. Firstly we have mentioned what is Judiciary and how it functions in India. For utmost clarity we have thoroughly studied the Historical background of the Judiciary and what were the threats existing then and now. Secondly, a detailed comparative analysis has been done of other countries Judicial System and how that system can be applied in India for better judicial management. Several instances of Executive interference of Judiciary have also been shown in the form of detailed case study.

The debate on Judicial Independence is not new. Several books and research papers have been published on this topic especially in India. The previous researches have also shown that often the organs of the government encroach upon the jurisdiction of the Judiciary either by influence through political power or by controlling the appointment of judges which in turn puts a threat on independent decision making of judges. Our research also focuses on these general guidelines, however certain new topics have been added to our study like the comparative analysis with other countries and the provisions mentioned in the Indian Constitution. We have also expressed our opinion on the said topic and have suggested ways so that these conflicts can be resolved or eliminated.

EXECUTIVE INTERFERENCE

Some of the situations through which we intend to show the interference from one of
the organs of the government that is the Executive are:

- Charles II, the then king of England issued a Charter in favour of East India Company in the year 1683 to establish an Admiralty Court in Bombay and in 1684 the court was finally established. Initially this court was meant to deal with the crimes related to maritime and mercantile laws. As per the Charter the cases referred to the Admiralty Court were supposed to be decided on the basis of equity and good conscience, subsequently in the year 1686 another Admiralty Court was also established in Calcutta. Over the passage of time their jurisdiction which was earlier only limited to maritime and mercantile laws was now extended to deal with all kinds of cases. Hence, all the judicial concerns were separated from the Governor and Council and entrusted in the hands of Admiralty Courts. A year later, the judge of the Admiralty Court succeeded in taking authority to act as Chief Justice of Court of Judicature and propounded the Doctrine of Judicial Independence in their various judgments which was the main reason of conflicts between the Admiralty Court and the Governor and Council. The Governor General and Council were also not permitted to appeal the judgments propounded by the Court of Judicature. Their conflict aggravated over time and all these matters came before the Directors of East India Company in London, the Directors had the strong bias towards the Governor and Council as a result of which, the matter was decided in favour of the Governor and Council and the Admiralty Court became in operative.

- Another such instance can be traced from the Settlement of Bombay, when the charter of 1683 was introduced. It contained several provisions for the judges appointment. One of the major provisions was that the person to be appointed should have knowledge of civil laws of England. A court was established in which the abovementioned provision was a must. This court had 3 types of Jurisdiction: Civil, Criminal, and Maritime. The jury system in this court was not followed instead only one person was granted the authority to decide cases under the charter and his name was St. John. He believed that the Judiciary should be independent without any interference from an outside authority as per the doctrine of Judicial Independence. John resuming his post started giving judgments against the East India Company and the Governor. The Governor was of the view that the John should work under and according to his orders and this led to tensions between those two persons. In order to remove the John from his post, Governor wrote a letter to the king which resulted in the passing of a new charter under which a provision for establishment of a new court was made. The new court so formed was called the Kings Court and as the name suggests, the new court was under the control of the Executive and thus it was biased to some extent. John raised some objections in which he argued how the executive persons so appointed in the Judiciary can deliver the judgment as RULE OF LAW says the Executive can’t deliver judgments.

- In 1973, the then Prime Minister Indira Gandhi announced Justice A.N. Ray as the next Chief Justice of India, however Justice
Sikri was to retire the next day. The appointment of Justice A.N. Ray came as a surprise to many people as Justice Shelat, Justice Hegde and Justice Grover were senior to Justice A.N. Ray and the mode of appointment followed was on the basis of seniority. Justice Ray was considered to have good relations with Indira Gandhi led government, thus there was biasness in his appointment. In the following years, Justice Ray went on to give several judgments in favour of the then ruling government especially during the emergency period (1975-77) including the famous case of ADM Jabalpur. His appointment to the Chief Justice of India gave rise to a nationwide agitation against the perceived attack on judicial independence.

From the above instances it is clearly evident that judicial independence, independence of judges or appointment of judges has always been under the control or has had the influence from outer institution be it executive or legislature whether in form of King or Governor General. Thus we can conclude that judicial independence has always been under threat. The scenarios of unfavourable appointments in the judiciary just doesn’t end here even in today’s contemporary era, there have been similar such instances.

CASE STUDY

The following are the popular cases or instances from the historical era as well as contemporary era in which through any external institution the Independence of Judiciary has been brought under threat:

- Trial of Ascentia Dawes: This case originated in British era in the year 1665, it was the first jury trial in Madras Settlement under the governorship of Foxcroft. The husband of Ascentia Dawes, William Dawes was a Magistrate and a close friend of Mr Reade, foreman of the jury. She was charged with the murder of an Indian girl slave who was working in her house, in the trial the jury found her guilty of the murder, however the foreman of the jury, Mr. Reade who was a gave a verdict contrary to all expectations. He expressed the opinion that each member of the jury is free and they can give their opinion without any reason and pronounced her not guilty which resulted in the acquittal Ascentia Dawes from all charges.

- Rama Kamti Case: This case was decided in the Settlement of Bengal. At that time the East India Company was facing threats from the pirates. Rama Kamti was a very rich and influential person. He had been working in the East India Company for nearly 30 years. However, once he was alleged to have a nexus with the leader of the Pirates. The major charges were that the close nexus was maintained through non-direct communication and that he disclosed some confidential information of the Company to the Pirates. When the case came before the court, which was presided over by Governor Boon and Council and Parker, Chief Justice of the Court. Parker was in favour of fair trial was against the torture faced by the Kamti’s servant who was being forced to give a written statement against Kamti as per the orders of Boon. After this scene, Governor Boon...

243 Rama Jois, Legal and Constitutional History of India (1984); Jain, Indian Legal History(1972)
removed Justice Parker from his post without instituting the impeachment proceedings against him according to the rule of law. Thereafter, the Governor General held the trial without hearing Kamti’s side of story and believing the story from a third person without having any concrete statement to support his argument. As a result, Kamti was found guilty and her property was confiscated. The result of showing this judicial independence was his dismissal from office, by the Governor. Thus, the judiciary was under threat as looking at the above case, it can be concluded that the Executive interfered in Judicial functions in this particular case also the Governor General concocted the evidence and this shows that the Justice System was biased.

State of Uttar Pradesh v Raj Narain244: This was a landmark case which was heard by the Allahabad High Court. In this case the then Prime Minister of India Indira Gandhi was found guilty of electoral malpractices. It was a first case in India where the election of a Prime Minister was set aside. The hearing took place at a time when the country was going through a phase of emergency and the fundamental rights were suspended and several other restrictions were imposed on the media. An appeal was filed by Raj Narain, against the judgment passed by the High Court of Allahabad quashing the election of Indira Gandhi. Meanwhile, the 39th Constitutional Amendment was passed by the parliament which added a new article (footnote). According to the article, the election of the Prime Minister and the speaker cannot be challenged by any competent court within the Indian territory. Rather, it could only be challenged before a community constituted by the parliament itself. The Supreme Court upheld the election of Indira Gandhi but pronounced the 39th Amendment as unconstitutional as it violated the Doctrine of the basic structure of Constitution.245 From the above case we can conclude the legislature was encroaching upon the Judiciary and the Supreme Court was right in setting aside the 39th Constitution Amendment as it was unconstitutional and violated the basic structure.

K.M. Joseph’s Dispute: The confrontation between the Executive and the Judiciary is also evident in the present dispute of K.M. Joseph’s elevation to the judge of Supreme Court. The collegium recommended Justice Joseph’s name to the government for approval but the government of India returned his name for reconsideration to the collegium. The possible reasons for the government’s rejection maybe that when Justice Joseph was the Chief Justice of the Uttarakhand High Court, he cancelled the President’s rule in Uttarakhand and so the Congress government in the State was restored in the year 2016. The government may have taken this step in a layman approach and hence, this might be the possible reason for not approving his name to the Supreme Court. This decision of the government was heavily condemned by many eminent jurists.

As we look through the abovementioned instances, it could be derived that the Judiciary as a pillar of democracy has been under threat whether by the Legislature, the

244 AIR 865 (1975) 3 SCR 333
245 KesavanandaBharati v State of Kerala (1973) 4 SCC 225
Executive or any other institution. Sometimes, this interference may result in biasness whereas at other times, it may lead to threat for the sitting judges. Elimination of these conflicts and confrontations is extremely important for the proper functioning of the judiciary and for the judicial system in India. People will lose faith in the judicial system if these conflicts repeat as is observed. Judicial independence is an indispensable part of the Judiciary and it should be conserved anyhow by the concerned body by taking appropriate steps.

**Comparative Analysis**

In Denmark the people have more faith in Judicial System rather than the other organs of the government such as the Legislature of the country as the transparency so ensured in the Judiciary can’t be challenged by any other organ and its legal system is regarded as a free standing one amongst the other Scandinavian countries. Since the significant upgrade of its legal framework, Denmark keeps on enhancing its legal system by adding more courts to its legal structure to all the more likely address its nationals' issues. The Danes selected to expel the reliance of its courts from the Ministry of Defence, the administration body that managed its tasks earlier. Therefore, it is expected to protect that among the Scandinavian nations, Denmark has the most detached legitimate framework. The reason for such is the existence of Review Courts and Special Courts, their judges are subjected for inspection and all of their records are made available to the public which results in transparency in judicial matters. In contrast, India doesn’t have any sort of Review Courts or Special Courts. Also, in India there is no such system of publicizing the records of the judges.

Another example where the Judiciary is independent is Finland. It operates with a dual-court system and unlike many other countries, Finland courts have the power to pronounce verdicts as well as draft legislations. The courts are governed by a centrally administered body of the democratically established government. In spite of this, the Constitution of Finland makes sure that the independence of judiciary is maintained and not touched upon. This can be verified from the fact that there are several provisions in its Constitution to maintain the autonomy of the judges. Finland is an example of consensus democracy and hence all the decisions taken by the court are consulted from the people who may have interest in the subject matter of the judgment natives feel incorporated into the legal framework and have high amounts of trust in it. Therefore, it’s no surprise that Finland ranks highest in criminal justice system whereas the courts in India don’t have the power to draft legislations. However, it can instruct the parliament to make a new law on a particular subject matter.

In Sweden the Court Structure is different. There, the Ministry of Justice which is an executive branch of the government, governs the operations of the Swedish Courts. However, this does not limit the power of the Courts as the complete independency is maintained while deciding the cases. As a result, the best possible transparency is maintained whereas the situation in India is not similar. The courts are not governed by any branch of the government but still there is interference.
from the external institutions. If India followed the Swedish system of Judiciary, many conflicts in the past could have been avoided as the confusion of power would not have arisen.

If India could follow any of the above three systems then it would be an ideal situation for the Judiciary in India. However, this is a very Utopian situation and it’s highly improbable that these systems will ever be followed in India. This is because India and these countries differ in their ideologies, their historical background is different, their culture is different and the approach of the government framing laws is different.

CONSTITUTIONAL PROVISIONS AND CURRENT STATUS

There certain are provisions mentioned in the Constitution of India which specify that the Judiciary is Independent from any external control like Separation of Judiciary, from executive and the State shall take steps to separate the judiciary from the executive in the public services of the State. Additionally, Courts not to inquire into proceedings of the Legislature is another provision mentioned in the Indian Constitution.

Earlier this year the four senior most judges of the Supreme Court namely Justices J Chelameswar, RanjanGogoi, M B Lokur and Kurian Joseph, held the press conference in the public domain made a scathing attack on the Chief Justice of India. In the words of Justice Chelameswar “democracy will not survive”. This was an unprecedented case where the sitting judges of the Supreme Court levelled serious charges against the Chief Justice of India. Many people felt that the CJI should come before the public and take a stand. Many people were of the opinion that it is matter of the Judiciary and should be resolved within the Judiciary itself. The reason for this press conference was the assigning of cases by Chief Justice Deepak Mishra, they alleged that he assigned the cases of utmost importance to the other judges of Supreme Court who were close to him so that he could influence the decision of the case. They also said, they have issues with the assignment of the case to do with the mysterious death of Justice B.H. Loya who was hearing the Sohrabuddin Fake Encounter Case, involving the BJP president Amit Shah. The issue went ahead, be that as it may, when the CJI set up a seven-judge seat to hear the request gone by Justice Chelameswar seat in the matter of SIT test. Two of the judges, in any case, recused themselves from the seat. The five-judge seat cancelled the request gone by Justice Chelameswar. Therefore, it can be concluded that the judges were not given the autonomy in expressing any opinion whether outside or inside the court.

THE IRONY....

The Independence of the Judiciary is not only encroached by the other organs but also from the Judiciary itself, this is an irony in itself as the institution which is meant for delivering justice is itself seeking for Justice. This can be verified by one such instance which shook the entire legal system of the country. Some experts termed this incident as “shocking” while others were of the opinion that there was no substantial
reason for this staggering move and the reasons could have been more compelling. As a result, the credibility of the Judicial System was at stake. Thus the irony is clearly perceptible through this instance mentioned below.

CONCLUSION

From the above study it is safe to say that the Judiciary has always had a significant value in the context of the Judicial System. By analysing and studying the historical background of the Judicial System, the Independence of Judiciary has always been under question. It has faced many impediments especially with the appointment and the removal of judges. However, the courts have always tried to maintain Judicial Independence and according to them it is the most basic and fundamental feature of the Judiciary. For smooth functioning of the courts, the Judicial Independence is prerequisite. Transparency in Judicial System and Judicial actions inspires public faith and confidence in the institution.

The preamble of India also states that India is a democratic country and so, transparency is a vital requirement. Judicial Independence depends not only from external influence but also the freedom from internal influences of the judges themselves. Judicial autonomy among the judges is also crucial and involves the judges consigns a role. Hence, Judicial Independence requires independence from the other organs of the government and the Judiciary itself.

Judiciary has great respect in society and people of the country have faith in Judiciary. Additionally, Republic is people’s power. Judiciary is a frank institution where secrecy has no place. In our opinion, threats on Judiciary by any factor including interference, influence and power would lead to losing faith and confidence of the people. This is an ironical statement as justice giving system is itself losing faith of the people thus making the general people vulnerable and contributing to the misery of the already suppressed class of people by not delivering justice and not helping them to restore faith in the system. The role of the judges is to decide cases by giving their opinion which implies a measure of autonomy involved.

Legal autonomy cause those individuals from the official who harbour the conviction that the freedom of legal is planned to praise legal officers or disparage the notoriety of those working in the other two mainstays of the State to acknowledge the way that the freedom is guaranteed to the judged and not for judges. While courts have a place with the general population and open trust in legal is fundamental, a Judge must stand firm against any terrorizing or weight from individuals from open. A judge must guard energetically the autonomy from society or gatherings thereof. This is any way to state that the judge isn't required to share the expectations and fears of the common natives.

The actions of the judiciary on the premise of independence of the judiciary while understandable cannot be at the expense of accountability. Accountability and Independence are not mutually exclusive.
In order to point out the faults in the Indian legal system, we have done a comparative analysis of legal systems of India with those of other countries. We have also suggested ways how the Judiciary can be more effective like that of the countries we have written. In our opinion this theoretical research has mainly focused on different threats by different institutions on the Judiciary affecting its independence, control and autonomy of the judges on deciding cases and how it results in injustice or biasness and this has been verified by the instances mentioned above both historical and the contemporary ones. Thus, it can be concluded that the Independence of Judiciary has been a critical point and has to be maintained for better functioning of the Judicial System of the country.

BIBLIOGRAPHY

Arun Prokas Chatterjee, “Independence of the Judiciary” (1973)
R.V Moorthy, “Supreme Court Crisis: All not okay, democracy at stake” (2018)
Akhilesh Pillalamarri, “Is India’s Judiciary out of Control?” (2015)
I. INTRODUCTION: CONCEPT OF CYBER CRIMES

“This is just the beginning; the beginning of understanding that cyberspace has no limits, no boundaries.”

-Nicholas Negroponte

With the coming of 21st Century, there has been tremendous increase in technological innovations and advancements which in turn has led to a rise in threats related to cyberspace. The crime has been computerized and financially sophisticated. Sutherland described such crimes as White Collar Crimes and nowadays they are known as Social and Economic offences in India.248 Computer and Internet is a technological innovation which has proved to be an intoxicating threat to the society because it may offer a blanket to the criminal to get away with legal proceedings as the Internet provides an opportunity to act in secrecy. The enormity and anonymity of internet and lack of legal control over internet have led to the emergence of concept of Cyber crimes. As per expert recommendations by UNO, Cyber crimes cover any crime committed by using computer systems or networks, within their frameworks or against them. Theoretically, it embraces any crime that can be committed in the electronic environment. In other words, crimes committed by using e-computers against information processed and applied in the internet can be referred to cyber crimes.249

Pavan Duggal in his book “Cyberlaw- The Indian Perspective” defines Cyber crime as, “All the activities done with criminal intent in cyberspace or using the medium of internet. These could be either the criminal activities in the conventional sense or activities, newly evolved with the growth of the new medium. Any activity, which basically offends human sensibilities, can be included in the ambit of cyber crimes.”250

Thus, we can describe Cyber crimes as, the crimes which are committed by mishandling of computers. However, instead of using the expression computer crime, the current trend leads to call them as computer-related crimes. Cyber crime involves activities where computer technology is used as an instrument to access sensitive information of people, revealing business trade secrets and using internet for malevolent purposes. The anonymity of internet makes it easier for cybercriminals to attack various computers present in different parts of the world. That’s why cyber crimes usually go concealed and unreported, rendering the jurisdiction unstipulated. Thus, Cyber crimes are found to be discreet and universal in nature and that they do not leave any physical evidence behind.

II. FORMS OF CYBER CRIMES

Cataloguing of cyber crime is an intricate task because it is new manifestation of crime

248 Dr AMITA VERMA, CYBER CRIMES & LAW 43 (1st ed. 2012).

www.supremoamicus.org
which is increasing at a great pace with each passing day and producing new and different species of cyber crime. Some of the cyber crimes committed with malicious intentions such as gaining wealth in a short period of time, for vengeance or harassment, are described as under:

A. CRIME AGAINST INDIVIDUAL

i. Cyber Stalking/Cyber Harassment- Cyber stalking, which is simply an extension of the physical form of stalking, is where the electronic mediums such as the internet are used to pursue, harass or contact another in an unsolicited fashion.²⁵¹ The term is used to refer to the use of the internet, e-mail, or other electronic communication devices to stalk another person. Stalking generally involves harassing or threatening behaviour that an individual engages in repeatedly, such as following a person, appearing at a person’s home or place of business, making harassing phone calls, leaving written messages or objects, or vandalizing a person’s property.²⁵² Internet has become a basic need of the individuals and they are connected through various social networking sites, making it easier for cyber stalkers to collect the private information about the victim. There is a misconception that cyber-stalking is concentrated because there is no physical contact involved and as such no vi. physical harm. However, it’s important to note that easy access to private information can cause greater harm by way of cyber-stalking/harassment.

Cyber Pornography- Cyber pornography refers to activities where sexual or illicit or obscene content is published or displayed over the internet. Pornographic contents become easily accessible to adults and children as well. Cyber pornography is banned in many countries and legalized in some. In India, under the Information Technology Act, 2000, this is a grey area of the law, where it is not prohibited but not legalized either²⁵³. Child pornography is another issue which is on rise and is a type of Child abuse where paedophiles obdurate their victims. Bombay High Court Committee gave recommendations to Hon’ble Chief Justice of Bombay High Court in its report, complaining about proliferation of pornographic sites on the Internet.²⁵⁴

Cyber Defamation- Defamation of an individual over internet or pertaining to cyberspace refers to Cyber Defamation. It will leave that individual’s disposition vulnerable and open to abhorrence or mockery. Cyber defamation is covered under Section 499 of the Indian Penal Code.²⁵⁵

E-mail Spoofing- A spoofed e-mail is one which appears to be sent from a particular source but is actually sent from some other

²⁵³ Advocate Puneet Bhasin, Cyber Pornography Law in India, (Sept. 27, 2018, 7:00 PM) https://blog.ipleaders.in/cyber-pornography-law-india/.
²⁵⁴ Protecting Children from Online Pornography- A report from Bombay High Court to Hon’ble Chief Justice of Bombay High Court, Jan. 30, 2002, India.
source. For example, a person sends an e-mail to another person by using his friend’s e-mail address, thus the receiver of spoofed mail would trust such e-mail, presuming it to be sent by his friend. Spoofing is done to gain access to private information by camouflaging a computer as some other computer.

ii. **E-mail Spamming**- Spam is a type of trash e-mail which is sent by the companies for the advertising purposes. The messages sent through e-mail may be same or different and can be received by the receiver on regular basis. These junk e-mails can be bothersome and wastes a lot of time of the receiver.

iii. **Phishing**- Phishing can be said to be similar to e-mail spoofing wherein vital information may be obtained falsely through e-communication. The users generally fill up their vital information on a fake website or counter, believing it to be an authenticated one. In Wombat Security’s latest report, 76% of information security professionals revealed that their organization experienced phishing attacks in 2017.256

B. **CRIME AGAINST STATE OR SOCIETY**

i. **Hacking**- When any person gains illegal access to others computer, computer database or network or tampering with the data or any computer programme, by breaking into the security system, amounts to crime. Hacking is a wide term and one of the primitive and perfidious cyber crimes. The techniques used for gaining illegal access may vary from stealing passwords by peeking at someone’s information at work or by luring to log in on spoofed sites. As far as legal aspect is concerned, Section 66 of The Information Technology Act, 2000, defines hacking and states that whoever commits hacking shall be punished or penalised with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or both.257

Cyber Fraud- In the present scenario, financial institutions carry out all their activities and money transactions through computers by way of Electronic Fund Transfer, increasing the chances of cyber fraud. Any act done with an aim to deceive a person by unjust means without the knowledge of that person is commonly known as fraud. Frauds which are practiced through computer network or internet and such related exchanges are known as cyber fraud. Most of the cybercrimes across India are related to online banking. There were about 2,095 cases of online banking fraud reported in 2017.258 Some common ways through which cyber frauds are committed include credit card frauds, e-retail fraud, embezzlement of funds, deceptive get-rich schemes provided online and job fraud.

Cyber Terrorism- Cyber terrorism does not involve violent acts expressly and that one does not witness immediate consequences. These groups fulfil their agenda by way of spreading threat and violence through computer network. Extremist groups or preachers with ideologies different from


www.supremoamicus.org
those of reasonable ideas, use technology as a weapon to spread those ideologies. Therefore, cyber terrorism may be defined as an act where computer set-up are used to create terror among the population at large and very often against the Government. It leads to a great threat to peace and national security.

vi. Cyber-Squatting- Cyber-Squatting is a form of speculation where a domain name is registered with the intention of selling off the same.\textsuperscript{259} It refers to the activity whereby a person registers an established domain name of other’s business as his own to sell it later in exchange of relevant consideration.

III. GROWTH OF CYBER LAW IN INDIA
With the evolution of the digital world, new technologies were discovered, leading to excess use of computer systems, software and networks for the processing and distribution of data. It further led to rise in legal issues and complications, which the existing laws in India were not able to deal with. With the emerging needs, it became a necessity to frame relevant and enhanced laws.

It has been observed that there is continuous addition and alteration to the already existing crimes. Cyber crimes too have shown modifications which could have been plausibly prevented with an appropriate legal infrastructure. These challenges led to the enactment of Cyber Laws in India.

The Union Cabinet approved the Information Technology bill on May 13, 2000 and on May 17, 2000; both the houses of the Indian Parliament passed the Bill. The Bill received the assent of the President on 9th June 2000 and came to be known as the Information Technology Act, 2000. The Act came into force on 17th October 2000.\textsuperscript{260} Some of the objectives of IT Act, 2000 are:

- It provided legality to the e-transactions.
- It reduced the number of cyber crimes and protected the privacy of users of the Internet.
- Electronic records and other relevant activities received legal sanction.
- Book-keeping of accounts by bankers and other institutions also received legal sanction.

In 2008, changes were made to the IT Act, 2000 and came to be known as Information Technology (Amendment) Act, 2008. Amendments were made to introduce new types of cyber crimes and ways to prevent them. Some of the new provisions in order to cover those crimes are:

- Sections 66A to 66F has been inserted to Section 66 providing punishment for offences such as obscene electronic message transmissions, identity theft, cheating by impersonation using computer resource, violation of privacy and cyber terrorism.\textsuperscript{261}
- However, in 2015 in a landmark case, Section 66A was struck down in entirety by the Supreme Court of India as it falls outside the scope of Article 19(2) which is associated to Freedom of Speech.\textsuperscript{262}

\textsuperscript{259} Dr AMITA VERMA, CYBER CRIMES & LAW 270 (1\textsuperscript{st} ed. 2012).


\textsuperscript{262} Shreya Singhal v. Union of India, A.I.R. 2015 S.C. 1523.
• Section 67 of IT Act, 2000 has been amended by reducing period of detention for publishing obscene content from 5 years to 3 years and increasing the fine from Rs 1 lakh to Rs 5 lakh. Section 67A to 67C has been added wherein 67A covers materials containing obscene acts, 67B covers child pornography and 67C covers obligation of an intermediary to safeguard and keep certain records as arranged by the Central Government.263

The Information Technology (Amendment) Act, 2008 has brought some striking changes to the IT Act, 2000 on several issues.

IV. DIFFICULTIES TO CYBER LAW IN INDIA

The difficulties faced by Cyber Law in India are fundamental and one of the principal difficulties to the law is to keep rhythm with the escalating technology. The laws are framed keeping in view the current trends in the technology, but the laws soon become obsolete with the rapid growth in technology. Cyber laws in India are itself a big challenge as they are not legally adequate and are not appropriately enforced. Another major issue faced by Cyber law is the surreptitious and gigantic nature of the Internet which helps the cyber criminals to perform unlawful activities on Internet without being caught or identified. Cyber crimes leave the jurisdiction unstipulated because any individual sitting in any part of the world can corrupt other individual’s network. Furthermore, cyber crimes in India are not reported by the people because of its unawareness and that it is still a growing issue. As many as 5,752 people were arrested for cyber crimes in 2014 and only 95 persons were convicted and 276 acquitted for cyber crimes in 2014.264

V. JUDICIAL RESPONSE

A variety of laws have been passed by the Legislature and implemented by the Executive and other controls to prevent Cyber crimes but ultimately it’s the Judiciary which is in charge of administration of Justice. Judiciary takes help of precedents for deciding the cases of similar kinds but as far as Cyber crimes are concerned, there are not many precedents to be found. Thus, judiciary needs to be a step ahead while interpreting the laws on the matters pertaining to Cyber crime.

The effective response of the judiciary to settle Cyber contention is contemplated through various case-laws.

In the case of Shreya Singhal v. Union of India265, the apex court had been called upon to examine the constitutional validity of Section 66A of the Information Technology Act, 2000 and its various parameters from the perspective of the various principles enshrined in the Indian Constitution. In an unprecedented judgement it declared that the said section was unconstitutional, marking the day as a time of jubilation for free speech activists. However, the said judgment was also a landmark as it upheld the power of interception under Section 69A of the

265 Shreya Singhal v. Union of India, A.I.R. 2015 S.C. 1523
Information Technology Act, 2000 as enshrined under the law. The Supreme Court also upheld Section 79 of the Act, pertaining to intermediary liability, but with a caveat: intermediaries in India will have to act only on court order or on order of governmental agency. The said judgment once again reiterated the principle that any provision of law, concerning the real as well as virtual world, will have to ensure compliance with the Indian Constitution.

In Satyam Infoway Ltd v. Sifynet Solutions Pvt. Ltd, the Supreme Court of India decided on the issue of domain name protection for the first time in its history. This was the case wherein the apex court declared that the Indian Trade Marks Act, 1999 was applicable to the regulation of domain names as well. It held that though there was no law in India which explicitly deals with the domain names; it falls within the ambit of the Trade Marks Act. It further observed that a domain name enjoyed all features of a trademark. Accordingly, it ruled that if the respondent was allowed to further continue using the domain names it would in all likelihood create confusion in the minds of the general public. A user could be diverted to the website containing the unauthorized domain name. And upon his arrival at the website, if he does not find the goods or services associated with the mark, he might think that the legitimate owner was misrepresenting the claims. This would result in the loss for the legitimate owner, thereby affecting his goodwill and brand name. Thus, the apex court granted an injunction in favor of the appellants, thereby restraining the respondents from further using the domain names in their business transactions.

In the case of National Association of Software and Service Companies v. Ajay Sood and Ors, the plaintiff in this case was India’s premier software association. The defendants were operating a placement agency involved in head-hunting and recruitment. In order to obtain personal data, which they could use for purposes of headhunting, the defendants composed and sent e-mails to third parties in the name of Nasscom. The high court recognized the trademark rights of the plaintiff and passed an ex-parte ad interim injunction restraining the defendants from using the trade name or any other name deceptively similar to Nasscom. Subsequently, the defendants admitted their illegal acts and the parties settled the matter through the recording of a compromise in the suit proceedings. According to the terms of compromise, the defendants agreed to pay a sum of Rs1.6 million to the plaintiff as damages for violation of the plaintiff’s trademark rights.

---


Although, it is going to be challenging for the judiciary to overcome the hurdles with changing times but, the above cited landmark cases acted as eye-openers and helped to interpret the laws in a different way.

VI. AUTHOR’S VIEWPOINTS
As authors, we have made an attempt to present these new species of crime in a precise manner for the better understanding of the readers. The research regarding the subject matter made us realise about its complexities and vastness and the challenges arising out of it. The viewpoints which we present are concerning the cyber security.

To prevent cyber crimes, the statutory provisions should be adequate enough and be fully complied with. Besides that, the relevant authorities must be fully aware and well equipped with, in order to face the operational challenges such as convictions. The Judiciary needs to be conscious and responsive towards cyber crimes so that the convictions can become prominent.

For better prevention, co-operation between the Indian Agencies and Foreign Authorities should be made possible, so that Cyber security is achieved. It is not possible to achieve security and prevention in entirety but new initiatives must be taken and it’s all that counts.

VII. CONCLUSION
Technology has made the world a global circle by bringing the people living in different dimensions of the world together with just few clicks and clacks. Internet helped reduce the time and distance constrictions. However, every great innovation does not come alone and brings hazards along with it such is the nature of Cyberspace. With every new invention comes bigger responsibility and with such opinion many countries including India have adopted the UNCITRAL Model Law for enacting the laws regarding the computer network and the Internet. The United Nations Commission on International Trade Law (UNCITRAL) framed the ‘Model Law on Electronic Commerce’ which makes it compulsory for the member nations to follow while structuring the Cyber laws.

This new species of crime has grown immensely in the last few decades and though the laws to avert them did not come up in the due time but the Information Technology Act, 2000 opened up new gateways and it is sincerely hoped that it establishes better Cyber security.
IN DEPTH ANALYSIS OF EMERGENCY ARBITRATION- THE INDIAN POSITION VIS-À-VIS THE GLOBAL POSITION

By Ishan Sharma
From Campus Law Centre, Delhi University

Abstract

Emergency Arbitrator, although a relatively new concept in the field of international arbitration, is a formidable weapon for the parties seeking interim emergency reliefs. However, there are certain aspects of it which are making it weak and not letting the parties enjoy the benefits of the same. This article analyses the concept of Emergency Arbitration.

The first part of the article provides for the rules of different Arbitral Institutions, Indian and foreign, revolving around Emergency Arbitration. The next part discusses the various lacunae in the concept of Emergency Arbitration. In the same part there is a detailed discussion of the enforcement issue of the decisions given by an Emergency Arbitrator including the author’s opinion as to how enforcement can be done under the existing laws of India.

The article concludes with the recommendation of the best way forward to strengthen this concept, by way of national legislative amendments and international instrument.

I. INTRODUCTION

Arbitral tribunal’s power to order interim measures of protection are essential for the smooth functioning of the arbitration process. It is indeed necessary to ensure that a party is prevented from taking any step during the continuance of the proceedings so as to prejudice the interests of the other party.271 Earlier such power to grant interim relief was only with the ordinary courts, an option which is mostly frowned upon by the parties. Approaching courts defeat the very purpose for which the parties choose arbitration in the first place, such as their intention to keep the matter confidential or engaging technical experts as arbitrators. Besides, parties have to go through slow and cumbersome process of the courts and in case of international arbitration the complexities involved are even more from engaging local counsel to going through foreign court’s procedures.

Many countries, realising the same, have incorporated in their laws arbitrator’s power to grant interim relief. In fact, UNCITRAL Model Law on International Commercial Arbitration was amended in 2006 to include a detailed provision on arbitrator’s power to grant interim relief.272 Indian law also recognizes arbitrator-ordered interim relief as provided in the Arbitration and Conciliation Act, 1996 (hereinafter referred

271Laurie E Foster & Nathalie Holme Elseberg, “Two New Initiatives for Provisional Remedies in International Arbitration: Article 17 of the UNCITRAL Model Law on International Commercial Arbitration and Article 37 of the AAA/ICDR International Dispute Resolution Procedures”, Transnational Dispute Management, highlights the fact that interim measures are necessary for the effectiveness of international arbitration.

to as “the Act”\textsuperscript{273}. However, such power becomes meaningless in situations requiring a prompt interim relief prior to the constitution of the arbitral tribunal, for example, a situation where in order to prevent the dissipation of assets an immediate injunction is required. Earlier, parties were left with only two options either to approach the courts\textsuperscript{274} or wait long enough for constitution of the arbitral tribunal. In order to tackle such situations many arbitral institutions around the world have framed rules for emergency arbitrators who are entitled to order interim measures for protection. It seems that now emergency arbitration, relatively a new concept in the field of arbitration, has given a party seeking urgent interim relief a viable and a quicker option. The Emergency Arbitrator is only entitled to pass interim decision until the constitution of the Arbitral Tribunal. It, however, cannot decide the merits of the case which is for the main arbitrator to decide.

II. INTERNATIONAL POSITION

Many arbitral institutions around the globe have adopted rules specific to emergency arbitrators. Presently, institutions such as the International Chambers of Commerce (hereinafter referred to as “ICC”), the Singapore International Arbitration Centre (hereinafter referred to as “SIAC”), the London Court of International Arbitration (hereinafter referred to as “LCIA”), the Hong Kong International Arbitration Centre (hereinafter referred to as “HKIAC”), the Swiss Chambers’ Arbitral Institution, the International Centre for Dispute Resolution, the Stockholm Chambers of Commerce, among others, provide rules for emergency arbitrators. Some of the institutions are discussed below in detail.

It was ICC which had, in the year 1990, first started a method to provide for emergency relief which was called “Pre-Arbitral Referee Procedure”.\textsuperscript{275} This method is still in continuance, however, not so much popular among parties because of the opt-in approach. In 2012, ICC rules of arbitration were amended and now Article 29(2) lays down procedure for seeking urgent interim or conservatory relief. Two significant features of ICC emergency arbitrator provision are:

1. \textit{Opt-out approach} - The procedure is automatically applicable on the parties unless the parties have agreed to the contrary.\textsuperscript{276}

2. \textit{Order not award} - Article 29.2 of the ICC Rules of Arbitration provide: “The emergency arbitrator’s decision shall take the form of an order.” Thereby keeping it out of the purview of the New York Conventions 1958.

SIAC introduced emergency arbitrator provision back in 2010 and thereby became the first arbitral institution in Asia to do so. Rule 30.2 of the SIAC Rules 2016 provide for the appointment of emergency arbitrators.

\textsuperscript{273} Section 17 of the Act enumerates certain circumstances under which interim order may be ordered.

\textsuperscript{274} Section 9 of the Act gives wide powers to the Courts to grant interim relief to parties to arbitration.


\textsuperscript{276} 29.6.(a), ICC Rules of International Arbitration.
arbitrator. Furthermore, SIAC has made significant revision in its rules in 2016 to improve the efficiency of emergency arbitration, these are:

1. Time frame of appointment of emergency arbitrator has been revised to one day which, earlier, was one business day under SIAC Rules 2013.
2. Time frame for issuance of order or award is set at maximum of 14 days from the date of appointment of emergency arbitrator.

Besides Singapore International Arbitration Act was amended to expand the meaning of “arbitral tribunal”, bringing emergency arbitrator under it.

Prior to 2014, LCIA rules provided only for expedited formation of arbitral tribunal in case of exceptional urgency. Presently, Article 9B of the LCIA rules (2014) provide for emergency arbitration as well. The appointment of emergency arbitrator shall be within three day of the receipt of the application by the registrar. The final decision may be in the form of order or award and shall be given in no more than 14 days from the date of appointment of the arbitrator. It has to be noted that after the recent and surprising judgement of the English High Court in Gerald Metals SA v Timis & Ors the parties’ options have been restricted, that is to say, if the seat of arbitration is London and the party requires an urgent relief and his case falls within the rules of LCIA, he must seek such relief from the expedited tribunal or the emergency arbitrator and the court shall not have the power to, nor will entertain such a case.

HKIAC 2013 Administered Arbitration Rules (HKIAC Rules) make an explicit mention that a party may apply for urgent-interim relief prior to the constitution of the arbitral tribunal and sets out the procedure, therein. Unlike ICC, HKIAC Rules do not provide for application for the appointment of emergency arbitrator before the notice of arbitration. The emergency arbitrator shall be sought to be appointed within 2 days of receipt of application and the application deposit. Decision shall be rendered within 15 days of receipt of file by the emergency arbitrator.

III. INDIAN POSITION

The Arbitration and Conciliation Act, 1996 provide for powers of the courts and the arbitral tribunal to grant interim relief. Section 9 provide power of the arbitral tribunal to order interim relief and Section 17 provide for power of the courts to order interim relief. However the Act does not mention or recognise emergency arbitrator.

The Law Commission of India in its 246th Report remarked that the Arbitration and Conciliation Act, 1996 neither encourages nor discourages parties to opt for institutional arbitration. In order the further the growth of arbitration and to strengthen the regime of institutional arbitration in

---

277 Schedule 1 of SIAC Rules 2016.
281 [2016] EWHC 2327 (Ch) [2016]
282 Article 23.1, HKIAC Rules.
283 Schedule 4, HKIAC Rules.
284 Schedule 4(1), HKIAC Rules.
286 Schedule 4(12), HKIAC Rules.
India, the Law Commission proposed amendments to the Act. One such amendment sought to give legislative sanction to the concept of an “emergency arbitrator”. It proposed to broaden the definition of “Arbitral Tribunal” under Section 2(d) of the Act so as to include emergency arbitrator within it. Similar changes were made in the Singapore International Arbitration Act which added emergency arbitrator to the definition of Arbitral Tribunal.

Surprisingly the proposal of the Law Commission report were not incorporated in the Arbitration and Conciliation (Amendment) Act, 2015. Interestingly, India was the second to only Singapore with maximum number of parties resorting to emergency arbitration in SIAC from 2010 to 2016. Despite the need of legal sanction to emergency arbitration in India, it, indeed, is a surprising move.

Although the Act failed to take any steps towards recognising the international trend of Emergency Arbitration, many arbitration institutions in India have indeed felt the need and purpose of the same. These institutions have made the necessary changes in their rules to provide for the appointment of Emergency Arbitrator. Following are some leading arbitration institutions in India:

1. **The Delhi International Arbitration Centre** (hereinafter referred to as “DAC”) - Part III-A of the DAC (Arbitration Proceedings) Rules provide for Emergency Arbitrator. Section 18A lays down the appointment procedure, powers and other rules relating to emergency arbitrator. The emergency arbitrator shall be appointed within two days of receiving the request and the order shall be passed within seven business days of the appointment of the emergency arbitrator.

2. **NaniPalkhivala Arbitration Centre** (hereinafter referred to as “NPAC”) - Rule 20-A of rules of arbitration for NPAC provide for the rules relating to emergency arbitrator. The emergency arbitrator shall be appointed within one business day of the receipt of the application by the registrar. The decision of the Emergency Arbitrator may be in the form of an award or an order and must furnish reasons for his decision.

3. **Mumbai Centre for International Arbitration** (hereinafter referred to as “MCIA”) - Rule 14 of the MCIA Rules provide for Emergency Arbitrator. An application has to be made to the registrar for the appointment of an emergency arbitrator which shall be accompanied with certain documents. The Emergency Arbitrator shall be appointed within 1 business day of the receipt of application by the registrar. The emergency relief sought shall be

---

287 Rule 20-A (ii), Rules of Arbitration for NPAC.
288 Rule 20-A (vi), Rules of Arbitration for NPAC.
289 Rule 14.1, MCIA Rules.
290 Rule 14.2, MCIA Rules.
decided within 14 days of Emergency Arbitrator’s appointment (time can be extended in exceptional circumstances). \(^{291}\) The decision can be in the form of an order or an award. \(^{292}\) In order to make the process cost effective, the Emergency Arbitrator’s fee is capped at 20% of the sole arbitrator’s maximum fees but it cannot be less than ₹300,000.

4. **International Commercial Arbitration** (hereinafter referred to as “ICA”)– Rule 33 of the ICA Rule of International Commercial Arbitration (effective from 1\(^{st}\) April, 2016) provide for Emergency Arbitration. Rules provide for immediate appointment of Emergency Arbitrator and in no case later than seven days from the date of receipt of fees by the registrar. \(^{293}\) It is the duty of the registrar to make sure that the decision is made within, thirty days from the date of the appointment of the Emergency Arbitrator. \(^{294}\) The decision may be in the form of an order or an award and shall be binding on the parties. \(^{295}\)

IV. **WHAT PLAGUES EMERGENCY ARBITRATION ?**

1. **Institutions require mandatory notice to be served on another party for the institutions of EA proceedings**– Some arbitral institutions require notice to be served on a third party and do not entertain ex-party proceedings. This, in turn, would provide enough time to a third party to prepare to get away with the liability, if any, of an Emergency Arbitrator’s decision. As the name suggests, EA would be of no use if it cannot meet the Emergency.

2. **Limited powers to make orders against third party** – Emergency Arbitrator’s power to grant interim relief is as limited as that of powers of an Arbitrator. Therefore, he has limited or no powers to grant orders against a third party, in which case, remedy can be sought by way of courts.

3. **Enforcement Issue.**

4. **Uncertainty of status of emergency arbitrator.**

5. **Not a final award.**

The last three issues being interconnected and of very high importance are discussed together at length. The decisions given by an Emergency Arbitrator can be in the form of an order or an award. ICC provides for the decision to be in the form of an award. \(^{296}\) Whereas, institutions like LCIA and SIAC provide that the decision of an emergency arbitration can be in the form of an order or an award \(^{297}\). Indian institutions like NPAC

\(^{291}\) Rule 14.6, MCIA Rules.
\(^{292}\) Rule 14.7, MCIA Rules.
\(^{293}\) Rule 33.4, ICA Rule of International Commercial Arbitration.
\(^{294}\) Rule 33.6, ICA Rule of International Commercial Arbitration.
\(^{295}\) Rule 33.9, ICA Rule of International Commercial Arbitration.

\(^{296}\) Article 29.2, ICC Rules of Arbitration.
\(^{297}\) Article 9.8 of LCIA Arbitration Rules (2014); Schedule 1 of SIAC Rules 2016.
and MCIA provide that the decision can be in the form of an order or an award.298

Global Position
SIAC Rules, 2010 introduced the provision for Emergency Arbitrator and empowered it to provide interim relief. However, the Singapore International Arbitration Act did not recognize Emergency Arbitrator within the definition of Arbitral Tribunal. This caused a great deal of confusion with regard to the enforcement of the decision of an Emergency Arbitrator. However Singapore amended its law so as to include Emergency Arbitrator within the definition of Arbitral Institution which has put a rest on the controversy and thereby, recognizing the awards passed by an emergency arbitrator and making them enforceable in Singapore. Hong Kong also introduced an amendment in Arbitration Ordinance to make Emergency Awards enforceable.299

Position in India
Indian law has not amended the definition of Arbitral Tribunal so as to include Emergency Arbitrator within its scope in spite of the fact that the Law Commission in its 246th report recommended to do so. This has left us in the same position as that of Singapore before the amended act.

There are not many judgements by the Indian Courts on Emergency arbitration. Delhi High Court came across this issue in Raffles Design International India Private Limited & Ors. v. Educomp300, where the laws of Singapore governed the arbitration agreement. An interim award was passed by an Emergency Arbitrator. In order to enforce the same in India, an application under Section 9 was filed. The Court mentioned Article 17H of the UNCITRAL Model Law which provides for enforcement of an interim measure and observed the the Indian Arbitration Act does not have an provision for the enforcement of interim orders granted by an Arbitral Tribunal situated outside India. And thus, the such emergency awards are not enforceable under the Act, however, the remedy can be availed by filing a suit.

In another case before the Bombay High Court, titled HSBC PI Holdings (Mauritius) Ltd v. Avitel Post Studioz Ltd & Ors301, in the proceedings under Section 9 of the Indian Arbitration Act, the Court gave the relief similar to what the Emergency Arbitrator had given.

It is pertinent to mention that the approach taken by the courts in these cases is different than the one taken by the author, to be discussed hereinafter.Although, these judgements reinforce the Judiciary’s support towards arbitration, the judgements do not offer much help to the question of enforcement and the confusion does not settle.

IV.ILegal Status of an Emergency Arbitrator.

It is important to find out the legal status of an emergency arbitrator. We need to see

---

300 (2016) 234 DLT 349
301 2014 SCC OnLine Bom 929.
whether emergency arbitrator is part of the arbitral tribunal or a different concept altogether. This question is of practical important since if it is part of the arbitral tribunal then it can be governed by the existing laws in India, otherwise not.

There are certain characteristics of emergency arbitrator like it cannot give a decision on the merits of the dispute but it can pass an interim order/award on an issue which needs to be expeditiously dealt with. Secondly, an award passed by the emergency arbitrator is not a final award but an interim relief pending the constitution of the main arbitral tribunal. However, generally arbitral tribunal are empowered to give a decision on the merits of the dispute which can be final in nature. Prima facie, it cannot be said that the features of an emergency arbitrator are different than of a arbitral tribunal. Generally accepted definition of arbitration provides that arbitration is a process by which parties, consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to be heard. **302** This definition is broad enough to include emergency arbitration within the definition of arbitration.

The broad characteristics of “arbitration” may be summed up as following –

- Arbitration is a voluntary process. The parties to the dispute by an agreement oral or written refer the dispute to arbitration.

- Arbitration enables the parties to tailor the procedure as per their own requirements. They are at the liberty to choose the place where and the time at which the proceedings shall take place. Besides, the parties can also choose the arbitrator.

- Arbitration, usually, does not take place publicly and is a private affair.

- There Is no procedural or evidentiary laws which govern the arbitration process.

- Arbitration awards are binding in nature. Awards can only be challenged on limited grounds.

On a bare perusal of the characteristics it can be safely said that Emergency Arbitration shares the same characteristics of that of any other arbitration. The process is voluntary since parties are subjecting themselves to the rules of a particular institution voluntarily, it is private and confidential process, not governed by any laws and the procedure can be tailor made by the parties.

On the surface we can thus say that the Emergency Arbitrator is nothing but a part and extension of the main Arbitral Tribunal.

**IV.II Pre-Arbitral Referee**

Pre- Arbitral referee procedure which shared characteristics with an emergency arbitration was introduced by the ICC in the 1990s. Paris Court of Appeal in Congo case discussed the status of an award passed by pre- arbitral referee. It was held by the Court that pre-arbitral referee procedure is not

---

arbitration in literal sense but a contractual arrangement between the parties and the decision passed by it cannot be said to be an award under New York Convention.\(^{303}\)

V. TRACING EMERGENCY ARBITRATION IN THE INDIAN ARBITRATION LAW

The concept of emergency arbitration is not explicitly provided in the Indian Arbitration and Conciliation Act, 1996 (the Act). The question arises if the same can be traced in the Act impliedly and in order to do so we must have a look at the definitions provided in the Act.

The term Arbitration is defined as “arbitration means any arbitration whether or not administered by permanent arbitral institution.”\(^{304}\) Arbitral Tribunal is defined as “arbitral tribunal” means a sole arbitrator or a panel of arbitrators.\(^{305}\) Arbitral Awards is defined as “arbitral award” includes an, interim award.\(^{306}\) International Commercial Arbitration is defined as “international commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and…\(^{307}\)

None of these definitions are comprehensive enough to render any help. The Halsbury Law of England defines arbitration as - “Arbitration is a process used by agreement of the parties to resolve disputes. In arbitration, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a national court of law that would have jurisdiction but for the agreement of the parties to exclude it. The decision of the arbitral tribunal is usually called an award.\(^{308}\)

It is a well accepted rule interpretation of statutes that where the language of the statute is plain and simple, the words must be given their ordinary, literal and grammatical meaning. However, in the recent times, the courts have departed from the literal rule of interpretation. In fact, the Supreme Court of Canada took the view that the modern approach to statutory interpretation involves a “textual, contextual and purposive analysis of the statute or the provision in question.\(^{309}\) Indian Supreme Court too has provided that interpretation should be preferred which best harmonises with the object of the statute.\(^{310}\) In the same way, in the author’s view, while interpreting the definition of arbitral tribunal u/s 2(d) of the Act, Emergency Arbitrator should be included within it to bring about a harmony with the object the Act.

The definition of Arbitral Tribunal provided under Section 2(d) of the Act provides that

---


\(^{304}\) Section 2(1)(a), The Indian Arbitration and Conciliation Act, 1996.

\(^{305}\) Section 2(1)(d), The Indian Arbitration and Conciliation Act, 1996.

\(^{306}\) Section 2(1)(c), The Indian Arbitration and Conciliation Act, 1996.

\(^{307}\) Section 2(1)(f), The Indian Arbitration and Conciliation Act, 1996.


\(^{309}\) Re Rizzo&Rizzo Shoes Ltd., 1998 1 S.C.R. 27

\(^{310}\) New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar, AIR 1963 SC 1207
an Emergency Arbitrator means a sole arbitrator or a panel of arbitrators. Thus, what needs to be seen is whether Emergency Arbitrator is an Arbitrator or not and whether the process of Emergency Arbitration is arbitration or not. Once again, the definition of Arbitration in the Act does not really defines arbitration but it only ascertains certain meaning to it so as to include ad hoc as well as institutional arbitration.

In such a case we need to proceed with the general definition of both Arbitration and Arbitral Tribunal. We need to employ purposive interpretation to reach to conclusion whether, in fact, Section 2(d) does or does not include emergency arbitration.

V.1 Purposive interpretation of the Act

The statutory interpretation of a provision is never static but always dynamic. Though the, literal rule of interpretation, till some time ago, was treated as the golden rule, it is the doctrine of purposive interpretation which is predominant, particularly in those cases where literal interpretation may not serve the purpose or lead to absurdity. Even the Mimansa Rules of Interpretation, which are India’s traditional rules of interpretation, provides for possibility of devision from the literal interpretation in exceptional cases. Meaning of a word depends upon the object it seeks to achieve. In case there exists two or more meanings to a word, the one which gives effect to the purpose of the statute must be given effect to.

Thus, in order to ascertain whether the definition of Arbitral Tribunal is wide enough to include Emergency Arbitration or not, in the author’s view, we need to resort to purposive interpretation since literal interpretation of the statute would not serve the purpose of the statute.

Then what is the purpose of the Act? In order to find the purpose of the statute we need to see the intrinsic sources. A perusal of the preamble to the Indian Arbitration and Conciliation Act, 1996 would make it clear that the purpose for enacting the the Act was to provide for a unified law on Arbitration and thus, the law was inspired and adopted from UNCITRAL Model law on International Commercial Arbitration. Arbitration is dispute resolution mechanism which is not confined to or limited by territorial limits. The success of Arbitration is dependent on the very fact that there is uniformity with the laws of other countries. If this were not the case, a person can easily circumvent his liability in one jurisdiction by not complying with an award passed by an arbitrator in another jurisdiction. This is also true for avoiding other complications of various such as fate of an interim award/order in another jurisdiction or, perhaps, other procedural complications.

312 Mimansa Rules of interpretation, Markandey Katju.
315 Preamble, Indian Arbitration and Conciliation Act, 1996.
If uniformity of the law was the purpose behind enacting the Act, it becomes very much necessary to be in tune with the present developments in the field of ADR. After all, ADR is a dynamic process and not static. It is a relatively new field of law which is, with the advent of globalisation, changing its course. It, therefore, becomes important to help it find the ocean it seeks than confine it to ponds.

Now the law in Singapore explicitly provides that the definition Arbitral Tribunal includes Emergency Arbitrator. It recognises that Emergency Arbitrator is part of the Arbitration Tribunal. Thus, this makes enforcement of the award by a domestic emergency arbitrator in lines with any other award. Therefore, having employed purposive construction on the same, we must interpret Arbitral Tribunal incurring in Section 2 of the Act to include Emergency Arbitrator within it.

Interpretation of the Section in this way does not interfere with the provisions of the rest of the Act. In fact, the definition of Arbitral Award, unlike the Singapore Arbitration Act, does not provide that the Award must be a decision on the substance of the dispute. It only provides that Award includes an interim Award. Therefore, a decision on a preliminary issue to prevent dissipation of assets or otherwise by an Emergency Arbitrator is an Award under Section (1) of the Act.

The arbitration proceedings conducted by an Emergency Arbitration can be said to be arbitration in the accepted sense of the word. Such interpretation is also backed by the definition of arbitration occurring in Section 2(1)(a) of the Act. Arbitration is defined in wide terms in that section.

Thus, the upshot of the preceding discussion is that Emergency Arbitrator has a place in the Indian Arbitration and Conciliation Act, 1996. The enforcement of the same can be like any other interim relief by an Arbitral Tribunal. This would make the award by an EA to be deemed to be an order of the Court whose non-compliance can lead to Contempt of Court Act. However in case of a foreign emergency award, enforcement in India will have to be seen on a different footing.

V.II Enforcement of Foreign Emergency Award

Foreign awards come within the purview of Convention on the Recognition and Enforcement of Foreign Arbitral Awards also known as the New York Convention(hereinafter referred to as“the Convention”) provided that both the countries, one in which the award is passed and the other in which it is sought to be enforced, are party to the Convention. Since the enforcement of foreign awards is governed by New York Convention, it has to

---

317 Section 2(1), International Arbitration Act.
318 Id. At page 12.
319 Supra note 31 at page 8.
320 Supra note29 at page 7.
321 Section 17, Indian Arbitration and Conciliation Act, 1996.
322 Ibid.
been seen in its context. There appears to be four different scenarios, they are-

<table>
<thead>
<tr>
<th>1. Award passed in India</th>
<th>1.1 Enforceable in a country party to the Convention.</th>
<th>1.2 Enforceable in a country not party to the Convention.</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Award enforceable in India</td>
<td>2.1 Passed in a country party to the Convention.</td>
<td>2.2 Passed in a country not party to the Convention.</td>
</tr>
</tbody>
</table>

In situation 2.2, the enforceability would be governed by the national laws of India. Thus, the above-mentioned discussion would come into play to determine the enforceability. In situation 1.2, the enforceability of the award would depend upon the national laws of the foreign country. This would, in turn, mean that if the national laws of the country recognises emergency tribunal and the enforcement of emergency award, it would be enforceable in that country. It is pertinent to mention that since most of the countries have adopted Model Law 2006, enforceability can be on the same lines. (as discussed above).

For situation 1.1 and 2.1, it has to be seen in the light of the Convention, that is to say the status of Emergency Arbitration under the Convention.

V. II. New York Convention and Emergency Awards

Under the New York Convention, the definition of Arbitral Tribunal is not provided for. The two basic requirements, need to be mentioned, for the enforcement of awards under the New York Convention are 1. Awards must be final and binding.325

The New York Convention specifies the word ‘award’, rather than order or direction. Furthermore, the award must be final and binding. There are arbitral tribunals which provide that the decision of the Emergency Arbitrator can be in the form of an award, order or direction326 and the EA is only entitled to give interim relief pending the constitution of the Arbitral Tribunal.

District Court of New York was seized with a matter involving award by an EA, in the case of Yahoo! Inc v Microsoft Corporation327. The Court held that the decision given by the Emergency Arbitrator was sufficiently final, since to reach at a decision the emergency arbitrator has to through the merits of the case. This would mean that the decision is final and binding as much as the interim relief by the EA is concerned. This precedent is helpful for the enforcement of Emergency Arbitrator's decision under the New York Convention.

V. CONCLUSION


325 Article V, item 2, ‘e’, New York Convention

326 ICC Rules provide that the decision can only be in the form of an order, rules of SIAC and LCIA provide that the decision can be in the form of an order or an award.

327 Yahoo! Inc v Microsoft Corporation, United States District Court, Southern District of New York, 13 CV 7237, October 21, 2013
At present, parties shy away from choosing EA and are opting to go to the courts. Those who choose EA comply with the orders not because of fear of any laws but not to invite the irk of the subsequent Arbitral Tribunal which shall deal with the matter on its merits.

Even though the author argues that EA can be traced under the Act by way of purposive interpretation, the best way forward is still an amendment in the Act as recommended by the Law Commission. It is surprising that Emergency Arbitrator finds no mention in the Arbitration and Conciliation (Amendment) Bill, 2018. An amendment in the Act would make the enforceability of an award by an Emergency Arbitration clear and certain and this would, in turn, instil confidence in the parties to opt for this provision, a step forward toward making India a hub of international arbitration. Since the other alternative option, to visit the courts under section 9 of the Act, is not a road which parties are willing to take. This road is paved with delays since the courts are already over-burdened with litigation.

The avant-grande by Singapore, amending legislation to give a statutory recognition to Emergency Arbitrator, is soon becoming the trend with countries like Hong Kong joining the bandwagon. The push for making India an international arbitration hub requires India to adapt to changes in this field, offering the best practices. This is important since India it will be a huge step forward for inviting investments in India. This would further have a progressive effect on institutional arbitration in India, which needs to be popularised and aligned with international standards.

On a global stage, it is high time to work on a Convention for the enforcement of interim awards, orders, directions including decision of an Emergency Arbitrator, which can help member countries to achieve uniformity, since uniformity is a sine quo-non for the success of international arbitration as a dispute settlement mechanism.

329 Report no. 246, Amendments to the Arbitration and Conciliation Act, 1996, Law Commission of India
IMPACT OF ANTI-DUMPING DUTY ON SOLAR ENERGY INDUSTRY

By Kalyani Karnad & Archita Rao
From NMIMS Kirit P. Mehta School of Law, Mumbai

Abstract
International trade has seen two contrasting approaches – free trade and protectionism. Dumping is a common form of price discrimination while anti-dumping is the protection provided to the importing country against dumping by the exporters. The Indian solar energy industry recently saw the initiation of anti-dumping investigations against the dumping of solar cells and modules by China, Taiwan and Malaysia. The National Solar Mission has set a target of 100GW solar energy by 2022. Imposition of anti-dumping duties could jeopardise the achievement of this ambitious target. While the solar product manufacturers would get a much wanted relief, the solar energy producers would be impacted by the higher prices of the solar products, resulting in higher project costs and tariffs, and a question mark on the viability of the project. This research paper studies the impact that anti-dumping duties, if imposed, would have on the solar energy industry. It analyses the current scenario and explores whether a solution exists which would address the issues of the solar energy producers as well as the solar product manufacturers.

Keywords: Dumping, GATT, export price, WTO, anti-dumping duties, discriminatory pricing, solar energy industry, viability, targets, efficiency

INTRODUCTION

International trade is the lifeline for all countries and consumers in today’s world. It allows consumers to avail of goods and services which are not available or those which cannot be efficiently produced in their own country. There are two contrasting views regarding international trade depending on the level of control placed on the trade. Free trade is a laissez-faire approach with no restrictions on trade. Nothing is required to be done to protect or promote trade, as the market forces will do so automatically. On the other hand, protectionism believes that international trade needs to be regulated to ensure that the markets function properly. Protectionism exists in the form of tariffs, subsidies and quotas.

Dumping is the most common form of price discrimination. It is defined as a situation where the price of a product when sold in the importing country is less than the price of the same product in the market of the exporting country. Dumping according to The General Agreement on Tariffs and Trade (GATT) is “The sale of products for export at a price less than the ‘normal value’ where normal value means roughly the price for which those same products are sold on the ‘home’ or exporting market.” The normal value is the comparable price at which the goods are sold in the domestic market of the exporting country. If the normal value cannot be determined through domestic

sales, the Agreement provides for two alternate methods:
- Comparable representative export price to an appropriate third country.
- Cost of production in the country of origin with reasonable addition for administrative, selling and general costs and for profits.

The export price of the goods imported into India is the price which is paid or payable for the goods by the first independent buyer.335

The concept of dumping cannot be actually considered as illegal or unethical. Producers may sell their goods and services in different markets at different rates depending on the influence of the market forces, which vary from time to time. Adam Smith had quoted: “If a foreign country can supply us with commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage.” 336 However, dumping is considered an unfair trade practice as it can cause or threaten to cause material injury to the importing markets. There are different types of dumping. Sporadic dumping is an occasional sale of commodity below cost in order to offload any surplus material in the international market. Predatory dumping is the sale of goods at a very low cost in order to drive the producers of the importing market out of business, after which prices are raised to take advantage of its monopoly situation. Persistent dumping is the tendency of a domestic monopolist to continuously sell goods at a higher price in the domestic market as compared to international market, in order to compete with the foreign producers.

Anti-dumping is a protective mechanism adopted by importing countries against dumping by the exporting countries. It acts as a protection as well as a counter against unfair competition. The World Trade Organisation (WTO) discourages protectionist trade policies. However, it allows anti-dumping measures to provide relief to importing countries against dumping by foreign countries. The anti-dumping provisions of WTO are available in GATT Article VI and the Uruguay Round Agreement on Anti-dumping, formally the Agreement on Implementation of Article VI.337 The Agreement contains detailed and specific provisions related to the process and methods for establishing the existence of dumping and injury to the domestic industry.

The Indian legislation is contained in the Customs Tariff Act, 1975 in Section 9A and 9B as amended in 1995. Further regulations are provided in the Anti-Dumping Rules [Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995]. These two regulations are compliant with the WTO Agreement and contain the entire framework required on matters related to dumping such as substantive rules, and rules relating to

337 Supra note 3
procedures, administration, practice and regulatory mechanism. The Ministry of Commerce is the Designated Authority for conducting investigations into Anti-dumping issues. The Ministry of Finance is responsible for imposition and collection of duties imposed or recommended by the Adjudicating authority.\(^{338}\)

The Directorate General of Anti-Dumping and Allied Duties (DGAD) is responsible for administering the anti-dumping, anti-subsidies and countervailing measures in India. It functions under the Ministry of Commerce and is headed by the “Designated Authority”, a quasi-judicial authority under the Customs Act 1962, appointed by the Central Government. \(^{339}\) The Designated Authority is of the level of Additional Secretary and is advised on costing issues by Principal Adviser (Cost) and one Joint Secretary. Additionally there are 15 investigating and costing officers with different levels of experience to conduct investigations. The DGAD is the single body for initiating required action for investigations and subsequent imposition of anti-dumping duties (ADD). Based on the recommendations of the DGAD, Ministry of Commerce, the duty is imposed by the Ministry of Finance. The law has a provision for appeal against the anti-dumping order before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), which is a judicial tribunal. The CESTAT reviews the final recommendations and measures and is independent of the administrative authorities. \(^{340}\) The Tribunal is consistent with the provisions of WTO which requires independent tribunals for the appeals against final recommendations and reviews. The appeal to CESTAT should be filed within 90 days.

Between 1992 and October 31, 2016, anti-dumping investigations were initiated into 352 products. The countries which figure prominently in the investigations are China, European Union, Taiwan, Korea, Japan, USA, Singapore, Russia and others. Anti-dumping duties levied on major product categories include chemicals and petrochemicals, pharmaceuticals, fibres/yarns, steel and other metals and consumer goods. \(^{341}\)

**ANTI-DUMPING DUTY AND THE SOLAR ENERGY INDUSTRY**

- **The Solar Energy Industry**

  India is a relatively new entrant in its efforts to harness the power of the sun as a sustainable source of energy. The National Solar Mission was launched just seven years ago, in 2010. It set a target of adding 20 GW of solar energy by 2022. In 2015, the Mission increased the target five-fold to 100 GW. This target is both ambitious as well as modest, taking into account India’s projected rise in energy demand. Energy consumption has increased two fold since

---

\(^{338}\) *Supra* note 3

\(^{339}\) Aradhna Aggarwal, *Anti-Dumping Law and Practice: An Indian Perspective*, INDIAN COUNCIL FOR RESEARCH ON INTERNATIONAL ECONOMIC RELATIONS (APRIL, 2002)

\(^{340}\) *Supra* note 7


http://commerce.gov.in/writereaddata/uploadedfile/MOC_636281140249481285_annual_report_16_17_en_g.pdf
2000, even though 240 million still do not have access to electricity.\textsuperscript{342}

Renewable energy accounts for more than 18\% of the total installed capacity, out of which the share of solar energy is nearly 4.5\%. Within renewable energy, solar accounts for almost 25\% of the total installed capacity. According to data published by the Central Electricity Authority, solar power accounted for 13.5 billion units (BU) during financial year 2016-17, as against 7.4 BU during the previous financial year.\textsuperscript{343} In spite of the impressive growth in the industry, the solar power generated accounted for only 1.09\% of the total power generated in the country, while within the renewable energy sources it came to 16.5\%. Over 5.5 GW of solar has been installed year-to-date, taking the total cumulative installations to over 15 GW in August 2017. It is expected that around 10 GW of solar will be installed in calendar year 2017 while another 8 GW is expected in 2018. The solar project pipeline in India is around 13 GW.\textsuperscript{344}

The indigenous manufacturing capacity is around 3 GW for solar PV cells and around 7-8 GW for solar PV modules. If we take into consideration the current solar energy capacity, India will need around 15-20 GW every year for the next five years in order to achieve the target of 100 GW by 2022.\textsuperscript{345} The domestic manufacturing setup is not at all equipped in terms of capacity to cater to the targets, particularly the solar cells. It is under this backdrop that that investigation has been initiated to levy anti-dumping duty (ADD) on imports of solar cells and modules.

- **Anti-Dumping Duty on Solar Product Imports – Initiation of Investigation**

The Indian Solar Manufactures Association on behalf of various Indian manufacturers filed an application before the DGAD for initiating anti-dumping investigation and imposition of anti-dumping duties on import of “Solar cells whether or not assembled partially or fully in Modules or Panels or on glass or some other substrates” which originate in or are exported from China PR, Taiwan and Malaysia.\textsuperscript{346} The petitioners claimed prima facie evidence existed of dumping of these goods from the originating countries and its linkage to the injury being caused to the domestic industry.


\textsuperscript{344}Supra note 11


The petitioners claimed that there was no difference between the goods imported from the originating countries and those manufactured in India – they are comparable and should be treated as “like articles”. In the absence of reliable information on the domestic prices of the goods in the originating countries, the Normal values have been estimated taking into account international prices of raw material, production costs and conversion costs of the domestic industry with reasonable adjustment on account of sales, general and administrative expenses and reasonable profit. Export prices for these goods have been claimed on the basis of Impex Statistic Services data. The normal value on comparison with the export prices at factory level clearly indicates that the goods are being dumped in the Indian market by the originating countries. Evidence has also been submitted regarding the injury to the solar manufacturing industry due to the increased volume of dumped imports, the production and consumption in India of the locally manufactured products, price suppression and price underselling and its impact on profits, return on capital employed and cash flow.

The period of investigation is for a 15 month time frame from April 2016 till June 2017. For analysis of injury to the manufacturers, a period of 3 years from April 2013 till March 2016 and the period of investigation have been considered. DGAD officially accepted the petition in July 2017 and initiated the investigation. The preliminary findings can take up to 12 months. Normally, DGAD does not initiate an investigation unless it is sure about the validity of the case and therefore there are strong chances that it will recommend ADD on the solar imports. Further, DGAD has not received any objections or further petitions so far from either developers or manufacturers, which is resulting in a strong push towards imposing ADD. Another important point is whether the Ministry of Finance would accept the ADD if they are recommended by the Ministry of Commerce, as they had refused to impose ADD in a previous case in 2014.

The US and India have agreed that the last day for the domestic content requirement (DCR) category will be December 14, 2017. The ending of DCR is one of the drivers of pushing the anti-dumping case. This is because domestic manufacturers feel that they do not have any other way to compete with Chinese manufacturers.

- **Analysis**

For the first time in Quarter 2 of 2017, solar tariffs breached the Rs.2.50 per unit rate, making it cheaper than even coal in some cases. Solar tariff of Rs.2.97 per unit was arrived at the Rewa Ultra Mega Solar Park and an even lower tariff of Rs.2.44 per unit at the Bhadla Phase III solar auctions. These rates were arrived at on assumptions that the solar product prices would drop further by 10-15% to around $0.26-$0.28 per watt. Their confidence was based on a decline in prices by a steep 26% in 2016 alone. For a bid of Rs.2.44 per unit, the internal rate of return (IRR) is already low at around 7%. Every 10% increase in the prices

---

347 *Id. note 14*

348 *Supra* note 11

349 Ksenia Kondratieva, *Anti-dumping duty on solar cells poses risk for recently bid projects*, THE HINDU - BUSINESS LINE (Mumbai Edition), September 13, 2017
of the solar modules will result in the IRR falling by around 0.7%.\textsuperscript{350}

Analysts have already started questioning viability of projects which have been awarded at tariffs below Rs.3.5 per unit. This is based on the rising prices of solar modules sourced from China. The module prices have increased to $0.35-$0.36 per watt and more, having been influenced by various factors. These factors include a high domestic demand for the solar panels in China, coupled with a decline in the production of polysilicon.\textsuperscript{351} Further, the US recently imposed anti-dumping tariffs on import of solar panels from China. Fearing the increased tariffs, US solar service providers started stocking up on the panels. However, it is generally accepted by industry experts that this is a short term phenomena and prices of the Chinese solar products are expected to stabilise from the beginning of next year. The recently bid projects are not expected to be impacted by the current increase in prices, given that they have long execution deadlines of around 18 months and procurement is expected to start only in the mid of next year. However, it is highly unlikely that the prices will fall to $0.26 per watt as anticipated by the lowest bidder of Bhadla solar park auction.

The prospect of imposition of ADD on solar cells and modules has made the solar industry jittery. Having seen bids as low as Rs.2.44 per unit, the DISCOMs are trying to target this rate and negotiate better deals, while module prices are on the rise. The low bids during the reverse auctions were entirely dependent on the cheaper Chinese modules. The solar auction activity has literally come to a standstill, with the August 2017 auction activity falling by 95% to just 76 MW, compared to the activity in June. Without clarity from the regulatory authorities, the industry finds itself in a state of confusion. Any delay in the decision regarding imposing ADD would increase the uncertainty in the industry. If a duty is imposed, there is a doubt whether the DISCOMs would be ready to pay more or they would shift to other sources till such time solar power becomes affordable.\textsuperscript{352}

Imposing an ADD of $0.12 - $0.15 per watt will result in an increase in the solar power tariff by Rs.0.80 to Rs.1.30 per unit, thereby taking the tariff to Rs.3.50 – Rs.4.00 per unit. This would clearly make it unviable for the DISCOMs, who would be unwilling to buy solar electricity for tariff above Rs.3 per unit. If tariffs increase to this level, one can expect only 30 GW of solar plants to be set up by 2022.

The anti-dumping investigation therefore needs some serious thought, considering the 100 GW target. Prices of solar cell and modules have been decreasing the world over, while tariffs have also reduced due to increased efficiency. While dumping of

\textsuperscript{350} Supra note 17


solar products has impacted the solar manufacturing industry, if we take a hard look we observe that in spite of the absence of ADD, the industry grew three times between 2014 and 2017, and the capacity utilisation of the plants increased from 28% to 78% during the same period. Solar power plants using domestic solar products have been subsidised by the Government through Viability Gap Funding (VGF). At such solar plants, a subsidy of Rs.1.75 crore per MW is offered, with the aim of keeping the tariffs competitive. The size and growth of the Indian solar power market is directly related to the tariffs. Any increase in tariffs will impact growth and shrink the size of the market, which is inevitable if ADD is imposed. The domestic manufacturers will then have to bear the brunt of their capacities remaining unutilised. Additionally, in order to ensure that tariffs are competitive, the Government will have to increase VGF.

The Government has initiated a few steps to support the industry. In order to revive the domestic solar manufacturing industry, the Ministry of New & Renewable Energy (MNRE) proposed the development of 7.5 GW of solar using domestically manufactured solar cells, as part of its CPSU program. The Ministry of Power has issued guidelines for large scale projects with a capacity of 5 MW or more. The guidelines include payment guarantees, longer construction timelines, deemed generation benefits and provision for an intermediary procurer. It also offers clarity on the change in law clause. These guidelines aim to address the challenges faced by many large-scale project developers.

The DGAD had sought the opinion of the Ministry with regard to the anti-dumping petition by the Indian Solar Manufacturers Association, considering that over 90% of the solar products used in the solar projects are imported from the three countries – China, Taiwan and Malaysia. MNRE has replied in their memorandum that the cost of the solar products imported from the three countries was indeed “artificially low”. However, imposing ADD would seriously impact India’s ambitious solar energy programme. Currently, the cost of a solar PV plant is Rs.3.5-4 crore per MW. A 10% add-on per watt would increase the project cost by about 15-20%. The Ministry has advised that if at all ADD has to be imposed, it should be moderate and not exceed $0.07 per watt, so that project costs would not increase beyond acceptable levels. MNRE has also pointed out that for projects which are under construction, a sudden imposition of ADD would result in increased cost, legal complications and strain on their viability. It also advised that projects where power purchase agreements (PPAs) have been signed or projects where the bidding process has been completed, should be exempted from the anti-dumping orders.

MNRE acknowledged that the domestic solar manufacturing industry was inadequate to achieve the targets. However, it would like to support the industry by imposing a reasonable ADD and introducing a subsidy. The proceeds from the ADD should be transferred to MNRE by The Finance Ministry. MNRE will further support the

353 Supra note 20

domestic manufacturers by providing a production subsidy which would be WTO compliant.

CONCLUSION
Dumping is actually not an unfair activity. People in poor countries benefit from the lower prices offered and the availability of a variety of new goods. Anti-dumping duties (ADD) are discriminatory in nature and can be misused by the domestic industry to target specific foreign companies whom they consider as rivals. Consumers ultimately suffer as they end up bearing the cost of duty. There are also chances of the domestic producers increasing their prices in order to increase their margins. If the ADD is imposed on an intermediate product, it would adversely impact the prices of the finished products.

Imposing ADD benefits only the domestic producers. While taking a decision, it would be prudent to evaluate whether the increase in profits of the domestic producers is sufficiently large enough to offset the decrease in benefits to the consumers in the country. It has also been argued by some economists that some countries manipulate the anti-dumping laws for economic and political advantages and thereby pose a threat to the free market access that is propagated by WTO/GATT. However, anti-dumping measures do work in situations where exporting countries adopt aggressive dumping in order to gain a significant market share in the importing countries. The ADD in such cases creates a level playing field for the domestic producers and the foreign companies.

In relation to the solar energy industry, the imposition of ADD can be like a double-edged sword. Low solar power tariffs in the range of Rs.2-2.50 per unit can bring about large economic gains to the country. Industries such as steel, cement and aluminium can become very competitive if they have access to low cost solar energy. Private consumption will also increase significantly from the current 60%, which will help to sustain a growth rate of over 7-8%. Electricity demand is increasing at almost 5% every year. At this rate, power generation needs to grow four times by 2040 in order to catch up with the demand.

Imposing ADD on solar products can disrupt India’s significant growth in this sector. The target of 100 GW by 2022 could become a missed opportunity. Under such circumstances, the Government has to balance the interests of both – the solar product manufacturers and the solar power producers. Neither sector can be given preferential treatment over the other, if the target set by the National Solar Mission is to be achieved.

The recommendations given by MNRE to DGAD on the anti-dumping investigations are a step in the right direction. If at all ADD is to be imposed, it should be reasonable at around 7 cents per watt so that it would not adversely impact project costs, while providing some relief to the manufacturers. Moreover, projects with PPAs signed or bidding process completed should be exempted from ADD. The proceeds from the ADD should be transferred by the Finance Ministry to MNRE, which would help provide production subsidy to the manufacturers. Another option that could be considered is the Government recommending a minimum
import price for the solar products, as was done for the steel industry. This would help in protecting the solar manufacturing industry and at the same time help it to remain competitive and grow on its own efficiencies.

The above recommendations, if implemented would help balance the interests of both the solar product manufacturers and the solar energy producers. However, the fact remains that the manufacturing sector is just not adequate to meet the ambitious targets. The Government could explore building a solar product manufacturing ecosystem along with an efficient supply chain system. It could also review the benefits and subsidies that have been provided to the manufacturers as well as producers and make appropriate changes to provide the much required thrust to the industry.

India is on the threshold of a big transformation. There is a huge potential for tapping renewable energy in India and the future lies with solar. The suggestions given above would help in aiming for a timely achievement of the ambitious target.

References

BOOKS

JOURNALS

ONLINE ARTICLE

REPORTS

NEWSPAPER
solar-sector/2660 (last visited 15 November, 2017)


WEBSITES


PROMOTER

By Kanchan Kalwani
From Bharati Vidyapeeth, New Law College, Pune

ABSTRACT

When a person or partner or any registered company thinks of formation of company the very first thing that comes in the mind is that the person has idea of that particular business but the who takes the step forward and make the company into existence or establish a company from ground to existence level is called as promoter.

The promoter is the one who has the idea of business and to make that idea into reality he first of all try to discover all the opportunities into which that idea can fit in, secondly, the promoter do all the necessary investigations and verification on that particular business to avoid any obstacles, and if the promoter is satisfied with its work then, thirdly, the promoter will make the financial preparation like to check the profits, feasibility, flexibility and etc, fourthly, the promoter will incorporate the company through filing the certain documents with registrar of company the like Memorandum of Association, Articles of Association, List of directors, consent of the directors to take up and pay for their qualification shares, A declaration by an advocate or attorney or a Chartered Accountant or a Director or any Officer of the company that all the requirements of the Companies Act with regard to registration have been complied with. A company with a separate legal identity of its own is deemed to come into existence on the issue of this Certificate.

The promoter have certain liabilities and rights also and the liability of promoter commences as soon as they have set out for the promotion of company and it does not extend any of their earlier acts.

Hence, the promoter play a very pivotal role from the formation of the company until its finally incorporated and commences its business and has control over the affairs of the company, directly or indirectly.

INTRODUCTION

The purpose to which the company is formed is to earn profits and Before a company is formed, there must be some persons who have intention to form it and take necessary steps to bring into existence. The person who initiate the process of a company are called 'promoters’. They not only conceive the idea of forming the company but also take necessary steps to complete the formalities of incorporation and registration and also make arrangement for capital or assets with which the company is to be started.355

The main stages for formation of company is (a) Promotion of company (b) its incorporation by registration and (c) commencement of business. The person who assumes the primary responsibility of matters relating to formation and promotion of company are known as promoters of company.356

DEFINITIONS

355Dr. N.V. Paranjape,Chapter 4. Page - 84
356Dr. N.V. Paranjape,Chapter 4. Page - 84
According to Cockburn C.J “a promoter is one who undertakes to form a company with reference to a given project and set it going and who takes the necessary steps to accomplish that purpose”.

According to Bowen L.J., “ the term promoter is not a term of law, but of business, usually summarising in single word a number of business operations familiar to the commercial world by which a company is brought into existence.

The term promoter is not defined in law. The promoter is the one who builds the company from zero to upper level. All the important and basic business operations to bring the company into function is called promotion.

The first person of the company who has command over the company’s affair is called promoter. Hence the promoter is the one who commence the promotion.

According section 2(69) of Companies Act, 2013 “promoter” means a person—

(a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or

(b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or

(c) in accordance with whose advice, directions or instructions the Board of

Directors of the company is accustomed to act:

Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity

To sum up, a promoter is a person who undertakes a number of business operations to bring a company into existence and set it going.\(^{358}\)

Any person who arranges a director, places shares or negotiates preliminary agreement may be called as promoter but a person who merely acts in professional capacity on behalf of promoter such as a solicitor or a valuer who is paid by the promoter is not himself, a promoter. Again, a person does not become a promoter merely because he is a signatory to the memorandum of the company or acts as an agent, banker, or underwriter, in ordinary course of his business.\(^{359}\)

A person to be called as promoter is depends on the act he performs. A promoter can be a person or can be a registered company. A promoter can also be a person who does not play an salient role but have acted in accordance. A promoter can not be a person who is simply in professional or technical capacity such as accountant, or business consultant.

Kinds of Promoters\(^{360}\):

---

\(^{357}\)The Companies Act 2013

\(^{358}\)Dr. S.R Myneni, Chapter -2, Pg -88

\(^{359}\)Dr. N.V Paranjape, chapter -4, pg 85

\(^{360}\)http://www.yourarticlerepository.com/company/promoters-of-a-company-definitions-characteristics-and-other-details/42057
The promoters may be of the following types:

1. **Professional Promoters:** The term professional means someone who is well qualified or specialised in somethings he does. So the professional promoters are those who have specialised in promotion of company. When the business starts they basically handover the companies to shareholder. These are the persons who specialise in promotion of companies. They hand over the companies to shareholders when the business starts. There is dearth of professional promoters in India. The professional promoters play crucial role to make the community of business to greater extent. For example : In England, Issue Houses; In U.S.A., Investment Banks and in Germany, Joint Stock Banks have played the role of promoters very appreciably.

2. **Occasional Promoters:** They may be called as temporary promoters they do not do promotion work on regular basis but they do take interest in floating some companies. These promoters take interest in floating some companies. They are not in promotion work on a regular basis but take up the promotion of some company and then go to their earlier profession. For example, engineers, lawyers, etc. may float some companies.

3. **Financial Promoters:** Some financial institutions of financiers may take up the promotion of a company. They generally take up this work when financial environment is favourable at the time.

4. **Managing Agents as Promoters:** In India, Managing Agents played an important role in promoting new companies. These persons used to float new companies and then got their Managing Agency rights. Managing Agency system has since long been abolished in India.

**ROLE OR FUNCTIONS OF A PROMOTER**

A promoter plays a pivotal role in formation of company. A promoter is influential spirit behind the company. The functions of promoter are:

1. **Discovery of business opportunity:** in general sense when somebody has an idea to start a business the very first thing comes in their mind will be to grab all the possible opportunities and before starting the firm they will prepare or process their idea and properly investigate all the profits, losses, and flexibility, similarly goes with the promoter, it can be any discovery from use of new invention to supply of existing product.

2. **Assembling the ideas:** after all of the detailed investigation and verification of work when he seems satisfied he further take step forward to make the proposition of his work in reality by making all necessary arrangements of technical or marginal work, recruitment, and equipment etc

3. **Financing the Proposition:** The promoter, at this stage, has to prepare a plan setting out the mode of getting the necessary finance. He should not only think about the long term but also for short requirements of capital. He also should think about all the necessary proposition of kinds of securities and methodology to further raise the capital.
4. **Incorporation**\(^{361}\): he must arrange for the preparation and filing of the following documents with the registrar of joint stock company:

(a) Memorandum of association
(b) Articles of association
(c) List of directors
(d) consent of the directors to take up and pay for their qualification shares
(e) A declaration by an advocate or attorney or a Chartered Accountant or a Director or any Officer of the company that all the requirements of the Companies Act with regard to registration have been complied with. A company with a separate legal identity of its own is deemed to come into existence on the issue of this Certificate.

5. **Presentation of the Proposition**\(^{362}\): Finally, after making necessary arrangements and modes of raising finance, he gets the necessary documents such as Memorandum etc. printed, filed with the Registrar and then arranges for their publication. He should take the aid of legal experts in preparing the documents and should see that the documents are strictly in accordance with the provisions of the Companies Act.

**Characteristics of a Promoter:**
1. To set up a business promoter creates an idea.
2. He does investigate all the possible grounds of business from initial to last stage and thus safeguard the future prospectus of the company.
3. He brings together various persons who agree to associate with him and share the business responsibilities.
4. To company get incorporated he does all the paper or documentation work.
5. To maintain the company in the market he also raises the required finances.

**LEGAL STATUS OF A PROMOTER**

In Lydneyn & Wigpool Iron Ore Co. V. Blackbird\(^{363}\) it was held that A promoter is not an agent or trustee of the company, because the company before incorporation is a non-entity. But he is in the situation akin to that of agent or trustee of the company and his dealings with it must be open and fair. Hence he occupies the position of quasi trustee.

**FIDUCIARY POSITION OF A PROMOTER (Liability)**

In Erlanger v. New Sombrero Phosphate Co.\(^{364}\) The fiduciary position of a promoters is as follows:

1. **Not to make any profit at the expense of the company** : The promoter must not make, either directly or indirectly, any profit at the expense of the company which is being promoted. If any secret profit is made in violation of this rule, the company may, on discovering it, compel him to account for and surrender such profit.

2. **To give benefit of negotiations to the company** : the promoter must, when once he has begun the act in the promotion of a company give to the company the benefit...

---

\(^{361}\)Dr, S.R Myneni, Chapter -2 , pg - 89

\(^{362}\)https://accountlearning.com/promoter-meaning-functions-legal-position/

\(^{363}\)[(1866) 33 Ch.D 85]

\(^{364}\)[(1878) 3 App.Cases 1218]
of any negotiations or contracts into which he enters in respect of the company.

3. To make a full disclosure of interest or profit: section 26(1)(a)(xiv) of the Companies Act, 2013 now requires the promoters earnings to be disclosed in the prospectus itself. It is not the profit by the promoter which the law forbids, but the non-disclosure of it or the non-disclosure of interest in the transaction. If full disclosure is made, the profit is permissible.

The disclosure must be made to an independent Board of directors. Where there is no Board, disclosure must be made to the intended shareholders as a whole.

The measure of damages is the actual loss suffered by the company as a result of the transaction in question.

4. Not to make unfair of position: the promoter must not make an unfair or unreasonable use of his position and must take care to avoid anything which has the appearance of undue influence or fraud.

In Re, Leeds and Hanley Theatres of Varieties Ltd: it was held that promoters were liable in damages and the measure of damages was the profit made in the sale.

In Gluckstein v. Barnes: duties of the promoter: -

The promoter must see that the prospectus issued should contain the necessary particulars and does not contain any untrue or misleading statements or does not omit any material fact. If the promoter fails to perform this duty -

(a) Allotment of shares may be set aside in the case of a fraudulent or innocent misrepresentation
(b) He may be sued for damages
(c) He may be sued for compensation for misrepresentation
(d) He may be sued for damages by shareholders who have suffered by reason of his non-compliance with the statutory requirement as to the contents of the prospectus; and
(e) He may become liable to criminal proceedings.

In the English Case Ladgwell Mining Co. V. Brooks: The Court ruled that the liability of promoters commences as soon as they have set out for the promotion of the company and it does not extend to any of their earlier acts.

RIGHT OF PROMOTERS

1. He is entitled for reasonable remuneration for the services rendered. He can get commission from the vendor of property or from company itself for under-writing its shares.

2. He can recover the price of any property he has purchased for the company. But the transaction must be ratified by an

---

365[(1902) 2 Ch. 809]
366[(1900) 2 Ch. 809]
36735 Ch D 400.
368Dr. S.R Myneni, Chapter-2, pg - 93
independent Board of directors constituted after the incorporation of the company.

3. He can recover from the company preliminary expenses he has incurred prior to incorporation, provided there is an express or implied contract between himself and the company after incorporation.

A promoter has no right to get the compensation from the company for his services in promoting the company unless there is a contract to that effect. If there is no such contract, he is not entitled to get any compensation in respect of any payment made by him in connection with the formation of the company.

CONCLUSION

The role of promoter is vital as it covers wide variety like from formation of company to commencement of business. The promoter covers all the important functions to establish a company which includes money, Material required for project, share capital, and also covers all the preliminary investigations and verification before incorporation of company. Hence with the above points it can be concluded that promoter is the one who by his idea of business alone sets a step forward to make company into existence or can say by the idea of which company gets established.

*****
The primary objective behind reducing the Original Jurisdiction of the Supreme Court is to disturb the inequity and injustice. This paper’s basic premise is to attract the article, i.e., the parties should be Government of India and one or more states or between States. However, the Courts have shown a welcoming attitude towards the upcoming cases and as a result added up its burden. This activism in a way, also leads to the disturbing the Montesquieu’s doctrine of Separation of Powers between the three Organs of Government. Hence, there is a pressing need to reduce the Original Jurisdiction of the Supreme Court by either reading it down or any other appropriate means. This paper’s primary aim to discuss around such aspects of the Indian Judiciary and increase its efficiency as a result.

Judicial Pronouncements Widening The Scope Of Article 131

A plain reading of Article 131 would make the fact clear that there are two basic requirements that needs to be met, in order to attract the article i.e., the parties should be Government of India and one or more states; or two different states and given that a legal

---

**Introduction**

The Supreme Court of India being the Apex Court is the final authority to decide and adjudicate on any matters owing to the reason of its finality of orders, as there can lie no appeals from this Court of record. It is to denote this reason that the Apex Court is also called as the Court of Last Resort. The primary objective behind the establishment of the Apex Court was to adjudicate over the matters pertaining to Constitutional importance and gross injustice. Sticking to this principle of Judicial Conservatism in the early cases like that of [State of Bihar v Union of India](http://njdg.ecourts.gov.in/njdg_public/main.php) 1965, the Courts refused to take up cases that do not strictly fall into the text of the statute describing their Jurisdiction under Article 131. However, with the passage of time, the principles of Judicial Liberalism and Judicial Activism became more prevalent.

In a very famous US case of [Roe v. Wade](http://njdg.ecourts.gov.in/njdg_public/main.php), the Court introduced the concept of Judicial Activism, which was then brought into Indian Jurisprudence through Socio-legal Judges like Justice Krishna Iyer in [Govind v](http://njdg.ecourts.gov.in/njdg_public/main.php)

---

**REFERENCES**


373 (1975)2SCC148.

right is in question. Initially the trends regarding the interpretation of the provision was very strict and narrowed to the text of the provision. In cases like Ramghar State v. Prov. Of Bihar,375 State of Bihar v. Union of India376 and Union of India v. State of Mysore 377 the courts followed a strict interpretation in regards with the parties to the suit, where it was held that private bodies or citizens or cannot be impleaded in the suit under Art.131 378 and Union of India is not impleaded as a party.379 It as also held that the enlarged definition of ‘State’ in Art.36 will not extend to Art.131.380

However, the same strict interpretation then transformed to be liberal ones, with the successive judgments. In State of Rajasthan v Union of India381 (hereinafter referred to as “Rajasthan’s case”), when it was contended that the term “State” in the Article, does not include the “State Government” and the phrase “The Government of India” did not mean “The Union of India”, the majority rejected the contention. Beg C.J and the majority considered it unnecessary to delve into the scope of Art.131 and held that a restrictive or a hyper-technical view of the State’s rights should not be taken up.382 It was also held that “Govt. of India” in Article 131 meant the “Union of India.”

In a subsequent case,383 while referring to the aforesaid decision, it was held that Article 131 should be widely and generously interpreted.384 In the same case, it was also held that it is not necessary that always the State should be able to show that some legal right of it is breached.385 H.M. Seervai 386 justifies the above judgment by calling the phrase “Govt. of India” as mere consequence of inadvertent drafting error.

The existence of a legal right and not a political right is the essential condition for any case to fall into the ambit of Art.131 387 In a US case,388 the concept of Political question was widely discussed about, which is absolutely alien to Indian Jurisprudence. Similarly, a mention of ‘Political Thicket’ can also be found in Rajasthan’s case. In Baker v Carr, Brennan J. remarked that the Doctrine of Political Question was essentially a function of Separation of Powers. 389 Indian Judiciary declined to accept the question of political right of the States, owing to a fact that the Separation of Powers in US is very strict and rigid, whereas it is flexible in India which makes it difficult to adopt.

Indian Judiciary has indeed given a more liberal and broad interpretation to the phrase “legal right” which made it include questions like Central Government inquiring about the Corruption of State Ministers;390 questions of rights, duties, liabilities and immunities of the State Government and its

375 AIR 1939 FC 55.
377 (1976) 4 SCC 531.
378 Supra Note 8.
379 Supra Note 9.
380 Supra Note 8.
381 (1978) 1 SCR 1.
382 Ibid.
384 Ibid. p. 127.
385 Ibid. p. 146.
389 369 U.S. at p. 217, 7 L.ed. 2d at pp.685-6.
agents; questions of powers vested in State Ministers vis a vis Union Ministers, right of Union Government to dissolve the State Assembly and unconstitutional exercise of powers conferred upon by the Union by Art. 356.

The primary intention of the Constitution makers behind drafting of such a provision was to grant the Supreme Court the Exclusive Jurisdiction to entertain matters exclusively between the Govt of India and States and between States, when it comes to a Legal right (as laid down Article 131), which is why even the bar set by section 15 of Civil Procedure Code is not applicable in these cases. However, the liberal attitude of the Court is not in consonance with the legislative intent behind the Constituent Assembly, which in turn defeats the whole purpose of the presence of such an Article.

Should Original Jurisdiction Of The Supreme Court Be Read Down?

As it is being briefly discussed in the previous section there has been a shift form a restrictive interpretation of Article 131 to a more liberal interpretation, as a result of Judicial activism and socio-legal Judges like Justice Krishna Iyer, Justice Bhagawati etc. in the Indian Judiciary. Since then the court has shown a more public interest approach towards accepting pleas under Article 131 of the Constitution of India. However, the Court has failed to understand that the very presence of such “Original Jurisdiction” is to give it the exclusive jurisdiction over certain subject matter, where no other Court can decide upon. The liberal approach of the Court completely does away with the primary object of drafting of this Article by the Constituent Assembly.

Secondly, in addition to being liberal in accepting pleas under Article 131, the court has also showed a liberal and welcoming approach rather an interventionist approach under Article 132-136 of the Constitution of India, while exercising its Appellate Jurisdiction and Special Leave Petitions. This amounts to a large number of insignificant cases coming up to the Supreme Court, wasting the time, money and energy. This point is further explained in the succeeding next two section that explains about the Appellate Jurisdiction and Special Leave Petition of the Supreme Court of India. Its current trend of functioning has further blurred the concept of separation of powers, and it has emerged to be in a dictatorial role as against the system of Checks and Balances.

Thirdly, even if the Supreme Court has adopted a welcoming approach towards upcoming cases in the interest of justice, they still remain undecided or unentertained. As on November 2017, there are 55,259 cases pending before the Supreme Court. On 26th April, 2016, Justice T S Thakur, the then Chief Justice of India, broke down several times in front of the Prime Minister.

392 Supra Note 22.
393 Supra Note 19.
394 Supra Note 19.
of India, while talking about the inefficiency in the Judicial system and need for more Courts and Judges to dispatch the pending cases in the earliest. There is a famous saying which goes like “Justice delayed is Justice denied.” Thus, delay in the granting a hearing to cases, is nothing but denial of justice.

From the abovesaid incidents the fact that the Original Jurisdiction of the Supreme Court has been widely overused becomes more obvious. Therefore, it should be read down to make it narrower in terms of application. It has to be realised that a broad interpretation causes nothing but more harm than good that was deemed to be caused, which is inviting out own unnecessary troubles. The test to be laid down should be that, in order to attract Art.131, the case should strictly fall under the text of the statute. If it is not done so, the exclusivity guaranteed by the Original Jurisdiction of the Supreme Court would be lost, due to the presence of concurrence of jurisdictions. In addition to that, the over-usage of the said provision makes it lose its importance and significance, keeping which in mind the Constituent Assembly drafted such a provision, thus, defeating the whole purpose of the said provision.

**Special Leave Petition**

Article 136 of the Constitution of India guarantees for Special Leave Petitions to be entertained by the Supreme Court of India. Like in the case of Article 131, even this provision comes with its own limitations, that the Supreme Court can only use its discretion to grant a special leave to cases that comes in the form of a judgement, decree, determination, sentence or order from a “Court” or “Tribunal”. However, the Courts seemed to have shown a more liberal attitude towards determining what constitutes a “Court” or a “Tribunal”.

The Supreme Court has broadly interpreted the term “tribunal” to be any quasi-judicial bodies, other than ordinary courts which have the “trappings of a Court”. In addition to that, the Supreme Court has also widened the scope of the term by holding that any tribunal against whose decision the Supreme Court has the Jurisdiction to issue the Writs of Certiorari and Prohibition, is a Tribunal for the purpose of Article 136. Since then, a number of Boards, Commissions, the Central Government, Educational institutions, a State Government etc, have been held Tribunals which is merely its own initiatives to welcome more and more unnecessary

---


397 Associated Cement Companies v Sharma, P.N., 1956 (2) SCR 366.


402 Abhijit v. Govt. Medical College Dean, 1987 (3) SCC 478.

403 Associated Cement Companies v Sharma, P.N., 1956 (2) SCR 366.

404 www.supremoamicus.org
burden upon the functioning of the Supreme Court.

In one of the earliest cases,\textsuperscript{404} Mahajan J. observed that this provision confers the Supreme Court with such powers that overrode the limitations contained in the previous articles (Art.131-135), on the Court’s power to entertain appeals. It was further held that the Courts could grant leave to even Interlocutory Orders. Following this, in a subsequent case,\textsuperscript{405} it was held that it is not possible to define the limitations on the exercise of the discretionary powers vested in the Supreme Court by Article 136, hence giving it unfettered discretionary powers.

Since then, the Supreme Court has used copious amount of available limited time to interfere in the functioning of various High Courts. The Supreme Court has interfered in the fact-finding process of the High Court,\textsuperscript{406} Suo-motto recalling of judgments given by the High Courts,\textsuperscript{407} quashing FIRs,\textsuperscript{408} bail matters,\textsuperscript{409} compounding of certain offences\textsuperscript{410} etc.

It has also interfered in the functioning of the executive and administrative bodies, by means of granting Special Leave to the appeals lying from them whenever it could. It includes interference in functioning of Municipal Corporation,\textsuperscript{411} findings of an Expert Committee,\textsuperscript{412} Industrial tribunals,\textsuperscript{413} Income Tax Appellate tribunals,\textsuperscript{414} Custom authorities\textsuperscript{415} etc. What is to be kept in mind is, when an expert body, that is solely established for the purpose of looking into the matter, then the courts should generally show a slow or no interference attitude towards it. Justice Krishna Iyer notes that when some expert bodies, with subject matter expertise entertain the petitions regarding their subject matter and pass orders as a result, then the Courts should be reluctant to re-entertain such petitions.\textsuperscript{416}

It overpowers the Supreme Courts and establishes a regime of Supreme Court creating a kind of reign of terror of the Courts. This not only wastes its own time, but also blurs the line of distinction between Judiciary and Executive in one hand and Judiciary and Legislature on the other.

**The Appellate Jurisdiction**

The Appellate Jurisdiction of the Supreme Court is enunciated in four different articles of the Constitution of India. Articles 132, 133, 134 and 135 talks about the Appellate powers of the Supreme Court of India. Supreme court being the Apex Court of India, has the authority to decide in matters relating to Constitutional importance and

\begin{itemize}
  \item \textsuperscript{404} Bharat Bank Ltd. v. Employees of Bharat Bank, (1950) SCR 459.
  \item \textsuperscript{405}Dhakeswari Cotton Mills’ v. C.I.T., W.B., (1951) 1 A.P.S.R.T.C. v. Satyanarayan Transports Pvt. Ltd., AIR 1965 SC 1303, 1307.
  \item \textsuperscript{406} S. Jamaldeen v. High Court of Madras, (1998) 2 SCC 705.
  \item \textsuperscript{407} S. Jamaldeen v. High Court of Madras, (1998) 2 SCC 705.
  \item \textsuperscript{408} Sunil Kumar v Escorts Yamaha Motors Ltd., (1999) 8 SCC 468 (para 8).
  \item \textsuperscript{409} State of Maharashtra v. Ramesh Taurani, 91998) 1 SCC 537 (para 3).
  \item \textsuperscript{410} O.P.Dholakia v. State of Haryana, (2000) 1 SCC 762 (para 3).
  \item \textsuperscript{411} Monarch Infrastructure (P) Ltd. v. Commissioner Ulhasnagar Municipal Corporation, (2000) 5 SCC 287.
  \item \textsuperscript{412} India Thermal Power Ltd. v. State of M.P. (2000) 3 SCC 379.
  \item \textsuperscript{413} Saran Motors v Vishwanath, 1962 (2) LLJ 139.
  \item \textsuperscript{414} Omar Salay Mohamed Sait v. I.T. Commr., AIR 1959 SC 1238.
  \item \textsuperscript{415} Minerals and Metals Trading Corpn. V. Union of India, (1972) 2 SCC 620.
  \item \textsuperscript{416} Rajkapoor v. Laxman, (1980) 2 SCR 512.
\end{itemize}
interpretations under Article 132. An appeal should be competent under Art.132 for the Supreme Court to hear an appeal, in addition to the certificate from the respective High Court.

In addition to that, Article 133 provides with appeals in Civil matters (proceedings under Article 226 which are not Criminal) which relates to those substantial questions of law of general importance. After this, Article 134 confers upon the Criminal Appellate powers upon the Supreme Court, which will be entertained if the respective High Court grants a certificate judicially after applying its mind, to the accused or the parties concerned, explaining so as to what substantial principal of law is under question. However, it is to be noted that appeal in this case exists as a right to the Supreme Court.

In the same given situation, comparison of the current situation of the appellate jurisdiction of the Supreme Court of United States of America would be more apt. There is a more watered-down approach towards the Appellate jurisdiction of the Supreme Court of United States of America vis a vis Indian Supreme Court. The right to appeal is not absolute in the US and the appellant needs to convince the Court stating that the lower court has made any substantial or procedural error of application and interpretation of law, which is called “showing cause.” It is wholly at the discretion of the state to allow for review.

There should necessarily be a presence of a “federal question” for the Supreme Court of America to entertain such appeals from the Supreme Courts of the respective States. The face appellate power of the Supreme Court of the US face three limitations over the federal question which are as follows: (a) Limitations in the Constitution where the court cannot decide moot; academic, or political questions; (b) Limitations set up by the Congress through 28 U.S.C.A. section 1257; (c) several self-imposed

---

418 Four Conditions required to be satisfied: (1) Needs to a “judgement decree or final order”; (2) Civil, Criminal or Other proceeding including interpretation of Constitution; (3) There should be a question of law in relation to the Constitutional Interpretation; (4) The question should be a substantial one: T M Krishnaswami Pillai v Governor-General in Council, AIR 1947 FC 37; State of Mysore v. Chabani, AIR 1958 SC 325; Bhagwan Swarup v State of Maharashtra, (1964) 2 SCR 378.
427 Colgrove v. Green, 328 U.S. 549 (1945).
428 Ex parte Peru, 318 U.S. 578 (1942).
429 "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the
The discretionary writ of certiorari, initiated by the Evarts Act of 1891 and the Judicial Code of 1911, by virtue of Rule 17 of the Supreme Court says that “a review on a writ of certiorari is not a right but of judicial discretion.

It is agreed that a check is required on the functioning of the lower Courts. But it should also be taken into consideration that the checking authority should also be under checks to strike a balance. The Union of India, being a quasi-federal country, should reflect at least some principles of federalism reducing the Union Judiciary’s powers to take decisions and its discretion to accept any cases from the lower courts. The idea that the High Courts are lower to the Supreme Court would hence change, where High Courts will be respected as same as Supreme Court. In the Indian case, the Supreme Court seems to be bullying upon the High Courts through wide powers conferred upon it by virtue of section 132-136 of the Constitution of India. This inevitably creates a need and necessary for reducing the powers of the Supreme Court under the given Articles.

United States, and the decision is in favour of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution, treaties, statutes of, or commission held or authority exercised by the United States.

Examples From Other Countries

United States of America

The Original Jurisdiction of the Supreme Court of Unites States is guaranteed by Article III Section 2 of the Constitution of and Title 28 of the United States Code, Section 1251. The Original Jurisdiction in United States is divided into two categories for the purpose of making Original Jurisdiction restrictive i.e., (i) Original and Exclusive Jurisdiction, and (ii) Original but not Exclusive Jurisdiction. The only difference if for the latter one, both the lower federal courts and the Supreme Court of US bears concurrent jurisdiction. In order to restrict the jurisdiction furthermore, the Congress brought in a criterion of “federal question” in order for the petition to be entertained in the Supreme Court. To constitute within the category of Original Jurisdiction, the case must constitute a proper "controversy." The Supreme Court is the Court of Last resort, which does not take cases for which fact-finding had not been done.

Canada

In 1875, when the Constitution drafters of Canada wished to give Supreme Court an Original Jurisdiction only to hear Constitutional controversies, the federal government supported it. As a consequence, only Constitutional matters will be decided by the Supreme Court on request of the trial judge, who will then decide on non-Constitutional issues. A dispute between

434 Peter H. Russel, The Jurisdiction of the Supreme Court of Canada: Present Policies and a program for

www.supremoamicus.org
Dominion and a province would be tried by Exchequer Court (with an appeal to the Supreme Court). Both Civil and criminal cases would be first decided by the provincial court first and then later an appeal shall lie to the Supreme Court. In Canada, the appellate jurisdiction itself restricts the Original Jurisdiction of the Supreme Court.435

Philippines
The Constitution of Philippines guarantees for Original Jurisdiction under section 5(1), Article VIII, only when there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law.” This signifies that it should be approached as the last resort when there is no other possible alternative available. In order to be directly filed under the Supreme Court of Philippines under its Original Jurisdiction, the case should strictly fall under the finding of “grave abuse of discretion” on the part of respondents to the suit to justify favourable action on the petition. The standard of “grave abuse of discretion” is generally higher than the standard of “error of law”. The former phrase has been defined as ‘a capricious and whimsical exercise of judgement to lack of jurisdiction.” 436 Notwithstanding, the Supreme Court yet has the discretion to decline to entertain a case under its original jurisdiction.

Ireland
The Constitution of Ireland clearly states that the Original Jurisdiction of the Supreme Court of Ireland can be used only in two cases. These two cases are when either a Bill is referred to by the President for the purpose of an opinion on whether or not the said Bill is Constitutional (Article 26); or when the Court has to determine under Article 12 of the Constitution whether the President has become incapacitated.

Conclusion
The issue that the instant paper briefly dealt with is whether the Original Jurisdiction of the Supreme Court should be read down, provided the prevailing circumstances and current trends in Judiciary. It is clear to an extent that lately, Judiciary is acting dictatorial by placing itself above all the organs of the government. This court style procedures are obviously democratically illegitimate. One reason that could be attributed to this is, the Judiciary cannot simply interfere into the functioning of the Other Organs of the govt. for they are either directly or indirectly elected by the people, counting on them for their accountability. However, Judiciary being an independent Organ of the Government, cannot be held accountable for its actions. It is a matter of fact that there has been no successful impeachment motion against any Judge of a High Court or Supreme Court till now, owing to the reason that the impeachment procedure is very difficult and requires a high threshold to prove it.

If one understands the current trends of the Judiciary, it has been broadly or liberally interpreting all the provisions. Its jurisdictions (Original, Appellate, Special Leave and Advisory) are all liberally interpreted by the Court, that causes troubles to its own self and administrative inefficiency. The court can follow the
system followed by countries like Singapore where there is no Original Jurisdiction at all, but only appellate jurisdiction, and the High Courts have the Original Jurisdiction. Due to its practical impossibility, a system of Canada can be adopted by India. As discussed earlier, the Appellate Jurisdiction of the Supreme Court limits the Original Jurisdiction. Considering that the Indian Constitution already provides for a wide appellate power of the Supreme Courts with respect to all subject matters, the Original Jurisdiction be essentially limited and restricted.

In short, the Supreme Court should only act as the Court of the last resort and particularly stick to the text of the provision and interpret it more narrowly. The Courts should go back in time and stat being the same strict as it was in the case of State of Bihar v Union of India. The problems caused by the liberal interpretations is already briefly discussed in the above sections. Keeping in view such problems caused to the Indian Judiciary, one of the most essential and basic steps is to restrict the interpretation and avoid any concurrence of Jurisdictions. The Court should be approached as its last resort, or in the first instance, if it strictly falls under the terms of the provision. That is to say that it has to be read down.

****

---

STATELESSNESS AND NATIONALITY: A PRIMITIVE PUNISHMENT FOR INVISIBLE POPULATION

By Mohit Vats
From School of Law, The NorthCap University

A. ABSTRACT

The predicament of statelessness is being faced by more the 10 million people around the globe. As a result of which they frequently aren’t permitted to go to school or any institution, see a specialist, hold a job, cast their vote, open a financial account, purchase a house or even get married. In short, complete social exclusion. The need of international action was seen post-second world war, population growth, migration, trafficking, gender inequality and ethnocentric policies and climate change.

Forthwith, 1954 convention remained the sole and imperative authority in addressing the issue of statelessness. There is no region in the world which is free from statelessness. Though, not politically affirmed but scientifically certain. A setback in curbing this melancholy portrays the hollowness of international human rights.

The author intends to exhaustively highlight the entire plight, sufferings faced by such ousted and unseen population. And measures adopted by international community, authorities and natural bodies to curb such issue. The paper exhaustively deals with crucial international judicial pronouncement in regard to questionable ends of statelessness. The paper with its last objective attempts, to contribute towards futuristic, credible and reasonable measures which may be adopted by UN in order dilute the present helter-skelter situation.

“Citizenship is man’s basic right for it is nothing less than the right to have rights.”

Key Words: Citizenship; Nationality; Statelessness; Quantification.

B. LIST OF ACRONYMS

- CTD: Common Technical Document
- FMR: Forced Migration Review
- IACrtHR: Inter-American Court of Human Rights
- IPCC: Intergovernmental Panel on Climate Change
- IPU: Inter-Parliamentary Union
- ICJ: International Court of Justice
- MEA: Ministry of External Affairs
- UDHR: Universal Declaration of Human Rights
- UN: United Nations
- UNHCR: United Nations High Commissioner for Refugees

C. EXECUTIVE SUMMARY

There are different shades and lenses to the problem of statelessness present around the world. The international community commits

to prevent statelessness is firm and evident from the Universal Declaration of Human Rights (UDHR), namely, Article 15 that “everyone has the right to nationality”. In addition to this major declaration, there was a leap of development in this subject in the middle of the 20th century with the advent of 1954 Convention on Status of Stateless Persons and 1961 Convention on Reduction of Statelessness. Persons become stateless by falling into the loop of the inconsistency, gaps, un-mapping of the issue in hand.

The problem of statelessness
As per 1954 convention, a stateless person is one “who is not considered as national by any state under the operation of the law”. The problem arises where there is a wider and destructive interpretation of such definition in relation to the domestic law. Such regional incoherence, leads to deprivation of the relevant rights attached to the acquisition of citizenship such as human rights, prevention from child abuse, economy, healthcare, democratic participation. Such issue requires more effective, collective, and integrated steps from UN and its agency. The paper in its following research objective deals more exhaustively.

De jure v. De facto statelessness
The definition of a stateless individual in the 1954 Statelessness Convention – “a person who is not considered a national by any State under operation of its law” – depicts the circumstance of de jure stateless. Apart from de jure stateless person, the final act also includes de facto stateless persons as well. On the other hand, de facto persons are those who are unable to demonstrate their de jure statelessness and for innumerable reasons don’t enjoy all the benefits or rights.

Stateless person as refugee
It was intended by the drafters of the 1954 convention to exclude de facto stateless persons outside the ambit of the stateless persons. It was presumed that such persons, being deprived of the nationality and rights associated with it are refugees. Also, such stateless person doesn’t signify persecution which is sole criteria in 1951 Convention on the Status of the Refugees.

The problem of quantification
The step towards mapping of statelessness is cumbersome process. Though, state has the primary duty to resolve and effective measure, but it is now essential that there are concrete steps from the side of civic society. But unfortunately, there several states as discussed in the paper which takes deliberate and politically driven steps to deny identification and prevalence of such population. On the top of it, there is evidentiary material of self-identification of statelessness forming a non-accurate data. From a more practical perspective, around 75 countries doesn’t provide with cogent data leaving 50% of world’s stateless population unmapped.

Recommendations and Conclusion
The research confirms and offers a number of recommendation, that states should adopt credible measure to quantify the stateless persons, promote the inclusion of definition of the ‘stateless persons’ with more consistency, a more unified approach to curb the issue, and societal measures inclines towards awareness of benefits attached to

the citizenship. The report concludes that there is quest and a huge demand for more clarity on the present subject with the involvement of international and national organization.

I. INTRODUCTION

‘For many of us, citizenship only really matters when we travel abroad, when the Olympic Games are on, or when we vote in national elections. We do not think about our citizenship on a daily basis. For others, citizenship is an ever present issue, and often an obstacle. Because recognition of nationality serves as a key to a host of other rights, such as education, healthcare, employment, and equality before the law, people - with or without citizenship - those who are ‘stateless’ - are some of the most vulnerable in the world.’

After completion 6 decades Human Rights are still one of the essential bedrock for human race and is duly weighted in the international community. After 1954 Convention on Status of Stateless Persons, to which eighty states are party to it, 1961 Convention on Reduction of Statelessness and other international instrument it is now clear that granting nationality stems out of human rights. But in practice, statelessness remains un-discussed and with snow ball effect has turned into one of the most devastating anomaly. Being ‘invisible’ mean that it is difficult to quantify such stateless population. And a huge number is still being unreported and outside the purview of UNHCR or other UN agency.

The topic has been linked, through a common link that person is out to greater risk. Without issuance of citizenship a person cannot apply for travelling document or registration of marriage, limited healthcare, ownership of the property, freedom movement, holding of public offices, contesting election. Whereas, grant of citizenship has wider benefits both material and immaterial such as concrete identification proof, entrance to the labour market, political and personal change is of high considerable value. Having nationality is a gateway for rights to have rights and other fundamental rights.

II. CAUSE AND IMPACT OF STATELESSNESS IN PRESENT SCENARIO

A. CAUSES

A closer scrutiny to the abovementioned objective has multifarious spur attached to it. For instance state succession; discrimination or the arbitrary deprivation of nationality; technical and administrative gaps; and causes linked to climate change.

1. STATE SUCCESSION

At the point when part of a state withdraws and gets to be distinctly free, or when it breaks down into numerous new expresses and a conundrum develops in the matter of nationality of influenced. The changed nationality laws of the successor shall leave individuals with stateless; also redefinition

441 Infra note 8.

442 For a good discussion on causes of statelessness, see: Inter-Parliamentary Union (2005).
of who is now a national of that parent state may likewise render individuals as stateless and vulnerable to the reinterpretation new laws, new citizenship and new administrative procedures prevailing at that point of time.\textsuperscript{443}

The analogy can be rightly being drawn out from the experiences embedded in territorial demarcation through colonisation and consequent nation building. And in recent period, countries of the former Soviet Union and Yugoslavia\textsuperscript{444} and South Sudan from Sudan\textsuperscript{445}, brings clear picture of the abovementioned object. Such a change in political and geographical move needs to unique challenges with regard to Statelessness and nationality.

2. DISCRIMINATION AND THE ARBITRARY DEPRIVATION OF NATIONALITY

In practice arbitrary act involves large-scale discrimination leading to collective withdrawal or denial of nationality of particular state despite well knit relation to that particular state. Discrimination involves grounds such as race, colour, descent, or national or ethnic origin in the determination of nationality and exclusion of civic criteria.\textsuperscript{446} Security can also be a ground for arbitrary deprivation nationality if due process of law has not been followed. Such form of predicament can be seen widely in 25 countries around the world.\textsuperscript{447} Most people are considered as national by the principle of blood origin or where the person’s parents were nationals (i.e. \textit{jus sanguinis}) and another category involves birth on the territory (\textit{jus soli})\textsuperscript{448}. Such mode of acquisition is known as automatic acquisition of citizenship. But in many countries where nationality based on \textit{jus sanguinis} has left children of many migrants in difficult times for instance Cote d’Ivoire to the Dominican Republic to the former Soviet Union to Germany and Italy\textsuperscript{449}.

Historically, world has witnessed various arbitrary acts of states, apart from abovementioned states, which has lead to segregation and failure to reintegrate the minority and their deprivation of nationality. The Bihari community in Bangladesh has been ostracised from the majority Bengali population on the evasive ground of disloyalty by the former community and were inclined to the regime of Islamabad during 1971 war. Gender based discrimination in several Arab states is widely evident as source of statelessness.\textsuperscript{450}

3. TECHNICAL AND ADMINISTRATIVE GAPS

\begin{flushright}
\end{flushright}

\textsuperscript{443} Id.
\textsuperscript{444} See sections 3.IV and 3.V on statelessness statistics in Asia and Europe.
\textsuperscript{445} See section 3.II on statelessness statistics in Africa.
\textsuperscript{446} Weissbrodt (2003).
\textsuperscript{447} See for more details on this issue UNHCR, \textit{Background Note on Gender Equality, Nationality}
Surprisingly, documentation regarding nationality designed to act as helping hand in the process can become a snake in the grass, as an inevitable barrier for nomadic, poor and minority population. There are innumerable administrative and logistic ostracism steps that may end up in the loss of the nationality. Excessive fees, red tape, documentary proof, peripheral challenges for the poor. In nations of the erstwhile Yugoslavia and somewhere else in Europe is a reasonable case of where absence of documentation and registration can rise into an issue of statelessness. 451

4. CLIMATE CHANGE
Notably, at UN Conference on Climate Change, the Intergovernmental Panel on Climate Change (IPCC) recognised Netherlands, south eastern Asian-oceanic states like Bangladesh and some other states as being threatened by the rising sea level. The reports guarantee that 600 million individuals could be affected by such an ascent in the sea water level, proposing that statelessness may emerge out of such a jibe before the end of the twenty-first century. 452

Conclusively, UNHCR while addressing the issue remarked that population of the affected state may be considered as de facto stateless. 453

B. IMPACT OF STATELESSNESS
In order to extrapolate the anomaly and untoward subject, it reports to impact 10 million (only mapped countries) as stateless. By all virtues Human rights are to be enjoyed by human race, but due to statelessness, are left high and dry. Being ousted from not only their country but also from all the countries can make stateless as an easy prey for bureaucracy. They can indeed be treated with exploitative practices; forced labour or different means of extortion; persecution; 454 purchasing or acquiring a land; acquiring a birth declaration; registration of car; driving permit; arbitrary detainment; marriage authentication; opening a bank account or even death testament; or getting an advance; getting a travel permit or surely being issued any type of personality documentation is to a great degree troublesome in the event that you are not the national of any country, to such a degree, to the point that various stateless individuals have no proof that they exist and no techniques by which to separate themselves in their ordinary communications with the state or with private components. Overall travel is unpragmatic, unless by illicit means. In a few circumstances, statelessness really turns into a course or impetus for human rights infringement. Stateless people might be subjected to particular directions or practices that don’t have any significant bearing to different inhabitants in a state. In outrageous cases, additionally crippling and dehumanizing confinements may likewise be forced, for example, on marriage or conceptive rights. Disenfranchisement is an inevitable and universal problem evidently present all over the world. 455

452 Supra note 11.
453 UNHCR (2009a).
“In Kenya, if you do not have an ID card, you don’t exist. Technically you cannot even leave your house, because if you leave your house and you are challenged ‘Where is your ID?’ That is considered a crime. Now, if you cannot leave your house, how do you live? How do you look for a job? You can’t even open a bank account, you can’t transact business, you cannot own anything, because you don’t exist.”

The truth is stateless person face distinctive challenges in all spheres of their life from birth to their death.

III. LACUNAE IN THE INTERNATIONAL LEGAL FRAMEWORK RELATING TO THE PROTECTION OF STATELESS PERSONS

Presently, it is essential to analyse whether 1954 Convention relating to the Status of Stateless Persons is fulfilling the need of the hour or whether there scope of any relevant development. In order to achieve predetermined objectives, UNHCR has sole authority which deals with drafting legislation, training of government officials, cooperating with regional bodies or Non-governmental organizations, Inter-Parliamentary Union (IPU) and implementation of national legislation. In the period of 2003-05 it has worked with not less than 40 states to enact, comment and revise nationality related laws within such states.

Firstly, access and enjoyment to political rights or holding a public office is a hot potato whenever there was a discussion in drafting 1954 convention. However, rather than protecting and safeguarding the rights of the nationality deprived persons, the delegates deliberately chose to exclude such vital rights in 1954 convention. Such rights aren’t subjected to possession of nationality. Abrogation of such rights could not be a legitimate in the eyes of International law and may take a destructive form.

Secondly, there is further betrayal and weakness in the 1954 instrument as it fails to settle questions with regard to right to enter the state on the basis of CTD. Moreover, there is little clarification on ‘State responsibility’ in the convention when it comes to statelessness due to denationalization. The 1954 relating to the Status of Stateless Persons differs significantly from its sister convention, 1951 Convention relating to the status of the Refugees, with regard to wage-earning employment. The latter lifted the restriction on the same subject. The 1954 convention skirts out on many of the essential and difficult questions leaving behind several normative gaps.

457 Supra note 7, See (See Annex 4 of Handbook for Parliamentarians for a list of UNHCR offices around the world)

458 Note that article 2 of the 1954 Convention relating to the Status of Stateless Persons- where the primary obligation of stateless persons is enshrined- were of the view to curtail the political activities of such individual. See Walker (1981) and Skoloff (2005)


www.supremoamicus.org
The UN ought to increment endeavours to elevate approval or promotion to the 1954 Convention which had just 65 States parties as on 1 January 2011. Notably, reference might be extracted from applicable resolutions of the General Assembly which persuaded and encouraged states to ponder and give consideration to acceding. 460 Besides, States ought to be urged to agree to enhance usage of global and provincial human rights recognised instruments that upgrade the insurance of the privileges of stateless people.

It is essential to develop the national legal framework and bring in to the International legal framework consonance. UN should irrespective of whether a state is a party to the 1954 Convention must promote the

i. definitional clauses;
ii. entry to the state;
iii. supporting institutional responses;
iv. residence to non-citizens in specific situation;
v. respect of regional and international human rights; and
vi. legal assistance and integration programmes for the stateless persons.

IV. CHALLENGE IN MAPPING MEASURES ADOPTED BY UN AGENCY

As emphatically mentioned in the title of the paper, statelessness is often regarded as the invisible phenomenon. The main problem to such matter is the difficulty in adopting the methodology to quantify statelessness itself. It must be acknowledged that quantifying such a problem is one of the most intricate jobs. 461 Since 2004, UNHCR has announced, on a nation by-nation basis, the quantity of people who fairly and squarely fall under its statelessness order, and remains the main association which methodically gathers and consistently gives an account of the quantity of stateless people. Just one other organisation has ever attempted a survey at such a global level that is Refugees International. The report, titled ‘Lives on Hold’, was published in February 2005 and includes a ‘Global Review of Statelessness’. 462 The report included a narrative section for an extrapolation of the stateless population present in 80 countries. The then global stateless survey was over 11 million. 463 A subsequent and updated survey namely, ‘Nationality Rights for All’ 464 rests the number on 12 million people all over the world. Such reports and UN statistics are the only concrete and up-to-date source of data. There several issues attached to these survey and methodologies in determining the actual number of stateless persons

The definition of statelessness “not considered as national...under the operation of its law” 465 doesn’t hold a stricter but authoritative interpretation on the basis of

460 See General Assembly Resolution 62/124, 64/127, 63/148, 50/152 and 49/169. also numerous Conclusions of UNHCR’s Executive Committee including Nos. 78, 85, 87, 90, 95, 99, 102, and 106. Human Rights Council resolutions on human rights and arbitrary deprivation of nationality 13/2, 10/13 and 7/10.

461 See UNHCR, Guidance document on measuring stateless populations, May 2011.


463 Id. p. 7.


facts and law.\textsuperscript{466} The ambit of interpretation gets wider as it excludes those who are stateless as per the competent authorities and those who don’t feel connected to the mass of the relevant state due to distinctive political and personal beliefs. And in many states there is no definition of stateless person in their national laws.

Again, many state authorities with their own deliberate political agenda deny the existence of stateless population in their state causing hardship to the hidden persons thereon. Going statistically, out of 142 national censuses conducted in 2005-14 for which UN possesses questionnaires, carrying 112 questions on nationality of which only 25\% i.e. 28 provide for statelessness to be recorded.\textsuperscript{467} UNHCR has data for number of stateless persons in 75 countries covering only 50\% of the world population.\textsuperscript{468} The reliability of such data is still a benchmark question for the UN agency as different countries compiled their data with different data sets.\textsuperscript{469} And thereby, no real or complete picture is revealed with such cumbersome statistical practices. To avoid falling into the pit of conundrum, UN practices the indication of asterisk (*) where no reliable or precise data is available for a state and drop them from including into the Global statistics. Hence, with the adoption separate programming and budget system, namely ‘Pillar-2’ exclusively involves stateless population under the UNHCR statelessness protection mandate and is thereafter, reported in its final statelessness statistics.\textsuperscript{470} UNHCR estimates the actual total global stateless population today to be “at least 10 million persons”.\textsuperscript{471} In order surpass the present data UNHCR as a part of ‘Action 10’ campaign to curb statelessness, strives to achieve credible data coverage for 150 states by 2024.\textsuperscript{472}

V. JUDICIAL TRENDS AND THE APPROACH TOWARDS THE STATELESSNESS

A. Declaring a Person Stateless

In a motion to declare a person stateless Delhi High Court addressed this question in Shekh Abdul Aziz v. NCT of Delhi\textsuperscript{473} wherein, the petitioner was ‘foreigner’\textsuperscript{474} and was destined in Kashmir. After serving for one year of imprisonment, the petitioner was then shifted to Tihar Jail in Delhi in


\textsuperscript{467} These instruments are available here: http://unstats.un.org/unsd/demographic/products/dyb/dybquest.htm. Also See in particular section 2 of the annual Population Estimates Questionnaire and table 20 of the Population Census Questionaire: General Characteristics.

\textsuperscript{468} See UNHCR, Global Trends 2013, 2014, for statistics for the stateless population as at end-2013.

\textsuperscript{469} For instance, Myanmar, while conducted their survey in Rakhine state for Rohingya stateless an estimated 500,000 stateless person were excluded from that survey.

\textsuperscript{470} See, UNHCR Executive Committee, Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, No. 106 (LVII).

\textsuperscript{471} Infra note 26.


\textsuperscript{473} W.P. (CRL) 1426/2013. This case is under trial as of date.

\textsuperscript{474} Section 2(3) (a) of the Foreigners Act, 1946.
order to proceed with initiation of the deportation mechanism. But the procedure didn’t take the pace which was required. Delhi High Court directed the Central Authority to determine the nationality of the person within 2 weeks. Thereafter MEA declared the petitioner as stateless but facilitating the whole dispute MEA stated that the person could attain long term visa expeditiously.  

B. Arbitrary deprivation of nationality

In the case of Yeany and Bosico Children v. The Dominican Republic 476 the Inter-American Court of Human Rights concluded that the Dominican Republic has violated various articles of the American Convention on Human Rights. Particularly, when it refused to issue birth authentications to, children born in the Dominican Republic to guardians of Haitian descent. The Court held that the interpretation of "in transit" in Dominican Republic's migration and citizenship laws ousted particularly Haitians born in the Dominican Republic from obtaining citizenship and that this treatment of ethnic group was arbitrary and prejudicial.


John K. Modise v. Botswana477 The African Commission on Human and Peoples' Rights while deciding on merits held that Modise had born within the territory South Africa and to British Protected Person. And in this way he was a native of Botswana by birth. The Court held that the state had abused Modise's rights under the African Charter on Human and Peoples' Rights by not recognizing him as a resident of their state and by extraditing him from Botswana, and consequently made him live in vicious poverty. The Court held that unstable living conditions while being stateless added up to an infringement of his right to respect for dignity. The Court additionally noticed that registration, citizenship granted by the state authority to Modise was insufficient on the grounds that it was not at par with the citizenship by birth in toto.

In some cases, where the states hold the procedure for re-registration of permanent residence of those erased from the registry and non-compliance of such procedure during the prescribed period would render them stateless. The court held such registration procedure as arbitrary and unlawful. 478

C. Equal access to the nationality

Also, at the domestic level, the Court of Appeal of Botswana held in Attorney-General v. Dow479 the Citizenship Act of 1984, which allowed citizenship to the children of a native father that is Botswana


478 Kurić and Others v. Slovenia [GC], no. 26828/06, Judgment of 13 July 2010.


www.supremoamicus.org
father and to children born out with a native mother that is Botswanan mother, infringed the guarantees provided by the grundnorm. This includes freedom from movement and liberty. Since in the present case, the children of a Botswanan lady wedded to a foreign national, could confront ostracism and in this way law discouraged marriage between native ladies and non-resident men.

D. Effective nationality

*(Liechtenstein v. Guatemala), Second Phase Nottebohm Case*\(^{480}\)

In spite of the fact that Nottebohm does not particularly address statelessness, it has much of the time been referred to in statelessness in regard to major principle of ‘effective nationality’. The International Court of Justice in Nottebohm considered the administrative move of Guatemalan such as extradition and seizure of property, a former German national who later on naturalized as a resident of Liechtenstein soon after the set about of World War II. The ICJ held that Liechtenstein’s claim was inadmissible as Nottebohm had no real ties to Liechtenstein since he didn’t reside there or, conducted any kind of business in Guatemala, and it overtly appeared to just have turned into a native of Liechtenstein with the sole purpose that he certainly be recorded as a native of a nonpartisan nation amid of the World War.

VI. RECOMMENDATIONS TO CURB FUTURE STATELESSNESS.

The right to nationality in the contemporary context is an essential and indispensable human right. Statelessness is a stage where the person has no nationality due several reasons as discussed in the paper. The report discussed in particular as to how statelessness is caused, what do the statistics shows, international legal framework lacuna, incomplete mapping and judicial mindset to the issue. The major focus of the research was that to determine and examine, quantify the rate at which the citizenship was granted. A comparative review articulates that there has not been much progress and in addition to that poor living standards, underdevelopment and corruption has undermined the potential benefits of obtaining nationality as evident in the states like Bangladesh, Kenya, Sri Lanka, and Republic of Crimea. In order to dilute a far stretched responsibility following recommendation has been made in order to bring conduciveness in the curbing future statelessness.

The necessary positive steps in tune with Indian political, administrative and judicial mechanisms are to accede to the 1954 and 1961 Conventions on statelessness. Such an accession would be fruitful to India and will be attached with positive obligation (protecting stateless children). Presently the lacuna is being fulfilled through judicial activism. Consequently, legislative reformation shall prevent future statelessness.

i. States should adopt credible measure to quantify the stateless persons. This can be done through dedicated mapping exercise and utilisation of more accurate administrative databases.

\(^{480}\) International Court of Justice (ICJ), 6 April 1955, (Mar. 2, 2017, 6.00 PM)
http://www.refworld.org/cases,ICJ,3ae6b7248.html
ii. State should promote the inclusion of definition of the ‘stateless persons’ in their national laws and consistently interpreting the same.

iii. State with major problem of statelessness should revisit their promulgation, procedures and percentage of coherence of their national laws to international status of stateless persons related legal framework.

iv. In pursuance to the commitment to curb statelessness, state should completely co-operate with UNHCR and paying due diligence on the developments brought in by such UN agency.

v. Regional and International funding will enhance the knowledge towards this issue with more brevity by introducing more cogent material in this regard. Eventually, making the state less dependent upon unreliable data and deceitful move of the authorities.

vi. It is required that UNHCR to come up with unified approach to define statelessness and effective measures to quantify such population.\textsuperscript{481}

vii. UNHCR and UN Regional Commissions can engage themselves during the national census by providing technical support.

viii. Society should persistently be inclined towards awareness of the plight caused due to statelessness among general public and enthusiastic measures in regard to mapping of stateless population.

\textbf{****}

\textsuperscript{481} Supra note 28, paragraph (f).
SECTION 377: A WIDER CONCEPT

By Muskan Gupta
From Guru Gobind Singh Indraprastha University, Delhi

ABSTRACT

The purpose of this paper is to determine the extent and manner of the phrase “carnal intercourse against the order of the nature” in Section 377 of the Indian Penal Code, 1860. Section 377 is not merely a law about homosexuality but applies to various other acts which are against the order of nature. The landmark judgment of 2018 has declared section 377 as unconstitutional only with respect to homosexuality. Section 377 is “capricious and irrational” as it criminalises the consensual sexual acts between adults in private space. However, bestiality, sodomy and other non-consensual sexual acts which are against the order of nature are still an offence. It is only amended and not scrapped off. This paper aims to deeply analyse the arguments in favour of not reading down the section as a whole. Section 377 not only elaborates on homosexuality but heterosexual acts and public health system also.

INTRODUCTION

The Indian Penal Code, 1860 is the major substantive criminal law of India. Section 377 of is a section of the Indian Penal Code introduced in 1864 during the British rule of India. Modelled on the Buggery Act of 1533, it is used to criminalize sexual activities "against the order of nature". It says

377. Unnatural offences: 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. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.483

It is clear from the section that consent is no defence to an offence under Section 377 and no distinction regarding age is made in this section. It makes consensual anal and oral sex a punishable offence. Thus, it makes homosexuality a punishable offence as they indulge in oral or anal intercourse. But homosexuality is no more an offence in India. The landmark judgment of Navtej Singh Johar v Union of India484 held that consensual adult gay sex is not a crime and article 14 and 21 of Indian Constitution contradicts the present view of Section 377. However, there is a general misconception that section 377 is only confined to homosexuality. The reference to “intercourse against the order of nature” is not confined to homosexual acts. The section also criminalises sexual activities like anal sex, fellatio (commonly known as blowjob) etc., even if it takes place between a man and a woman. Although not mentioned in so many words, sexually assaulting a minor too invites a punishment


484 Navtej Singh Johar v Union of India, W.P. (Crl.) No. 76 of 2018.

www.supremoamicus.org
under § 377, apart from the relevant sections of the POCSO (Protection of Children from Sexual Offences) Act, Necrophilia (sexual intercourse with a dead body), sex with animals and other such ‘unnatural’ practices too fall under the ambit of the section. Therefore, section 377 not only includes homosexual acts but heterosexual acts also.

**MEANING OF UNNATURAL OFFENCES**

The term “unnatural offences” comes under chapter XVI of Indian Penal Code, 1860. The title of Section 377 uses the term “unnatural offences”. The word “unnatural” means contrary to nature, abnormal. The word “carnal” means something related to sexual acts. Then, unnatural offences means sexual activities contrary to nature. Section 377 of the Penal Code is intended to punish the offence of sodomy, buggery and bestiality. The offence consists of a carnal knowledge committed against the order of nature by a person with a man, or in the same unnatural manner with a woman, or by a man or woman in any manner with an animal. In the case of *Lohana Vasantlal Devchand v State*, three men were charged under Section 377 for inserting penis in a boy’s mouth. It was held to be an unnatural offence. Same was the decision of the court in *State of Kerala v K Govinda*, where it was held that committing of intercourse by inserting the male organ between the thighs of another is an unnatural offence punishable under section 377, IPC. This decision throws light that for committing an unnatural offence; it is not necessary to penetrate in to the orifice of mouth or anus or another by interpreting the word ‘penetrate’ to mean find access into or through, pass through.

**SECTION 377 CANNOT BE DECLARED UNCONSTITUTIONAL AS A WHOLE**

According to the law of Section 377, any kind of sexual activity that is not penile-vaginal intercourse (intercourse as explained in the explanation of the section) is punishable. The term “Against the order of nature” in Section 377 subject to various interpretations by the court. The Court in *Khanu v Emperor* laid down that, “the natural object of sexual intercourse is that there should be the possibility of conception of human beings.” The court then defined sexual intercourse as “the temporary visitation of one organism by a member of the other organism, for certain clearly defined and limited objects”. Thus in sexual activity, the natural object of which is not conception, is against the order of nature. This section was read by courts to criminalize bestiality, child sexual abuse and consensual homosexual intercourse. The section as interpreted by the courts from time to time initially punished only anal sex as unnatural.

Section 377 used to criminalise homosexuality (before 2018 judgment) but this is the only section which covers paedophilia and tyke sexual abuses. It is on

---

488 State of Kerala v KundumkaraGovindan and Anr., 1969 CriLJ 818.
489 Khanu v Emperor, A.I.R 1925 Sind 286.
account of this very clause that those accused of sexually assaulting minors are brought to justice. In the recent past, cases of sexual abuse against minors (those below the age of 18 years) have been on the rise. In such circumstances, it becomes essential to safeguard the dignity and fundamental rights of the children of the country.

Those held responsible for sexually abusing minors are now charged under Section 377, making their punishment more stringent. Therefore, the keenness of the Court in bringing justice to the victims who are either women or children cannot be discounted while analysing the manner in which the section has been interpreted.

Also, it not only punishes those who conduct unnatural sexual acts on humans but it also punishes act such as bestiality which punishes those who conduct unnatural sexual act on animals. This provision has been used mostly against gay men, men who have sex with men (MSM), hijras and male sex workers in the public sphere. It has also been used against organizations and ground level activists working on issues of sexual rights, LGBT issues and HIV/AIDS. But this is the only section which is a redressal for men. Marital rape is not recognised in India and therefore, section 377 is a resort to the victims of marital rape. This paper will discuss these various aspects of Section 377 of Indian Penal Code. For the proper understanding, section 377 is categorise into three categories:

A. SEXUAL ACTS BETWEEN HOMOSEXUALS
B. CRIMINALISES SEXUAL ACTS BETWEEN HETEROSEXUALS
C. CRIMINALISES SEXUAL ACTS BETWEEN ANIMALS AND HUMAN

Sexual acts between Homosexuals:
Before the 2018 judgment of SC in Navtej Singh Johar v Union of India, homosexuality was a criminal offence under Section 377. Consensual sex between people of same gender was criminalised and people were punished for it. In Suresh Kumar Kaushal v Naz Foundation, 2013, SC upheld the constitutional validity of Section 377 and held that section 377 is not violative of the fundamental rights enshrined in the Constitution of India. But later in 2018, SC reversed the judgment and a five-judge constitutional bench declared Section 377 of Indian Penal Code unconstitutional to the extent of consensual same sex between two adults. It declared that adult gay sex is not a crime and held the law to be “irrational, arbitrary and incomprehensible.”

Criminalises sexual acts between heterosexuals:

---

490 Hijras can be called, for lack of a better term, transgender people. In India they are also a social, political and cultural community.
491 Bharosa Trust, an organisation in Lucknow working on issues of HIV/AIDS was raided and accused of having in their possession ‘pornographic’ material. The material in question was that relating to sexual health. Employees were arrested under 120 (B) for criminal conspiracy and under sec. 377 of the Indian Penal Code.
For an offence under Section 377, penetration is sufficient to constitute carnal intercourse. The section used to have various implications for homosexuals but it has implications for heterosexuals too. According to the meaning of the section, if a man and a woman engage in sexual activities which are against the order of nature they will be punished with imprisonment for life and/or fines. This means that anal sex and oral sex are against the order of nature as they do not contribute to the process of reproduction. However, a lot of people engage in anal and oral sex behind the four walls of their homes and yet they go unpunished. No case so far has been registered against any heterosexual for engaging in sexual activities against the order of nature. Most people are unaware of the interpretation of this section and the implications on heterosexuals. Also, the definition of rape under section 375 is not gender neutral. Therefore, men who are raped is against the order of nature and thus section 377 it is a redressal for men also. In India, there is no law on Marital Rape. Section 377 is a resort to those marital rape victims who are subjected to non-consensual sexual acts, which are unnatural.

**Redressal for men**

Section 375 of Indian Penal Code is the provision for rape. It says

“A man is said to commit “rape” if he --
Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

Inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

Manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any ~ of body of such woman or makes her to do so with him or any other person; or

Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—
First. — against her will.
Second. — 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 nature and consequences of that to which she gives consent.
Sixthly. —with or without her consent, when she is under eighteen years of age.
Seventhly.—when she is unable to communicate consent.”

Section 375 only recognises rape on a woman by a man. There is no provision for rape on a man. Currently, if a man is

---

494 Indian Penal Code 1860, Section 375.
raped, the person is punished under Section 377. Considering that the definition of rape in the Indian Penal Code is not gender-neutral, if Section 377 were to be simply struck down, it could potentially leave those who are raped with even less in the way of adequate redress in criminal law. Only a woman can invoke Section 375 of the Indian Penal Code, which defines the offence of rape, and a woman too cannot generally invoke it unless she is raped by a man who is not her husband. Thus, section 377 is a resort to all those men who are raped.

Resort to marital rape victims
Rape laws in India are the result of a patriarchal mindset of considering women to be the property of men post marriage with no autonomy or agency over their bodies. Even though many countries around the world have taken such strong and progressive steps towards marital rape, India is one of those countries where it is still not a criminal offence. Indian law considers rape to be a crime committed by a man against a woman who is not his wife.

An explanation to Section 377 states: “Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.” Unlike the offence of rape, this provision against supposedly unnatural acts contains no marital exception. As a result, it has been possible to innovatively invoke it to proceed against husbands who subject their wives to penetrative non-consensual sexual acts which, it could be argued, are unnatural. Section 377 thus, in such circumstances, can accord relief to wives whose husbands rape them or perform unnatural sexual acts on their wives without their consent. It is useful in the sense that since marital rape is not an offence in India, so the Indian women would have a way out to get their husbands punished when they perform unnatural sexual acts on them. This section would act as a tool in the hands of Indian married women suffering under their cruel husbands who cannot take a relief under Section 375, IPC.

Criminalises sexual acts between animals and human
Sexual activities which truly are ‘unnatural’ like having sex with dead bodies or animals, among others, too fall under this Section. Therefore, this aspect of the section needs to be retained since it is essential in upholding the fundamental rights of minors and preventing their exploitation. In the 2018 judgment, the court held that sex with animals will still remain an offence under Section 377. There are a number of cases that have emerged over the years where one can clearly see that committing unnatural sex is not unreal. In Jisha murder case 2016, the accused was charged under Section 377 for having sex with a goat. There are numerous cases where people are charged under Section 377 for committing sex with animals.

CONCLUSION
Deletion of the Section 377 can well open flood gates of delinquent behavior and be misconstrued as providing unbridled license for the same. Sections like Section 377 are intend to apply to situations which are not covered by the other provisions of the Penal Code and there is neither occasion nor necessity for declaration of the said section unconstitutional. Section 377 is not confined to homosexuality alone. It prosecutes

www.supremoamicus.org 145
various homosexual acts which are against the order of nature. This section is invoked for complementing the lacunae in the rape laws and not mere homosexuality.

*****
LAND TRIBUNAL UNDER THE TAMILNADU LAND

By N. Ilakkiya
From Tamil Nadu Dr. Ambedkar Law University

1. INTRODUCTION:
The Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961 is an important piece of agrarian legislation. This Act is mainly enacted for fixing a ceiling on the holdings of agricultural lands and provides for the acquisition of surplus lands and then distributes those lands to landless people and also deals with other matters connected therewith in the state of Tamilnadu.

The preamble further states, that earlier the agriculture lands was with the few people alone and they were cultivating the land by giving some wages to the cultivating tenant. But the

2. OBJECTIVE OF THE ACT:
The objective of the Act is pointed out in the preamble itself. The main aim of the Act is to fulfil the provisions as provided under the Article 39 of the Indian Constitution. Article 39 states that certain principles of policy to be followed by the State:

The state shall, in particular, direct its policy towards securing-
(b) That the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good;
(c) That the operation of the economic system does not result in the concentration of wealth and means of production to common detriment;

Thus the preamble of the Act tries to fulfil the above clauses of the Article 39 (b) and (c) of the Indian Constitution. It is also pointed out in the case State of Tamil Nadu v. Narendra Dairy Farms (P) Ltd, that “the land ceiling Act has been enacted to give effect to the Directive Principles of State Policy in the Article 39 of the Indian Constitution.”

The Cultivating Tenant is defined under section 2(aa) of the Tamil Nadu Cultivating Tenants Protection Act, 1955- "cultivating tenant" -

(i) means a person who contributes his own physical labour or that of any member of his family in the cultivation of any land belonging to another, under a tenancy agreement, express or implied; and
(ii) includes-
(a) any such person who continues in possession of the land after the determination of the tenancy agreement;
(b) the heir of such person, if the heir contributes his own physical labour or that of any member of his family in the cultivation of such land;
(c) a sub-tenant if he contributes his own physical labour or that of any member of his family in the cultivation of such land;
(d) any such sub-tenant who continues in possession of the land notwithstanding that the person who sublet the land to such sub-tenant ceases to have the right to possession of such land; but
(iii) does not include a mere intermediary or his heir;

Explanation. - A sub-tenant shall be deemed to be a cultivating tenant of the holding under the landlord if the lessor of such sub-tenant has ceased to be the tenant of such landlord:]

---

495 INDIA CONST. Art. 39, cl.(b) and (c).
rivalry started from here. The landowners started to exploit their cultivating tenants by providing low wages and also started to evict their cultivating tenants without any reasons. And hence in order to protect the tenants, some measures are taken on the part of the government. They are:

1. The government started to acquire the surplus lands i.e. the excess lands are acquired from these landlords and distributed them to the poor people who are not having any source of income.

2. In order to protect the cultivating tenants from unreasonable eviction The Tamil Nadu Cultivating Tenants Protection Act, 1955 was enacted. This was enacted to safeguard the tenants from unreasonable eviction of landlords.

Thus the Tamilnadu Land Reforms (Fixation of Ceiling on Land) Act, 1961 was enacted in order to reduce these disparities prevailing among the landlord and the tenants. Land should not be concentrated on certain people. This will lead to disparity and hence for this purpose, it is necessary to fix a ceiling on agricultural holdings and acquire the agricultural land in excess of the ceiling area and it must be distributed to the landless people. By this way of distribution, it will sub-serve the common good, increase agricultural production and promote social and economic justice.

Thus the prime object of the Act is to get the excess of lands and to distribute to the landless people in order to sub-serve the common good, increase agricultural production and promote social and economic justice.

3. SALIENT FEATURES OF THE ACT RELATING TO LAND TRIBUNAL:

1) The Act comprises of Land Board under Chapter V headed with a land Commissioner, Chief Conservator of Forests, the Director of land Reforms and two non-official members, nominated by the Government. All the above said members are ex-officio members except the two non-official members as per section 24. The Tamil Nadu land board is also vested with the power of deciding the question of future acquisition of land.

2) It has also constituted a tribunal called Land Tribunal under the section 76, 76A, 77, where these sections deal with the constitution, powers, and jurisdiction of land tribunals respectively. The Act also constitutes a Special Appellate Tribunal (section 77(c)) under the Chapter X A under Article 323B of the Constitution of India vested with the power of hearing appeals and also revising the orders passed by the Land Tribunal.

3) As in the other tenancy laws, the jurisdiction of the Civil Courts is ousted with respect to any matter which is to be decided or dealt with by the authorised officer, the land board, the Land Commissioner, the Land Tribunal or the Special Appellate Tribunal.

**Note:**

499 The term “Cultivating tenant is also defined under the section 3(10) of the Tamilnadu Land Reforms (Fixation of Ceiling on Land) Act, 1961.

500 Section 3(23) -“Land Board” means the Tamil Nadu Land Board constituted under Section 24.

5) Chapter XI deals with the appeal to Land Tribunal and Special Appellate tribunal, Revision by the land Commissioner and Special Appellate Tribunal and power to stay the execution of an order.

4. DEFINITION OF LAND TRIBUNAL UNDER THE ACT:

The Section 3 of the Act deals with the definition clause of the Act. This section has nearly 47 clauses by defining various terms.

The term tribunal is defined under the Section 3(2b). “Land tribunal means a land tribunal constituted under section 76.”

Thus land tribunal is very important for dealing of cases which comes under the per-view of this Act.

5. LAND BOARD:

Before appearing for the tribunal the Land Board does the initial methods necessary for going into the tribunal. The Land Board is constituted according to the Chapter V of the Act. This chapter deals with the constitution and functions of the Land Board. Section 24 speaks about the constitution of the Tamil Nadu Land Board. The Land Board consists of-

i. The Land Commissioner, ex-officio;
ii. The Chief Conservator of forests, ex-officio;
iii. The Director of Land Reforms, ex-officio;
iv. Two non-official members, nominated by the government.

The member referred above will be the chairman of the Land Board and shall be a gazetted officer nominated by the Government. The term of office for the above members is three years and he is also entitled to re-nomination. It is also to be noted that if the above member is said to be absent from the meetings for a period of three consecutive months then he is deemed to have vacated his office. At the same time if a member wanted to resign from this post then he can submit a letter in writing to the land commissioner. Then that vacancy will be filled by a fresh nomination.

5.1 FUNCTIONS OF THE BOARD:

One of the major functions for the Land Board is that the board is vested with the power of granting permission of acquiring the excess of lands. But when the landowner wants the surplus plus lands for the cultivation or plantation purposes or for other ancillary purposes then the owner must apply for the permission of the Land Board in order to retain his lands.

After considering the permission letter, the Land Board goes for an enquiry whether the landowner is true in this work and whether he needs the land for cultivation or for plantation purpose or for any other ancillary purposes. After looking to this if the Land Board is satisfied in the sense then they give permission to the landowner for such purposes. At the same time, the extra

---

502 Section 3(24)- "Land Commissioner" means the Land Commissioner appointed under section 97
land is given up to 20% and not more than that.

While deciding the question of granting permission or refusing permission, the Land Board will take into consideration the following matters:

i. The area under plantation and area required for ancillary purposes of the plantation;
ii. Programme for extension of the plantation;
iii. Lands necessary for factories, labour quarters, playgrounds, hospitals, schools, and other ancillary buildings;
iv. Such other matters as may be prescribed.

On the following grounds, the Land Board may cancel the permission granted under section 31. The grounds are:

i. Breach of conditions specified by the Land Board;
ii. Use of land for any purposes other than the purpose of extension or for ancillary purposes of the plantation;
iii. Obtaining the permission by fraud or misrepresentation.

Thus the giving or refusing of permission by Land Board under section 31 and cancelling of such given permission under section 33 is final and they are not subjected to be questioned in the court of law. Only if the Land Board is found to be guilty under these cases then they can be questioned about their responsibilities in these courts.

5.2 POWERS TO RECTIFY MISTAKES:

The section 36 of the Act provides that the board has the power to make necessary correction where a bona-fide mistake has occurred. So also it can correct any other relevant mistakes also.

5.3 PERMISSION TO HOLD EXCESS LAND BY INDUSTRIAL OR COMMERCIAL UNDERTAKINGS OR PUBLIC TRUST:

Section 37A provides that the Government can permit any industrial or commercial undertakings to hold or acquire any land in excess of the ceiling area. Similarly, it also applies to the public trust. Such trusts wanted to hold or acquire any land for the purposes:

1) For establishing any educational institutions or hospital;
2) Expanding any existing educational institutions or hospital;
3) Such other matters as may be prescribed.

There are many powers and functions are laid on the part of the Land Board but the above mentioned are some of the important functions of the Land Board.

6. LAND TRIBUNAL:

The Land Tribunal is discussed in section 76, 76A and 77 of this Act. The said sections discuss their constitution, powers, and jurisdiction of Land

---

510 Section 34.
Tribunals. The government can constitute any number of land tribunals in that State when they think it is necessary.

The members of this tribunal should be an officer not below the rank of District Revenue officer.

The land commissioner has the power to transfer the appeal from one tribunal to another.

Each land tribunal shall have jurisdiction over such areas as the government may notify from time to time determine. Every land tribunal shall have the powers as are vested in a civil court under the Code of Civil Procedure, 1908. The land tribunal is a single member body under the administrative control of the land board. The High Court has also got revisional jurisdiction over the Land Tribunals orders.

6.1 NEED FOR LAND TRIBUNAL:

The problem of land reforms administration came to an end only when the land tribunals are established in each and every state. Failure to hear every side, prejudice decrees, private consultations, policy outside the statute, facts determined independently of policy are some of the common complaints made against the Administrative Tribunals. The Administrative bodies often make their own decisions on their own mindset without even thinking other legal consequences which will happen in the future. They lack knowledge in judicial provisions and statutes and also they were not aware to follow the provisions of Code of Civil Procedure, 1908. The absence of arrangements to review decisions, the concentration of power in these bodies and the absence of appellate authorities are other sources of anxiety.

It is also seen that the lawsuit method of adjudication in a Civil Court is the other alternative for this defects. But at the same time these Civil Courts also have various defects like if there was a rivalry between a tenant and landlord in the sense the landlord will be having the sound financial resources and he may appoint a leading lawyer to his case or there are also chances of bribing a Judge and hence he may get the Judgement in his favour through these crooked means. Or the landlord provides only less amount of compensation to his tenant and also can evict him unreasonably.

Hence to overcome all these disadvantages the Land Tribunals are constituted in each and every States.

6.2 POWERS OF LAND TRIBUNAL:

The land law Tribunal is playing a vital part among other tribunals and courts. There are many powers vested in them. But some powers are discussed below. They are:

1. To determine the purchase price of the land.
2. To determine the value of the site of the dwelling house.

512 Supra note 8.
3. To decide disputes arising between the landlord and tenants.
4. Any other duty which may be prescribed by the government.

Earlier the bill was propounded to the constitution only one land tribunal in a state. But after the amendment, it is made that any number of tribunals can be constituted. At the same time earlier it was propounded that only one member to be in the Tribunal. But after the amendment, it is increased to three in number with a term of office not less than three years.

7. TAMILNADU LAND REFORMS SPECIAL APPELLATE TRIBUNAL:

The chapter X-A of the Act deals with the constitution of the tribunal appointment, qualification, removal of members of tribunal, powers, and jurisdiction of the Tribunal.

The following officers constituted under this Act are:
1) Authorised officer- section 3(5)\(^{513}\)
2) The Tamil Nadu Land Board
3) Land Tribunal
4) Land Commissioner
5) Tamil Nadu Land Reforms Special Appellate Tribunal.

The above mentioned authorities are appointed in order to look into any dispute or complaint with respect to issues or matters arising under this Act.

7.1 CONSTITUTION OF TAMIL NADU LAND REFORMS SPECIAL APPELLATE TRIBUNAL:

The section 77(c) deals with the constitution, appointment, qualification of the members of the Tribunal. The Government has the discretionary power to constitute for Special Appellate Tribunal if it is necessary to constitute provided by notification.

The Special Appellate Tribunal shall consist of:

7.1.1. Qualification:

1. A Chairman, who must be a judge of the High Court or must be a person who held the office of Vice-Chairman for at least two years.
2. A Vice-Chairman, must be a person qualified to be a judge of a High Court or has been an Officer of Government not below the rank of Special Commissioner or Secretary to the State Government for a period not less than two years or has been Secretary to Law Department for a period of not less than two years or has been member of the tribunal for the period of three years.
3. Judicial member- he must be qualified to be a judge of a High Court or has been the Secretary to Government, Law Department for a period of not less than two years.
4. Administrative member- he must be an officer not below the rank of commissioner and secretary to the Government and has dealt with land

\(^{513}\) Section 3(5)- "authorized officer " means any Gazetted Officer authorized by the Government by notification to exercise he powers ‘conferred on, and discharge the duties imposed upon, the authorized officer under this Act for such area as may be specified in the notification.
reform measures during his service for a period of not less than one year in the aggregate.

7.1.2. Terms and conditions of service: The Chairmen, Vice-Chairmen, and other members can hold office for a period of five years. The Chairman and Vice-Chairman can hold office until the age of 65 years and 62 years respectively.

7.1.3. Salary and allowances: The salaries and Allowances are prescribed by the Government. The increase of salary and allowances are discretionary powers of the Government.

7.1.4. Removal: the above said members cannot be removed before the term of office expires. They can be removed before their office gets over only on the grounds if they are proved misbehaviour or incapacity.

7.1.5. Powers of the Special Appellate Tribunal: the powers are as same as vested in Civil Court under the Code of Civil Procedure, 1908 including the powers to punish for contempt. Likewise, the orders or decrees passed by the Special Appellate Tribunal shall be final and shall not be questioned in any court of law except in Supreme Court.

7.1.6. Power to summon persons etc: The authority referred under this Act has the power to issue summons to any person in order to give evidence or to produce a document. The enquiries conducted by these authorities are said to be judicial in nature proceeding within the meaning of sections 193 and 228 of IPC.

7.1.7. Penalty: the authorities can even issue penalties if they find anything contravening their order as per section 77-I of Act.

8. CONCLUSION:

Thus the Land Tribunal is established in order to overcome the difficulties prevailing in the Administrative Tribunal. At the same time, the Land Tribunal is constituted as per the Article 323B of the Indian Constitution. Article 323B empowers Parliament and State Legislatures for establishing Tribunals for adjudication of disputes complaints or offences regarding the following matters:

a. Foreign exchange and export
b. Land reforms
c. Industrial and labour disputes etc.

It should be kept in mind that the proceedings of these Courts are

Section 77G.

Section 193 of IPC- Punishment for false evidence.—Whoever intentionally gives false evidence in any stage of a judicial proceeding, or

Section 228 of IPC- Intentional insult or interruption to public servant sitting in judicial proceeding.—Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Article 323B- Tribunal for other purposes.
governed by the Principles of Natural Justice and subject to the sections 193, 219, 228 of IPC.

Thus the Land Tribunal of Tamil Nadu is one of the pioneer legislation in the land reforms. Since it resolves the dispute between the landlord and tenant in a peaceful manner and this hears the cases relating only to land related issues hence the decrees are provided faster than the other courts. There is a saving of time for both the parties. The land tribunal tries to safeguard the interests and rights of both the landlord and tenants. Thus the tribunal plays a very important role under the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961.

Thus the following things that can be summarised are:
1. Pioneer of Tamil Nadu legislations when it comes to land Reforms.
2. Bill provides for simplified procedures rather than the procedures lay down in the civil courts.
3. It tries to safeguard the interests, rights of the landlord and the tenants.
4. The Act provides to constitute any number of tribunals if the Government feels necessary.
5. The Special Appellate can also be constituted under the Act.
6. The Act also provides provisions for constituting Land Boards in respective States if necessary.

Thus these are the specialties of the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961 regarding the land tribunal.

*****
EVOLUTION OF DUE PROCESS IN INDIA

By Navneeta Shankar
From Maharashtra National Law University, Mumbai

ABSTRACT

The phrase ‘due process of law’ implies that it is not sufficient that a law has been enacted by following the required procedure but it must also be just, fair and reasonable. This phrase holds great significance as it has been used extensively over the years in interpreting various provisions of the Constitution and in shaping the judicial interpretation of the fundamental rights, especially Article 21. However, this view of the apex court has been arrived at after decades of reinterpretation and is not one that the court has held since the enactment of the Constitution. This article aims to cover this history as to how the understanding of Article 21 has evolved over the years and how the concept ‘due process’ gained prominence in the Indian scenario. The article also looks at the tussle between ‘procedure established by law’ and ‘due process of law’ and the inherent conflict that existed within Article 21. It also emphasises on the drastic change in the ratios given in the cases of A.K Gopalan and Maneka Gandhi and why these judgments were crucial in shaping the Judiciary’s understanding of ‘due process of law’.

Keywords: Due process of law, Procedure established by law, Constitution, Article 21

1. INTRODUCTION

Justice means giving someone what is ‘due’ to them. The word ‘due’ becomes important here as it refers to something being just, fair and reasonable. Article 21 of the Indian Constitution ensures the Right to life and personal liberty of a person as his/her fundamental right and forms the backbone of all the other rights guaranteed by the Constitution. This is because Article 21 is a natural right of a person i.e. such a right is available to a person by virtue of them being a human being. This right to life and liberty can neither be given nor be taken away by anyone. Every person is born with this right. Article 21 of the Constitution states that: ‘No person shall be deprived of his life or personal liberty except according to procedure established by law.’

The phrase ‘procedure established by law’ means that any law which the legislature has enacted by following the required procedure would qualify as a means to deprive any person of their right to life and liberty. The flaw with such an understanding is that it does not create a distinction between a procedure that is arbitrary and unjust and a procedure that is just, fair and reasonable.

This where the distinction between ‘procedure established by law’ and ‘due process of law’ becomes important.

The Indian Constitution does not mention the phrase ‘due process of law’ anywhere in its text. However, it has borrowed the understanding of this phrase from the US Constitution, inserted by the 5th Amendment.

518 Article 21, Constitution of India, 1950
Amendment.\textsuperscript{520} This concept played a major role in shaping the doctrine of judicial review and the role of judiciary in US since then.\textsuperscript{521} The absence of due process of law from the Indian Constitution does not mean that the Supreme Court has completely overlooked it but rather, through a continuous interpretation of Articles 14, 19 and 21, the apex court has time and again emphasised on following a ‘due process of law’ especially since the emergency period.

2. DUE PROCESS OF LAW
The US Courts have interpreted the word ‘due’ to mean just, reasonable and fair and therefore, it gives powers to the courts to declare any law that is unfair or arbitrary or goes against the basic rights of people as void ab initio.\textsuperscript{522} This understanding is what significantly distinguishes this phrase from a ‘procedure established by law’. While a procedure established by law implies that any law which has followed the due procedure, irrespective of whether it is just and reasonable, shall qualify under it, the phrase ‘due process of law’, on the other hand, implies that only those laws which have followed the due procedure and at the same time are just, fair, reasonable and \textit{intra vires} of the powers of the legislature shall be valid. It holds the government to be subservient to the laws of the land.\textsuperscript{523} ‘Due process of law’ therefore, can be understood as a tool of Constitutionalism and an extension of the rule of law. Constitutionalism, simply put, means adherence to the Constitution. It refers to a limited government or control on the powers of the state. It seeks to ensure that the state does not use the powers, conferred upon it by the Constitution, in an arbitrary and unchecked manner. ‘Due process of law’, acts as a tool to achieve this. It ensures that the laws made by the state are just and do not merely seem to be just. In a broader context, the two are often considered to be synonymous, though Constitutionalism has a wider ambit with concepts like ‘rule of law’ and ‘due process of law’ acting merely as means to achieve this Constitutionalism. 

Due process of law has two aspects. It can either be procedural or substantive. Procedural due process of law ensures that no person’s life and liberty is taken away without following the required procedure. This means that every person must have the right to a free and fair trial, an opportunity to be produced before a magistrate, to be heard and to be subjected to an unfair trial.\textsuperscript{524} When such a procedure has not been followed, it constitutes a direct violation of the powers conferred upon the state by the Constitution.\textsuperscript{525} This is the reason why the

\textsuperscript{520} A.H Hawaldar, \textit{Evolution of Due Process in India}, Manupatra, (Dec 2014), Available at http://docs.manupatra.in/newsline/articles/Upload/C64E2EB3-321D-470D-A4C8-0EE5E55BA21A.pdf (last visited on October 14th 2018)


\textsuperscript{523} A.H Hawaldar, \textit{Evolution of Due Process in India}, Manupatra, (Dec 2014), Available at http://docs.manupatra.in/newsline/articles/Upload/C64E2EB3-321D-470D-A4C8-0EE5E55BA21A.pdf (last visited on October 14th 2018)


\textsuperscript{525} A.H Hawaldar, \textit{Evolution of Due Process in India}, Manupatra, (Dec 2014), Available at

www.supremoamicus.org

156
Constitution has given the powers of judicial review to the Judiciary in order to ensure that a system of checks and balances deters each of the three organs of the government from acting in a manner ultra vires of their powers. Substantive due process of law ensures that the provisions of law and in consonance with the essence of the Constitution and that the substance of the law enacted is not in violation with the lex loci.\(^{526}\)

3. **A.K Gopalan: The Old Approach to Article 21**

The Supreme Court was faced with the dilemma of interpreting ‘procedure established by law’ in the famous case of *A.K Gopalan v. State of Madras*\(^{527}\) and this interpretation held the field for almost three decades from 1950 to 1978. The *Gopalan* case questioned the constitutionality of the Preventive Detention Act, 1950 and challenges his detention has violative of the rights guaranteed under Article 19(1) of the Constitution. It was also contended that freedom of movement was a part and parcel of Article 21 which guaranteed rights to life and personal liberty.\(^{528}\)

The *Gopalan* case holds significance for two reasons. Firstly, the majority opinion in the case was that the Articles 19, 21 and 22 were mutually exclusive of one another and a law to which Article 21 applied, Article 19 was not to be applied to it.\(^{529}\) The second dilemma settled by the case was that Article 21 does not encompass natural justice or due procedure and any procedure followed by the parliament shall make the law valid.\(^{530}\) The judgment clearly gave immense powers to the state as Article 21 provided no protection against unchecked legislative powers and any law which has merely followed the procedure could be used to strip a person off his life and personal liberty irrespective of whether the law was just or not.

The Supreme Court’s rejection to the inclusion of natural justice within the purview of Article 21 were based on several reasons. Apart from the omission of the word ‘due’ from the wordings of Article 21, another reason was that the draft Constitution had included the phrase ‘due process of law’. The mere fact that this was omitted in the actual text of the Constitution implied that the Constituent Assembly did not intend to introduce procedural due process in India. The concept of natural justice was seen as too vague and uncertain and therefore, something that could not be included under Article 21.\(^{531}\) The apex court’s decision was criticised and scrutinised and much of the majority’s reasons could not stand the scrutiny that came its way. The court was seen as relying too much on the literal interpretation of the provision and missing the inherent essence of right to life and personal liberty.

\(^{http://docs.manupatra.in/newsline/articles/Upload/C6A4E2EB3-321D-470D-A4C8-0EE5E55BA21A.pdf\)


\(^{527}\) AIR 1950 SC 27

\(^{528}\) *A.K Gopalan v. State of Madras*, AIR 1950 SC 27


Contrary to this, the dissenting opinion given by Fazi Ali J. implied that Article 21 was an umbrella provision that included natural justice as well as due process. He interpreted that ‘procedure established by law’ included ‘due process’ which further covered every person’s right to free and fair trial and the same is recognised by every modern legal system. His opinion suggested that Articles 19, 21 and 22 should not always be read in isolation but can also be mutually dependant depending on the circumstances of the case. While the majority’s view was upheld and led to several anomalous judgements, the dissenting opinion in the case played a major role in changing the judicial perception towards Article 21 in the upcoming years.

4. JUDICIAL INTERPRETATION OF PROCEDURE ESTABLISHED BY LAW

The judgement given in A.K Gopalan v. State of Madras was reiterated in Kharak Singh v. State of Uttar Pradesh, where the ‘domiciliary visits’ of the police to the houses of habitual offenders was seen as violative of Article 21 however, the majority, following the ratio laid in the Gopalan case, refused to examine the issue under Article 19(1)(d). The minority opinion in the case was given by Subba Rao J., who was of the opinion that a law must not be in contravention to both Article 21 and Article 19 in order to qualify as a reasonable restriction.

This minority opinion in the Kharak Singh case was adopted as the majority judgment in the case of Satwant Singh Sawney v. Union of India, where the apex court held that the rights of the petitioner under both Article 14 and under Article 21 had been violated. This view was further strengthened by the case of R.C Cooper v. Union of India, also known as the bank nationalisation case where the constitutional validity of the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1969 was challenged. The act was declared as void for violating Articles 14, 19 and 31 of the Constitution. The Court, in this case, took the view that Article 21 should be read with Article 14 in order to strengthen the right to life and personal liberty and do away with the dilemma created by ‘procedure established by law’. The bank nationalisation case, hence marked the new trend of shift towards the understanding of ‘due process of law’.

321D-470D-A4C8-0EE5E55BA21A.pdf
(last visited on October 14th 2018)

AIR 1950 SC 27

AIR 1963 SC 1295 : (1964) 1 SCR 332

A.H Hawaldar, Evolution of Due Process in India, Manupatra, (Dec 2014), Available at http://docs.manupatra.in/newslines/articles/Upload/C64E2EB3-321D-470D-A4C8-0EE5E55BA21A.pdf
(last visited on October 14th 2018)

AIR 1970 SC 564

A.H Hawaldar, Evolution of Due Process in India, Manupatra, (Dec 2014), Available at http://docs.manupatra.in/newslines/articles/Upload/C64E2EB3-321D-470D-A4C8-0EE5E55BA21A.pdf
(last visited on October 14th 2018)

R.C Cooper v. UOI, AIR 1970 SC 564

www.supremoamicus.org
5. MANEKA GANDHI: THE NEW APPROACH

The view adopted in the Gopalan case was completely overturned in the landmark case of *Maneka Gandhi v. Union of India.* In *Maneka Gandhi,* the petitioner had approached the Supreme Court after her passport had been impounded by the airport authorities under section 10(3)(c) of the Passport Act, 1967. This was challenged as violative of Article 21 of the Constitution especially as the order of passport impounding was given without giving the petitioner an opportunity of being heard in her defence. The verdict was delivered by a seven-judge bench with the leading opinion propounded by Justice Bhagwati.

The court held that Articles 14, 19 and 21 did not exist in isolation but there existed a nexus between them. A law under Article 21 must satisfy the provisions under Article 14 and Article 19 as well. Further, simply any legislation passed by the parliament would not qualify as a law but the same must be just, fair and reasonable. It was held by Krishna Iyer J., that travel is an essential part of a person’s liberty and therefore no one can be denied their right to travel abroad except according to procedure established by law. This law was not to be arbitrary or vague but should be able to stand the test of reasonability. This means that the procedure must be ‘right, just and fair’ or it wouldn’t qualify as a procedure under Article 21 at all. In such a case, the court would have the powers to declare the law as unconstitutional by reading Article 21 along with Articles 14 and 19 as Article 14 of the Constitution provides no room for laws that are arbitrary and unreasonable.

This judgment held in the case of *Maneka Gandhi* has since then stood strong with the ratio being reiterated in numerous cases in the decades ahead. This shift from a ‘procedure established by law’ to the new understanding of ‘due process of law’ has brought about remarkable shifts in the understanding of Article 21 and gave rise to a new era of constitutional interpretation.

6. CONCLUSION

The Supreme Court’s understanding of due process of law stems from years of interpretation of the Indian Constitution. The Constitution has been, time and again, re-interpreted to suite the changing trends of the modern world with a special emphasis on increasing the ambit of Article 21. The apex court made a narrow interpretation of Article 21 in the *Gopalan* case, in which it was held that any law which has followed the procedure shall be capable of taking a person’s life and liberty. It gave immense unchecked and arbitrary powers to the state and led to several faulty decisions for almost three decades. This understanding was however, later rejected in the *bank nationalisation* and *Maneka Gandhi* case where the majority of the view was that all the fundamental rights were mutually

---

540 *Maneka Gandhi v. UOI,* AIR 1978 SC 597 : (1978) 1 SCC 248
dependant and could not exist in isolation from one another. Any law enacted by the parliament, especially with the aim of altering one’s life and liberty must be fair, just and reasonable and any law that violates this shall be void ab initio. This reinterpretation of Article 21 and 14 in 1978 is a landmark in the Indian Judiciary as it not only increased the ambit for further interpretation by the judiciary but also provides a safeguard against unchecked and uncontrolled use of power by the state. Since 1978, the powers of judicial review, which was strengthened by the case of Maneka Gandhi, has evolved continuously in ensuring justice for the common man in India.

*****
IS THE INDEPENDENCE OF JUDICIARY AS A PILLAR OF DEMOCRACY UNDER THREAT

By Neelesh Meena
From National Law University Odisha

Abstract

Independent Judiciary is a concept that the judiciary should be politically isolated from executive and legislative branches of the government. Judicial Independence is a quintessential characteristic of a democracy to work in a flawless manner. Firstly, the threats to judicial independence were identified which are prevalent in the society and then the methods to secure the judicial independence of the country as a pillar of democracy were identified. A questionnaire was drafted and the opinion of the people from different culture and ideologies were recorded. It helped to understand that whether all the methods to secure judicial independence were applied efficiently or not. The analysis of various cases such as emergency of 1975, NJAC and Collegium helped to assess the fact that weather the independence of the judiciary as a pillar of democracy under threat in India. The results of the research were that people indeed think that there were some threats to judicial independence that were not taken of initially but as the time passed and as people became much more aware, the methods to secure the Judicial Independence were applied judiciously the judicial independence to a much greater extent is achieved.

Keywords: Independent Judiciary, Judicial Independence, Branches of Government, Threats to Judicial Independence, Methods to secure Judicial Independence.

Research Methodology

The questionnaire provided in Appendix - I require information about the development of the independence of the judiciary and current status of it. It also has questions related to 1975 emergency and public opinion related to Kesavananda Bharati v. State of Kerala. The description of the current status of the Judiciary was given by Law Students from all walks of life.

Introduction

The separation of branches of government were result of the efforts channelized towards preventing the concentration of power under one authority. These branches were judiciary, executive and legislative. Every branch was to keep a check on each other. Judiciary was to be consisting of the judicial authorities of a country and judges collectively. Its objective was to ensure that the government is efficient and the rights of the citizens are protected at any cost. Through Independence judiciary, the formulators of the constitution wanted to intercept other branches of government, or the people themselves, undermining the judiciary’s decisional impartiality. It is a quintessential to preserve the rights of every individual, his life, his property.

544 JOHN HAMILTON, Branches of Government 22 (ABDO Publishing Company 2004)
545 JOHNSON F, The Role of the Judiciary with Respect to the Other Branches of Government 455 (1977)
Judicial Independence is a concept that the judiciary should be politically isolated from the executive and legislative branches of the government. That is, courts should not be subject to improper influence from the other branches of the government, groups or any groups of person. According to Dr. V.K. Rao, “Independence of judiciary has three meanings:

(i) The judiciary must be free from encroachment from other organs in its sphere. In this respect, it is called separation of powers. Our Constitution makes the judiciary absolutely independent except in certain matters where the Executive heads are given some powers of remission etc.,

(ii) The decisions of the judiciary should not be influenced by either the Executive or the Legislature—it means freedom from both, fear and favour of the other two organs.”

The Constitution of India envisages an independent Supreme Court. In fact, every member of the Constituent Assembly had been eager to see that the Court was made independent, as it could possibly be. In the words of Austin, “The members of the Constituent Assembly envisaged the judiciary as a bastion of rights and of justice. The Assembly has been careful to keep judiciary out of politics.”

According to a member of the Constituent Assembly, “This is the institution which will preserve those fundamental rights and secure to every citizen, the rights that have been given to him under the Constitution. Hence, it must naturally be above all interference by the Executive. The Supreme Court is the watchdog of democracy.”

In the words of Graham Wallas, “The psychological fact behind the principle of independence is not the immediate reaction of feeling in a man whose impulses are obstructed but the permanent result in his conduct of the destruction of some impulses and the encouragement of others. We make a judge independent not in order to spare him personal humiliation but in order that certain motives shall not and certain other motives shall direct his official conduct.”

 Threats to Independence of Judiciary

“All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary.” ---- Andrew Jackson

In late 1940’s there was huge waves of change was flowing as world’s biggest democratic nation was taking birth, and the responsibility to make India a fully democratic nation was on our great drafters of constitution of India which is led by Bharat Ratna Shri Bhim Rao Ambedkar, huge responsibility was there on the team as they are drafting rule book of a nation that will be socialist, secular, sovereign and democratic republic and for that equality and justice is a quintessential concepts. And for unbiased and fair justice systems separation between judiciary, executive and legislative is must, in the word’s of Bhim Rao Ambedkar

  546 Grahm Wallas, Human Nature in Politics 154 (Transaction Publishers 1920)  
  547 Andrew Jackson,  "President of USA, in his remark on judiciary in congress  
  548 Preamble, Constitution of India 1976
There can be no difference of opinion in the House that our judiciary must be both independent of the executive and must also be competent in itself. And the question is how these two objects can be secured.549

That clearly shows that makers were in the opinion to separate the judiciary from executive and legislature and article 50550 in Indian constitution clearly reflect the independent nature of judiciary but definition of independence of judiciary is still not clear that creates many tussles several times between legislature, judiciary and legislature.

In landmark case of S.P Gupta vs Union of India551 apex court made it clear that “The concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law thereby making the rule of law meaningful and effective.”

So “bacially if the judiciary by their performance and conduct does not meet the expectations for which such Constitutional protection has been provided, the judiciary will be reduced to any other organ of the State which we have come to distrust in recent times.”

4 Judges Conference

Unprecedented’ seemed to be the word of the day that Indians see in wee hours of 12th January 2018. Disputes and clashes in the Supreme Court burst unbar for the first time after four senior most judges also sobriquet as collegium minus chief justice of India, came out publicly against the Chief Justice of India, a supreme office that have paramount responsibility to safeguard the right and deliver justice to every particular that comes under the jurisdiction of India.

In India’s history, many tantamount events happened but they were either very general or kind of off records like Justice J S Verna’s remarks in late 90’s on things ailing the judiciary that were so general that no hype controversy was created at that time. Even in the Indira Gandhi Regime when plethora of attempts were made to control judiciary like Justice A N Ray’s552 upliftment as Chief justice of India, Raj Narain Controvery553 at Allahabad High Court. So even when attempts to tarnish the temple of justice were made but no on


550 Article 50, Constitution of India

551 S.P. Gupta vs Union Of India & Anr, (1981) SCC 87


553 The State of Uttar Pradesh v. Raj Narain(1975) SCR (3) 333
record and official statement were given by any Judges.

But things are different in today’s 21st century. Supreme court of India where whole collegiums excluding CJI, is taking stand against master of roster i.e. Chief justice of India Mr. Dipak Mishra and all the four most senior judges who presented their issues in front of the country which has been never done before as CJI is someone who in declining and ignoring the particular methodology and procedures that are customarily followed from decades, like the roster procedure in which there is a custom to allot sensitive cases to senior and experienced judges and also cases which are given according to the specialization. A particular judge have all these roster procedures under the power of CJI which are later on said by Supreme court in a reply to a public interest litigation that clearly states that CJI is the master of the roster.

There is also a different approach and view towards this particular issue i.e. it includes Justice Dipak Mishra’s past judgment on Lucknow based Medical college in which charges of corruption were levied and subsequent SIT probe and CBI inquiry is going on. Several allegations were framed against Justice Dipak Mishra that arose negative waves against him. Another such wave came from Justice Loya Murder case in which allegation on CJI being supportive of the government and kind of ignorant towards this particular issue was raised. This created ambiguity towards Justice Mishra in apex court and subsequent atmosphere. These are some assumptions that media, intellectuals and we have analysed.

Methods to secure judicial independence

Appointment

Appointment of the judges is one of the most important characteristics for Judicial Independence. Appointment by an institution which is not connected to any other branches of the government is quiet essential for the achievement of judicial independence. The Judiciary should be above suspicion and above any influence from the political parties of the country. Hence, Judiciary should be appointed by an impartial Institution.

Denial of Political Office to the Judges

The temptation of creating a base for becoming a political leader or gaining some political advantage through the help of the legislatures will make the judges do things which will ultimately hamper the

---

556 Medical council Of India vs GCRG Memorial Trust and Ors, (2017)
557 Medical council Of India vs GCRG Memorial Trust and Ors, (2017)
Independence of the Judiciary\textsuperscript{560}. Therefore, the judges should not be allowed to contest election or hold any political offices after the Retirement.

**Immunities**

The decisions and actions of the judges are immune from criticism. Even if the ratio behind a judgment may prove illogical but a judgment can not be wrong, but they are subject to the critical academic analysis. The court has been given power to initiate contempt proceeding against anyone who disrespects the court in order to maintain the dignity of the court\textsuperscript{561}. The court is also authorized to stop any act that might prejudicially affect its arriving at an impartial decision.

**Security of Tenure**

The Judges of Supreme Court should enjoy security of tenure. They can not be easily removed from the office of the judges except by an order of the president passed after an address by each house of parliament which should be supported by majority of the total number of house and by majority not less than two-third of the house of parliament.\textsuperscript{562}

**Handsome Remuneration**

To maintain status and dignity, every judge is paid a high salary. From 1986 when the salary of the Chief Justice of India was 10,000 rupees to 2018 when it is 2,80,000 rupees. In addition, they enjoy different kind of perquisites such as residential accommodation, free electricity, many servants, etc. This helps the judges of the supreme court and high courts of India to maintain a decent standard of living\textsuperscript{563}. This will ensure that any judges do not resort to bribe as an option to earnings.

**Right to Information**

According to K.G. Balakrishnan, Judges are constitutional functionaries, hence they are not covered under right to information act. According to former Chief Justice of India.

The report of the Parliamentary Standing Committee which was presented to the Rajya Sabha on April 29, 2008 stated, “Except judicial decisions making, all other activities of administration and persons included in the judiciary are subject to the RTI Act.”

**Results of the Findings**

After doing all the research and analysis we find various things that are there in our

\textsuperscript{560}Jodi S Finkel, Judicial Reform as Political Insurance 7 (University of Notre Dame Press 2008)

\textsuperscript{561}Bright SB, Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions 72 YALE L.J. 308 (1997)

\textsuperscript{562}Kaufman IR, Chilling Judicial Independence 88 YALE L.J. 681 (1979)

judicial system as from British era when judiciary in India start establishing some problems were there and in different periods problems used to come and go as we have talked major issues in the project that was there in history of judiciary of India. We infer from this project that there were always major threats to judiciary in every regime, but judiciary on its own managed to get out of every such evils. For getting this particular findings of our project we thank students of our own National Law University Odisha who helped us in surveying and data analysis. In the analysis we find that in India still only 74.9% people know the meaning of independence of judiciary, only 35.6% Indians know about judiciary at the time of independence, a chunk of people accepts that supreme court came into importance in last decades 1900’s, 81.91% people accepts that judiciary was under threat during Indira Gandhi regime, and the major finding in our survey is that 95.1% Indians have full trust and faith in our judiciary system.

Conclusion

The whole study of Judicial Independence and its importance as a pillar of democracy was assessed. Different threats to Judicial Independence and methods to secure it was identified through various sources. It shows that how well these methods are applied to those threats and what is the current status of the Judicial Independence of the country. The analysis shows in 1950s, Judiciary had very less judicial independence as judiciary was very submissive at that time. In 1960s and 1970s, the position of Judicial Independence improved as Indira Gandhi at several times tried to suppress the Independence of Judiciary through her conduct of Introducing Article 13(4) of Indian Constitution. In the year of 1973, the supreme court in the case of Kesawananda Bharati vs State of Kerala held that there is a Basic Structure of the Constitution that the parliament can not amend it. Further, the government still tried to snatch its independence by introducing article 24(1) but Supreme court held this amendment as unconstitutional. Thus, Justifying its stature as a Pillar of democracy. People believe that the judgment of supreme court are still sometimes subject to influence but Judiciary has been successful in achieving Judicial Independence to a great extent.
Questionnaire on Judicial Independence

1. What is your Name?

2. Do you the meaning of Judicial Independence?
   - [ ] Yes
   - [ ] No

3. What was the status of Judiciary at the time of Independence?
   - [ ] No Independence of Judiciary
   - [ ] Independence was very less
   - [ ] There was Independence of Judiciary

4. What was the Position of Independence of Judiciary in 1950s and 1990s?
   - [ ] Improved Fully
   - [ ] Improved considerably
   - [ ] Didn’t improved at all

5. Was there a Threat to Independence of Judiciary in the regime of Indira Gandhi?
   - [ ] Yes
   - [ ] No

6. Was the stance of Supreme Court of India in the case of Kheavvarna Bharati v. State of Kerala correct to secure Independent Judiciary?
   - [ ] Yes
   - [ ] No
POVERTY AND ENVIRONMENTAL DEGRADATION IN INDIA

By Pranjali Jha
From School of Law, University of Petroleum & Energy Studies, Dehradun

Abstract
The study reviews research on effect of poverty of rural areas on environment. There is a strong relationship between poverty & environmental degradation. First report of Human Development mentions, “Poverty is one of the greatest threat to environment” (UNDP1990). This is because the factors like level of income, quality of goods and services affects the living standards of people living in rural areas & hence affect their activities towards environment. Poor people rely on natural resources for their livelihood & are very vulnerable to causing environmental problems. Government is taking steps to solve this problem. Rural India is witnessing a significant process in the poverty reduction. Earlier 57% of rural India were below poverty line but now due to policy initiatives of government it has reduced to 45%.

Introduction
Poverty is a significant issue in India. According to 2011 census of India, approximately 68.84% of population live in rural areas. The level of poverty in rural areas is more as compared to urban areas. This is because the factors like level of income, quality of goods and services, affects the living standards of people living in rural areas. Poor people of rural areas are dependent on local natural resources for their sustenance. They depend on forest, pastures, water resources for their livelihood, income & employment. This leads to overexploitation of these natural resources. This overexploitation of natural resources leads to changes in environment. Environmental degradation is the measure of change in environment. Environment degradation is a state of crisis arising out of the environmental pollution caused to the environment in various forms such as ecological damage, depletion of natural resources etc. One of the important reasons of environment degradation is the excessive exploitation of natural resources. It is the direct consequences of environmental pollution. Environment is degraded to large extent by human activities. Poor people living in rural areas cut forest for wood so that they can earn money by selling it in the market and also use wood for cooking & heating. Majority of rural population depends on agriculture for their living. The production of main crops like food grains which consists of cereals, pulses and oil seeds has increased over the years. Agricultural land is also increasing consistently due to this. Slash & Burn agriculture is one of the common practice of small farmers due to its low cost. It involves cutting and burning of forest to create lands for agriculture. This exposes the soil to destructive environmental forces. After doing agriculture on that land for some time they shift to other land leaving the land barren. This leads to infertility and weakening of soil. Environmental degradation leads to various calamities and many hazardous problems. Also bush burning, charcoal burning and fetching of firewood for cooking leads to deforestation which causes a lot of damage to the environment. Some animals are forced to flee and others extinguish. This also leads to
air and water pollution resulting in more environmental hazard. It will also further deepen the poverty situation because draught may occur and the nutrient of the soil is reduced since the soil is exposed to lot of degradation, which will lead to low productivity and therefore more poverty and the emergence of many kinds of diseases as a result of the contamination of the environment and malnutrition. Poverty is said to be the cause and effect of environmental degradation. Population growth in poverty conditions increases the pressure on natural resources, in some cases to the point of destruction. Environmental degradation is usually understood in terms of high use of scarce non renewable resources, damage or destruction of key renewable resources (such as soils and forests) and the generation of wastes that are not easily assimilated or broken down by natural processes. Rural poverty is a major contributor to soil degradation, deforestation and over-use of freshwater worldwide. Rural people obtain their daily bread from environment in many ways that will eventually degrade the environment to an extent that they will venture into deeper exploitation. This trend will continue to an extent that the environment is no longer sustainable and would not be able to satisfy the livelihood of the community which will eventually lead to more poverty and environmental related problems such as draughts, famine, air and water pollution, deforestation, encroachment of agricultural land, poor sanitation etc.

WAYS IN WHICH POVERTY LEAD TO ENVIRONMENTAL DEGRADATION

1. Desertification: Poverty leads to desertification because people are forced to venture into the forest to meet their basic needs. Desertification is the encroachment of the desert into area where erosion has been most severe. This will even consume the more productive land due to the cutting down of trees by the poor, the soil is exposed to all forms of erosion which later lead to further desertification.

2. Rapid growing Population: Since poverty can also lead to a rapid growing population, it means that there will be more people who will exploit the environment by any means for the sake of finding ways and means to survive. As the population increases, there will be need for more houses and more demand for agricultural land which will eventually lead to the factors listed above. Most environmental problems, including those arising from climate change, tend to be aggravated by population growth. Rapid population growth combines with poverty & lack of access to resources in a number of poor countries to exacerbate problems of local environmental degradation, resource depletion & inhibition to sustainable development. Population, environment degradation & poverty are linked in the search for fuel wood, food, water & other basic needs making impoverished people unwitting agent of environmental change.

3. Dependence on biomass fuel: The poor especially the rural poor exclusively depends on biomass fuel such as firewood, straw etc. This will have a heavy impact on environmental degradation. More than 67% of rural households in India still depend on firewood or wood chips for cooking. More than 93% of rural households in Chhattisgarh use firewood or wood chips to
cook followed by Rajasthan (89%) and Orissa (87%). A new data from National Sample Survey (NSS) Office shows that over two-thirds of households in rural India still rely on firewood for cooking. One study estimates the annual consumption of firewood around 325 million cubic meters which is above the carrying capacity of forest.

4. **The widespread of Garbage**: Poverty leads to the widespread of garbage because there is always a problem of sanitation. If these rotten, it will leach into ground water or it is wash away into the river there by causing water pollution and water borne disease will eventually be witnessed. This gave rise to the widespread of cholera, diarrhoea etc. in sanity towns and rural villages that lacks a proper drainage system and a hygienic water supply system.

5. Poorer people who cannot meet their subsistence needs through purchase are forced to use common property resources such as forest for food & fuel, pastures for fodder & ponds and river for water. Even distress rural out migration has been primarily because of push factors operative at the place of origin, for example, land degradation, water scarcity, deforestation etc. and also because of shrinkage of common property resources, which have natural tendency to be exploited.

6. Water is one of the most important elements of nature. Poor people living near the sea cost depend on fishing for their livelihood. Some fishing techniques cause habitat destruction. Blast fishing & cyanide fishing which are illegal in many places harm surrounding habitat. Blast fishing refers to the use of explosives to capture fish & cyanide fishing refers to the practice of using cyanide to stun fish for collection. In this method, fishermen light sticks of dynamite and toss them into the water. The explosion stuns nearby fish and can make their swim bladders rupture, causing them to float to the surface for easy capture. These practices are destructive because they impact the habitat that the reef fish lives on after the fish have been removed. Trawling is one of the common method of fishing. But if fish stocks are continually trawled throughout the year, they can become significantly depleted. Bottom trawling the practice of pulling a fishing net along the sea bottom behind sea trawlers removes around 5% to 25% of an areas sea bed life on a single run. Since fishing is the only source of income for poors living near sea they often indulge in overfishing. This has lead to the breakdown of some sea ecosystems. Many sea species have extincted or are in the verge of extinction. Ecological disruption can also occur due to overfishing of critical fish species like tilefish & grouper fish who are known as ecological engineers. Overfishing has been identified as a primary cause of ecosystem collapse in many aquatic systems.

**EFFECTS OF ENVIRONMENTAL DEGRADATION**

Level of exploitation of nature is directly proportional to the effect of environmental degradation on earth and its people. As the level of exploitation is increasing due the activities of people the effect of...
environmental degradation is also increasing day by day. People overexploit nature for their means & greed without thinking of the consequences of their act.

1. Cutting of forests lead to the decreasing number of trees which further lead to decrease in level of oxygen in the environment hence resulting in the increasing level of air pollution. Due to air pollution the health of people are degrading day by day. Harmful air pollutants causes respiratory problems like asthma, pneumonia etc. Many people also die due to the indirect effects of air pollution.

2. Environmental degradation has lead to the depletion of Ozone layer. Ozone layer protects earth from the harmful ultraviolet rays of sun. The presence of chlorofluorocarbons, hydro chlorofluorocarbons in the atmosphere causes the ozone layer to deplete. As it will deplete, it will emit harmful radiations back to the earth. This radiation of sun causes harmful skin diseases like skin cancer etc.

3. Biodiversity is important for maintaining balance of the ecosystem in the form of combating pollution, restoring nutrients, protecting water sources and stabilizing climate. Deforestation, global warming, overpopulation and pollution are few of the major causes for loss of biodiversity.

4. The deterioration of environment can be a huge setback for tourism industry that rely on tourists for their daily livelihood. Environmental damage in the form of loss of green cover, loss of biodiversity, huge landfills, increased air and water pollution can be a big turn off for most of the tourists.

5. Environmental degradation also lead to the extinction of many species. Poor people cut or burn forest for wood or agriculture purpose leading to the loss of habitat of wild animals, birds & different species. Even overfishing and different harmful ways of fishing leads to loss of habitat of aquatic animals. This all finally result in extinction of various species.

6. The huge cost that a country may have to borne due to environmental degradation can have big economic impact in terms of restoration of green cover, cleaning up of landfills and protection of endangered species. The economic impact can also be in terms of loss of tourism industry.

SOME LAWS RELATING TO ENVIRONMENT

Some of the laws to protect environment are:

The Environment Protection Act 1986-
According to this act Central government can make laws to protect and improve environmental quality and reduce or control pollution.

The Indian Forest Act 1972 and Amendment 1984- It consolidated and reserved the areas having forest cover or wildlife, to regulate movement and transit of timber and other other forest produce & duty leviable on them.

The Indian Fisheries Act 1897-
According to this act government can punish any person who uses explosive products to catch or kill fishes.

National Green Tribunal Act 2010-
According to this act National Green Tribunal was set up to deal with all the environment laws relating to air & water
pollution. The objective of government behind this was to provide a specialized forum for effective and speedy disposal of cases related to environmental protection, conservation of forest and for seeking compensation for damages caused to people or property due to violation of environmental laws.

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 - It recognises the rights of forest-dwelling Scheduled Tribes and other traditional forest dwellers over the forest areas inhabited by them and provides a framework for accoring the same.

Coastal Regulation Zone Notification - The Ministry of Environment and Forests had issued the Coastal Regulation Zone Notification with an objective to ensure livelihood security to the fishing communities and other local communities living in the coastal areas, to conserve and protect coastal stretches and to promote development in a sustainable manner based on scientific principles, taking into account the dangers of natural hazards in the coastal areas and sea level rise due to global warming.

CONCLUSION
More than half of the population of India live in rural areas and majority of them are poor. This is due to less income & poor quality of goods and services. Hence they use or completely depend on natural resources to improve their quality of life. In this process they don't realize or neglect the fact that they are overexploiting the environment. This results in the degradation of environment. Environmental degradation means decline in the quantity and quality of natural resources. There are many harmful effects of environmental degradation on earth. It leads to various calamities and many harmful problems. It also affects the health of people. It will also further deepen the poverty situation and will also lead to emergence of many kinds of diseases as a result of the contamination of the environment and malnutrition. Government has taken many steps to improve the quality of life of rural people. It has also made laws for the protection of environment and wildlife. Government should provide job opportunities to the poor rural people and provide the basic items which are necessary for living at very low price and should ensure that the quality of goods and services provided to them are good. They should also try to spread more awareness among people regarding the impact of overexploitation of natural resources and the adverse effects of environmental degradation on earth. Hence if the poverty is controlled the problem of environmental degradation will improve to a large extent.

BIBLIOGRAPHY
- Dr. N. Maheshwara Swamy, ENVIRONMENTAL LAW, 2nd edition.
- Usha Tondon (Ed.) , CLIMATE CHANGE: LAW, POLICY & GOVERNANCE.

*****
DOMESTIC VIOLENCE AGAINST WOMEN – AVAILABLE REMEDIES

By Pratima Mishra
From National University of Study and Research in Law, Ranchi

Abstract
Violence against women is a universal phenomenon. It may differ in its scope from society to society, but it exits everywhere. India is no exception to this unfortunate incident. This menace is present in rural as well as urban areas. Violence against women can be – physical, sexual, psychological and economic. The most disturbing fact is that all these atrocities are done by those who are supposed to be the protector. The causes of violence against women are many depending upon type of violence. The root cause of violence against women lies in historically unequal power relations between men and women, and perpetual discrimination against women. Patriarchal society, son preference, treating daughters as burden, alcoholism, dowry, objectification of women by print and electronic media are some of the causes which led to domestic violence. Domestic violence affects adversely not only to the victims, but also to the male counterpart, and children. Many initiatives have been taken at international and national level to protect women from this menace. Indian constitution prohibits discrimination based on sex. There are many provision in IPC to protect women from domestic violence. Domestic Violence Act 2005, and PC&PNDT Act have been passed to protect women from domestic violence. A lot of positive results are being seen because of government initiatives. The need of the hour is more scientific research and unique initiative to protect half of the population of the world from menace of domestic violence.

“Violence against women and girls continues unabated in every continent, country and culture. It takes a devastating toll on women’s lives, on their families and on society as a whole. Most societies prohibit such violence – yet the reality is that too often, it is covered up or tacitly condoned.”

United Nations Secretary-General Ban Ki-moon

Violence against women is a universal phenomenon. It may differ in its scope from society to society, but it exits everywhere.

According to UN, across the world up to 7 in 10 women experience physical and/or sexual violence at some point in their lifetime, 603 million women live in countries where domestic violence is not yet considered a crime and as many as 1 in 4 women experience physical or sexual violence during pregnancy.

India is no exception to this unfortunate incident. It is prevalent in both rural and urban areas. 27% of women in India have experienced physical violence since the age of 15 and this is more common in rural areas than in urban areas. 564 Domestic violence cases, where women reported physical abuses were 29 percent in rural areas and 23 percent in urban areas. 565

564 National Family Health Survey (NFHS-4) 2015-16.
565 National Family Health Survey (NFHS-5) 2015-16
Violence against women Women can be – physical, sexual, psychological and economic. Physical violence consists of acts aimed at hurting the victim and include, but are not limited, to pushing, grabbing, twisting the arm, pulling the hair, slapping, kicking, biting or hitting with the fist or an object, to trying to strangle or suffocate, burning or scalding on purpose and attacking with some sort of weapon, a gun or knife.  

Psychological violence includes a range of behaviours that encompass acts of emotional abuse like insulting or making a woman feel bad about herself, belittling or humiliating her in front of others, deliberately scaring or intimidating her, threatening to hurt her or others she cares about, and controlling behaviour like isolating a woman by preventing her from seeing family or friends, monitoring her whereabouts and social interactions, ignoring her or treating her indifferently, getting angry if she speaks with other men, making unwarranted accusations of infidelity, controlling her access to health care, education or the labour market. These often coexist with physical and sexual violence. 

Economic violence is difficult to define. It varies significantly across the cultural and physical boundaries. Generally economic violence involve denying access to property, durable goods or the labour market; deliberately not complying with economic responsibilities, thereby exposing a woman to poverty and hardship; or denying participation in economic decision-making. 

The most common type of women violence is physical violence (27%), followed by emotional violence (13%). 

The most disturbing fact is that, domestic violence is caused inside home, which is supposed to be the safest place and at the hands of near ones who are supposed to act as their protector. 31 percent of married women have experienced physical, sexual or emotional violence by their spouses. 

Causes which led to Violence against women 

The causes of violence against women are many depending upon type of violence. The root cause of violence against women lies in historically unequal power relations between men and women, and perpetual

570 National Family Health Survey (NFHS-4) 2015-16
571 National Family Health Survey (NFHS-4) 2015-16
discrimination against women. Image created by society, portraying a man as strong, educated, creative and clever than women is one of the reason of violence against women. The faulty parenting technique create disparity between boys and girls leading to gender based violence in later life. When a boy grows up in a family, where he is not supposed to wash his own cloths, cook or help in house hold works, if he gets married to a woman who come from a family where house hold duties are equally shared, this may lead to tension and violence later in life.

In Indian patriarchal society women normally do not have control and access over almost all spectrum of resources which may be physical, financial, intellectual, political, social and technological. The capacity to take decision regarding labour, sexuality and fertility lies with male members of the family. Women are supposed to preserve family honour. There is an established norm that if a man is violent towards his mother, sister or wife, nobody needs to intervene. These ideology is so deeply rooted that women themselves become propagator of patriarchal mind-set. Son preference is a common feature of patriarchal set up in developing world in general and India in particular. Daughters are considered as a burden until she gets married. The problem of dowry is also a reason for violence against women. A notion has been prevalent in Indian society that son will look after the parents in the old age, which led to son preference. Thus such an atmosphere has been created which led to development of an inferiority complex in women. They accept their low status and find nothing wrong in crimes and exploitation committed against them. They silently bear the tolls of crime and exploitation committed against them. According to Unicef’s “Global Report Card on Adolescents 2012”, 57% of boys and 53% of girls in India think a husband is justified in hitting or beating his wife.

Parental alcoholism and drug addiction prevalence of violence in family, broken home environment, poverty, low status given to mothers, prostitution, unemployment and association with criminal gangs can also led to domestic violence. Suspicion about the wife's fidelity, her childlessness or not bearing a son, disputes about household matters, wife's protests about husband's alcoholism, husband's infatuation with another woman etc. are other important reasons which led to domestic violence.

Electronic and print Media has also contributed in increasing domestic violence. Portraying women as an object in movies, TV serials, and advertisement has been increased in recent times. The concept of item numbers has been emerged. It has led to vulgar songs and dances by actor and actress. All this has led to increase in atrocities against women. Low conviction rate has been a huge contributor in increasing violence against women. The remedies available within law has been ineffective to provide immediate relief to women. Existing loopholes in law, lack of guidance and evidence make legal procedure cumbersome leading to further exploitation of victims.Complaints in these cases are rarely registered; if registered, the culprits are rarely apprehended; if apprehended, they are rarely brought to
Impact of Violence against women

Violence against women affects adversely to the victims, her male counterpart, children, family and society as a hole. The impacts may be short term in the form of stress, anxiety, depression, sleep disturbances, physical fatigue, chronic head-ache etc. on the life of the victims, or long term like reduced social contacts, impaired health, mental disturbance and disorganization, loss of mutual trust and finally break up of family.

Children of victimised women are severely impacted. Children who are exposed to violence during their initial growth period, suffer from an extent of emotional disturbances and behavioural problems, which sometimes may lead to perpetrating or being victims of violence later in life. There is a higher probability that the children who have witnessed violence, may believe that violence is a reasonable way to resolve conflict between people. Sometimes boys who learn in their initial growth period that women are not to be valued or respected, are more likely to abuse women when they grow up.

Victims of domestic violence, who continue to live with their perpetrators, due to various social and economical constraints commonly report high scores of fear, stress, and anxiety and depression. Sometimes because of continuous criticism victims may feel guilty and less confident. The victims may go through depression, and may have high tendency of suicide attempt.

Sometimes domestic violence may lead to chronic health issues, like arthritis, irritable bowel syndrome. Women who went through domestic violence during pregnancy may experience the risk of miscarriage, pre-term labour, and injury or death of the foetus. Disability in new-borns or toddlers are somewhere related with domestic violence. i.e Autism is a mental disorder which we are seeing very common in infants.

Due to financial dependency on perpetrator and lack of specialized skills and training to gain employment, victims go through economic crisis after breaking up relationship with perpetrator and this is also a reason why females do not try to come on front to reveal their pain or whatever torture they face.

Global initiative to protect women from violence

Domestic violence has been recognized in international law as a violation of human rights. Pre 1990’s international treaties provided protection against domestic violence only implicitly, but from 1990’s with the passage of the General Comment No. 19 by the Committee on the Elimination of Discrimination Against Women (1992) and the Declaration of Elimination of Violence Against Women (1993) domestic violence began to receive more explicit attention in international treaties. In the last two decades’ numerous resolutions have been passed from UN General Assembly on violence against women generally and domestic violence specifically.
Together with the Universal Declaration, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights make up the International Bill of Human Rights. Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights use the same wording to prohibit discrimination based on, inter alia, sex (art. 2), as well as to ensure the equal right of men and women to the enjoyment of all rights contained in them (art. 3). The International Covenant on Civil and Political Rights guarantees, among other rights, the right to life, freedom from torture, freedom from slavery, the right to liberty and security of the person, rights relating to due process in criminal and legal proceedings, equality before the law, freedom of movement, freedom of thought, conscience and religion, freedom of association, rights relating to family life and children, rights relating to citizenship and political participation, and minority groups’ rights to their culture, religion and language. The International Covenant on Economic, Social and Cultural Rights guarantees, for instance, the right to work, the right to form trade unions, rights relating to marriage, maternity and child protection, the right to an adequate standard of living, the right to health, the right to education, and rights relating to culture and science.

The Convention on the Elimination of All Forms of Discrimination against Women articulates the nature and meaning of sex-based discrimination, and lays out State obligations to eliminate discrimination and achieve substantive equality.

It also mentions specific obligations to States to eliminate discrimination against women in political, social, economic and cultural fields in 16 substantive articles. The Convention covers both civil and political rights (rights to vote, to participate in public life, to acquire, change or retain one’s nationality, equality before the law and freedom of movement) and economic, social and cultural rights (rights to education, work, health and financial credit). The Convention also pays specific attention to particular phenomena such as trafficking, to certain groups of women, for instance rural women, and to specific matters where there are special risks to women’s full enjoyment of their human rights, for example marriage and the family.

The Convention also specifies the different ways in which State parties are to eliminate discrimination, such as through appropriate legislation prohibiting discrimination, ensuring the legal protection of women’s rights, refraining from discriminatory actions, protecting women against discrimination by any person, organization or enterprise, and modifying or abolishing discriminatory legislation, regulations and penal provisions.

---

572 Women’s Rights are Human Rights, United Nation publication, p.4, ISBN 978-92-1-154206-6
573 Women’s Rights are Human Rights, United Nation publication, p.4, ISBN 978-92-1-154206-6
574 Women’s Rights are Human Rights, United Nation publication, p.5, ISBN 978-92-1-154206-6
575 Women’s Rights are Human Rights, United Nation publication, p.5, ISBN 978-92-1-154206-6
Provision in India to protect women from violence

Government of India has taken various measures to address domestic violence and curb the societal pressures which subsequently result in violence against women. Some major provisions are:

### Constitutional Provisions

1. Article 15(3) empowers states to make special provisions for women and children.
2. Article 23 prohibits traffic in human beings.
3. Article 39 directs the state not to discriminate on the ground of sex, also state should direct its policy towards securing equal pay for equal work irrespective of sex.
4. Article 42 makes provisions for securing maternity benefit, justice and better condition of work.
5. Article 51 declares it a fundamental duty of every Indian citizen to renounce practices derogatory to dignity of women.
6. Article 243 added by the 73rd & 74th amendment, in 1992; provide reservation of 33 percent seats for women in the direct elections to every panchayats and municipalities.

### Provisions Under Civil Laws

2. The Indian divorce Act, 1869.
3. The Dissolution of Muslim Marriage Act, 1930.
4. The Parsi Marriage and Divorce Act, 1939.
5. The special Marriage Act (1954).

### Provision under IPC

1. The victimised wife can file a suit against her husband if the husband fails to maintain her under section 125.
2. There is a provision for punishment of rape under Sections 375 and 376.
3. Kidnapping of women is punishable under section 359-396.
4. Homicide for dowry, dowry death, or their attempts is punishable under section 302/304B.
5. Causing miscarriage is punishable under section 312 – 314.
6. Under section 494 bigamy is an offence which may be punishable with imprisonment for a term extending 7 years or with fine.
7. Under section 498 enticing or taking away or detaining a married woman with criminal intent is also punishable.
8. Under section 498A FIR can be lodged at any police station or a women cell for torture, both mental and physical by the husband or the in-laws. The offense is cognizable, non-boilable non-compoundable.
9. Under section 366B importation of girl up to 21 years of age from a foreign country shall be punishable.

---

576 The Constitution Of India, Bare Act.
577 The Indian penal code 1860, Bare Act.

www.supremoamicus.org 178
10. Section 354 deals with outraging modesty of women. Any act of molestation with intent to outrage the modesty of a women is punishable.

11. Section 509 is related to the insult of modesty of a woman (sexual harassment) such an act shall be punishable with imprisonment may extend up to 10 years and also give.

Provision under The Domestic Violence Act 2005\(^{578}\)

This act has widened the definition of Domestic violence. According to this act Domestic Violence include an act or conduct which harms injures or endanger the health, safety and life or well-being mentally or physically. It may be in the form of physical, sexual, verbal, emotional and economic abuse.

According to this act
- Physical Violence - Includes use of physical force against women such as pushing throwing, kicking, slapping biting, beating assault, burning and murder etc.
- Sexual Violence - Includes sexual assault, harassment and exploitation.
- Verbal or nonverbal Violence - may be subtler in action or behaviour than physical abuse. Score of this abuse may not be visible but can be felt and proves to be more emotionally damaging. It may be in the form of isolation, excessive possessiveness and trusting, screaming, embarrassing, making fun for or mocking.
- Economic Violence - includes withholding economic resources defrauding of money exploitation or women resources, with holding physical resources such as food clothes, shatter preventing the women from working.

vi. Any women who is or has been in a domestic or family relationship, if is subjected to any act of domestic violence can complain under this Act.

Other provisions of the act-
- Any aggrieved women can approach to the concerned protection officer, police officer service provider or magistrate under section 5.
- there is provision of shatter home and medical facilitates can to aggrieved woman under section 7.
- An aggrieved woman has right to reside in shared household under section 17.
- The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person under section 18.
- The Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence under section 20.
- Magistrate may on an application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by that respondent under section 22.
- There is provision of imprisonment up to 1

\(^{578}\) The Domestic Violence Act 2005, Bare Act.
year a fine up to 20,000 or both for breach of protection order by respondent under section 30.

- There is a provision of up to 1 year of imprisonment or with a fine up to Rs. 20,000 or both of protection officer, under section 33.

Recently Honourable Supreme Court ordered that The Domestic Violence Act — meant to punish men who abuse women in a relationship — extends to all man-woman relationships, and also protects divorced women from their former husbands.579

Provision under The pre-conception and pre-natal Diagnostic Techniques (prohibition of sex selection) act 1994.580

This Act provide provision for the prohibition of sex selection, before or after conception, and for regulation of prenatal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities of certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide.

National Policy for Empowerment of Women 2001581

This policy envisages to bring about the advancement, development and empowerment of women and to eliminate all forms of discrimination against women. The policies/programmes of the Government are all directed towards achieving inclusive growth with special focus on women in line with the objective of the National Policy for Empowerment of Women.

Recently government came out with Draft National Policy for Women 2017. This Draft envisage a society in which women can attain their full potential and are able to participate as equal partners in all spheres of life. The draft policy identified priority areas like Health including food security and nutrition, Education, Economy (including agriculture, industry, labour, employment, NRI women, soft power, service sector, science and technology), Violence against women, Governance and decision making, Violence Against Women, enabling environment (including housing, shelter and infrastructure, drinking water and sanitation, media and culture, sports and social security), and Environment and climate change. This draft policy addresses the diverse needs of women.582

India has experimented with many innovative models of community dispute resolution mechanisms — the Nari Adalats (women courts) in various States, Women’s Resource Centres (Rajasthan), Shalishi (West Bengal), and Mahila Panchayats http://wcd.nic.in/womendevelopment/national-policy-women-empowerment


580 The pre-conception and pre-natal Diagnostic Techniques (prohibition of sex selection) act 1994, Bare Act.

But these mechanisms have not seen much success. The biggest drawback of these mechanisms are that they see domestic violence as a public issue rather than a personal problem. Many NGOs have used these models to resolve cases of domestic violence without getting entangled in tedious legal processes.

Many innovative and unique campaigns like Bell Bajao (ring the bell) campaign has been started to call on men and boys across India to take a stand against domestic violence. In this campaign people are supposed to ring the doorbell when they witnessed domestic violence taking place. The campaign seeks to reduce domestic violence and to highlight the role that men and boys can play in reducing violence.

Women is around 50 percent of the world population. They have every right to be treated equally with men in every sphere of life. The inclusion of “gender equality” as one of the goals in Sustainable Development Goals underscores the relevance of this fact. Swami Vivekananda’s quote that “there is no chance for welfare of the world unless the condition of women is improved. It is not possible for a world to fly on only one wing” beautifully sums up the essence of the power of women in leading not just their families but also the nation and the world.

*****

INTRODUCTION

Juvenile Delinquent:-
Juvenile Delinquent means a juvenile who is alleged to have committed an offence and has not completed eighteen years of age as on date of commission of such offence.584

Juvenile Justice Act:-
The chief aim of this Act is to formulate efficient provisions in law for ‘Juveniles in Conflict with Law’ and ‘Child in need of Care and Protection’, on condition that proper concern, security and conduct by their Development needs, and by impending a gracious approach in the adjudication and settlement of matters in the paramount concern of the children and for their eventual rehabilitation through different institutions below this Act585

Rehabilitation Programs:-
The rehabilitation and reintegration in public of a child shall be initiated while the child lives in a children’s home or special home and could be carried out then again by Adoption, Foster care, Sponsorship, and After-Care Organizations586

Institutions for ‘Juvenile in Conflict with Law’ and ‘Child in need of Care and Protection’

<table>
<thead>
<tr>
<th>Juvenile in Conflict with Law</th>
<th>Child in need of Care and Protection</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>


585 Preamble of JJ act 2000
586 Section 40 of the JJ Act,2000
Observation Home/ Special Home:- Juvenile who is not living with parents or guardian and is bought to observation home shall be first admitted in a reception centre of the observation homes for primary investigation, categorization of Juveniles by their age, i.e. seven to twelve years, appropriate concern is given to their physical and psychological status and the extent of the crime committed, for auxiliary training into observation home. The Principal Aim of Special Home is to serve as reconditioning center for recasting the juvenile’s attitude, recognizing his behavior, and ultimately rehabilitating him in the society.

Children’s Home:- Each children home should be a complete Child Care Center with the primary objective to promote an integrated approach to child care by involving the community and local Non-Governmental Organizations through the management Committee and the State Government should make an yearly report of performance of the children homes.

Place of Safety:- If the offence commended by the Juvenile is so severe that in the approval of the Board, it is neither in the betterment of Juvenile himself nor in that of juveniles of special home, the board might possibly arrange the juvenile to stay in the place of safety and in a way that is most appropriate.

Shelter Home:- The Shelter Homes are as drop-in-centers for children in critical want of care and have been bought to such homes. The State Government may assign a duty to such experienced Voluntary/Non Governmental organization to make available the support to set up and govern as many shelter homes for juveniles or children as required.

Table 1.1: Showing the Institutions for rehabilitation of juveniles and children

The Rehabilitation and social integration after these Institutions can be carried out further by:

Adoption:- Adoption means other than parents who gave birth to the child, for the specific reason the child will live and taken care of by the other parents that are assigned by legal and social process. In this process the child will be living and taken care of by other parents that are legally assigned by government and not by the parents who gave birth to that child. To make more efficient the procedure of adoption, the Center Adoption Resource Agency (CARA) was established in India in 1986. The chief

---

587 Section 8(4) of JJ Act (2000)  
588 Rules 57 Gujarat JJ Rules  
590 Section 37 of JJ Act
function of CARA is to supervise and control the entire adoption procedure.  

**Foster Care:** the foster care is a provisional arrangement where if the Parents of the children are insufficient to up bring their child and are not able to take care of them then the adults of another family/Foster family will take care of them for specific amount of time. Foster care is not for the Juvenile delinquents but for the Children who’s Parents for any reason cannot take care of them. Foster care can be casual or approved by the courts or NGO’s. The ultimate aim for a child in the foster care is usually for child’s best concern that may be reunion with their original family or may it be adoption. Foster care is temporary practice where children will remain their for specific amount of time as pre-decided by court or any NGO.

**Sponsorship:** it is one of the most efficient program to make available monetary help to families to meet the medical, dietary and educational requirements of their child and develop the quality of life. The children not separated from the parents and continues to dwell with and take pleasure of a family environment which is obligatory for wellbeing and growth of children. To make efficient the family to become self satisfactory and self-sufficient is much effectual approach in sponsorship. There are various programs like the individual to individual sponsorship, Group Sponsorship or community Sponsorship. 

**After-Care Organizations:** Aftercare means the plan organized for the rehabilitation of juveniles released from correctional homes. It includes abandoned or irrepressible children who are kept in correctional homes under the orders of the court. The significance of aftercare is the full reintegration and rehabilitation of the juvenile in society after his release from an institution and preventing him not to re-indulge into a life of crime, delinquency or dependence.

**Judicial and Juvenile**

Section 21 of the Juvenile justice (care and protection of children) Act 2000 [JJ act], There is a proscription on publishing or disclosing the name, identity or any other action that will disclose the identity of the Juvenile that is in conflict with law or has committed crime by newspaper, magazine etc. The fine of Rs-25,000/- is applied to whosoever who does not follow the above section 21 of JJ act. This will help the juvenile to develop in better way as they can get jobs or apply for higher education that can lead to ultimate rehabilitation of that juvenile. According to this section the Patna high court in Sanat Kumar Sinha, Bal Sakha v. State of Bihar declared that the government shall guarantee the Rights of

---


Juvenile and should not get dishonored by anyone.\textsuperscript{595}

The Bombay High Court in \textit{Prerana v. State of Maharashtra} gave the judgment that the girls who are rescued from the brothel or who are working as prostitutes in any of the brothel should not be considered as ‘juvenile in conflict with law’ instead the Brothel keepers are the offenders as they forced the girls below 18 years to get indulged in such Activities and such girls should be treated as ‘child in need of care and protection’ instead of ‘juvenile in conflict with law’.\textsuperscript{596}

\textbf{Conclusion}

Parents are the role model for their children. They should protect and care for their children and do any possible things for the overall development of their child. But in case due to unfavorable circumstances or any other reason if any parent or Guardian is unable to take care of their child then they should hand over the custody of child to competent authority, instead of neglecting them.

When a juvenile is released from any correctional home or institute then the people in the society should not see that juvenile as criminal and should do whatsoever is best for the development of that child and should appreciate the child for his good deeds. This would encourage the child and it will keep aside the juvenile from again indulging into the criminal activities.

All a child need is care and love from their family and the society and it will keep aside the juvenile from again indulging into the criminal activities.

The Juvenile justice system tries to make the juvenile released from correctional him a better citizen and a lawful gentleman by eliminating the odds from the society that are disturbing the juvenile. The society should not prevent the juvenile to obtain higher education or job opportunities as this will affect the juvenile in negative way and by doing so there are highly likely chances that the juvenile will commit offense again.

The Government plays a pivotal role in rehabilitation and reintegrating of the juvenile. The state government applies the action plan for each juvenile in correctional home/institute.

Every state government is provided with monitor the funds by the Central Government for the care and proper development of children in these institutes but the problem is that many state governments are unable to use these funds for the above stated reasons.

The State Governments are doing well but they lack expert knowledge somewhere for the best possible use of the funds.

The NGOs, non Governmental Organizations have taken the responsibilities to some extent and they are working as correctional homes to support the Government for the betterment of the juveniles. NGOs are assisting the Board and Committee in obtaining social investigation report of juvenile or child. They are special adoption agency.

\textbf{REFERENCES}

\textsuperscript{595} Sanat Kumar Sinha (Chief Co-ordinator), Bal Sakha v. Atate of Bihar, 2009 (4) PLJR 718

12. Sanat Kumar Sinha (Chief Coordinator), Bal Sakha v. Atate of Bihar, 2009 (4) PLJR 718

*****
FEMALE GENITAL MUTILATION: A HUMAN RIGHTS PERSPECTIVE

By Riddhi Mahesh Jangam
From Department of Law, Savitribai Phule Pune University

Abstract
Gender discrimination and inequality is deeply rooted in our society in some or the other form. Women and children all over the world are prone to all kinds of exploitation. They are recognized as a vulnerable group and their right to health has been recognized as a human right by the United Nations. Despite of several efforts made on an international and national level to uplift women and children one can see blatant violations of their human rights throughout the globe and Female Genital Mutilation (FGM) is one such example. It is estimated by the World Health Organization that more than 200 million girls and women alive today have been cut in 30 countries in Africa, the Middle East and Asia. As averse to the popular belief, FGM is also practiced in India by the Dawoodi Bohra community, which is a sect of the Shia Muslims. The Supreme Court on 24th September, 2018 referred a petition challenging the practice of Female Genital Mutilation among Dawoodi Bohra Muslims to a Constitution Bench. In the light of this stepping stone, this article outlines the practice of Female Genital Mutilation in the Indian context.

Introduction
“Girls are well created, and it is unnecessary and irrelevant to cut any part of their bodies”
-Joseph Osuigwe Chiediebere

According to World Health Organization, Female Genital Mutilation (FGM) is a practice which comprises all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons. This practice is also known as Female Genital Circumcision (FGC), Cutting, Sunna, Tahor, Khatna, Khafz among many other terminologies. FGM is performed on women of different age groups such as five to eight, babies, teenagers or sometimes even on adult women depending upon the community practices. It is usually performed by elder or experienced women also known as Mullanis, who often play other important roles in the community and have a high religious standing. It is often performed using kitchen knives or razor blades without an anaesthetic or sterilizing them. In urban settings, it is many a times performed by healthcare professionals under the pretext of medical reasons.


it being safer when performed by them. FGM is considered as an important culture and tradition in certain communities which is why it has been in practice for centuries. Many justifications are given for the prevalence of this practice such as cultural identity, to decrease a women’s libido, to increase men’s sexual pleasure, to follow a religious requirement, to ensure a girl’s virginity and many more. In reality, such justifications have no scientific or religious basis and no health benefits arise out of them; therefore they are internationally recognized as human rights violations. The World Health Organization has recognized four types of FGM practices which are given below.

- **Type 1:** Often referred to as **clitoridectomy,** is the partial or total removal of the clitoris (a small, sensitive and erectile part of the female genitals), and in very rare cases, only the prepuce (the fold of skin surrounding the clitoris).
- **Type 2:** Often referred to as **excision,** is the partial or total removal of the clitoris and the labia minora (the inner folds of the vulva), with or without excision of the labia majora (the outer folds of skin of the vulva).
- **Type 3:** Often referred to as **infiltration,** is the narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the labia minora, or labia majora, sometimes through stitching, with or without removal of the clitoris (clitoridectomy).
- **Type 4:** This includes all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterizing the genital area.

- **Impact on the health of women**

FGM is not known to have any health benefits for women but on the other hand it may harm girls and women in many ways. The victims of this practice may suffer not only from physical and sexual problems but also psychological problems. Such problems may have immediate or long term consequences and may be temporary or permanent. Immediate complications in a woman can include severe pain, excessive bleeding (haemorrhage), genital tissue swelling, fever, infections like tetanus, urinary problems, wound healing problems, injury to surrounding genital tissue, shock and death. Long-term consequences can include urinary problems (painful urination, urinary tract infections); vaginal problems (discharge, itching, bacterial vaginosis and other infections); menstrual problems (painful menstruations, difficulty in passing menstrual blood, etc.); scar tissue and keloid; sexual problems (pain during intercourse, decreased satisfaction, etc.); increased risk of childbirth complications (difficult delivery, excessive bleeding, caesarean section, need to resuscitate the baby, etc.) and newborn deaths; need for later surgeries: for example, the FGM procedure that seals or narrows a vaginal opening (type 3) needs to be cut open later to allow for sexual intercourse and childbirth (deinflibulation). Sometimes genital tissue is stitched again several times, including after childbirth, hence the woman

---


600 Supra 2.

601 Ibid.
goes through repeated opening and closing procedures, further increasing both immediate and long-term risks and other health complications resulting from female genital mutilation.\textsuperscript{602} Apart from the physical problems various other psychological consequences of FGM may include depression, anxiety, post-traumatic stress disorder, anger, low self-esteem, fear and feeling of helplessness, sexual phobia i.e fear of indulging into sexual intercourse, feeling of not being a whole or a normal woman, etc. There have been reported cases of some women who have completely blocked out this traumatic incident from their minds and don’t know what was done to their bodies. This is a similar kind of defense mechanism used by minor rape victims.\textsuperscript{603}

Legal Framework pertaining to Female Genital Mutilation
Since FGM in India has been kept as a secret until recently, it remained as a subject which was never discussed. This could be one of the reasons why India does not have a full-fledged law prohibiting FGM. Despite of this, a person can be brought in the purview of other existing provisions which are as follows:

a) The Indian Constitution under Part III guarantees the fundamental rights like the freedom of equality, prohibition of discrimination based on sex and right to life and liberty (Article 14, 15 and Article 21 respectively) to every citizen of the country. This practice is violative of these rights; one can seek protection under these provisions.

b) Section 320 of the Indian Penal Code describes certain kinds of grievous hurt, i.e. if any person causes hurt to another person in any of the way specified in the said section is liable of causing grievous hurt which is a punishable offence.

c) Section 326 of the Indian Penal Code states whoever, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance is liable for the offence under this section.

d) Section 3 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) addresses penetrative sexual assault by any person on any child, inter alia defines it as insertion of any object into the vagina of the girl. It is well established in law that penetration in sexual offences need not be complete penetration. Apart from the above, India has ratified various international instruments which lay an obligation on India to ensure gender equality under its national laws. Due to the nature and consequences of Female Genital Mutilation, certain provisions under international law are clearly violated by the practice of Female Genital Mutilation:

a) Article 3, Universal Declaration of Human Rights (UDHR) states that, everyone has the right to life, liberty and security of person.

\textsuperscript{602} Ibid.
b) **Article 5, Universal Declaration of Human Rights (UDHR)** states that, no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

c) **Article 25, Universal Declaration of Human Rights (UDHR)** states the right to the highest attainable standard of physical and mental health.

d) **Article 6(1) of International Covenant on Civil and Political Rights (ICCPR)** states that, every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

e) **Article 7 of International Covenant on Civil and Political Rights (ICCPR)** states that, no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

f) **Article 12 of International Covenant on Economic, Social and Cultural Rights (ICESCR)** states that, the State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken by the State parties to the present Covenant to achieve the full realization of this right shall include those necessary for (a) The provision for the reduction of the still birth rate and of infant mortality and for the healthy development of the child, (b) The improvement of all aspects of environmental and industrial hygiene, (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases, (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

g) The right to be free from gender discrimination is guaranteed in numerous other international human rights instruments. For example, **Article 1 of the Convention on the Elimination of all forms of Discrimination against Women, 1979 (CEDAW)** defines ‘discrimination’ as: any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

h) **Article 2 of the Convention on the Elimination of all forms of Discrimination against Women, 1979 (CEDAW)** requires all State Parties to pursue by all appropriate means a policy of eliminating discrimination against women and, to this end, undertake all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

i) **Article 5(a) of the Convention on the Elimination of all forms of Discrimination against Women, 1979 (CEDAW)** requires State Parties to take “all appropriate measures” to “modify the social and cultural patterns of conduct of men and women” in an effort to eliminate practices that “are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”. The international community has generally regarded Female Genital Mutilation as a violation of the rights of the
child. The United Nations Child Rights Commission (UNCRC) places on the
government the ultimate responsibility for ensuring that the fundamental rights of
children are recognized and protected. The guiding standard established by the
UNCRC under Article 3 is “the best interests of the child”.

specifically mentions traditional practices, saying that “States Parties shall take all
effective and appropriate measures with a view to abolishing traditional practices
prejudicial to the health of children”. India has ratified to the above mentioned
International instruments and it is failing to carry out its obligations under the relevant
provisions. The government therefore needs to ensure gender equality under its
national laws by eradicating practices like Female Genital Mutilation.

Freedom of Religion v. Human Rights
A provision on Freedom of Religion can be found in Article 18 of the
Universal Declaration of Human Rights which states that “Everyone has the right to
freedom of thought, conscience and religion; this right includes freedom to
change his religion or belief, and freedom, either alone or in community with others
and in public or private, to manifest his religion or belief in teaching, practice,
worship and observance”. \(^{604}\) The Indian Constitution under Article 25-28 also
guarantees this as a Fundamental Right. But very often, Freedom of Religion as a
right finds itself in a conflicting position with basic human rights values such as
gender equality, non discrimination and so on. However, one common ground
between many world religions and human rights is that they are both founded on the
principles of ‘Humanity’ and ‘Humanitarian Principles’. Certain convictions formed by the proponents of a
particular religion often results in the violation of human rights and create
tension between the two set of principles. Freedom of Religion cannot prosper on its
own and it requires a protection of collateral rights which is why these
competing rights are to be reconciled.

In the modern world, the state has assumed the responsibility of exercising its
political power over its citizens in a manner which would curb discrimination
and be fair to all. In this sense, the state can interfere in religious matters and regulate
the practices of people which clearly affect public health, public order or public
morality. This raises questions in the context of FGM, which right has a higher standing than the other or how to strike a
balance between the two rights. A general

\footnote{604}{Article 18, Universal Declaration of Human
Rights, 1948.}

\footnote{605}{Facilitating Freedom of Religion or Belief: A
Deskbook, 119 (Tore Lindholm, W. Cole Durham,
Jr., Bahia G. Tahzib-Lie, 1st ed., 2004).}
human rights of all people. Thus the right to Freedom of Religion should be restricted within the four walls of the Constitution.

**Conclusion**
Not much has changed till date and this practice goes unchecked by the law authorities. Thus, a legal intervention is essential at the earliest. Laws should penalize the family members who are the primary perpetrators of this act and anyone else who incites, abets, aids or carries out this act such as the doctors, mullanis, etc. Also, voices are being raised against this practice and it is becoming apparent that the younger generation is getting involved in women empowerment and social justice.

It is worthy to note here that the Bohra women are stepping up publicly against this age old barbaric custom. There is an urgent need to spread awareness of this practice and its ill effects on a woman’s body. The hush-hush around this subject needs to be removed and it should be discussed rationally and scientifically. Men need to join the protest led by women against this practice. It is high time that the Bohra community realizes that no right to religion is absolute and eventually they will have to bow down to the constitutional restraints of this country. Given the current situation in India and having discussed the various provisions of law under which a person can be charged with FGM but with no mention of FGM anywhere, I strongly suggest that we need a specific law dealing with FGM to ensure prosecution of the perpetrators. Laws enacted by other countries on FGM such as Australia, United Kingdom and Egypt can be used as a model law for India subject to appropriate modifications suitable to our social structure. This law should also deal with other collateral issues such as building mechanisms which would help a minor girl child or the complainer on her behalf to effectively utilize her remedy, which will ensure rehabilitation, protection and after care of the victims.

*****
DEFENCE OF STATUTORY AUTHORITY

By Ritvik Maheshwari & Dhruv Sirpurkar
From National Law University Odisha

ABSTRACT
Statutory authority in the law of tort is a defence to claim that the defendant was authorized by some statute to do a particular act for which he was accused. A statutory authority is a body set up by law which is authorized to enact legislation on behalf of the country or relevant state. It is the authority that is derived from a statute or law, or a piece of legislation. The most fundamental underlined philosophy behind this principle is that lesser private right might yield to the greater public interest. This authority exist because of lesser personal rights can be ignored in favour of a larger public good also the defense exists not only because of the acts authorized by the act but also to all inevitable consequences of that act. This includes harm which is incidental to exercise of such authority. The powers conferred by the legislature should be exercised with judgment and caution so that no unnecessary damage is done, the person must do so in good faith and must not exceed the powers granted by the statute otherwise he will be liable.

INTRODUCTION
Statutory authority in the law of tort is a defense to claim that the defendant was authorized by some statute to do a particular act for which he was accused. A statutory authority is a body set up by law which is authorized to enact legislation on behalf of the country or relevant state. It is the authority that is derived from a statute or law, or a piece of legislation. The most fundamental underlined philosophy behind this principle is that lesser private right might yield to the greater public interest. This authority exist because of lesser personal rights can be ignored in favor of a larger public good also the defense exists not only because of the acts authorized by the act but also to all inevitable consequences of that act. This includes harm which is incidental to exercise of such authority. The powers conferred by the legislature should be exercised with judgment and caution so that no unnecessary damage is done, the person must do so in good faith and must not exceed the powers granted by the statute otherwise he will be liable.

The defense of statutory authority can be applied when an act or conduct is authorized by a statute, but it can extend to all inevitable consequences of that act. If the act is not authorized by any statute and the any injury (must be Damnum sine injuria) comes, the plaintiff is entitled to compensation. But if the act done by any persons who has the power to do that by the statute does something for which he is not
authorized and does something beyond the course of employment he cannot take the defence of statutory authority and the state will also not be liable because at the time of the wrong committed he was not in the course of employment. In this defence the plaintiff has to show that there is negligence on the side of the accused in order to claim compensation. The act committed by the person who is authorized by the statute has to show that the act was for the public good and it was with due care and no negligence was there in accordance of the act. The compensation can be awarded when the act committed was foreseeable and then also it was committed.

THE ABSOLUTE NATURE OF STATUTORY AUTHORITY

The Legislature as an authority has great powers, it has a power to reverse any principle of common law through an act of parliament so any tortious act or omission within the circle of common law could specifically be made legal by the help of a statute. The term Statutory Authority under the law of torts is used as a defence, it is used in a situation when the defendant wants to claim that he was acting under statutory authority. The well-known tort of nuisance is known in England as a strict liability and the defence of statutory authority is also available in the cases of nuisance. There are certain principles, which shows the absolute nature of statutory authority, these principles have emerged through the judicial decisions, Let us now discuss them

It could be easily noticed here that the legislature confers absolute power in one of two ways. The legislature could order to do a specific thing regardless of whether it does an injury to the other person. This is known as Absolute authority or the Imperative authority. In cases like this the authority covers not only harm which has to obviously occur, but also the harm which is actually incidental to the exercising of the authority. Let us explain this by taking an example it is not possible build a railway with no interference in the land of the people (private land). In the case of Dunne v North West Gas Board606, what happened was that gas was leaked due to a burst (by water) and the gas escaped in the sewer and travelled along, there was a series of explosions observed, many people were injured including a cyclist, two children playing in the field, a couple etc. In this case principle of strict liability was applied while deciding the case and the defence of statutory authority came out as an absolute defence, the defendant was not found liable. Similarly, it has been held in India that if an act is authorised by the legislature and the authority given is absolute, no action will be going to lie against the person who has been directed by the statutory authority to do the act, provided that the act done was not negligent, this statutory authority acts as a defence not only for the act but also the necessary consequences of the act, it is that if the legislature authorises an act, it should also authorise with implications on all inevitable results of that particular act.

It is evident that the statutory powers are not the charters of immunity for any of the injurious acts done while exercising the statutory powers but the condition is that the acts done in pursuance of the statutory authority have to be done without any negligence otherwise an action lies, as it happened in the case of Chandra ram anagram Rice and oil mills ltd., Gaya v.

606 (1964) Bom LR 415.
Municipal commissioner of Purulia. What happened in this case was that the plaintiff send 1000 cannisters filled with mustard oil from Gaya to Purulia with the help of a van which belonged to E.I. Railway. As these canisters reached Purulia, the Municipal committee of that place rushed to the place and applied the Bihar and Orissa Municipal Act, for a search warrant under section 287 on the ground that the oil was not good, the defendant committee seized the bad oil and loaded that oil in a scavenger’s truck with the help of workers.

In the present case the court held that the defendant acted unreasonably in order to prevent the spread of beriberi in the municipality, the court observed that if a person exercises his rights under the statutory authority he would not be made liable until and unless it is proved that he acted out of malice and was negligent in exercising his rights. One important and interesting concept in connection to the statutory authority is permissive or conditional authority under this the legislature can merely permit to perform a particular act, here also there is no liability but for negligence. In the case of Faiyaz Hussain v. Municipal Board of Amroha, the facts were that the Shia Mohammedans claimed that they had a right to move along with their Tazias which are of 27 feet in height in the streets of Amroha but through certain fixed routes and the defendant have to raise the electric wires to such an extent that the procession of tazias do not get interfere as it was their right.

The court held that when according to statute the legislature has authorized some act and has given the authority which is just permissive and not absolute or imperative, the legislature means that the execution of work must be carried out in such a manner that it not interfere with the common law rights of people. In this case the judge observed that “there is nothing on the record of the present case from which it could be argued that the fixing of the wires at the height of 27 feet was an impossibility or that some other arrangements could have been made so that the inherent right of the plaintiff was not to be interfered with…” After a healthy discussion on the nature of statutory authority and after some examples of the cases, it is clear to us what actually the nature of statutory.

APPLICATIONS OF THE DEFENCE OF STATUTORY AUTHORITY

Statutory authority is a defence by which the defendant gets the immunity from the charges brought against him. But there are some criteria that need to be fulfilled by the act to come under the ambit of statutory defence. What does the statute mean? How can an act fully satisfy the defence of statutory authority? And does plaintiff entitled for the compensation? These questions will be tried to answer in this section.

The power that is vested by the government to take the property (personal) from the individual is deep rooted in the idea of eminent domain. The state can use the personal property, to ensure the public good (like a house can be demolish or a building can be demolish for the construction of railway station) This is because the state has the responsibility to ensure the welfare of the people at large, enshrined in the Latin maxim, saluspopuli suprema lex, meaning that the “welfare of the people is the

607 AIR 1944 Pat 408.
608 AIR 1939 All 280.
paramount law”. This is quite similar to the defence of statutory authority because in this defence the welfare of the public at large is supreme and a lesser personal right can be ignored in favour of a larger public good. The defence of statutory authority can be applied when an act or conduct is authorised by a statute, but it can extend to all inevitable consequences of that act. If the act is not authorized by any statute and the any injury (must be Damnum sine injuria) comes, the plaintiff is entitled to compensation. But if the act done by any persons who has the power to do that by the statute does something for which he is not authorised and does something beyond the course of employment he cannot take the defence of statutory authority and the state will also not be liable because at the time of the wrong committed he was not in the course of employment. The Supreme Court in Kasturilal and Ralia Ram Jain v. State of U.P. 609 held the State is not liable on the view that tort was committed by the police officers in the exercise of delegated sovereign powers. The Court observed: “it must be borne in mind that when the State pleads immunity against the claims for damages resulting from injury caused by negligent acts of its servant, the area of employment referable to sovereign powers must be strictly determined. Before such a plea is upheld, the Court must always find that the impugned act was committed in the course of an undertaking or employment which referable to the exercise of delegated sovereign powers.” The plaintiff can also get the compensation if the act was faceable and was negligent in their conduct. In a particular case the railway worker company negligently trimmed the grass and hedges near the railway track, and no proper care was exercised in doing this job. Later on, sparks set by the passing train from the train set the grass and bushes on fire. Due to the presence of strong winds, the fire was carried to the plaintiff’s house. The house was a few metres away from the railway track. In this case it was not unforeseeable that in the event of a fire brought on by the sparks, the house could be affected. So, the railway company was held liable for the damage.

The plaintiff is not entitled to any damages if the action was with due care and all the necessary precautions were taken. In Manchester Corporation v. Farnworth 610. His Lordship said "When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense."). But the public authority is liable when its servant who is under their course of employment acting illegally, public authorities are liable for their actions in precisely the same way as private individuals. As early as 1866 in the case of Mersey Docks & Harbour Board Trustees

609 Kasturilal and ralia ram v. state of U.P. (1964)

610 Manchester Corporation v. Farnworth (1930) AC 171
v. Gibbs (1866) L.R. 1 H.L. 93 the House of Lords held that statutory bodies were liable for the wrongful acts of their servants. Statutory bodies such as the National Coal Board, the British Railways Board, and the British Airports Authority all have the same liability in tort or contract as private individuals. In *Allen v. Gulf Oil Refining Ltd* (1981), (a) the limit of the statutory authority and immunity depends on the relevant statute. (b) Where statute has directed to perform any action or authorized for any function or to construct/demolish with immunity from any action based on nuisance. (c) The person who has been authorized by the statute to do any work should carry out the work without any negligence in order to be immune from any charges brought against him and should work for the benefit and in the interest of other people. (d) There will be no immunity or a person if the term of the statute is permissive only, in which case the power must be exercised in strict conformity with the individual rights. (e) the immunity will extend to any nuisance which is the inevitable result of doing the act authorised by the act.

**SOVEREIGN AND NON-SOVEREIGN POWERS OF STATUTORY AUTHORITY**

**SOVEREIGN POWERS**

Sovereign powers are powers which if exercised, and during which a tortuous act is committed, no action will lie against the wrongdoer as these are the powers/functions those are assented/delegated by the central or state government or by any department under the government and which otherwise cannot be done and would not be lawful.

**SOVEREIGNITY**

In order to fully understand the “sovereign powers”, it is necessary to understand from where these powers are derived from. The sovereign functions are delegated either directly or indirectly by the (central/state) government. The government run the country and as we all know (and as enshrined in our preamble as well) that ours is a sovereign nation. It won’t be incorrect to say that the meaning and roots of sovereign powers belongs under the concept of sovereignty.

Sovereignty is a term that is used to refer to the independence and autonomy of modern nation states. Sovereignty means that nation states are free to decide for themselves about the kind of democracy that they want, the kind of rulers that they want, and their policies internally and externally.

Sovereign nations are expected to be autonomous and independent when they pursue policies through a complex system of delegation of powers and functions to individuals/institutions/authorities/bodies/companies etc.

**DOCTRINE OF SOVEREIGN IMMUNITY**

The Age old concept of “Sovereign Immunity” that basically postulates to - “Kings can do no wrong” and the king (/state) is not responsible for any tortuous act and the aggrieved person gets no compensation.

---

611 Report from the United Kingdom, KENNETH MYNETT QC
612 *Allen v. Gulf Oil Refining Ltd* (1981)
The liability of the state (if at all), arose first in the *P. & O. Steam Navigation Co. Vs. Secretary of State* Case. "The Court laid the definitions of the sovereign functions, i.e. if a tort were committed by a public servant in the discharge of sovereign functions, no action would lie against the Government."

A case in which the principle laid down in Stream Navigation case was followed was *Kasturi Lal Ralia Ram Vs. State of UP*. In this case partner of KasturilalRalia Ram Jain, “a firm of jewellers of Amritsar, had gone to Meerut for selling gold and silver, but was taken into custody by the police of the suspicion of possessing stolen property. He was released the next day, but the property which was recovered from his possession could not be returned to him in its entirety inasmuch as the silver was returned but the gold could not be returned as the Head Constable in charge of the Malkhana misappropriated it and fled to Pakistan.” The firm filed a suit against the State of U. P. for the return of the ornaments and in the alternative for compensation. “It was held by the Apex Court that the claim against the state could not be sustained despite the fact that the negligent act was committed by the employees during the course of their employment because the employment was of a category which could claim the special characteristic of a sovereign power. The court held that the tortuous act of the police officers was committed by them in discharge of sovereign powers and the state was therefore not liable for the damages caused to the appellant."

**NON-SOVEREIGN POWERS**

Although there is no statutory definition of Non-Sovereign Powers but it basically means any act or function done in the conduct of undertakings which might be carried on by private person-individuals without having such power. There is no immunity from judicial proceedings if a tortuous act that has not been authorized by a sovereign body is done, even if in the course of employment of the government or any department of the government.

For a better understanding let us take a case of pre-constitution era, wherein the court held the state liable in case of non-sovereign functions and to point out as to how far the state was liable in tort. *State of Rajasthan v. Mst. Vidyawati*, in this case, the claim for damages was made by the family of a person who died in an accident caused by the negligence of the driver of a jeep of the government for official use of the Collector of Udaipur, while it had been being brought back from a workshop after some repairs. The Rajasthan high court took the view-that the State was liable, for the State is in no better position in so far as it supplies cars and keeps drivers for its government officials, this activity could not be counted as a sovereign function in any way. The court held that –

---

613 BOM HCR Appendix a. 1  
615 (1965) AIR 1039 SCR (1) 375  
617 (1962) AIR SC 933
“Act done in the course of employment but not in connection with sovereign powers of the State, State like any other employer is vicariously liable.”

IMPORTANCE OF STATUTORY AUTHORITY IN INDIA

India is a fast growing economy and is also emerging as an important country in the political sphere. In this hour we need a strong development plan for our country that is supported by a strong administrative machinery which takes us to the formation of statutory authority and why they are of importance. The state has a responsibility to look after the welfare of the people and for that matter any person’s personal loss can be overlooked as inscribed in the Latin maxim Saluspopuli suprema lex which implies that the welfare of the people is the paramount law.”

Example: The power to take personal property of citizen’s to serve the purpose of public welfare is deep rooted and mentioned in the idea of eminent domain. This eminent domain is the state's power to take private property for public use. Likewise, in India, the Land Acquisition Act of 2013 gives the power to the state or union government to acquire a piece of land from an individual this unchallenged authority has been given to these bodies so that the minor infringement of rights that is caused by these bodies does not hamper the working of the administrative bodies.

Thus no matter how much misuse can be done through this defence but it is required for effective functioning.

Nuisance and Statutory Authority

Nuisance has been defined as any act done to or which results in hurting or annoying another individual by directly or indirectly invading his personal rights. Nuisance is of two kinds public nuisance and private nuisance. Public nuisance comes under the ambit of criminal law while private nuisance is a civil wrong. This paper focuses on private nuisance. “Private nuisance occurs when a person disrupts or otherwise prevents another person from using and enjoying his own property.”

For instance, if a person is playing songs on his music system after midnight at a high decibel which ends up causing annoyance to the neighbours. The court will entertain the lawsuit of nuisance only if the wrong has been committed repetitively even after being intimidated. Also, the decibel of sound and the timing should be unreasonable. Having understood the meaning of Nuisance let’s move on to its relation with statutory authority.

Statutory Authority is a valid defence to private nuisance. When undertakers act under a mandatory or rather statutory obligation, they may avoid liability if the tortious act committed is expressly required to be undertaken as prescribed in the statute. This principle can be illustrated with the example of Allen v Gulf Oil Refining Board. “The plaintiff brought an action in nuisance for the smell, noise and vibration created by an oil refinery which had been constructed by the defendant on their land. The defendant’s action in constructing the oil refinery was authorised by an Act of Parliament. The court held that the defendant was not liable to pay damages to the plaintiff as he was acting under a

618 Ratanlal and Dhirajlal, Law of Torts.

www.supremoamicus.org
Negligence and Statutory Authority

Negligence is the breach of duty of care owed to a neighbour which ends up in causing injury to the neighbour and draws liability. The definition of neighbour may include all those persons who may be affected proximately by one's acts and he owes them a duty of care. The misfeasance malfeasance or nonfeasance to fulfil the duty of care leads to negligence. The perfect example of negligence can be seen in the famous ginger bottle case of Donoghue v Stevenson.622

The defence of statutory authority can be claimed only if the act carried out is sans any negligence. Any misfeasance malfeasance or nonfeasance on behalf of the defendant will dissolve the defence of statutory authority and will attract liability. This principle has been laid down in the above discussed case of Allen v Gulf Oil Refining Board623.

CONCLUSION

While reading about the defence of statutory authority, we referred different books and also took help from different online sources. By doing this healthy research and discussing all the facts and different cases related to defence of statutory authority. We came to a conclusion that statutory authority is the authority that allows people or a group of people to enact legislation on behalf of the relevant government. Also, statutory authority gives people or a group the right to act on behalf of the government. Statutory authority is considered as a major defence in the law of tort in India in which anybody derives its power from a law or a statute that is made by the parliament of India. The statutory authority in the law of torts extends not only to the act that is authorized by the government or statute, but to all inevitable consequences of that act, this includes harm which is incidental to exercise of this authority, the defence of statutory authority exists in India just because of the fact that a lesser personal right can be ignored in favor of a larger public good. If any harm is caused to anyone deriving the performance of statutory work then he/she can’t claim damages for the loss in value of their property, bodily harm or any other monetary or physical harm. So, this is the conclusive form of what we study while doing various researches during the making of this project. Also, this project helps us a lot in deep and broad understanding of one of the major defence

620Department Of Transport v North West Water Authority (1983) 3 WLR 105.
621Home Office v Dorset Yacht Co Ltd(1970) 2 WLR 1140
622Donoghue v Stevenson (1932) UKHL 100
623Supra.
of the law of tort which we see in our daily life that is used by different officers appointed by the statutes or directly by the Government.

BIBLIOGRAPHY

BOOKS:

2. John Murphy ‘Street on Torts’, 11 Edition

3. MP Jain ‘Indian constitution law’ (1962)


WEBSITES:
1. https://home.heinonline.org/


5. https://www.lawgazette.co.uk/

6. https://www.lawteacher.net/
MEDIATION: AN EFFECTIVE TOOL IN THE PURSUIT OF JUSTICE

By Samarth Khanna
From Advocate, Supreme Court of India

ABSTRACT

The Indian Judiciary has often been criticised for an inefficient administration, backlog of cases and an archaic approach to the resolution of family disputes. The need to establish alternatives to the aforesaid has often been weighed upon by Law Commission of India, acclaimed scholars and Judges alike. The use of mediation as a tool to effectuate justice in matrimonial disputes holds enormous promise. With an increase in India’s divorce rate, and the incapacity of the adversarial system to handle such conflicts, divorce mediation has attracted a lot of attention in recent years as a possible alternative to the traditional adversary system. The balanced, practical, and fair approach adopted in facilitated mediation can strengthen the system’s capacity to bring justice. Divorce mediation helps the disputants to not only negotiate an agreement but also to renegotiate their relationship in a way that contains conflict, manages feelings and ensures a degree of future cooperation. At the heart of mediation lies the inherent understanding that, disputes must be resolved efficiently, at minimal costs (both financially and emotionally) with parties in full control of the process becoming the rule-makers for the resolution of their own dispute. In contrast, when a family dispute enters the adversarial web, anger and distrust are escalated, control is often is lost and the players become pawns and consequently are relegated to a reactive rather than a proactive role. Mediation employs principles of cooperation and conflict resolution enabling the disputing couple to become rational and responsible enough to cooperate toward making compromises acceptable to both. This paper offers an overview of mediation process and other forms of ADR practices, including a discussion on the reasons for the rapid development of this practice, gives recommendation for further improving use of mediation and briefly outlines the role of lawyers including ethical considerations in this crucial process.

INTRODUCTION

---

Divorce, the dissolution of marriage is an emotional and legal whirlpool. The collapse of family life takes its toll on not only the married partners but, family members as well. Matters further get complicated on account of custodial claims. Children suffer harassment and are scarred for life. To add to this, civil courts in India seldom offer alternatives to litigation. As the dispute enters the realm of litigation, quarrels, egos and manipulation take centre stage. In all this noise, sound is lost; it’s no longer just about divorce and moving on but also about denting and painting the other side with one’s all might.

Abraham Lincoln once said “Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser— in fees, expenses and waste of time.” In similar spirit, it is the duty of the State, its functionaries and lawyers alike to promote alternatives to conventional dispute resolution. The adversarial system promotes quarrels, leads to ego inflation, and encourages disharmony. Conversely, Alternative Dispute Resolution (i.e. ADR) Mechanisms reduce tension, encourage mutual understanding and help foster a safe environment for negotiations.

The term “Alternative Dispute Resolution” takes in its fold, various modes of settlement. Primarily, there exist 4 types of ADR processes such as Arbitration, Conciliation, Mediation and Lok Adalats. These can broadly be distinguished as falling within the following two broad headsviz:- Adjudicatory Process (i.e. Arbitration) and Negotiatory Processes (i.e. Conciliation, Mediation and Lok Adalats).

Arbitration is somewhat similar to the adversarial process. Both the parties present evidence to the Tribunal (generally comprised of either one or 3 Arbitrators), they hear arguments and then pass an order (i.e. an award) which is legally binding and enforceable in between the parties. Though, the parties have a right of appeal against the award, in India, such right is limited. Arbitration can either be voluntary or mandatory.

In conciliation, the parties refer their dispute to a conciliator who meets with the parties in order to resolve their differences. The terms conciliation and mediation are often used interchangeably in common parlance yet, the difference between the two is that, in mediation, the mediator is mandated to be impartial and its role is restricted to that of a mere facilitator.

627 American statesman and lawyer who served as the 16th President of the United States.
632 Id. §34.
whereas, the role of a conciliator is more pro-active and interventionist.  

**LokAdalats or the People’s Courts** are established by the government to settle disputes through compromise. The LokAdalat is presided over by a chairman who usually is a sitting or retired judicial officer. The panel also comprises of two other members, usually a lawyer and a social worker. No court fees is charged for the settlement of dispute. A LokAdalat is not strictly bound by rules of procedure and evidence like ordinary courts thus making the process more easily understandable to the less educated section of the society.

Mediation is a process wherein a third party, (the mediator) sits with the disputants, encouraging them to find a mutually agreeable agreement by helping them define issues, clarify priorities, find points of agreement, and explore areas of compromise. The word mediation is derived from the latin word ‘mediare’ which means ‘to be in the middle.’ A properly executed mediation process incorporates all of the essential players to the dispute, depolarizes them and focuses on the common goal—‘the resolution.’ Rather than attacking each other, the parties attack the problem. It can be voluntary or court imposed. Mediation does not seek to cultivate the objective truth rather, aims at resolving dispute in a manner which either preserves the relationship or, completely terminates it allowing the parties to move forward either together, or apart. Mediation seeks to understand the underlying interests and motives driving the dispute, it is a simple exercise to find the middle ground between two conflicting parties. It aims to achieve a mutual settlement without necessarily going into the contours of blame labelling.

**WHY MEDIATE?**

Mediation is not a cure for all diseases, it’s not a one stop shop for all Litigation woes. However, it does offer certain distinct advantages which give it an edge over the conventional forum. Mediation as a process of intervention in the legal system fulfils other instrumental and intrinsic functions apart from reducing court burden. Mediation both quantifies and expands the qualitative capacity of the system to resolve conflicts. Following are the advantages mediation has to offer over litigation:

1. **Confidentiality:** Confidentiality is essential for any mediation proceeding to be successful. Maintaining secrecy vis-à-vis mediation proceedings is the hallmark of mediation and helps create a safe environment allowing the parties to directly target the issue. The Supreme Court when

---

635 Supra Note 10.
637 *Mediation as an ADR* available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/44117/10_chapter%204.pdf (last accessed, September 04th 2018);
discussing mediation as a process held in Moti Ram v. Ashok Kumar⁶⁴¹, that mediation proceedings ought to be strictly confidential, and the mediator must simply place the agreement before the court without conveying to the court what transpired during the proceedings.⁶⁴² The element of confidentiality gives the disputants the capacity to talk freely, bring issues to the fore and engage in open, honest and informal discussions. Parties may negotiate freely and openly, without fear of jeopardizing their legal rights or positions.

2. Privacy: Don’t wash your linen in public goes the old adage. Keeping in line, Mediation proceedings are strictly private. The dispute or the pleadings are not public record nor are they subject to public scrutiny. This is especially critical when, reputation of the disputants is at stake. Privacy breeds security and comfort, the psychological inhibitions but proves to be a great catalyst for honest conversations, thereby expediting the process.

3. Party Control: The central theme of mediation is self-determination. Partners’ best know how to resolve their own disputes. In mediation, the parties remain in full control of the entire process. The beauty of mediation is that, even the mediator’s role is relatively small and non-interfering in contrast to other forms of ADR. The parties embrace their inherent power to become their own rule makers for the resolution of their own dispute. In contrast, while ensuring adjudication in the conventional format, the parties delegate this capacity to the courts, risks increase and the dispute lingers on without allowing the parties to either move on, or shed their past.

4. Procedural Flexibilities: Being in full control, the parties chart out their own way. Simplified procedure designed by the parties themselves helps create a comfortable environment which is the sine-qua-non of a successful mediation setting. Not being dependent on formalities of court, the parties have the capacity to think out of the box, schedule meetings as per their own convenience and design their own settlements.

5. Time—Protracted litigation characterizes the Indian Judiciary and is a blot on what otherwise could have been called a near efficient system. Indian courts are jammed and packed. As of 2018, there are over 2.6 crore cases pending in High Courts across the country and Seventy-five lakh civil suits are pending in India’s District Courts.⁶⁴⁵ In contrast, time as a factor is in complete control of the parties in the mediation process. From few weeks to months, the probability of the dispute being elongated is less. It helps the parties get over the dispute fast and simple, leave their baggage behind and move on in life. Mediation has proven to be quick and efficient, with two-thirds of mediated

---

⁶⁴¹ Moti Ram v. Ashok Kumar, (2011) 1 SCC 466.
⁶⁴² Id. ¶2
⁶⁴³ Supra note 2.

---


"Id."
6. A Win for Both: Mediation allows both the parties to be creative so that a novel solution can be carved out which would be in the best interests of both the parties. In the adversarial process, each side must prove they were right and blameless or lose. In litigation, you are either right or wrong, there is no middle ground. Mediation talks about what is right, whereas adversarial system talks about who is right. In mediation, the parties adopt a more balanced, facilitative and future looking process. They identify the areas of miscommunication, rectify the error, create a new design and reach a mutually beneficial settlement. Settlements so reached are durable as they tend to make arrangements for certain future adjustments. For example, a child custody settled via mediation will make suitable arrangements for re-marriage of one of the erstwhile spouses.

7. Emotional Stability: Courts in India can be intimidating. Continuous visits can damp an individual emotionally and can hamper her/his professional prospects. Further, getting involved in the judicial web can impose certain social prejudices which further dent an individual. The court room debates over ones erstwhile married life can be overwhelming and thus, mediation being offered in a private setting away from public glare is certainly a better alternative.

8. Costs: Expenses in a divorce litigation are many and vary from lawyers’ fees, court fees, filing fees, clerical fees to expenditure for securing documents and witnesses. Innumerable adjournments mean increased expenditure on transport and in some cases, even lodging.\textsuperscript{647} Spread over a considerable period of time, these costs increase substantially. In contrast, mediation being flexible and relatively short offers the disputants the less expensive way out thereby reducing monetary costs.

9. Conclusion: Last but not the least, mediation offers closure to both the parties once and for all. Once the terms of a mediated settlement is written and signed by both the parties involved, and presented to the court, it becomes binding.\textsuperscript{648} A mediated settlement tends to have a high rate of compliance as it is mutually agreed to by the parties and has more durability than a court decree. Furthermore, it’s not just the cases referred for mediation which are settled once and for all but all the other cases pending adjudication can be settled in one go.

AN IDEAL MEDIATOR:

The essence of mediation lies in the role of the mediator as a facilitator. The aim of divorce mediators is to assist the parties and

\textsuperscript{646} VIDHI CENTRE FOR LEGAL POLICY, Strengthening Mediation in India: Interim Report on Court Annexed Mediations, 42, (July 29, 2016), available at https://static1.squarespace.com/static/551ea026e4b0a12b1a8f9df/579e7be5016e10ca2ae65f0/1470031920694/Interim+Report+Strengthening+Mediation+in+India.pdf (Last accessed, September 10\textsuperscript{th} 2018).


\textsuperscript{648} Ravi Aggarwal v. Anil Jagota2009 SCC OnLine Del 1475.
not to make decisions for them. Mediation works best when the mediator's role is solely restricted to the facilitation of the disputants to broker their own agreement, while raising questions about the fairness, equity, and feasibility of proposed options for settlement. Unlike the Judge in traditional Courts or an arbitrator, the mediator is neither a trier of fact nor an arbiter of disputes. There are certain attributes which are a must have for a mediator. These characteristics are simple and easily adoptable; reflections of which can be seen in Lord Ganesh.

1) Big Ears: The mediator must have big ears i.e. he must be a good listener so as to enable him to understand the underlying issues.

2) Big Head: A Mediator must have a big head in order to enable him to think big and think in a liberal manner.

3) Big Stomach: A mediator must have the capacity to digest everything that comes from the respective parties.

4) Long Nose: As a mediator, one must poke her/his nose into separate essential from the non-essential and learn to distinguish between position and interests.

5) Small Eyes: A Mediator must have small eyes thereby enabling him to concentrate more on the subject matter and do away with any distractions.

6) Small Mouth: A mediator must have a small mouth thereby enabling him to talk less so as to has to enable the parties to understand their own interests.

LAWYERS AND MEDIATION

A. THE LAWYER MEDIATOR:

Lawyers are best suited for setting the mediation process in flow. A good mediation utilises the resources of law and not of therapy or psychology. A lawyer mediator can do much good, help distinguish the grain from the chaff and provide legal information as distinguished from legal advice. Legal information is general and impartial whereas legal advice involves specific suggestions to pursue or refrain from pursuing a particular course of action. Legal information is a very important aspect of mediation. It helps the disputants outline available options and review the advantages and disadvantages of each, it helps the parties gain a certain perspective about their respective positions.


652 Id.
how they stand and what lies in store if they go to courts as opposed to mediating the dispute.

Furthermore, a lawyer-mediator’s draft of an agreement also helps move things along. It helps the parties to identify areas of agreement / disagreement, recognise the broad parameters of the settlement. It also gives them a preview of what the final product would look like making the entire process more constructive and appropriate.

B. LAWYERS, MEDIATION AND THE CLIENTELE:

The role of the lawyer is all the more crucial when it comes to advising a client involved in divorce mediation. The attorney must make the client understand how mediation works, the mediator’s role and the alternatives available with the client apart from mediation. The attorney on her/his part must have an understanding of the psychological and emotional makeup of the client, the relevant law and facts.

In preparing the client for mediation, the lawyer must focus on emphasizing what mediation truly stands for, the confidential and private character of the proceedings and the impartiality and non-interventionist role of the mediator must also be highlighted. The client must be made aware that his participation in the process does not necessarily mean that she/he is bound by the outcome of the process.

Psychological conditioning of the client is important. It is the duty of the lawyer to prevent the client from being disillusioned by the process of mediation. Clients who see divorce mediation as a painless and amicable process may become fixated on that as a goal. 653 A lawyer though determined to make the mediation process a success shouldn’t allow the client to enter the process with too many hopes so that, the client invariably does not end up signing away important economic, social and emotional benefits away.

Post mediation, the role of a lawyer assumes more significance. In the event of a breakdown of the mediation proceedings, the lawyer must guide the client as regards the next course of action. In the event the mediation proceedings are a success, it is imperative that the lawyer scan through each and every term of the settlement, examine the scope of future conflicts and bear in mind the legal consequences that would flow from the settlement.

MEDIATION IN INDIA, ISSUES AND SOLUTIONS

Many legal systems worldwide have made sweeping commitments to the use of ADR mechanisms. Studies indicate that an effective Justice system has a profound impact on the efficiency of the economy. 654 The Code of Civil Procedure (“CPC”) was amended in 2002 to incorporate Section 89 which includes mediation as an ADR mechanism. 655 However, the Hon’ble Supreme Court of India in the case of in Salem Advocate Bar Association v. Union of India (‘Salem I’) recognised the need for

655 Civil Procedure Code (Amendment) Act, 2002
regulating mediation proceedings on account of the absence of a framework rendering Section 89 ineffective.\textsuperscript{656}

The Judicial branch of the state is the most important yet, most neglected branch in India. From the highest court of the land to the court of a Munsif, the Judiciary is under-supported, under-funded, under-protected and undertrained. Administration of Justice still favours the powerful over the weak and cultivates conditions conducive to corruption, and delay. Resultantly, majority of Indians have become averse to the idea of going to courts.\textsuperscript{657}

It is imperative that, alternate forums be developed and promoted for adjudication of disputes. Mediation bears a comforting alternative to the traditional system. Mediation is not intended to supersede or supplant the judicial set-up rather, complement the same, help achieve objectives of the judicial branch and relieve traditional courts of several cases.

Apart from statutory mandates, creation of mediation centres and rule making by High Courts and efforts by state governments\textsuperscript{659} have played a significant role in the popularisation of mediation. Mediation though on the rise in India faces a lot of obstacles too. From lack of public awareness to almost negligible institutional / legislative back up, mediation’s step-son treatment continues till date.\textsuperscript{660} In light of the aforesaid, let’s discuss issues which beset the development mediation in India and further look into the possible solutions to the same.

A. ISSUES

1. Lack of legislative / Regulatory framework: The success of mediation in a mature legal system cannot be solely based on random rule making / judicial precedents but requires a concentrated legislative effort promoting and securing the entire process.

True that the Indian state has made rules and regulations but almost all of them have been half-hearted attempts. The Mediation and Conciliation Rules, 2004 were brought into effect from 11th August, 2005. A cursory look at these rules in contrast to those surrounding other forms of ADR mechanisms reveal that the rules have not been framed adequately, do not cover the entire landscape of mediation and are a superficial attempt at mediation, lacking conviction. There is no regulation of mediation, its process and mediators outside that of the court scheme including requirement for training, certification or

\textsuperscript{656}Salem Advocate Bar Association v Union of India, (2003) 1 SCC 49.


\textsuperscript{658}The Industrial Disputes Act, 1947, §§4,5,12; Hindu Marriage Act 1956 §§ 23(2), 23(3); Family Courts Act 1984, § 9; Companies Act § 442; Companies (Mediation and Conciliation) Rules, 2016, Rule 17.

\textsuperscript{659}For Eg. The Delhi Disputes Resolution Society set up under the aegis of the Government of NCT of Delhi and the Delhi High Court; SaurabhKulshreshtha, Alternative Dispute Resolution

\textsuperscript{660}Supra note 17
In this approach has led to a stunted enforcement of mediation by going for an adversarial approach. The resultant consequence of this has been the stunted growth of mediation culture as a result of which, mediation lacks popularity and support.

2. Lack of reputed mediation centres: In the absence of institutes / centres offering mediation services by trained professionals, the natural recourse of any litigant lies ultimately with the courts of the country.

3. Enforceability: Unlike the law on arbitration, mediation settlements are not enforceable with similar mandate. There are no set rules governing enforcement of settled agreements. Any agreement reached in a private mediation is governed by the Contract Act, 1872. In court-referred mediations, parties need to approach courts to enforce the settlement; something, which the parties sought to avoid by going for mediation in the first place. This lack of enforceability decreases the confidence of not only the public at large but also practitioners of mediation. Eventually, the possibility of the parties not complying with the final outcome of the settlement makes the entire mediation process redundant and fruitless.

4. The Adversarial system: The Indian court system inherently has had a right v. wrong, Party 1 v. Party 2 approach. The adjudicatory nature of the system as opposed to a settlement based approach has led to a generations of lawyers, litigants and judges trained to follow and approach a particular case in this binary fashion. The resultant consequence of this has been the stunted growth of mediation culture as a result of which, mediation lacks popularity and support.

5. Lack of Public Awareness: The lack of public awareness vis-à-vis mediation and its advantages is a major impediment in the use of mediation as an effective tool in India. Steps taken to promote mediation are still haphazard and have not garnered much attention nor do they seem to have met the desired objectives. A lack of dissemination of data highlighting advantages of mediation over litigation such as cost efficiency, success rates and overall expediency has led many to opt for the conventional forum.

6. Reluctance of the Bar: The general perception of mediation having a negative impact on incomes of advocates contributes as a major factor in mediation still not being the preferred mainstream dispute resolution process.

B. RECOMMENDATIONS:

After having discussed the problems let’s have a look at the possible solutions which if adopted can go a long way in promotion and use of mediation. For the sake of convenience, the following recommendations have been broadly divided in four aspects dealing with statutory and regulatory framework, role of the bar and the bench and role of the executive in promotion of mediation.

1. Regulatory and Statutory Framework:

Unlike arbitration and conciliation, mediation in India still suffers from a legislative and regulatory void. Following the framework laid down for arbitration and

---

conciliation, a legislation on mediation must address the following issues:-

- Mediator training, standards and accreditation to protect the mediation eco-system from unscrupulous and/or under trained mediators.
- Enforcement of mediation settlements to promote confidence of the public and practitioners of mediation in the final outcome of the result.
- Confidentiality of mediation proceedings to facilitate a safe and secure environment for conduct of mediation proceedings.
- The conduct, initiation and termination of mediation proceedings.
- Establishment of Central oversight regulatory authority.
- The requirement of compulsory recourse to mediation in certain categories of cases, before the Court is moved.

Though, the aforementioned list is not exhaustive yet, it offers a starting point for law and policy makers. A legislation would codify and align the law. This will not only increase public confidence but would also serve as a referral point for those practicing mediation and would boost the use of mediation in India.

2. Role of law schools and the bar:-

2.1 Law schools curricula and training:-

Law schools are seminal in cultivating a culture surrounding mediation. Law students are often subject to a rigorous court training curricula in their final year of law school. From drafting pleadings and conveyance to mock trials, moot courts, it is mandatory for law students to undergo such training as per the rules of the Bar Council of India. However, a detailed and thorough course on mediation skips the bus. Mediation training at this nascent stage of learning in contrast to learning mediation in a belated manner while at the bar has several advantages. Among other things, young emerging lawyers would always consider mediation before considering the option of litigation. Furthermore, law students would consider mediation as a full time career and thereby contribute in further advancing the intellectual capacity of the field.

2.2 Role of the Bar:-

Lawyers and the Bar play a pivotal role in promoting and improving the use of mediation in India. The lack of confidence by the bar in the mediation process is a huge impediment. From mandatory pre-litigation efforts to training of mediators and providing infrastructure for the same, the Bar Associations should frame rules of conduct for members to follow. Such efforts would help advance public confidence in the use of mediation. Lawyers must advise their clients to opt for mediation over litigation as the first step in the resolution of a dispute. Rules such as this should be made mandatory and Bar Council’s rules of practice should be amended accordingly.

3. Role of the Bench:

3.1 Penalise Litigative mind-set:

Imposition of costs on frivolous and

---

mischievous litigations is not new to the Indian landscape. Yet, the bench has not been as pro-active in penalising the mind-set behind litigation. The Judiciary must try to discourage parties wanting to opt for the litigation process. As a natural consequence thereof, parties would instinctively opt for ADR mechanism as the first step in resolution of a conflict. This move would also reduce the burden on the courts.

3.2 Judicial Training: Sensitising the judiciary at all levels, towards understanding the need and purpose of mediation is necessary to popularise and tap into the potential of mediation. Mediation should be a central part of Judicial Training at all levels so as to increase the utility of mediation.

3.3 Supervision of Mediation Centres: District Mediation centres / Court-annexed mediation centres though having been established rarely are accountable vis-à-vis targets met. The Judicial system must set a certain target for cases in each year that must be solved via ADR processes. Judicial supervision, particularly by the Superior Courts would serve as sufficient mechanism of checks and balances ensuring realisation of targets.

4. Role of the Executive:

4.1 State Investment: There is need for state governments to invest greater funds to bolster the infrastructure of mediation centres within their territories. Better infrastructure, enhanced facilities, mediator training and government mediation centres will not only boost public confidence but would also attract young professionals who would see mediation as a full time career. These efforts would prove to be conducive towards making mediation an everyday affair rather than a one-off event.

4.2 Public Awareness: Awareness by way of advertisements, prominent display hoardings highlighting benefits of mediation in court premises and information dissemination about mediation in court premises at designated permanent offices would help boost public awareness. Naturally, any potential litigant would first want to follow through with mediation, and perhaps even force his/her lawyer to go for mediation over litigation.

CONCLUSION

Mediation has globally surfaced as an extremely popular ADR mechanism to supplement the existing formal adjudicatory mechanism. In India, settlement of disputes via Mediation holds significant promise yet, it is still to gain a significant foothold as a popular dispute resolution mechanism. Though, the Judiciary and the executive have taken several positive steps yet the same remain unmethodical, casual and most importantly unpopular. Development of mediation centres in India, their supervision and conduct have mostly been isolated and sporadic. An all-inclusive legislation on mediation is the need of the hour which would not only widen the horizons of mediation but, would also add to its efficacy, popularize it and put in order the mediation ecosystem. My attempt in

663 Laura Fishwick, Mediating with Non-Practicing Entities, 27(1) HARVARD JOURNAL OF L. AND TECH, pp. 331-349 (2013).
665 Laila Ollapally & G Aparna, Mediation an omission in the ADR Legislation, BAR & BENCH,

www.supremoamicus.org
writing this paper is not to demean valuable contributions made by the state but to highlight the scope of mediation and our systems incapacity, both physical and mental to tap into the potentialities of mediation. Above all, the legal system exists to serve Justice. This service is a sacrosanct responsibility. Therefore, execution of this service bereft of access is no true service rather a failure to honour responsibility. Mediation is not a means but an end in itself.

******

INTRODUCTION

A trade mark could be said to entail any word, symbol, name, device, packaging, shape of goods or combination of colours or any combination which is capable of lending the distinctiveness to the goods being produced and marketed under the mark so adopted. This is the scope of what are commonly known as ‘Traditional Trade Marks’ which are backed by the Indian legal provisions. The Trade Mark Act, 1991 defines “trade mark” as a ‘mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours…’

However, in today’s world, with the aggressive rate of rising competitiveness in the commercial and physical commodities markets around the world, the production and distribution corporations have to be creative and it has become imperative for them to stand out from their competitors in order to sustain a goodwill in the market. Further, registration of a trademark helps to instil consumer confidence and prevent confusion about the source of products sold under a trademark. Consumers rely on trademarks in most cases where it is difficult to inspect a product quickly and cheaply to determine its quality. It is here that the use of non-traditional trademarks can come into play. Such production and distribution houses tend to invest largely in non-traditional trademarks like smell, sound or...
colour combinations, which are based on the different senses of a human, in order to distinguish their products from the established standards.

Non-traditional trademarks can be divided into two groups of visible signs (colours, moving images, etc.) and non-visible signs which relate to all five senses (sounds, smells scents, tastes and textures). Due to the dynamic interpretation with regards to the general, universal understanding of term ‘Trade Mark’, various non-traditional marks have become widely accepted, being reflected in many inclusive legislations and international treaties such as Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995 (TRIPS).\textsuperscript{668} The TRIPS Agreement defines trademark on a functional basis and provides a list of marks that can be considered to be trade marks however, the list is non-exhaustive. Therefore, even the TRIPS Agreement cannot paint a clear picture as to the admissibility and registrability of non-conventional trademarks.\textsuperscript{669} It is only the Singapore Treaty on the Law of Trademarks, 2006 and the 2011 Regulations on this Treaty\textsuperscript{670} which has been the first piece of formal normative provisions expressly recognizing non-conventional trademarks. While including colour, sound and smell marks, the Regulations have also recognized hologram marks, position marks, motion marks and 3D marks among others.

Despite the repeated use of these non-conventional marks in the global market, it lacks a universal validation owing to the existence of territory wise registration. But at the same time one of the most imperative changes has been introduced by these modern trademark forms in the present trademark law along with the constant struggle for the law makers to guarantee a balance between development intellectual property laws and technological improvements and that they are at par with one another.\textsuperscript{672}

This article attempts to highlight the registrability of non-conventional trademarks over various jurisdictions along with India and it also tries to highlight the nuances involved in this niche specification of the legal world. It aims to provide a background of the various technicalities involved in the registration and protection of the non-conventional trademarks which, though have been in the commercial world for quite some time, still remain in controversy and the subject of various debates.

**REGISTRABILITY OF NON-CONVENTIONAL TRADEMARKS**

---

\textsuperscript{668}Hereinafter referred to as the TRIPS Agreement.

\textsuperscript{669}Sankalp Malik, ‘Property Rights Over Fragrances, Smells And Perfumes Protecting Your Aroma Creation Against Competitive Imitation & Registering Scents As Community Trade Marks’, An Open Access Journal from The Law Brigade (Publishing) Group.


\textsuperscript{671}International Trademark Association Bulletin, Vol. 61, No. 9, 1st May, 2006.

\textsuperscript{672}Garry Trillet, Registrability of smell colour and sounds: how to overcome the challenges dressed by the requirements of graphical representation and distinctiveness within European Union Law.
Interestingly, non-conventional trademarks, which have found place in the commercial world quite recently, associate with the five senses of a human. The Manual (Draft) of Trademarks Practice and Procedure of Indian Trademark Registry, 2015 states that colour, sound, shape of goods, packaging and smell trademarks fall under the category of unconventional trademarks. However, considering a global perspective, the below-mentioned fall under the categories of non-conventional trademarks:

1. The Sense of Sight:
   i) Colour marks
      Usually a combination of colours is easily registrable as a non-conventional trademark. The perfect example of which is when Tiffany & Co successfully registered the robin’s egg colour “Tiffany blue” for its boxes and bags. However the real controversy arises when the registrability of a single colour mark is considered. It was held in Dyson Ltd’s Trade Mark Application, that a single colour may be registrable as a trademark if it is very unusual and peculiar in a trade and is recognized by traders and consumers alike that it serves as a badge of origin for that class of goods. According to the recent decisions of the court, it is the ‘source-distinguishing ability’ of a sign that permits it to serve as a trademark and not its ontological status as colour, shape, fragrance, word or sign and in reference to this Christian Louboutin’s red colour used on the soles of Louboutin shoes was granted protection for its red colour trademark.

Further, the registrability of colour mark depends on how the colours are presented and what they are applied to and a mere sample of colour particularly on a paper is unlikely to be sufficiently durable.

---

675 Dyson Ltd’s Trade Mark Application 2003 RPC 47.
677 Christian Louboutin v Van HarenSchoenen Case C-163/16.
for the purposes of graphical representation as it will have to be backed by strong evidence of factual distinctiveness. The Court further recognized the existence of an internationally recognized colour identification code like the Pantone Code which is a commercial system that designates specific shades numerically and categorizes over thousands of shades by unique codes. Thus, it becomes clear that in order for a colour to be a trademark, the test is three fold functionality, source indication and distinctiveness.

Citing another example, in the case of KWS Saat an application for single colour orange trademark in respect of ‘seeds and treatment installations for seeds, consultancy services and agricultural, horticultural and forestry products’ was rejected on the ground of lack of distinctiveness. Adding on to that the TRIPS Agreement states that ‘Combinations of colors...shall be eligible for registration as trademarks [although] members may make registrability depend on distinctiveness acquired through use [and] members may require, as a condition of registration, that signs be visually perceptible.’ This shows that distinctiveness is absolutely mandatory to get a colour registered as a trademark and thus various countries including Germany, Sweden, UK, Norway etc. recognize the registrability of single colour provided it is proven with acquired distinctiveness.

Considering the scenario in India, as per the draft manual for Trademark Practice and Procedure of Indian Trademark Registry, one of the means of registering a colour as a trademark is to use them as a livery, i.e., as a consistent colour scheme applied to a range of products of the same general kind so as to designate the trade source which has been used for buses, trains and vehicle service stations nowadays. Further, in the case of Colgate Palmolive Company v Anchor Health and Beauty Care Pvt Ltd. the court ruled that a colour combination was a ‘trademark’ under the act, as the act’s definition includes no exclusion and even a single colour is entitled to protection under the law of passing off. This is testimony to the fact that the Indian legislation has started recognizing the non-conventional trademarks and have provided them with legal sanctity.

ii) Moving Trademarks

681 KWS Saat AG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) C-447/02, 2004, ECJ.
Moving images in the form of a film clip, video, animation, logos etc. which can combine colours, sounds and aspects of product designs can also qualify for trademarks in some countries. Motion trademarks may also be known as animated marks, moving marks, or movement marks. They are the result of multimedia technology. They are used by the company as an innovative marketing strategy to attract consumer towards their product. Any motion mark is made by using animation and different computer programs and any moving object which exist around that company.  

The requirements of a motion trademark involve the detailed description of the various components or elements of the trademarks and their interaction with each other explained in a sequence of steps. It also requires the use of a sequence of pictures or drawings to depict how the trademark functions. A portion of the sequence comprising the entire moving image, such as the first or last frame could be provided as long as the description of the mark clearly references the entire sequence. The description of the Columbia motion trademark is described as consisting of “A moving image of a flash of light from which rays of light are emitted against a background of sky and clouds. The scene then pans downward to a torch being held by a female figure on a pedestal. The word “COLUMBIA” appears across the top running through the torch and then a circular rainbow appears in the sky encircling the figure.” Just like the US, the European Union has also allowed registration of motion trademarks. The arrangement and opening of the doors of a Lamborghini has a motion trademark which has the description “The trademark refers to a typical and characteristic arrangement of the doors of a vehicle, for opening, the doors are “turned upwardly”, namely around a swivelling axis which is essentially arranged horizontal and transverse to the driving direction”.

Moving trademarks are, in fact, video fragments. The standard should be established that such trademarks must be accepted and reflected in the register in a certain video format. It would also be reasonable to consider the possibility of registering a combination of sound and moving marks (actually, it is a video with sound). Taking into account the pace of the development of 3D technologies, such trademarks may also constitute shape trademarks (a 3D video with sound). Meanwhile, it is necessary to set a uniform standard for the submission of such material. The respective video fragments should be available for review and analysis in the register.

Any motion mark should have the capability of depicting itself on paper while applying

Michal Ziolkowski, Motion Trademarks As An Element Of Brand Promotion, Https://Www.Iplawwatch.Com.


IPVigil, Non-Conventional Trademarks-India, June 26, 2015.

USPTO TM 1975999.
for registration in the intellectual property office of India. Submitting a motion mark involves the same criteria of evaluation as do other forms of trademarks, but motion marks have remained a small fraction of trademark submission in India. While submitting the registration of motion mark the company or individual has to keep in mind that any movement occurring in the mark should be represented in the sequence, it is being presented for the product. The succession of images in the mark being registered as motion mark is the most critical aspects which may be subject to protection. Presentation of such marks is interpreted liberally by the registrar of the trademark.

Sony Ericsson submitted a flipbook depicting of up to 20 images which allowed the examiner of the trademark to flick through the pages and see the motion in the pictures. This application was initially rejected by the examiner but was then accepted on appeal.

Until recently, trademark application of motion marks did not fulfill the condition of graphical representation, and hence, it was hard to register it as a trademark of the company. Even if the trademark is presented before the registrar graphically, this representation must be clear, precise, self-contained, easily accessible, intelligible, durable and objective. The definition of the trademark under the Indian Trademark Act is an inclusive one and covers within its ambit anything that is capable of being graphically represented and distinguishing any product.

One of the most perfect illustrative examples of moving trademarks is the universally known handshake on the opening introduction in old Nokia cell phones. This is how this trademark was registered:

---

690 Archi, Registration of Motion Mark as Trademark, April 27, 2018.
691 Case R 443-2010/2 (Sept. 23, 2010).
Interestingly, the description of this mark directly states as follows: “The mark consists of an animation created by showing the pictures in a consecutive manner”.

iii) Shapes Trademarks

The UK Trade Marks Act, 1994 and the Indian Trade Marks Act, 1999 specifically included the shapes within the definition of trade mark. Shapes with significant functional features are unregistrable. The Indian Trade Marks Act 1999692 like the UK Trademarks Act 1994 693 specifically provides that a mark shall not be registered as a trade mark if it consists exclusively of (a) the shape of goods which results from the nature of the goods themselves; or (b) the shape of goods which is necessary to obtain a technical result; or (c) the shape which gives substantial value to the goods.

Inherent distinctiveness of three-dimensional trademarks which includes the shapes of products has been outlined over the years by the ECJ and OHIM and Indian judiciary. In the US, the Lanham Act does not specifically define shape to be a trademark but modern practice has included shape and design of the product in the concept of ‘trade dress’.694

Shape of the product can be a trademark if it has acquired distinctiveness and is not functional. In Bongrain’s Trademark Application:695 the court rejected an application for three-dimensional shape of a cheese in flower-like form since the mark was devoid of distinctive character. It also held that there is a public interest in preserving certain signs for other traders to use in relation to the same or similar goods to maintain freedom of action and competition. Public’s perception of a sign is generally of paramount importance and the public generally does not make assumptions about the origin of a product from its shape. It is easier to register a mark if it is demonstrated that a shape mark has in fact acquired distinctiveness through use.

In Coca-Cola Co. v. A.G. Barr & Co.,696 the unique contour bottle, familiar to consumers everywhere, was granted registration as a trademark by the USPTO in 1977 as it was widely believed that most customers associate shape of the bottle with Coca-cola because of which it can be said that the shape is distinctive and has acquired secondary meaning.697

A shape trademark must not to be confused with the shape of a product. Although the sign, particularly the three-dimensional sign, is inherent to the product, it must be conceptually separated from the product and perceived as a trademark (i.e., a sign that distinguishes the product of one undertaking from that of others). To assess whether a

692 The Trademarks Act 1999, Section 9 (3).
693 UK Trademarks Act 1994, Section 3(2).
sign can be considered a shape mark, reference should be made to:\textsuperscript{698}:
\begin{itemize}
  \item the way the product is put on the market and distributed; and
  \item the way it is advertised.
\end{itemize}

In addition, attention should be paid to how the shape is perceived by the relevant public. In the case of \textit{Gibson Guitar Corp}\textsuperscript{699} the Sixth Circuit stated that trademark and trade dress are two distinct legal concepts, and while the Lanham Act defines a trademark, trade dress is not explicitly defined in the Act. Citing the Supreme Court, the Sixth Circuit described trade dress as the ‘design or packaging of a product which has acquired a secondary meaning sufficient to identify the product with its manufacturer or source.’ An applicant seeking a trademark registration for product packaging must prove both that the trade dress is inherently distinctive and has attained secondary meaning and that it is not functional.\textsuperscript{700}

The Indian courts have recognised trademark rights in the shape of goods, provided that the shape can serve as a source identifier. In \textit{Gorbatschow Wodka KG v John Distilleries Limited}\textsuperscript{701} the Mumbai High Court prohibited the defendant from using a bottle shape that was identical or deceptively similar to that used by the plaintiff. The court specifically stated that the shape of goods or their packaging is capable of trademark registration.

Similarly, in \textit{Zippo Manufacturing Company v Anil Moolchandani}\textsuperscript{702} the plaintiff sold lighters bearing the mark ZIPPO and held the rights to the mark relating to the 3D shape of its lighters. The defendant sold counterfeit Zippo lighters, imitating the plaintiff’s product. The court prohibited the defendant from selling lighters under the ZIPPO mark and with a 3D shape that was identical or similar to that of the plaintiff’s lighter.

Besides, protection of trade dress has, in recent years received express recognition in a number of international treaties like TRIPS [Article 15(2)], Article 1708 of NAFTA, Articles 2 and 4 of the European Trademark Harmonization Directive and Article 6 of the Mercosur Protocol. The Indian Trademarks Act, 1999 also specifically recognizes trade dress.\textsuperscript{703}

It is concluded that inherent registrability of the shape marks is difficult to accept. Though, it may be easier to register a shape mark if it is able to prove that the shape mark has acquired distinctiveness through use with passage of time.

\begin{itemize}
  \item iv) Hologram Trademarks
\end{itemize}

Holograms have for long been used for security purposes on credit cards, concert tickets, certain currencies etc. The purpose

\begin{itemize}
  \item \textsuperscript{699} Gibson Guitar Corp v Paul Reed Smith Guitars, LP, 423 F 3d 539, 543 (6th Cir 2005).
  \item \textsuperscript{700} Supra 15.
  \item \textsuperscript{701} Gorbatschow Wodka KG v. John Distilleries Limited (Notice of Motion No.3463/2010 in Suit No.3046/2010)
  \item \textsuperscript{702} Zippo Manufacturing Company v Anil Moolchandani, 2011 (48) PTC 39.
  \item \textsuperscript{703} Susan Binsy, Recent developments in non-traditional trademarks, http://www.manupatra.com (21 November 2006).
\end{itemize}
of use is to prevent counterfeiting and fraudulent replication, as replication of a hologram is considered more difficult. In recent times holograms have been increasingly used as trademarks in the marketplace. 704

Holographic trademarks have been registered by a few European countries and also in the US. The basic requirements for a trademark registration apply to a hologram too, i.e., the mark should be distinctive enough to be used by a business to uniquely identify itself and its products and services to consumers. The main difficulty arises in the method of graphically defining the mark in trademark registrations. Holograms by their very nature possess multiple images or colours that are visible only when viewed from different angles. The image may work electronically, but on paper, the published mark will only be a substitute of the mark itself; a figurative mark which needs graphical representation and adequate written description if it is to succeed. Applicants wishing to register their hologram as a mark should therefore seek to describe the hologram in as much detail as possible, providing visual views of the hologram in various frames with descriptions of angle and appearance. 705

Use of high-resolution frames avoiding fading or picture overlapping may be an option, as descriptions of the visual effects alone might not be allowed 706

In the United States, the trademark manual for examination requires under 1202.14 that a hologram used in varying forms does not function as a mark in the absence of evidence that consumers would perceive it as a trademark. In re Upper Deck Co. 707, where the Board held that a hologram used on trading cards in varying shapes, sizes, and positions did not function as a mark, because the record showed that other companies used holograms on trading cards and other products as anti-counterfeiting devices, and there was no evidence that the public would perceive applicant's hologram as an indicator of source.

![Hologram Image](image.png)

The VF – Video Future hologram trademark (CTM 2117034) registered by GDS Video.

---


705 Non-Conventional Trademarks- Analysis Of The Indian Structure RLR Volume IV Issue I.


2. The Sense of Smell: Smell and Olfactory Marks: these type of marks are theoretically registrable as a trademark and it was recognized for the first time by the American courts wherein the application for registering the written description of the smell of ‘a high impact, fresh floral fragrance reminiscent of Plumeria blossom s’ for sewing thread and embroidery yarn was accepted as a graphical representation and granted trademark protection.

However when we consider the registrability of scent marks, various jurisdictions have held differing opinions. In John Lewis of Hungerford Ltd’s Trade Mark Application the trademark was graphically represented by the description that ‘the trade mark comprises of the smell, aroma or essence of cinnamon’ in respect of furniture. The application was refused on the ground of lack of precision as a result of the degree of subjectivity it allowed. Further, “More recently, the European courts rejected the “smell of ripe strawberries” on the ground that there is no “generally accepted international classification of smells” (such as Pantone for colours) that would sufficiently identify the smell. This case has been seen as closing the door to smell marks in Europe. At least until a new method is devised to sufficiently identify smells.

In 1994, the globally well-known brand Chanel applied for the registration of their signature perfume fragrance product, ‘Chanel No. 5’ based on its fragrance. They attempted to represent their smell mark graphically by describing the perfume in their application as “The scent of aldehydic-floral fragrance product” however; this application failed to proceed and was rejected because the perfume which was the smell mark which sought to be registered was also the end product in its finality. Further, the mark could not be considered indicative of the origin of the product.

---

708 In Re Celia Clarke, USPQ 2d 1238 (1990) (TTAB).
709 John Lewis of Hungerford Ltd’s Trade Mark Application (2001) RPC 575.

On the other hand, in Britain, the Sumitomo Rubber Company successfully registered “a floral fragrance/smell reminiscent of roses” as applied to tyres. 712 The world’s leading manufacturer of darts, Unicorn Products, obtained a trademark for “the strong smell of bitter beer on the flight” of their darts. 713

In the landmark case Ralf Sieckmann v. Deutsches Patent und Markenamt, 714 Mr. Sieckmann sought trademark protection in respect of his conglomeration of businesses. He represented the mark by denoting its chemical composition - C6H5-CH = CHCOOCH3 and also submitted a sample, stating that the scent was usually described as “balsamically fruity with a slight hint of cinnamon”. The application was rejected at various levels and the ECJ decided that graphical representation per se is not enough for registration, and it must meet the following criteria:

i. It must be complete, clear and precise, so that object of the right of exclusivity is immediately clear.

ii. It must be intelligible to those persons having an interest in inspecting the register, i.e. other manufacturers and consumers. 715

In Indian context, the Registry has directly applied the Sieckmann test, stating that though smells are registrable, the fulfilment of the graphical representation criteria becomes difficult to post the Sieckmann holding. 716 It is disappointing to note that the Registry has not suggested any alternative method of graphical representation in spite of stating that smells are registrable. 717 Further, the Draft Manual states that, “Consumers of such fragranced goods are unlikely to attribute the origin of the products to a single trader based on the fragrance. Whatever may be the case, for purposes of registration as a trade mark, unless the mark is ‘graphically represented’ it will not be considered to constitute as a trade mark.” 718 The Manual puts it very bluntly that a smell mark can be registered in India only if it is able to be represented graphically, so that the primary purpose it being capable of differentiating one product


714 Ralf Sieckmann v. Deutsches Patent und Markenamt, Case C-273/00, 12 December 2002, European Court of Justice.
from the other for the consumer can be achieved with ease.

3. **The Sense of Sound:**

Sound or Aural marks: some of the famous sound marks are the Tarzan yell, the Merrie Melodies theme song and the melody of ‘Sweet Georgia Brown’ to which we all can associate very well. Registrability of sound marks opened the Pandora box of doubts which was very well showcased by Harley Davidson’s attempt to register ‘the mark consisting of the exhaust sound of the applicant’s motorcycles, which sparked a major controversy on the same. Now, the acceptability of a sound mark depends upon whether that sound has acquired a distinctive sign. It may consist of strings, notes, jingles, natural sounds, unnatural sounds produced by electronic equipments etc. The World Intellectual Property Organisation (WIPO) Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) suggests “[o]ffices may require that the representation of sound marks consist of a musical notation on a stave, a description of the sound constituting the mark, or an analog or digital recording of that sound. However, for some jurisdictions, only a musical notation on a stave may be considered to adequately represent the mark.”

Sound mark will qualify for acceptance only with evidence of factual distinctiveness including songs commonly used as chimes; well-known popular music in respect of entertainment services, children’s nursery rhymes. Further, the sound marks shall be capable of graphical representation by way of musical notation and/or description of the sound in words. Onomatopoeic words, sonograms or spectrograms may also be accepted as graphical representations. On the other hand, if the applicant can prove that the sound, although non-descriptive, has acquired ‘distinctiveness through use’, the application may be considered. For instance, a toilet flushing sound for plumbing services, which has acquired distinctiveness through use, may be granted registration.

Considering the Indian context, India has been successful in protecting the sound marks considerably. Some examples could be, the sound of a human voice yodelling the words “Yahoo” was granted registration as a trademark in 2008, Nokia registered the sound of the guitar tunes playing whenever one of their devices is switched on, National Stock Exchange trademarked its theme song

---

719 Nineteenth Session of WIPO Standing Committee on The Law Of Trademarks, Industrial Designs And Geographical Indications, Representation And Description Of Non-Traditional Marks Possible Areas Of Convergence (Geneva, July 21 to 25, 2008).


721 Shield Mark BV v. Joost Kist h.o.d.n. Memex, Case C-283/01.

722 Martin Lindstorm, Brand Sense: Build Powerful Brands through Touch, Taste, Smell, Sight and Sound (Kogan Page Ltd., 2005).


and ICICI bank has trademarked their ‘corporate jingle’, well-known and used in their commercial advertisements prominently. Further, after the introduction of the new Trade Mark Rules, 2017, the process of sound mark registration has been streamlined, with more emphasis on digitization. Earlier, to register a sound mark, the applicants had to file applications with graphical representation or by spelling out the tune which lacked practicality. However, now the new provision requires the sound to be submitted in MP3 format not exceeding 30 sec length and graphical representation of the sound notations with TM-A form.

According such marks the statutory benefits of registration are:

a. How to represent the mark to enable it to be clearly articulated, and to ensure that it can be readily interpreted and searched.

b. The requirements of affixation, in particular with reference to wares, in terms of how the mark is to be connected with the wares.

And it has become imperative to list down solutions for the aforementioned problems now.

4. The Sense of Touch: Tactile or Haptic Marks: Haptic marks are basically associated with a distinctive touch like the velvety surface of a wine bottle or the feel of cotton and are protected as trademarks so as to indicate its origin. Rights over the tactile marks are generally claimed by the established use over a period of time. There is a dearth of recognized tactile marks and these are least common non-traditional trademarks. Hence, the legal authority is scarce.

However, owing to the below-mentioned examples it can be comprehended that this type of trademark has also been gaining popularity. Some examples include: in 1996, Louis Vuitton Malletier sought US trademark protection for its ‘distinctive man-made textured pattern utilized as a surface feature’ on its luxury luggage and leather products; Kimberly-Clark has federal trademark registration for ‘the configuration of the container used to dispense’ facial tissue and the United States Patent and Trademark Office (USPTO) also

---

728 Supra 24.
allowed Kimberly-Clark’s intent-to-use application for its raised, alternating dot pattern on paper towels; Touchdown marketing has a registered trademark in the ‘pebble-grain texture’ and ‘soft-touch feel’ of its basketball-shaped cologne dispenser and Fresh Inc. has a registered mark on ‘cotton-textured paper’ that wraps its soap products; and in 2006 American Wholesale Wine & Spirits, Inc. successfully obtained U.S. Reg. No. 3,155,702, for “a sensory, touch mark” alone and used with its Khvanchkara wine.  

And perhaps owing to these trademarks, in the year 2006, the International Trademark Association adopted ‘a resolution supporting the recognition and registration of touch marks’. This is an attempt to protect the tactile trademarks and get them registered as per the legal norms.

**The Sense of Taste:**

**Taste or Gustatory Trademarks:** Taste trademarks are extremely unlikely to be held inherently distinctive in any jurisdiction without strong prove of acquired distinctiveness. Unlike sound and smell marks, taste marks can only be applied to goods and not services. WIPO SCT report states that the graphic representation requirement can be satisfied by using a written description of the taste and an indication that it concerns a taste mark. However, it has to pass the non-functionality test.  

---

729 Christina S. Monteiro - A Nontraditional Per-Spectrum: The Touch of Trademarks, June 15, 2010 Vol. 65 No. 11.

US appeal board decision in In Re N.V. Organort highlights this aspect. The trademark application for ‘an orange flavor’ for pharmaceuticals for human use, namely, antidepressants in quick-dissolving tablets and pills was denied registration being not capable of trademark protection. It was also held that the applicant’s taste would not function as a trademark since there are numerous other orange flavored medicines. The appeals board also noted that flavor is a characteristic of the goods and not their origin. As the trademark trials and appeals court pointed out, it is difficult to define how taste can act as a trademark when consumers only taste the goods after purchase. Registration of a flavor mark will require a substantial showing of acquired distinctiveness.

OHIM boards of appeal rejected an application by Eli Lilly for “the taste of artificial strawberry flavour” as gustatory trademark for pharmaceutical preparations by stating that “it is in any event clear that such a taste cannot distinguish the pharmaceutical preparations of one undertaking from those of another.” The court added: “Moreover, the taste is unlikely to be perceived by consumers as a trade mark; they are far more likely to assume that it is intended to disguise the unpleasant taste of the product.” In this case, the Court implicitly recognized that taste marks could be registered as trademarks. The Board also debated on the issue of how taste marks could be represented without reaching a specific conclusion. However, it can be safely assumed that graphical representation for taste marks will be required to meet the standards set for sound and smell marks, in which case it might be difficult to get recognition for taste marks in most cases.

One substantial impediment to enforcement of flavour marks is functionality because they need to be available to all competitors. Examples would include mint toothpaste for adults and bubble gum toothpaste for kids. Flavours may also be found to be generic because they are used frequently by different manufacturers. Only an unusual flavour like melon or caramel or peanut butter added to a toothbrush or dental floss would be more likely to be protected than the same for cookies or bread.

INDIAN SCENARIO
The trademark law in India has developed a lot since the last decade. To meet its obligation under the Paris Convention for Protection of Industrial Property and the TRIPS Agreement, the Trademarks Act, 1999 was enacted. After the enactment of the Act, a lot of further development was made, for instance, electronic filing of a trademark application.

---


733Supra 15.

734 https://economictimes.indiatimes.com/small-biz/legal/recent-developments-in-intellectual-
In India, Section 2(1)(m) of the Trade Marks Act of 1999 defined a “mark” as “includes a device, brand, heading, signature, word, letterlabel, ticket, name, numeral, shape of goods, packaging or combination of colors or any combination thereof.” This definition seems to be influenced by the United Kingdom. Therefore, the list is not construed to be exhaustive, and the Draft Manual provided by the Controller General of Patents Designs and Trade Marks (CGPDTM) indicates that marks which are not visually perceived will be given special consideration on a case-by-case basis.

The draft manual of trademark published by Trademark Registry explains in 4.2.4 Acceptable forms of graphical representation. “In the Registrar’s view a mark is graphically represented when:

a) the representation of a trade mark is in paper form

b) it is possible to determine from the graphical representation precisely what the mark is that the applicant uses or proposes to use without the need for supporting samples etc;

c) the graphical representation can stand in place of the mark used or proposed to be used by the applicant because it represents the mark and no other;

d) it is reasonably practicable for persons inspecting the register, or reading the Trade Marks Journal, to understand from the graphical representation what the trade mark is.

Hence, in nutshell, the mark is eligible of protection under the Act if it is capable of being represented graphically on paper in a meaningful way. Non-conventional visible marks can be easily graphically represented on paper; hence those can be registerable under Indian Trademark Act.

With respect to shape of goods, the Act categorically provides protection since it can be easily graphically represented. Shape requirements for graphic representation can be met by providing a pictorial representation in conjunction with a written description. The pictorial representation will need to clearly show all features of the mark.

With respect to Colour mark, the Act allows only “combination of colours” hence protection to single colour as a trademark is not categorically allowed for registration under the Current Act. Although, the draft Trademark Manual the Trademark Registry accepts principle laid down – “A single colour may be registerable as a trade mark if it is very unusual and peculiar in a trade and is recognized by traders and consumers alike that it serves as a badge of origin for that class of goods.” However, with

---


737Supra 10.
respect to other types of non-conventional trademark such as smell, taste, sound are traditionally difficult to “Graphically represent” to meet the trademark Act requirement. With respect to the sound mark, the Draft trademark manual explains sound mark as – “Act does not explicitly exclude “sound marks” from registration nor does it say that a trade mark must be visually perceptible. It only provides that the trade mark must be “capable of being represented graphically” besides capable of distinguishing. The Draft Manual applies, although indirectly, the Sieckmann standards with regard to the requirement of graphical representation.⁷³⁸ Although the Manual indicates that the description requirement is met by musical notation in case of a mark consisting of musical elements, there is no indication as to the sound marks consisting of non-musical elements.

When India granted registration for sound trademarks, India simply borrowed the Shield Mark doctrine which was given in the case of Shield Mark BV v Joost Kist⁷³⁹ by the ECJ in which it opined that if the sound was distinctive and people were able to recognize it, there was no reason why such sound couldn’t be registered as a trademark.

As indicated above, the definition of trade mark makes it clear that in order to constitute a trade mark it should be “represented graphically” [section 2(1)(zb)] An application which does not meet this requirements will face an objection under this section and in the case of “smell mark” the greatest handicap will be the inability of traders to meet the requirements for graphical representation.

SUGGESTIONS AND CONCLUSIONS

Essentially there exists no difference between “non-conventional” and a “conventional” trademarks and there is no justification in wrangling about whether the former express an unreasonable restriction of free intellectual property resources or not. Non-conventional marks are strikingly unsteady of origin and are seldom used without additional words or figurative marks to support them. Since the trademark law is of an international spirit, it is apparent that the same is versatile in nature and the local laws have to keep on reforming themselves quite often in order to adjust with the changes and to be able to resolve the technical encumbrances it may have to come across regularly.

There is a plausible sense that Indian trademark law has effectively caught up with contemporary marketing techniques. What one does not see is the ambiguity and anti-competitive issues that such subject matter forms. The draft manual deciphers several of these issues and presents an entire structure within which to allow steady evolution of principles in this arena. Considering, India is an acutely active member in the world intellectual property field,it ought to be able to amend its laws and defend the businesses of numerous makers and also the goodwill of the consumers. The TRIPs Agreement as well as the US trademark regimedo not make ability of graphical representation as a pre-requisite for trademark. The Indian Trademark

⁷³⁸Ch II, Section 5.2.2 Draft Manual, 2015.
⁷³⁹Supra 46.
Regime resembles the stand of European Union as far as condition of graphical representation for a trademark is concerned. The non-conventional trademarks retain capability of source identifier despite not comfortably graphically representable. Thus, we can conclusively state that the Indian Trademark Act 1999 has put an unessential hindrance of capability of graphical representation as a condition for the registration of a trademark. In the developing globalized world, the use of colour, sound, scent, motion or holograms as a trademark is bound to grow in the near future. Thus, we should expand our trademark regime by diffusing the requirement of graphical representation for the non-conventional trademarks.

*****
SUBRAMANIAN SWAMY V. UNION OF INDIA

By Shivam Mishra
From Dr. Ram Manohar Lohia National Law University

INTRODUCTION

In Subramanian Swamy v. Union of India, the constitutional validity of criminal defamation under Section 499 and 500 of the Indian Penal Code, 1860 (‘IPC’) was challenged.

In its judgment, the Supreme Court upheld the constitutional validity of criminal defamation under Section 499 and 500 IPC on the basis that –

- Through it we achieve the goal laid down in Preamble of fraternity assuring dignity of individual that will result in unity and integrity of nation. This is also a fundamental duty under Article 51(e) and (j).
- Criminal defamation is a reasonable restriction on Article 19(1)(a) under Article 19(2) and it also maintains social balance.

This paper analyze the case and gives argues that criminal defamation is an unreasonable restriction on freedom of speech and expression under Article 19(1)(a).

The court held that criminal defamation helps to achieve the objective of preamble, but the same preamble also provide us with, LIBERTY of thought, expression, belief, faith, worship. To achieve the objective of preamble criminal defamation is not the only source. Just because an individual said something which other person did not like and it hurts his feeling, could lead him into jail, and he would be treated as a criminal. This is an overarching punishment since that object can be achieved by civil defamation alone. This case should not be examined using the framework of preamble because here the real issue is whether such restriction is consistent with Article 19 and 21.

Article 13 of the Constitution provides laws which are inconsistent with fundamental rights shall be void. Criminal defamation falls under the above discussed rule because, “liberty of free speech is a foundation of any democratic country”, means which means that democracy is only possible if people can speak and can give their personal opinion freely. In our Constitution Article 19(1)(a) provides the same but Section 499 along with 500 IPC infringes it.

All the reasonable restrictions provided under Article 19(2) are concerned with public wrongs and concerned with public interest in which the State will be a party. In fact all fundamental rights provided to us are against the State and not against individual citizens. So defamation which is instituted against any citizen by any other citizen can’t come under Article 19(2) and nor can it be a crime, because,

“Crime is an act committed or omitted in violation of public law forbidding or commanding it”.

Although Section 40 of the IPC defines ‘offence’ instead of crime but they mean the same. Defamation is between individuals and hence is a civil wrong.

Admittedly right to reputation was declared a facet of Article 21 in Sukhwant Singh v. State of Punjab. However in Maneka
Gandhi v. Union of India Supreme Court said that Articles 14, 19, and 21 should be read together. If a person does not have rights to speak freely where will his personal liberty lie? When at the time where civil defamation is giving strong ground to any person speak on reasonable note like Mr. Arun Jaitly’s 10 crore civil defamation suit against Arvind Kejriwal. Justice P.B. Sawant v. Times Now in which Times Now was slapped 100 crore as a compensation. These are the perfect examples which show civil defamation is enough to maintain a social balance and criminal defamation exceeds what is needed. Criminal defamation is working as an instrument through which powerful or political leaders can stop criticism. For example in Tamil Nadu 80 MLA’s of opposition party were evicted and suspended from state assembly on the ground of criminal defamation. Later on Supreme Court held that it was the misuse of criminal defamation law by Ruling party.

In Shreya Singhal v. Union of India Supreme Court struck down Section 66A of Information Technology Act 2000, on the ground that it violates the free speech and it is not protectable under Article 19(2) because, Section 66A is over-broad and vague. This section has lots of similarity with Section 499 and 500 IPC. Both protect one’s reputation and they provide for imprisonment. In today’s technological world it is easy to interpret that one can offend other’s reputation online very easily. Nevertheless Supreme Court said Section 66A is an unreasonable restriction and civil remedy will be enough. In that case civil remedy should be sufficient for defamation too. Section 499 is overbroad and vague similar to Section 66A. Section 66A was declared vague because it was not clear which information may offend anyone. Similarly in Section 499 there is no specific interpretation of the term ‘reputation’. Even a lightly remarked comment can be defamatory.

Further, under the first exception of Section 499 one can’t take even truth as defense because under this section even if you are telling truth it should be for public good which the Court decides. This seriously threatens citizens’ free speech because it’s very hard for anyone to decide which speech will not be a public good in view of the Court. The United Kingdom from which this law was borrowed has also repealed criminal libel and provided only for civil remedy.

In conclusion, India, as a country with democratic status should provide freedom of speech and expression to everyone without any unreasonable restriction.
Citizenship is a key institution through which competing demands for the membership are made. It is also a mechanism for determining how prospective diverse groups should be delimited and what ‘concrete action should result from such [their] solidarity’. Citizenship is an axis in the terms of engagement between individuals, social groups, and the state. It is made up of a bundle of rights and obligations, which form the basis for attaining a full membership, the terms of participation and a sense of belonging in the social body. Citizenship is a way nationhood is experienced in practice. In as diverse a social setting as India, citizenship is a ‘mechanism of incorporation’ for competing membership claims. The form of incorporation, or citizenship regime, is shaped by the institutional practices and their underpinning ideological conceptions, which define the paradigm for the allocation of political, social, economic, cultural and symbolic resources, privileges and duties. The meaning of the word ‘citizenship’ continued to be a matter of discourse among the liberals, republicans and ethno-nationals. The liberal conception of citizenship views the individual as the bearer of a package of rights, designed to protect her personal liberties. On its face, the liberal concept of citizenship is the most inclusive and universalistic. A republican concept of citizenship, in turn, contains a notion of a ‘common good that is prior to the individual citizen and her choices. Rights are granted in accordance with the contribution of citizens to the common good. The ethno-nationalist notion of citizenship anchors membership by a descent group. The nation is founded on blood-ties. This citizenship conception is the most exclusionary. It enables an almost unadulterated sense of belonging in the social body and the state for some groups. Citizenship becomes an end in the making of the state; the paradigmatic question becomes the extent to which the

747 Ibid
748 Ibid (n-9)
state protects the life of individuals.749 This concept of non-statist citizen exists in India which was introduced by Gandhi. In the non-statist citizenship conception, a citizen has an ‘inherent right’ to civil disobedience; in some circumstances it is the citizen’s ‘sacred duty’.750 Gandhi played an important role in ethno-national conception.

When India gained Independence it was the moment ‘to make Indians’.751 At independence, a tension between an ethno-nationalist and a liberal citizenship discourses was at play. An ethno-nationalist citizenship discourse gained currency in the context of partition. Many people asked: ‘Can a Muslim be an Indian?’752 These questions probed the drafters of the constitution as well as Nehru. Among the main concerns that preoccupied Jawaharlal Nehru after the independence was the question of how to safeguard the country’s national unity. In his fortnightly letter to the Union’s chief Ministers, Nehru repeatedly voiced his fear about what he saw as an inherent ‘tendency towards [the] disintegration of India’.753 A common proposition for the endurance of India’s National integrity, of which Nehru was a proponent, suggests that ‘the consolidation of independent India was to occur around the concept of “unity in diversity”’.754 Many scholars and leaders agreed with him on this point and thus began pondering over how to establish a nation where this principle was followed without disturbing the peace of the nation and the tranquility also stays intact. Thus came about the concept of citizenship.

The question of citizenship became particularly became important at the time of the making of our constitution because the constitution sought to confer certain rights and privileges upon those who were entitled to Indian Citizenship.755 The constitution, however, did not intend to lay down a permanent or a comprehensive law relating to citizenship in India. It only talked about people who would be citizens of India at the date of the commencement of the constitution and then left the entire clause of citizenship for the further interpretation and regulation by the parliament. The parliament then enacted the Citizenship Act, 1955 making much more comprehensive provisions for the cancellation of the citizenship subsequent to the commencement of the constitution.756

749 Ibid (n 9)
750 CWMG, Vol. 25, p. 391-392, (Young India), 5th January.
Under Articles 5-8 on the Constitution, people who became citizens on January 26, 1950 are being talked about. After the Citizenship Act, 1955, various modes of acquisition of citizenship were prescribed: Citizenship by birth, Citizenship by descent, Citizenship by registration, Citizenship by naturalization, citizenship by incorporation of territory. Then came the demands by the overseas Diaspora. Diaspora means a group of people who spread from one original country to other countries. In response to their growing demand of Dual Citizenship India introduced the concept of the person of Indian Origin (a PIO) in 2002 and an overseas citizen of India (an OCI) in 2006 as categories of persons who enjoy certain legal rights in India. People always mistakenly refer to the concept of dual citizenship. A PIO is simply defined to be a person registered as a PIO cardholder under the Ministry of Home Affairs scheme. An OCI is a person registered as an overseas citizen of India under section 7A of the Citizenship Act, 1955 (the "Act").

PIOs and OCIs essentially enjoy certain rights in India, on par with Indian nationals. Basically, people of Indian origin of certain categories who migrated from India and acquired citizenship of a foreign country, other than Pakistan and Bangladesh, are eligible to be granted an Overseas Citizenship of India on an application made in this behalf to the central government as long as their home country allow dual citizenship in some firm or the other under their local laws. The Persons of Indian Origin enjoy fewer benefits than Overseas Citizenship of India. The Amendment Act (which amended the Act) was introduced in the Lok Sabha on 27 February 2015 and passed by the Lok Sabha on 2 March 2015. The bill was subsequently introduced in the Rajya Sabha and was cleared on 4 March 2015. The bill received the assent of the President of India on 10 March 2015 and is deemed to have come into force on 6 January 2015. The Amendment Act introduces the concept of an 'Overseas Citizen of India Cardholder' (an "OCC") that essentially replaces and merges together OCIs and PIOs. The act provides the qualifications of registrations along with additional grounds. (1) a minor child whose parent(s) are Indian citizens; or (2) spouse of foreign origin of an Indian citizen or spouse of foreign origin of an overseas citizen India cardholder, subject to some conditions.

---

757 Article 5-8, The constitution of India, 1949. Bare text
758 Cambridge dictionary, https://dictionary.cambridge.org/dictionary/english/diaspora, accessed on 16 September, 2018
760 Introduced pursuant to a notification dated 19 August 2002 (and subsequently amended on 30 September 2014)
761 Ibid (n 17)
great-grandchild of a person who is a citizen of another country but meets several conditions.\textsuperscript{763}

An OCC are entitled to some rights and enjoyment. An OCC is entitled to a multiple entry multi-purpose lifelong visa to visit India and has no requirement to register with the authorities for the duration of stay, irrespective of how long it is. An OCC will not require a separate visa to visit India. They are treated very similar to NRI’s in respect to economic, financial and educational rights. They are also treated with par in matters of international adoption of Indian children and pursue the professions of doctors, dentists, advocates, architects and chartered accountants in India, pursuant to the provisions contained in the relevant acts governing those professions.\textsuperscript{764} In the context of the introduction of the concept of an OCC, the Department of Industrial Policy and Promotion recently amended the consolidated foreign direct investment policy circular of 2015\textsuperscript{765} (the "FDI Policy") in relation to NRIs, PIOs and OCIs.\textsuperscript{766} Pursuant to the amendment, for the purposes of the FDI Policy, 'NRI' shall also include an OCC.

Along with these rights comes the ones which are unavailable to them OCC’s as well. Certain rights have been reserved exclusively for citizens. The reasoning behind this is that citizens are entitled to enjoy and exercise rights that are guaranteed by the Constitution compared to persons who are not the citizens of a country.\textsuperscript{767} Section 7B (2) of the Amendment Act lays down several rights, conferred on a citizen of India, which are not available to an OCC. Such rights include: (1) the right to equality of opportunity in matters of public employment (based on Article 16 of the Constitution); (2) the election as President or Vice President (under Article 58 and Article 66 of the Constitution); (3) the appointment as a judge of the Supreme Court or the High Court (under Article 124 and 217 of the Constitution); (4) the right to registration as a voter (under section 16 of the Representation of the People Act, 1950); (5) eligibility for being a member of the House of People or of the Council of States (under sections 3 and 4 of the Representation of the People Act, 1950); (6) eligibility for being a member of the Legislative Assembly or the Legislative Council of a State (under section 5, 5A and 6 of the Representation of the People Act, 1950); and (7) appointment to public services and posts in connection with affairs of the Union or of any State for appointment in such services and posts as the Central Government may specify.

Prime Minister Atal Bihari Vajpayee said in 2002, "We are in favor of dual

\textsuperscript{763} Bureau of Immigration, ministry of home affairs, <https://boi.gov.in/content/overseas-citizen-india-oci-cardholder> accessed on 16 September, 2018
\textsuperscript{764} Ibid (n 23)
\textsuperscript{765} Press Note No. 7 (2015 series) dated 3 June 2015
\textsuperscript{766} This came in effect from 18 June 2015
\textsuperscript{767} Ko Swan Sik & T.M.C. Asser Instituut (1990), Nationality and International Law in Asian Perspective, https://books.google.co.in/books?isbn=079230876X (accessed on 16 September 2018)
citizenship. Not dual loyalty."  

The concepts to Overseas Citizen of India Cardholder, person of Indian Origin (a PIO), Overseas citizen of India (an OCI) was introduced just to compensate for India’s negation of dual citizenship. The reasons though justify as to why the government took such a stance. Dual citizenship will bring confusion in the state of minds of the people. For example, people having dual citizenship will have the right to vote and exercise their political rights in both the countries. These citizens might have a bias or a prejudice in their mind regarding either of the country which in every way is not very healthy for the country whom the person has a bias against. The following paragraphs will justify why India denies the concept of Dual citizenship.

The dual obligation. As a dual citizen, the person will be bound by both the countries laws. For example, if you are a citizen of US and a country with mandatory military service, you can lose your U.S. Citizenship under certain circumstances, such as if you serve as an officer in a foreign military that us engages in a war against the US. 

Double Taxation. Paying taxes of both the country can be pretty rough for the citizen who resides in only one place but has citizenship of both. These are just the personal problems, the following disadvantaged relate to the state. First is the constitutional issue, the implication of the Parliament is that there are many constitutional issues to tackle before implementation of dual citizenship can be achieved, which is a very complicated process altogether. Owing to the first disadvantage comes the second which is internal security. The parliament is concerned with security implications in cases where the dual citizens can be in favor of or be working with sensitive organizations, armed or paramilitary forces.

Social divide. It was also contemplated that guaranteeing dual nationalities to a community in the country would cause social divide.

Considering the advancement of the world now, the above reasons can easily be conquered. Most of the Indians who seek the citizenship of another country would be for employment or education matters. Like any other immigrants they would feel themselves being cut off from their ancestral roots when they are denied Indian Citizenship. In order of emotional respects, the persons of Indian origin should be given the certificate of dual citizenship and their Indian passports to feel more close


770 Jean Folger, ‘Dual citizenship: The advantages and disadvantages’, (Investopedia, November 27, 2017)


772 Ibid
to their home country and culture. They can still be verified under Foreigners Act, Passport Act, 1920 and Passport Act, 1967 of India.\textsuperscript{773} In addition the High Commission on the Indian Diaspora has endorsed the idea of dual citizenship for economic, technological, social, political and psychological reasons. Thus, dual citizenship can truly contribute to democratic transition in India and carry her forward in development.\textsuperscript{774}

The idea of our constitution, the very identity and the preamble talks about Justice, Liberty, Equality, Fraternity, secularism and socialism\textsuperscript{775} etc, then why not grant dual citizenship and be fair to people who left the country maybe to make the country proud, or to feed their family, for employment purpose or for anything else. Why not give them the respect they deserve and why should they be treated like they aren’t one of ours. The commission of dual citizenship wont change the identity of our constitution, but only make be shine bright and be stronger.

\textsuperscript{773} Ibid (n 32)
\textsuperscript{774} Ibid
\textsuperscript{775} Indian constitution, 1949
WILDLIFE BEARS THE BRUNT-IMPACT OF HUMAN INTERVENTION ON WILDLIFE IN INDIA

By Shubhra Sotie & Aman Singh
From UPES School of Law

1. Abstract

“What we are doing to the forests of the world is but a mirror reflection of what we are doing to ourselves and to one another.”

-Mahatma Gandhi

As the Human civilization spreads its limbs across the lands with increasing human population and the inherent need to accommodate the population; Development and housing projects become inevitable. Acres of forest land is converted to residential facilities, commercial hubs, roads and railway tracks that slice through the hearts of wildlife habitat. The linear infrastructure that springs up subdivides the wildlife landscape to such an extent where habitats are restricted to patches leading to habitat fragmentation that vividly increases the chances of extinction of species which are higher in food chain and this singular event generates the possible extinction of species lower down the order due to the eventual domino effect. Human intervention has been dismantling the sensitive ecological harmony in the forests of India whether it is the resounding echo of gunshots or the eerily silent setting of traps and snares to add to the rising illegal poaching and killing of wildlife species for the insatiable thirst of the elite class for peculiar commodities or the harvesting of vital flora to a point of no regeneration.

Judicial fraternity has in recent times taken remarkable steps such as giving legal sanctity to ‘protected’ areas and restricting the usage of roads inside sanctuaries yet implementation continues to be a challenge.

Keywords- Loss of Habitat, Fragmentation, Wildlife Jurisprudence, Wildlife Trade, Poaching, Development Projects, NGT, Maintainability.

WILDLIFE BEARS THE BRUNT-IMPACT OF HUMAN INTERVENTION ON WILDLIFE IN INDIA

Introduction

Environmental ethics vary exceedingly but one common characteristic that is often observed is that these ethics are tainted by the belief that the needs of human beings should be prioritized in terms of lifestyle, development or industrialization irrespective of the irreparable damage that is done to the environment. Anthropocentrism is an approach that celebrates this practice which is one of the major causes of human intervention. The lack of consideration for wildlife and their habitats is because of this inclination towards anthropocentrism that is, seeking what is best for human beings as opposed to an eco-centric approach which attaches value to non-human beings, flora and fauna and what is best for them. The Supreme Court rightfully laid down that non-human entities also deserve equal consideration and the right to have


777 Centre for Environmental Law WWF-India v. Union of India (2013) 8 SCC 234.

www.supremoamicus.org
meaningful existence which is distinct from whether or not it benefits human beings.

The Wildlife Protection Act, 1972 sprints without fail to keep up with the international standards of Wildlife Conservation hitherto the incomprehensive legislation in certain cases unequivocally allows the advantage one can take of the loopholes of the ‘posuit et lege’ or the laid down law. The rising environmental activism and jurisprudence is of the view that its time the wildlife is given the deserved crucial attention it needs under the tenet of equality. After all the Principle of equality does not require equal or identical treatment; it requires equal consideration.

3. **Historical Background**

The holy texts of most religions revere the animals of the wild; sanctifying them to such an extent that scripts as old as Manusmriti condemn the killing of wild animals and deem the trading and consuming of them as the most heinous of all sins. India as a country has seen a major shift in wildlife management and conservation but the subject of poaching and hunting has remained the same through the developments. Before the country’s wild was devoured by the colonizers, Maharajas and Princes took pride in hunting wild animals. In a peculiar era, such as this hunting and poaching was a favourite pastime of the elite and also deemed to be a sport of the royalty. The impact of the sport was so atrocious that during the Mughal reign it has been often stated by historians that wildlife saw a significant diminution. It is important to note that the Asiatic Cheetah was declared extinct in the 20th century being one of the first mammals to go into extinction due to unnatural causes. The British Raj collectively took up the hunting cause creating hunting reserves for themselves. Rewards were situated upon the hunting of tigresses and cubs and any clearance of forest land was looked at as an opportunity to generate revenue through timber. Over 80,000 tigers, more than 150,000 leopards and 2,00,000 wolves were slaughtered in the fifty years from 1875 to 1925. The Forest Act, 1865 the first ostensible environmental legislation didn’t have a single bone of conservation in its objective or the mention of wildlife rather it further enabled the Raj to plunder the forest resources. The legislation sang to the tune of optimum exploitation of forest resource to the thriving timber trade that the British most profited from. This led to loss of wildlife habitat and the wildlife itself was massacred like vermin which meant more land for cultivation and clearance and eventual income. It is interesting to note that the British government had appointed a “forest conservator” it came to be known as the office that did more damage than conservation.

4. **Wildlife and Contemporary Issues.**

Organized crime by avaricious and rapacious person have destroyed large parts of wildlife of India and eventually brought many species of animals like Lion, Tiger etc. to the brink of extinction. According to Global Financial Integrity in its report

---


2017 annual illegal wildlife trade ranges from $5 billion to $23 billion\textsuperscript{781}, this wildlife trade is the greatest threat to our wildlife preservation and ecological balance, the wealth turnover involved in illegal trading of all the wildlife flora and fauna gives another reason to exploit for illegal organization’s benefit.

India upon independence observed a complete period of indifference towards the wildlife. It only was an obstacle in the progress of a developing country that was facing stark poverty and a food crisis. The forest lands saw more influx of agriculture to keep up with the growing agrarian needs of an incessantly growing population. Poaching and hunting of wildlife went on unchecked. The first Wildlife regulatory board called the Indian Board for Wildlife was established in 1952 which consisted of ardent hunters\textsuperscript{782} who enjoyed it as a sport, set the theme for how the conservation of wildlife would turn out in the coming years. Wildlife is under siege today despite the increasing legislations wildlife trafficking is on an inundated rise. What demands the drive for wildlife products are highly unusual. The foremost reason for the desire of animal articles are for (a). Ostentatious display of status and wealth whereas the other closely following reason being (b). Superstitious beliefs that vest medicinal value to the animal products. The Ivory derived from Elephants tusks\textsuperscript{783}, trade of which is one of the most extensive networks of illegal trade find its demand in the former whereas trade in Rhinoceros\textsuperscript{784} horn and gall bladder extraction of Himalayan Brown bears\textsuperscript{785}, pangolin scales are demanded for the latter reason. It’s interesting to note that articles derived from tigers are traded for diverse perverted uses. The hide or the cured skin of the animal for the grandiose of it and its bones and claws for medicines that are believed to cure sterility in men.

The demands and beliefs of these articles are popularly shared by mainly a network of three countries- China, Vietnam and Thailand.\textsuperscript{786} the Wildlife Crime Scorecard Report by the WWF\textsuperscript{787}. The Delhi High Court in stated “Since there is hardly any market within the country for wild animals or articles and derivatives thereof, the stocks acquired for trade within the country are smuggled out to meet the demand in foreign markets. This clandestine trade is abetted by illegal practices of poaching which have taken a heavy toll of our wild animals and birds.”\textsuperscript{788} Asserting how wildlife trade has


\textsuperscript{782} D.P. Chattopadhyaya, Environment Evolution and Values 53(Concept Publishing Company, 1\textsuperscript{st} edn., 2007).


\textsuperscript{784} Id. Entry 30.

\textsuperscript{785} Id. Entry 3A Vide Notification No. S.O. 859(E), dt. 24-11-1986.


\textsuperscript{788} M/s. Ivory Traders & Manufacturers Association, and Others v Union of India and Others AIR 1997 Del. 267.
increasingly become a lucrative business for international markets. The act provides for National Board for Wildlife on the central level and State Wildlife Boards which act as advisory bodies and National Wildlife Crime Control Bureau which together are watchdogs of detecting and curbing poaching and trade in wildlife articles yet in recent cases habitual smugglers who have interestingly served time due to illicit wildlife trading were found to be engaging in the same racket. Poaching appears to be an easy getaway with lesser cases reported and a meagre number of convictions as the implementation of the act remains frail. Poaching is a sinister act that must not be always associated with wounding animals with modern weapon. The regulation continues to be primitive while poachers find newer escapes to hunt and trade silently by setting snares and traps or poisoning carcasses of prey animals that predators feed on and pass away silently without a gunshot to alert the officials. Does technology set us so far back that it becomes seemingly impossible to nab culprits trading online and poachers to move silently in our forests robbing the heritage of the country? The Andhra Pradesh government has provided forest guards to have access to equitable technology as the poachers such as firearms and wireless communication devices that would bring them on levelled field.

Another aspect of the legislation that is completely overlooked is the fact that flora and fauna cannot be divorced from one another and together they form wildlife. Schedule VI of The Wildlife Protection Act enlists plants and foliage that are protected under the same. A racket of medicinal plant export takes 90% of derivatives from the wild which are cultivated ruthlessly in unsustainable ways which put a halt to regeneration of the plants. Human intervention in the form of development projects cause immense distress to the wildlife. Highways, Railway lines and other linear infrastructures have caused the death of numerous endangered animals. Railway tracks and their auxiliary electric cables in recent years resulted in innumerable deaths of elephants due to collision and electrocution. Elephants which are protected under Schedule I Part I of the Wildlife Protection Act yet the issue of their decimation cannot be brought under the National Green Tribunal. This is because for a petition to be filed under S.14 there must be a civil dispute under the legislations provided under Schedule I of the Act. The Wildlife Protection Act is not one of them. In a recent judgment of the Principal Bench, National Green Tribunal which discussed the issue of protection of Elephant Corridors and stated that Elephant Corridors are ecologically sensitive zones that must be protected under the Environment Protection Act, 1986.

5. Legal Aspect
a) International Stand
This contemporary issue of Wildlife preservation is of international importance and it does not seem to catch adequate

---

792 Dr Kashmira Kakati v. Union of India (Original Application No. 19/2014 NGT).
Convention on International Trade in Endangered Species and India being party to this Convention needs to fill this void in Convention on International Trade in Endangered Species through national legislations.

‘A just world that values and conserves nature’ with this vision International Union for Conservation Nature frames its mission to influence, encourage and assist societies to conserve the diversity of nature. International Union for Conservation Nature is an ideological actor which involves not only in conservation action but it distributes definition of what constitutes conservation.

b) Constitutional Development

In spite of being world’s bulkiest Constitution, India did not have any specific provision for Wildlife protection and promotion. Nation’s commitment towards wildlife protection was shown when Prime Minister Mrs. Indira Gandhi at United Nations Conference on Human Environment, 1972 said: “nature conservation including wildlife must receive importance in planning for economic development” and through 42 Amendment Act, 1976 Article 48-A and 51-A (g) were added as express provisions for protection and promotion of Environment and Wildlife.

Though The Wildlife Protection Act was enacted through resorting Article 252 of

---

793 Supra Note 5.
795 Ibid.
796 CITES, 1st mtg., Conf. 1.2 (Berne, 1976).
The Indian Constitution at the request of 11 states but post enactment after introduction of Entries 17 - A and 17 - B in the List - III of the constitution (Forty - second Amendment) Act, 1976 the Parliament was empowered to enact laws relating to the Wild Life, without recourse to Article 252 of the constitution.  

**c) National Legislation**  
The Wildlife Protection Act being the host of legislation in India aimed at protecting the Wildlife from exploitation and maintaining the ecological balance and in its entirety was expected to fill the lacuna but so far, the conservation aimed, does not seem to be achieved. The Hon'ble Supreme Court raised the apprehension of ecological imbalance and its subsequent damages and indicated that humans are progressing at the expense of damage to the environment which he cannot repair and cannot foresee. The Wildlife Protection Act which contains regulatory framework for protecting wildlife species through different means and ways, with few main objectives in the enactments which is, to have a Uniform Wildlife Legislation across the country; to establish a network of protected area i.e. national parks, sanctuaries, Zoos etc. and to regulate illicit trade in wildlife and its products. Under section 2 (37) ‘Wildlife includes any animal, bees’ butterflies, crustacean, fish and moths and aquatic or land vegetation which forms part of habitat’. This is very specific and wide definition of Wildlife as compared to International definitions adopted in different conventions. More than that Indian legislature went a step ahead and enlisted wildlife which includes any specified in Schedule I, II, III, IV, V and VI or wherever found. In general, The Wildlife Protection Act covered most of Wildlife flora and fauna of the country, moreover to be more illustrative, if a dog is found in a sanctuary or if a tiger is found in streets then both will be categorized as wildlife animals, this wide definition of Wildlife under The Wildlife Protection Act is made to achieve the third objective i.e. to prevent illegal trade, and this illegal trade of animals irrespective of animal being wild or not.

**d) Judicial Approach**  
A Writ Petition filed in year 2015 order of which came in 2018 to form a committee to review the conservation policy and improve the conservation status of species like Great Indian Bustards, snow leopards, the Himalayan Brown Bear and Indian wolves, which are on the verge of extinction. The time span which extends for a favorable order to come is much more in Supreme Court as compared to National Green Tribunal a specialized body to determine cases relating to the environment and hence it is technically equipped to handle cases even under the Wildlife Protection Act, but because of procedural irregularities National Green Tribunal’s jurisdiction excludes The Wildlife Protection Act. Hunting has been one of the major causes for the extinction of the wildlife species across India and offenders have been using The Wildlife Protection Act as their protective umbrella to escape punishment

---

799 The Constitution of India, art. 252.  
802 Vidya Athreya & Anr. Vs. Union of India Ors (Writ Petition (C) no. 275 of 2015).
Under section 2 (16) hunting means capturing, killing, poisoning, snaring etc. and Section 9 partially prohibits the hunting of animals with Section 11 and Section 12 as its exception Section 11 evidently shows the fragility of the act, since conflict between human and animal is fueled by human encroachment yet under this provision human’s triumphs over animals and use this provision to evade sanctions. Since legislations are man-made, the rights of other sentient beings are only secondary to the rights of humans. The Supreme Court stated that environmental justice can only be achieved if we drift away from the principle of anthropocentric to eco-centric. Anthropocentric principle means that needs of human being supersedes need of the ecosystem. It cannot be left unobserved that humans are using animals as an apparatus for their puerile experiments.

The countless incidents of illegal trading of animal articles are immersed in normalcy to such an extent that the debauchery goes unchecked. Ivory trading which encapsulates narcotizing elephants for the purpose of extracting ivory, which often results in death of elephants. Court prohibited trading of ivory by restricting the ‘fundamental right to freedom of trade’ and stated that ‘trade and business at the cost of disrupting life forms and linkages necessary for the preservation of bio-diversity and cannot be permitted even once’ in another judgment, the Hon’ble Supreme Court prohibited the trapping and of birds by declaring it as hunting within the purview of the Act.

As in the landmark judgment of Sansar Chand Court raised serious concerns over the state of wildlife protection in India in light of continuous poaching incidents and also requested Central Government and State Government and their respective agencies to make all necessary efforts to preserve wild life of the country and take stringent actions against those who are violating the provisions of The Wildlife Protection Act.

It is indisputable that the court often portrays an anthropocentric outlook themselves. The court has been found strengthening human intervention that enables depletion of wildlife, this quandary of deciding between the two matters can be evidently seen in the case of Consumer Education and Research Society vs. Union of India where the petitioner challenged the decision of High Court through a special leave petition which denied its contention to challenge the notification of State Government reducing the area of ‘Narayan Sarovar Chinkara Sanctuary’ from 765 sq. kms to 95 sq. km. For the purpose of mining. Apex Court in this case decided against the petition and declined to overrule the decisions of State Government and High Court and stated that: “It will not be proper to invalidate the resolution of the State legislature on such a ground when we find that it took the decision after duly deliberating upon the materials which was available with it and did not think it

803 Supra Note 14.
806 Supra Note 5.
807 AIR 2000 SC, 975
necessary to call for further information.”

The judgment clearly displays a anthropocentric quality where the need for excavation of minerals for human beings was adjudged at the expense of the protected habitat of wildlife.

Another widely celebrated environmental principle of ‘polluter pays’ also has an underlying condition of certain extent of harm to human beings. The apex court in Indian Council for Enviro-Legal Action vs. Union of India 808 stated that “the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity.” The following was reiterated in Vellore Citizens Forum case 809 and Kanpur Tanners case 810 that the principle is only applicable if along with the environment, harm to human beings is present and explicitly so.

This approach is not only witnessed in judgments and executive decisions but also the constitution of the country paints a similar picture wherein access to clean and healthy environment is an inherent fundamental right that human beings are entitled to under article 21 and Article 48A that states “Protection and improvement of environment and safeguarding of forests and wild life: The State shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country”. Even though the content is very noble due to its characteristic of being a directive principle is not enforceable as a right per se.

The destruction or depletion of other forms of life would create ecological imbalances endangering human life, no one can be given the privilege to endanger human life as that would violate Article 21 of the Constitution. Basically, it is extremely essential for the survival of man to co-exist with nature, and to preserve and protect wildlife.

6. Recommendation and Conclusion

While The Wildlife Protection Act encompasses most issues relating to wildlife it does not address the issue of human-wildlife conflict and how to reduce these confrontations. The legislature must take necessary steps to resolve this issue by establishing district registries in areas where the locals can report animal encounters immediately so they don’t indulge in actions which can be detrimental to the wildlife. Human settlements around, within or in the peripheries of protected areas should be discouraged.

Initiatives like Tiger project and Elephant projects that were initiated in the wake of crisis have been relatively successful. Initiatives such as these must be taken to preserve the wildlife species in order to prevent possible extinction by compartmentalizing each and every specie. Tiger project is centrally funded scheme with National Tiger Conservation Authority which pigeon-holes the problem of tiger population diminution. As suggested by Supreme Court to Governments and their agencies, National Tiger Conservation

808 1996(3) SCC 212.
Authority to take stringent action against those who violate provisions of The Wildlife Protection Act there must be strict reprimands against offenders under The Wildlife Protection Act that deter them.

Influx of tourists towards protected areas has been increasing at constant rate which needs to be curtailed so that animal habitats are not disturbed. Turning protected areas into zoo exhibits is contrary to the objective of the legislation which strives to provide a safe haven to the wildlife.

Use of new technology shall be incentivized by agencies to have better patrolling in protected areas and also enhanced tactical instruments that bring forest guards at par with the offenders to prevent poaching and trophy killing. Little to no attention is paid to the flora facet of the wildlife as offences of smuggling medicinal derivatives from plants is widespread yet remains unrestrained and unreported. Authorities should monitor Cultivation of scheduled plants that must only be done through scientific methods that encourages regeneration. As the demographic expands from the snow-capped Eastern Himalayas to the sultry ends of the Deccan plateau in India, habitats of the native animals get restricted unjustly. Preservationists continue to dream of the Era of Asoka’s edicts and the reign of Indira Gandhi in whose tenure the first and only legislation with the idea of conservation of wildlife came into effect- The Wildlife Protection Act, 1972 with the succession of The Project Tiger in 1973; Conservation and longevity of wildlife was boldly defended amidst a growing dissent. Public participation and a changed outlook of compassion and ominous importance towards the wildlife would significantly halt the diminishing numbers of the wealth of our nation. A Native American proverb puts simply the rude awakening that awaits us as we continue to treat the wildlife as vermin: “When the last tree has been cut down, the last fish caught, the last river poisoned, only then will we realize that one cannot eat money”.

7. Bibliography

a) Books

- M. Rangarajan, India’s Wildlife History 20 (Orient Blackswan, 2005).

b) Articles


812 SupraNote 5.
- What drives demand for wildlife
- WWF wildlife crime scorecard report 2012.
- IUCN: A History of Constraint, Kenneth Iain MacDonald.

c) Cases
- *Consumer Education and Research Society v. Union of India* AIR 2000 SC975
- *Vidya Athreya & Anr. Vs. Union of India Ors* (Writ Petition (C) no. 275 of 2015).
- *Dr Kashmira Kakati v. Union of India* (Original Application No. 19/2014 NGT).


d) Statutes
- The Wildlife (Protection) Act 1972
SECTION 377: EVOLUTION AND RELEVANCE

By Souranil Mondal
From The West Bengal National University of Juridical Sciences

INTRODUCTION

The Love that Dares not to Speak its Name
This is one of the lines of Lord Douglas poem Two Loves which is purportedly interpreted as Lord Douglas’s platonic relationship with Oscar Wilde. When Oscar Wilde was charged with Sodomy and Gross Indecency for his writings, he was asked to explain this line. According to him, this line means “It is beautiful, fine and noblest form of affection. There is nothing unnatural about it. That it should be so, the world does not understand. The world mocks at it, and sometimes puts one in the pillory for it.” Though this audacious statement did not stop him from getting punished in 1895, but now it is necessary to observe how much society has accepted this erotic desire.

This article attempts to establish that Section 377 of the IPC is not in consonance with contemporary realities by examining how the notion of homosexuality has evolved through the ages. At first, we look at mythology and literature as also historical evidences to establish that existence of homosexuality has contoured since antiquity. By doing so, we seek to challenge the proposition that it is a Western concept that developed in 19th century Europe and is alien to Indian culture. Next we look at works of sexologists like Kerthbeny, Ulrich to show that attraction towards same-sex is not unnatural and hence penalizing homosexuality is denial of the natural and inalienable right of freedom of human emotion. Thereafter, we critically examine the changing contours of societal reaction and evolution of Section 377 in Post-Independence Era which leads us to judicial interpretation and legislative inaction in the matter due to lack of acceptance by the larger society.

HISTORY REGARDING THE ORIGIN OF HOMOSEXUALITY

ANCIENT AGE

Ancient texts like Arthashastra and Manusmriti had explicitly mentioned about homo-eroticism though in a negative sense. Verses 369 and 370 of the Manusmriti, which is the earliest source of Hindu Law, says “If a female virgin has homosexuality to another female virgin, she should be fined 200 pennies, be made to pay double (the girl’s) bride-price, and receive ten lashes. But if an adult woman does it to a female virgin, her head should be shaved immediately or two of her fingers should be cut off, and she should be made to ride on a donkey in public.” One of the reasons for this antagonism towards homosexuality was due to its non-procreativity. However, prevalence of the law against homosexuality itself substantiate that it existed during that period. Ancient Indian mythology also gives ample examples of Male-Male love.

813 Pariplab Chakraborty, Marginalization of Homosexuals: Analyzing the Space of Dissension in the realm of Non-Normative Sexuality, Politics of Dissent, 115
814 R. K. Dasgupta, Queer Sexuality: A Cultural Narrative of India’s Historical Archive, 3 Rupkatha
of the most prominent of this is the bromance between Krishna and Arjuna in Mahabharat. Their Krishna explicitly states that Arjuna is more important to him than wives, children or kinsmen- there can be many spouses and sons but there is only one Arjuna, without whom he cannot live’ Same sex love has also been justified through the concept of Rebirth. Eg- In Somadatta’s Kathasaritsagara, Somaprabha falls in love with the beautiful princess Kalingasena and attributes this love to her previous birth when he says ‘female friends I am sure she and I were in previous birth’. Another aspect of this homo-eroticism is the concept of sex change. Hindu deities are multidimensional and thus they can appear in any form. Eg- Vishnu, which is one of the primary Gods, can also take the form of a woman called Mohini. Thus despite knowing that Mohini was an incarnation of Vishnu, Shiva, another primary Hindu god, got attracted to her and their ‘violent coupling’ gave birth to Aiyappa. However, the most famous literary text on this homo-eroticism and sexuality is Vatsyana’s Kamasutra. Regarding non-normative sexual practices, the text says ‘in all things connected with love, everybody should act according to the custom of the country, and his own inclination’. Thus the text talks about Auparishtaka or Mouth Congress which is one of the sexual intercourses between two eunuchs815. Thus the text says that sexual intercourses do not necessary always lead to procreation, but also give pleasure. Hence these mythological and literal evidences show that a non-procreative sexual practice, which is a deviance from the prescribed sexual practices, was very much present in ancient India.

BHAKTI MOVEMENT & MEDIEVAL AGE

Starting in South India in 8th century and then flourishing in North India in 15th century, the movement brought alternative paths of devotion through music and dance. Negating the orthodox boundaries of caste and creed, now the gods were not worshipped as a Supernatural Power, but as friend, lovers, spouse and child. Poets like Surdas, Mirabai and Tulsidas sang hymns for their Gods which went beyond the confines of marriage and family bonding and inadvertently legitimizing same sex love and desire. E.g., - Surdas writes “These eyes thirst for a vision of Hari (The god Krishna) Wanting to see the lotus eyed one Grieving for him day and night”. One can easily fathom that it talks about an intimate relationship between Lord Krishna and his disciple Surdas. However the devotees tend to identify themselves with the female who desires union with the male deity.816 Thus in JagGANathCharitramitra, Oriya poet Jagganath Das says that Shri Chaitanya(who considered himself an reincarnation of Krishna) called him as Sakhi (female friend). Thus the works in Bhakti Movement show that Homo-eroticism was justified through hymns in praises to God where the


God becomes a central character of the devotee’s family and also through the changing of sex of the devotee. With the advent of Islamic Rule in India, evidence of same sex love and homo-eroticism became more vivid and explicit. A multiple invasion of Mahmud of Ghazni (971-1030 AD) from 1000-1025 AD marked the inception of Islamic rule in India. Though the ruler was known for his valor and destruction of many temples including Somnath, another aspect of him was his sexual relationship with his slave Ayaz. There are many Ghazals attributed to their platonic relationship which not only show homo-eroticism, but also love which breaches the social and class hierarchy. One such ghazal is:

“Mahmud set a cup beside him and a decanter before him
Full of burgundy wine, as if distilled from his own heart
He filled the cup with wine like his love’s ruby lips
Entangled in the curls of Ayaz, Mahmud began to lose control”

However there is difference of opinion regarding their homo-eroticism. While historian Scott Kugle compares it with other types of romantic characters like Heer-Ranjha and Laila-Manju, Indrani Chatterjee is more skeptical about it since she feels that it is not a manifestation of individual sexual choice, but rather sexual exploitation and misuse of their social position. Similarly in his autobiography Babarnama, Babar talks about his intimate relationship with his male slave Baburi. However historians once again opined that Baburi was nothing but a catamite who was enslaved during wars to fulfill the ruler’s homosexual pleasures and there was no space for the slave’s sexual preferences. However Mahmud-Ayaz love stories remain one of the most vivid and explicit evidence of homo-eroticism which also got mentioned in Sufi literature. Poets like Abru and Mir Taqi Mir have extensively wrote poems on homo-eroticism called ShahidBaazi (Love of boys). These poeties use words like “Maikhana’ (tavern), ‘sakhi’ where the protagonist is seen drinking alcohol in an all-male gatherings and expressing sexual desire for his fellow men and lamenting for the heartbreaks. However poets like Rumi was critical about ShahidBaazi since he felt that Sufism was for seeking purity and not for committing sodomy. Another interesting aspect of Arabic Literature is the introduction of Lesbian poetry called Rekhti. Introduced by SadaatYaar Khan Rangin, here the protagonist is a female (BegumatiZabaan) who shows her love for her fellow female character. The language was also used of the courtesans and other ill-reputed women which show that even though male-male love had become a part of the mainstream society since they had greater autonomy, lesbianism was still an anathema to the public at large due to a patriarchal society. However these instances show that homo-erotic desire was quite common in ancient and medieval age and thus it is not at all an ‘Occidental Concept’.

**EVOLUTION OF THE LAW AND POST INDEPENDENCE DEVELOPMENT:**

The Founding Fathers of Indian State were quite ambiguous regarding homosexuality. In one of his letters, Mahatma Gandhi opined that homosexuality was an “unnatural
vice” which has come to us from time immemorial and there is no genuine difference between Homosexual and Heterosexual lust.\textsuperscript{818} Even Nehru, who was quite influenced by Western Ideas, went on to say that ‘Homosexual behavior was an aberration introduced into India by the colonial masters. This is despite the fact that India’s history has had very vivid evidences of homo-eroticism and Macaulay described homosexuality as an ‘ecclesiastical offence’ while introducing Section 377 of the IPC.\textsuperscript{819} This is because the law is a legacy of ‘Victorian Morality’ and ‘Victorian Puritanical Movement’ when sexual restrain was at its peak and citizens had to follow ‘Moral Code of Conduct’. Due to this Puritan Control, many people born in Victorian Age were uninformed and emotionally frigid about their sexual desires. One of the prime reasons for this was the threat of population growth and concomitant scarcity of food. Thus sexual appetite was seen as a disease and men were counselled for avoiding masturbation and extra marital sexual affairs. But as Victorian era was full of contradictions, so even homosexuality was also seen as a serious ‘Mental Disorder’ though it does not indulge in procreation. Though death penalty for buggery was abolished in 1861, but the Criminal Law Amendment Act, 1885 which made Sodomy a punishable offence under ‘gross indecency’\textsuperscript{820}. One of the most controversial part of this act was that it penalized people even when there was no sufficient evidence for sodomy since it had given judges a wide discretion. Thus Oscar Wilde was given the most severe punishment under this act on mere suspicion of his relationship with Lord Douglas which was based on the content of the letters exchanges between the two. Similarly mathematician Allan Turing had to undergo ‘Hormone Therapy’ when he was convicted under this Act on mere presence of a male partner at his home. For the first time Queer Movement came into the spotlight when Shakuntala Devi published her book The World of Homosexuals in 1977. Inspired by her own life experience of marrying a homosexual man, who eventually led to her divorce, she narrates the different approach towards homosexuality through various interviews between homosexual couples in India and Canada.\textsuperscript{821} The next spur took place when journalist Ashok Kavi Row explained the term ‘Gay’ in Savvy Magazine in the year 1986 and later started the first Gay Magazine Bombay Dost in 1990.\textsuperscript{822}

If the decade of 1980s saw the rise of Gay Movement in India, the decade of 1990s witnessed the growth of Lesbian Movement. First Deepa Mehta’s film named ‘Fire’ released in 1996. The film narrates the story of two married women named Radha and Sita who failed to get a blissful married life due to very puritanical nature of their husbands. Devoid of matrimonial love, these

\textsuperscript{818}Supra 2, at 658
\textsuperscript{819}Supra 1
\textsuperscript{822}Naisargi N. Dave, To Render Real The Imagined, 35 The University of Chicago Press Journal, 34, 35 (2010)
two developed an immense love and affection for each other which was also a way for their emancipation from a highly patriarchal and conservative society. One of the first film in this genre, it faced a massive protest by Right-Wing Hindu political parties and groups who called it ‘immoral’ and ‘against India’s culture and tradition’. However the movement got a major fillip through GeetiThandani who formed the Sangini help line and support group for Lesbians. Through this helpline Lesbians from various parts of the country can communicate with one another by writing letters which remain confidential to the NGO.

One of the most remarkable inferences which came out through this NGO is that the meaning of the term ‘Lesbian’ is very different from what it means in the West. Letters reveal that even Married Women who are confined to their household chores are also actively conversing through letters. For most of them it is not a sexual desire for someone of same sex, but a cry of emancipation from their restrictive monotonous life. That is why in the initial phase of the movement, they used terms like ‘single-woman’ or phrase such as ‘woman who love woman’ instead of calling themselves ‘Lesbian’ outrightly. It was also due to the fear of social taboo existing in the society against ‘Lesbianism’ that people were reluctant to call themselves Lesbians. For example, in 1987, two police officers named Urmila Srivastava and LeelaNamdeo decided to marry each other though it was still unlawful in India. However this very idea of marriage had led to their dismissal from their service. A women centric NGO named Jagori decided to fight for them which was interestingly not in the name of Lesbianism but in the name of Feminism. This was the trend of the decades of 1980 to late 1990s to relate it to the more acceptable Feminist’s movement and women’s empowerment. This was also because women calling themselves ‘Lesbians’ had to face a ‘double discrimination’ since choosing not to marry and being independent was being seen as a bad omen in the society. However this trend was broken in 1999 when women started openly calling themselves as ‘Lesbians’ and, like men’ they also started attending Lesbian Night Parties. The first Pride March was conducted in Kolkata in 1999 when both men and women took part in it.

But despite this developments, the mainstream society has never accepted it and one of the fundamental reasons is because the abysmal notion of ‘Privacy’ among the Citizenry. Indian society gives too little place to one’s private life and individual autonomy because We inherit the Shame Culture where one’s Public Image matters a lot to exist in the society. That is why in most of the times; a person has to relinquish his/her personal desire if it violates the general norms of the society.

823 A Marathi Professor named Prof. Siras was allegedly having consensual sex with a rickshawallah in his own room when some miscreants forcibly entered his room and made video of the entire incident. This was circulated through media which led to his suspension from the University. Though the Allahabad HC ruled in his favor (this incident happened before Suresh Kumar Koushal Case) but AMU, being a very conservative University, would have never accepted him and he later had to commit suicide. It is also alleged that he was actually murdered. However his death is still considered a mystery.
because of the fear of being shamed and ostracized. It is interesting that even UK has abolished Sodomy Law in 2010. Recently USA has abolished it in 2014 through a plebiscite and countries like Ireland, Iceland and Belgium have had Gay leaders as Head of the State. However in India, the lack of social consciousness is evident and that is why the Parliament and the Judiciary have to play a greater role in it.

RELEVANT QUESTIONS RAISED DURING THE EVOLUTION OF LAW

1. HOMOSEXUALITY: A WESTERN CONCEPT?

Whenever the debate regarding decriminalization of homosexuality (Section 377 of IPC) starts, Cultural chauvinists argue that it is a ‘smuggled’ idea and has been imported from the West.\(^{824}\) They go to an extent to announce that the Indian Constitution is averse to homosexuality. However the fact is neither it is a Western idea nor Indian Constitution is exclusively for the heterosexuals. Homophobia is simply the part of Victorian Morality’ legacy which was brought by Thomas Macaulay when he made the Indian Penal Code in 1860. Indian historical evidences show that the society had the idea of homo-eroticism since the age of Dharmashastras which were composed in 1250 BC and it became more explicit during the medieval ages.

While describing homosexuality, the words ‘against the Order of Nature’ has been used in Section 377 of Indian Penal Code. However sexologists like Karl Maria Kertbeny and Karl Heinrich Ulrich have proved that homosexuality is not at all ‘unnatural’. In his writings, Ulrich emphasized on the existence of a ‘Third Sex’ whose nature is inborn. He assumed as a rule that human being either born with male or female sexual organs and they get attracted to person having opposite sexual organs. However there can be exception to this rule where the direction of sexual attraction is determined by a person’s psyche and he referred to them as ‘Third Sex’\(^{825}\). Thus he used the term ‘Urning ’ for a male bodied person with a female psyche who gets attracted to male and not woman (gay) whereas ‘Urningin’ for a female bodied person with a male psyche who gets attracted to female.\(^{826}\) Similarly Kertbeny became the first person to use the word ‘Homosexuals’ when he wrote a letter to Ulrich. Unlike Ulrich, who considered himself ‘Third Sex’, Kertbeny was ambiguous about his sexuality and called

---


himself ‘Normally Sexed’ while also appreciating male-male love. The most significant contribution of Kertbeny was criticizing the ‘Medical Model’ of homosexuality where it was considered a disease and he tried to prove that it was quite natural. As a gay right activist his arguments against Sodomy laws were remarkable. He said

“Legislation is not concerned whether this inclination is innate or not, legislation is only interested in the personal and social dangers associated with it ... Therefore we would not win anything by proving innateness beyond a shadow of doubt. Instead we should convince our opponents— with precisely the same legal notions used by them — that they do not have anything at all to do with this inclination, be it innate or intentional, since the state does not have the right to intervene in anything that occurs between two consenting persons older than fourteen, which does not affect the public sphere, nor the rights of a third party.”

Ironically this innate argument of homosexuality was propounded by Richard Von Krafft Ebbing in his highly influential book ‘PsychopathiaSexualis’. Being himself a therapist, Ebbing described various types of sexuality through the case studies of his patients having sexual deviations. In his degeneration theory he said that homoeroticism was an illness since it did not have the ability to procreate, so it was a biological deformity. Since he believed that it was an innate, so he felt that rather than criminalizing homosexuality, it could be cured through pathology. However he also believed that sexual attraction (libido) was natural and inevitable whose abstinence would indeed lead to serious health hazard. But he also argued that since one’s sexual preference also plays a constructive role in social life, thus too much non-procreative sex would be detrimental to the society at large. In his later works, he defined sexuality as ‘pleasure’ rather than a ‘mean of procreation’. Thus he concluded that apart from homosexual and heterosexual, there were bisexuals who get attracted to both and men. Thus at last he concluded that homosexuality was analogous to heterosexuality and thus it was not a disease or innate which had to be treated. This tectonic shift of understanding sexuality with the perspective of psychological perversion and affection rather than an orthodox moral and social view which had to be curbed, had had led to legislative reforms. Thus it led to the ‘Secularization of Sexuality’ where one no longer confesses his sexual desire to a priest, but to a doctor or psychologist.

828 He was one of the first signatories of Hirschfield’s Petition for abolition of Section 175 of German Legal Code which criminalized Homosexuality

---

However, it is also widely believed that ‘Sexuality’ is a ‘Social Construct’ and heterosexuality is imposed on an individual by a Homophobic society through various legislative and political means. But in his book ‘History of Sexuality’, Foucault argues that this ‘Repressive Hypothesis’ of sexuality since the Victorian Era had led to a new medico-juridical discourse and a new identity for the homosexuals. This ‘reversal discourse’ from ostracism to identification has led to various Gay Liberation Movement and LGBTQ Movement in the 20th century in the West. Thus the West does not see homosexuality as a ‘Sexual Perversion’ or innate which needs to be treated but more as a sexual preference.

LEGAL ASPECT OF SECTION 377

Section 377 of IPC which criminalizes homosexuality and bestiality runs as follows: **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.** Now if it were to believe that words like ‘against the Order of Nature’ defines ‘Unnatural Sex’, then it becomes all the more ambiguous since it has not been defined anywhere on which basis it has been called ‘unnatural’. Modern science and biologists have proved that there is nothing unnatural about homosexuality. However the notion of homosexuality being ‘Unnatural’ is itself an archaic concept which derives its strength from religion and morality. Earlier sexual intercourses were seen as a ‘cycle of reproduction’ and that is why heterosexuality was practiced. Based on this same argument, the State derived its power to control sexual intercourses in order to curb population growth. But criminalizing homosexuality becomes all the more absurd since it does not lead to any population growth nor the modern State is governed by religious laws. With the increasing notion of privacy and individual autonomy, the logic to criminalize homosexuality becomes all the more weak since sexual intercourses are no longer seen only as means of reproduction but also a mean for pleasure. The sheer increasing the number of cases and publications on homosexuality also buttress the fact that it is no longer seen as ‘Unnatural’ by the general society.

VIEWS ON THE DECISION TAKEN BEFORE THE 2018 DECISION

NAZ FOUNDATION VERDICT: INFRINGEMENT OF PRIVACY

In the landmark judgment of Naz Foundation v State of Delhi, the DELHI High Court ruled that Section 377 of IPC is Unconstitutional since it violates Article 14 (Right to Equality before Law) 15 (Protection from discrimination on the basis of Religion, Race, judgment says that Right to Sexual- Orientation falls under Protection from discrimination on the basis of Sex and

---

831 Compulsory Heterosexuality- Introduced by Adrienne Rich it implies that Heterosexuality is not so much the natural form of sexual preference, but it is imposed on individuals by social constraints.


833 Naz Foundation v State of Delhi, 160 Delhi Law Times 277, (Delhi High Court, 02/07/2009)
also Right to Life And Personal Liberty. Thus the State has no right to control sexual intercourses between two adults if there is a free consent. It is to be noted that at that time Right to Privacy was not included under Article 21 as Fundamental Right. However after interpreting the previous cases on Right to Privacy like Kharak Singh vs State of UP and District Registrar & Collector, Hyderabad v. Canara Bank, the Court ruled that the idea of Right to Privacy is implied in Article 21 since privacy is a sine qua-non for a person’s individual autonomy and thus it needs to be protected. On the issue of Morality, the Court makes a very interesting distinction between Public Morality and Constitutional Morality where the former derives from the social acceptability; the later derives from Constitutional Values. Then the Court held that while enshrining reasonable restrictions on Fundamental Rights, it needs to be satisfied that the Act violates Constitutional Morality and not any Public or Religious Morality. Since Our Constitution envisages an ‘Inclusive Society’ and also gives protection from discrimination on the basis of Sex, restrictions on homosexuality is not justified and thus Section 377 is unconstitutional unless it is coercive and lacks free consent.

**SURESH KOUSHAL VERDICT: A REGRESSIVE DECISION**

After the landmark verdict, PIL was filed in the Apex Court against the judgment which overruled the judgment and once again held that Section 377 of IPC is Constitutional since it does not violate any fundamental Right since the Section does not discriminate against any particular gender or community. However it failed to recognize the LGBT as a ‘Community’ who are discriminated by this law for their sexual preferences and orientation. Further negating all the arguments of Right to Privacy and ‘inclusive society’, the Court held that Section 377 is a pre-constitutional law and had there been any violation of fundamental rights then the Parliament would have amended it. The Court showed reluctance in reviewing the Act since it felt that legislating is the task of the Parliament and not the Judiciary which is concerned with interpreting and adjudicating disputes. However this reasoning is quite absurd because India, being a Common Law Country, the Court has greater discretion of Judicial Review and nullifying laws if it violates the Fundamental Rights.. The judges also relied on the *de Minimus Rule* that the issue is a trivial matter since only 200 cases has been reported on the concerned section since the inception of the law and the Court can refuse to adjudicate on it. This reasoning is quite horrifying since

---


836 District Registrar & Collector, Hyderabad v. Canara Bank, Civil Appeal no. 6350-6374 of 1997 (Supreme Court, 01/11/2004).


838 Doctrine of Eclipse: Any Pre-Constitutional Law, which is inconsistent with the Part 3 of the Constitution, becomes inoperative from the date of the commencement of the Constitution.
one’s sexual preferences and Right to Sexual Orientation can be anything but ‘trivial matter’. At last, it also rejected the Delhi HC’S doctrine of Severability to sever the portion of consensual same-sexual intercourse from the Section and thus penalizing Bestiality and non-consensual homosexuality or sexuality with a minor, holding that there is no part that can be severed without affecting the whole section.

PUTTASWAMY JUDGMENT: A RAY OF HOPE

After years of serious contentions and debates, the Apex Court finally recognized Right To Privacy as one of the Fundamental Rights under Article 21 of the Constitution. Though the case was initiated challenging the validity of Aadhar Project, which aims to build a personal identity database of every citizen based on their biometric information, on the ground that it violates a person’s Right to Privacy, the judgment has far reaching consequences for the queer community. In the Section ‘Discordant Note’, Justice Chandrachud severely criticized the Koushal Judgment and held that one’s right to sexual-orientation is within a person’s right to life since it is intrinsically related to one’s identity and facing discrimination based on this can have ‘chilling effect’ on the fundamental rights. The Court made the following observation “Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution”.

It also criticized the approach of the judges calling LGBTQ Rights as ‘so-called’rights and held that their rights are genuine rights like any other human rights. Even though, the Court did not nullify Section 377, but it had asked the Parliament to adopt the Yogyakarta Principles where it says that the State shall repeal any law which criminalizes homosexuality between two adult persons. Following this landmark judgment, a Curative Petition has been filed against the Koushal Judgment by a Constitutional Bench.

LATEST AMENDMENT IN THE FIELD OF HOMOSEXUALITY: DECRIMINALIZATION OF SECTION 377

The recent judgement by CJI Dipak Mishra in the case of Navjot Singh Johar & Ors v Union of India has decimalizes the offence made under section 377 IPC and held that the free consensual sexual activity between the LGBT persons of the same sex in private is against the section 14, 15, 19 and 21 of the Indian Constitution and also said that this judgement will prevail over all the pending cases charged under the same offence. The Court overruled the judgement of the Suresh Kumar Koushal & Ors V Naz

839Justice K. S. Puttaswamy (Retd.) and Anr. v Union Of India And Ors., Writ petition (civil) no. 494 of 2012 (Supreme Court, 24/08/2017).

840 Navjot Singh Johar & Ors v Union of India, W. P. (Crl.) No. 76 of 2016, (Supreme Court, 06/09/2018).
Foundation & Ors \(^{841}\) and held that the choice of an LGBT person to have a consensual sexual activity with another same sex in private is their right of having free choice, a choice of their sexual activity and judicial determination.

**CONCLUSION: THE WAY AHEAD**

So as we could see that despite having a vivid history of homo-eroticism, it has never been accepted by the mainstream society and homosexuals have always been marginalized. Similarly, we also saw how the sexologists have proved that homosexuality is not an ‘Unnatural Sex’ and it has been widely accepted by Western societies like UK which eventually brought Section 377 of the IPC. However the acceptance of homosexuality by the ‘traditionalist’ Indian society lies deep in the notion of privacy. As Shankuntala Devi said ‘It is not the individual whose sexual relations depart from the social custom are immoral- but those are immoral who would penalize him for being different, so we can just hope that this time the legislatures and the judiciary could be a harbinger for a social change by making love and attraction gender-neutral. But the recent Supreme Court Judgement has de-criminalized the act of sexual activity between the same sexes. The LGBT persons deserve to live a life unshackled from the shadow of being ‘unapprehended felons’.

****

\(^{841}\) Suresh Kumar Koushal & Ors V Naz Foundation & Ors, Civil Appeal No. 10972 OF 2013, (Supreme Court, 11/12/2013).
THE EVOLUTION OF PRINCIPLES OF NATURAL JUSTICE

By Swarnika Gupta
From Institute of Law, Nirma University

ABSTRACT

The Principles of natural justice have its foundation in English common law. In one of the English decisions it was observed by Viscount Haldane that "...those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice.” Natural Justice is an important concept in Administrative law. Principle of Natural Justice says that no man can act as a judge for a cause in which he himself has some Interest, may be pecuniary or otherwise, also, no man can incur the loss of property or liberty for an offence by a judicial proceeding until he has a fair opportunity of answering the case against him. In India the principle is prevalent from the ancient times. In ancient India, duty of a judge was his integrity which means impartiality and total absence of bias or any kind of attachment. Independence and impartiality of judiciary is to be maintained, even king was to adhere to the rules of dharma and he must above the worldly detachments in deciding the cases. The main aim of natural justice is to provide the fair play which proves to be the peg to good administration. An impartial Tribunal, Notice, Orderly course of justice and Opportunity to be heard are some essentials of the concept of Natural justice. This paper is an attempt to understand the evolution in the understanding of the term natural justice through case laws where it is discussed in the court of law in a very brief and easy manner.

Keywords: Natural Justice, evolution, fairness, Audi Alteram Partem, Nemo Debet Esse Judex In Propria Causa.

INTRODUCTION

The concept of Natural Justice has come out from the need of man to protect him since these principles are necessary for just and fair decision making. ‘Rules of natural justice is a hedge serving against blatant discrimination of the rights of individuals’. Principles of natural justice can be said as the rules laid down by the courts at different point of time, as being the minimum protection of the rights of the individuals of the society against the arbitrary procedure which may be taken and adopted by judicial, quasi-judicial and also administrative authorities while giving any order affecting those rights. These rules broadly intend to prevent these authorities from doing any injustice in the society. Natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice.

In the case of Abbott v. Sullivan842, it was stated that “The Principles of Natural Justice are very easy to proclaim; but their precise extent is very less easy to be defined”. The court said that it is not possible to define the term Natural Justice also; it is possible only to enumerate with some certainty the main

principles. Earlier, the expression ‘natural Justice’ was often used interchangeably with the term natural law, but now the term natural justice has a restricted meaning of it. Further, there are various statements of the Honorable Supreme Court which explains, broadly, the two essential elements of the concept of the Natural Justice namely:

a. No man shall be Judge in his own cause.

b. Both sides shall be heard.

There are some other principles also which have been derived and stated to constitute the meaning of the elements of Natural Justice, they are:

i. The parties to any proceedings must have a due notice of when the Court / Tribunal shall proceed.

ii. The Courts and Tribunals must act in a complete honest and impartial manner and not under any kind of the dictation of any other person, whosoever, to whom the authority is not granted by the law itself.

These above are the extensions or refinements given to the two principal principles stated above. The main idea of Natural justice is to promote the faith in the society for the administration. The Supreme Court in many hearings, discussed in the further chapters, has discussed and explained the concept and idea behind natural justice.

EXPANSION AND EXTENTION TO THE MEANING OF NATURAL JUSTICE.
The expression ‘Natural-Justice’ says justice to one’s own conscience. It is derived from the times of Romans, the concept of ‘jus – naturale’ and ‘Lex naturale’ which refers to the principles of natural law, natural justice, eternal law, natural equity or good conscience.

Lord Esher, in the matter of Vionet v. Barrett 843 exclaimed that, “Natural Justice is similar to the natural sense of what is right and wrong.” But from the cases to cases it can be understood that Natural justice has meant and taken different meaning to different people in different cases or at different times. In its broader sense, it was initially used as a synonymous term for natural law. But eventually the meaning has evolved. Later, the concept of natural justice has been used to mean that all the reasons must be given for any decision by the court imparting justice; also that a body deciding any issue has to only act on the basis of evidence of probative value/s.

The concept of natural justice is not new in this era where people know their rights and they claim for justice. The concept of justice gave the term and understanding of natural justice. Without hearing the party or with a partial bench it is not possible to protect the interest and faith of the common people in authorities. Therefore; the court has tried to clarify the concept and discussed in plethora of cases. The interpretation of the term Natural justice in every case forms a base to understand how the expression natural justice is understood and evolution in its meaning. In the beginning, the term Natural Justice was given a different expression by judges in various cases:

In the year 1855, Lord Cranworth, in the matter of Drew v. Drew and

lebura referred Natural Justice as ‘universal Justice’. He said that the term Natural Justice is nothing but it means universal justice and the justice is lawful and fair. Sir Robert P. Collier, while speaking for the Judicial Committee of the Privy Council, in James Dunber smith v Her Majesty The Queen, referred Natural Justice as ‘the requirements of substantial justice’. Later, Lord Esher, in the matter of Barrett, defined the expression natural justice as ‘the natural sense of what is right and wrong’.

In 1890, Lord Fasher while deciding for the case of Hookings v. Smethwick Local Board of Health did not follow the meaning of the term natural justice as what was suggested by Lord Esher previously. Instead, Fasher in the matter of Hookings, referred natural justice as ‘fundamental justice’. Thus, giving the term a different understanding. Harman LJ, in the court of appeal, in the matter of Ridge v. Baldwin countered natural justice with ‘fair play in action’, a phrase coined by J. Bhagwati in Maneka Gandhi v. Union of India. Lord C. J. Parker, referred natural justice as ‘a duty to act fairly’. Lord Russell from Willowan in 1975 said natural justice is ‘a fair crack of the whip’. L. J. Geoffrey Lane, in Regina v. Secretray of State for Home Affairs Ex Parte Hosenball referred the term natural justice as ‘common fairness’.

Therefore, summarizing the meanings given to natural justice in different cases, natural justice is:

1. Universal justice.
2. The requirements of substantial justice.
3. The natural sense of what is right and wrong.
5. Fair play in action.
6. A duty to act fairly.
7. A fair crack of the whip.

Now it’s clear that the term natural justice has no law and strict meaning and the term itself is so flexible in its meaning that it can be understood differently in different cases, the idea is justness and fairness to the parties. And the concept of natural justice and its rules is not static.

**FRAMING OF THE PRINCIPLES OF NATURAL JUSTICE**

Natural justice as a term in itself implies ‘an idea of justice’. We have already seen that the idea of justice is evolving and changing depending upon the facts and circumstances and also the needs. Therefore, court felt to discuss the term in depth for the better understanding and application of the same. The court has tried to make the broad concept of natural justice and discussed it in detail.

The strict rules of natural justice are laid down by the authorities not with main view of fairness in the bench but the main idea

---

844 Drew v. Drew and lebura, (2) Macg. 1.8 (1855).
845 James Dunber smith v. Her Majesty the Queen, 3 A.C. 614 (1877).
846 Hookings v. Smethwick Local Board of Health, 24 QBD. 712 (1890).
850 Hira Nath Mishra and Ors. v. the Principal Rajendra Medical College, Ranchi and Ors.,(1973)A.I.R. S.C. 1260.
was to promote confidence among the common people towards the administration of the state. Therefore; it is said that justice is something which is not merely imparting justice but it should look like justice is imparted. This has also done to ensure that no personal interest should make the court of law bias in nature and judgments. The “Interest” can be anything like pecuniary benefit or anything. Interest is generally understood not as favor. Any interest if it found with the judge will disqualify him or her to pass any judgment in that case matter and all the proceedings are struck down.

Further, it must be noted that the matters of public interest are excluded and magistrate having similar interest as general public will not disqualify him to hear the proceeding and pass an order. “The interest or bias, which disqualifies is an interest, in the particular case, something, reasonably likely to bias or, influence the minds of the magistrates in the particular, case.”

The another essential Principle is “audialterampartem”, this states that parties to a matter or issue has a right to be heard in the court of law before making any final decision regarding the case. It is always allowed to dispute the opponent’s case, to cross examine the opponent’s witnesses and to call witnesses to support and defend his own matter. The party is always allowed to give its own evidence before the court. Also, this principle explains the idea of knowing the reason for the final statement of the court and tribunals.

In the case of Union of India v. Tulsiram Patel, which was reported in AIR 1985 SC, the issue concerned about Article 309, 310, 311 of the constitution of India. In this case SC analyzed in detail the concept of natural justice and its Principles. SC held that the concept of Principle of natural justice is not the creation of Article 14 of the constitution of India and traced the ancestry of the concept of natural justice as discussed above. Further court says that after interpreting the evolution and the understanding in the concept of natural justice, it can be derived that the concept contains two rules. They being:

a. no man shall be a judge for/in his own matter.

b. it is essential to hear the other side.

Therefore, from the above it was stated that whoever decide anything without hearing the other party to the matter, is said to do wrong and injustice. Justice should not just seem to be done but should look to be done. In the case, Viswanathhan v. Abdul Wajid, Principles of Natural Justice was again discussed. The court said that the judgments given by the courts or tribunals must observe the minimum requirement of natural justice. The court must act fairly, without bias and in good faith. It further observed that any judgment which is biased or partial will be a trial coram non judice.

In Canara bank &othrs. V. Sri Debasis Das &othrs, the Supreme court analyzed the depth of the concept of Natural Justice and its Principles, while

852 Viswanathhan v. Abdul Wajid,(1963) A.I.R. 1
hearing for the scope and ambit of the “Canara bank officers employees Regulations,1976”in this case the supreme court summarized the concept of natural justice in a broader sense and gave the idea and understanding for the rules of natural justice.

The concept has completely evolved over time and then interpretation is not static for every matter heard in the court of law. It was analyzed that the expression Natural justice and its Principles depend on what are the facts of the case. It was said that any order violating the broad essentials of natural justice, i.e., not inviting the other party of the matter to present his case or giving a partial judgment will make the judgment completely vitiated. Further, the concept has evolved beyond imagination. In M. C. Mehta v. Union of India, the court says if the party has no ‘real substance’ and also if that there is no possibility of success on his part that is the results will not be different after admitting his contentions.

THE ESSENTIALS TO THE PRINCIPLES OF NATURAL JUSTICE.

Audi Alteram Partem:
In any case, the parties should be given a very fair chance to represent in the court of law. This suggests that the party has a right to defend its case. The notice is always given to a person before making any judgment. The party has always right to know what is the reason behind its accusation. Therefore, the phrase audi alteram partem means the parties to the case should be given fair chance to represent themselves in the matter.


Now in the case of Nataur Nagar Palika v. Uttar Pradesh public service tribunal, it is where despite of the continuous reminders to the employees they did not appear or replied. The court gave the judgment without listening to them. This case is not said to violate the Principles of Natural justice since they were given fair chance to which they did not reply. Therefore, the party itself waived the right of representation before the court to explain its side of the case, and is not violating the principles of natural justice. In Ajit K. Nag v. General Manager of Indian oil Corp., is a case which held ‘the non-observance of principle of natural justice vitiates the order or when some real prejudice is caused to the complainant” Therefore; after this case the said principles stated to be applied depending upon the facts and circumstances of the case. Facts and circumstances are the essence to this principle.

Nemo Debet Esse Judex In Propria Causa:
The idea behind this maxim is that no party can be the judge of his own case matter. This is conduct fair trial which is unbiased and impartial in nature. Disciplinary authorizes which include all courts and tribunals should give fair judgment so to have the faith in the decisions. No cause or matter which is related to the judge or it is anyway his matter of interest can be decided by him. The matter of interest may include any kind of benefit like ill-will or any personal connection with the party or may

be some official biasness. It should be noted that the concept is the same but has different understanding based on facts of the case.\textsuperscript{857} In the matter of Mukhtar Singh v. State\textsuperscript{858} the court was in the opinion that any matter should be decided by the tribunal or any authority which is competent should be impartial. No direct interest in the matter should make the decision biased. Also, if anyone found biased in the dealing of the case will be struck down.

Similarly, in industrial disputes, the argument for good faith and bad faith of the employer is of great importance. In any way if it is proved that the employer has any personal interest or gain then the employer is held liable\textsuperscript{859}. Therefore; this is the reason for the enquiries in industrial matters are scrupulous when it come to rules of fairness and natural justice. Further in the matter of Anandram Vaswani v. U.O.I \textsuperscript{860}, it was discussed and analyzed that whatever ruling the court gives should not only be done in a just manner but should appear in a just and fair nature.

CONCLUSION

After analyzing the concept of natural justice it is understood that the idea behind Principles of natural justice is simply, fair adjudication. Principles of natural justice aims to identify what is right and what is wrong. As discussed, the term is flexible with its meaning and understanding depending upon the facts and circumstances. The aim is to provide justness and fairness. Also, the main objective to gain public faith in the competent authorities. As it is impossible to give a specific meaning to Justice in similar manner no thumb rule can be made to make the concept of natural justice complete? The expression takes its meaning according to the facts of the cases. Principles of Natural justice is a way for the parties to let them represent their case and their contentions. Through these Principles parties are always allowed to make their statements in the court of law. Also, the Principles of natural justice state that no judge can be partial while delivering the judgment ensuring the fair trial of any case. Therefore Principles of Natural justice helps the parties to get justice and a fair judgment but the understanding and application changes and is not static. The principles have also certain exceptions.

Natural justice is seen as the essence and the core concept to enhance the fair trial and gain the public faith. Through rules of natural justice, it is very easy for the state to impart justice at large in the society. The main target is to ensure fairness among common people of the state. These ideas therefore make the researcher to study the evolution and modification in the understanding of what exactly is the idea of natural justice and to make a brief after understanding the case laws in which the principles are widely discussed. The evolving nature makes the concept to be analyzed very carefully and it is important to understand the scope, the extent, and also the implications of the judgments regarding natural justice.

\textsuperscript{857} Sujata Manojar, Principles of Natural Justice, (March 22, 2008).
\textsuperscript{858} Mukhtar Singh v. State, (1957) A.I.R. ALL 297.
CORPORATE INSOLVENCY IN INDIA

By Tapan Sharma & Abhishek Mohan Goel
From DES Navalmal Firodia Law College, Pune & New Law College, Bharati Vidyapeeth (Deemed to be) University, Pune; respectively

Abstract:-
Insolvency in India is not a new thing to talk about. It is something which omnipresent in almost all the circles of the society. Be it a local business or be it an international philanthrophist like Vijay Mallya, everyone has seen insolvency in some way or the other.

Insolvency can be simply termed as a state of being insolvent or a state of being in a situation where one is unable to pay debts owed by him. A person turns insolvent primarily due to lack of money and to ensure that the person does not run away with the money, the Government of India introduced the Insolvency and Bankruptcy Code in India in the year 2016.

With the coming of this Act, India was able to curtail and control problems arising out of insolvency both in the Corporate as well as the personal level. Because India is growing into a Business hub, it is very important for the government to check and ensure the corporate insolvency that might cause problem to the Indian economy in the later stages. This paper lays stress and talks about the Corporate Insolvency in India in a very descriptive yet lucid manner.

INTRODUCTION

The Corporate insolvency is dealt under the Companies Act of 1956. Besides the Companies Act the other relevant legislations are – the ‘Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) this is currently incorporated into the current amended Companies Act, the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDB Act). The related legislations are ‘The Transfer of Property Act, 1882, and ‘The Securities and Exchange Board of India Act 1992. The Companies Act has since seen as many an amendment. Some of the major amendments to the Act were made through Companies (amendment) Act of 1988 on the recommendations of Sachar Committee and then again in 1998, 2000 and finally in 2002 though the Companies (Second Amendment) Act of 2002 as a consequence of Eradi Committee Report.

This Eradi committee was set up by the Government of India in 1999 and was headed by Justice Eradi – a retired judge from the Supreme Court of India.

In the process of liberalization, deregulation and adopting market economy, India is experiencing a massive growth of retail loans to individuals, housing loans and credit card users. On account of phenomenal rise in retail lending it will be necessary in the near future to give a re-look at the personal insolvency laws to ensure that any insolvency proceedings against individuals are also expeditiously decided.

Causes of Insolvency in India

The research shows that India has about 11% of bad debt records out of the total lending and it is increasing day by day. Mr Vijay Mallya is one such example. The time

www.supremoamicus.org
taken to resolve a case of insolvency is very high as compared to many other countries of the world. Due to this issue, India ranks 130th in ease of doing business in the world. More than 50% of bad debts are that of Corporates who have taken such loans from nationalised banks. The recovery from such defaulters is generally next to impossible because of a number of reasons like overlapping jurisdictions etc. Hence, these cases continue for years and years but the recovery remains zero. Previously there were about twelve laws which dealt with insolvency. Basis on those twelve laws, it took more than four years to wind up a corporation in our country.

Due to lack of required institutional and legal setup, the defaulters started considering India as a safe haven for such activities which clearly depicted incompetence on the part of our country when compared to global standards. Although India had numerous acts in place to punish the defaulters like the Indian Contract Act, the Recovery of debt due to Banks and Financial Institution Act 1993, the Securitizations and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the SickIndustrial Companies (Special Provisions) Act, 1985 (SICA) and so on has failed miserably to recover to the outstanding dues from the defaulters. The aforesaid laws had many loopholes which kept the defaulters fear free and safe. If there is no fear of law, this scenario is likely to happen.

The Government decided to replace the existing insolvency laws with new stringent laws which would take care of the existing defaulters in a time bound manner and also set an example for the people of the country who considered this activity of willful defaulting as a gag. On 11th May, 2016, the Insolvency and Bankruptcy Code, 2016 was passed by both the houses and received the assent of the President on 28th of May, 2016.

- The Insolvency and Bankruptcy Code, 2016 (IBC) deals with:
  a) Insolvency Resolution and Liquidation of Corporate Entities
  b) Bankruptcy of individuals and partnership firms.

**Amendment to The Indian Partnership Act, 1932**

Section 41(a) of Indian Partnership Act provides for Compulsory dissolution which reads as under:

A firm is dissolved

- By the adjudication of all the partners or of all the partners but one as insolvent.
- Part III of the IBC (Section 78-187) deals with Insolvency Resolution and Bankruptcy for Individuals and Partnerships. Firms and accordingly Section 41 has been omitted by virtue of Section 245 R/w First Schedule of IBC.

**Amendment to The LLP Act, 2008**

- Section 64(c) of LLP Act 2008 which provided for inability to pay debt as a Circumstance in which LLP may be wound up by Tribunal has been omitted by virtue of Section 254 R/w Tenth Schedule of IBC.
- The definition of Corporate persons as provided under Section 3(7) of IBC includes a LLP, as defined in the LLP Act.
- Ground inability to pay debt no longer subsists and a creditor (financial and
operational) can initiate insolvency proceedings against a LLP only before NCLT under IBC.

LIQUIDATION FOR CORPORATES
In case the default is for an amount over and above Rs. 1 lakh, the creditor has the authority to initiate insolvency process as per the new Code. The Code recommends two autonomous stages:

Resolution Process for Insolvency:
1. Under this stage, the financial creditors make an assessment of whether the debtor’s business is worthy of continuing or not. The creditors come up with options for restructuring the business model to avoid any further losses.
2. Liquidation:
   In the event the abovementioned Insolvency Resolution Process fails, the creditors make a unanimous decision to wind down and sell the debtor’s assets in order to recover their dues.

LIQUIDATION
The liquidation process commences only if:
1. The Committee fails to submit the resolution plan with the provided time frame to the NCLT. (Ex. Hindustan Motors Ltd.)
2. The Resolution Plan is rejected because of non-adherence to the Code.
3. The Creditor’s Committee takes a decision for liquidating the assets by a majority vote.
4. The resolution plan is flouted by the debtor.

VOLUNTARY LIQUIDATION BY CORPORATE PERSON
The Insolvency and Bankruptcy Code also provides a section wherein the corporate person can take a decision of liquidating itself if it has not committed any default and has the capacity to pay its creditors through liquidation of its assets. In order to proceed with such a liquidation process, it is mandatory for majority of the directors of the said corporate to give a declaration stating that such activity is not taking place in order to defraud any person. Such a resolution shall be approved the creditors of the company who are signifying at least two-thirds value of debts of the company. The commencement of voluntary liquidation takes place on approval received by the creditors. Even in case of voluntary liquidation, provisions of liquidation process apply. On the assets being totally liquidated, NCLT passes an order for dissolution of the corporate.

BANKRUPTCY AND INSOLVENCY RESOLUTION IN CASE OF INDIVIDUAL AND PARTNERSHIP FIRMS
In case of individuals and partnerships, the Code does not provide any specific time frame within which a resolution decision has to be structured. The reason behind this leniency is that individual businesses are of diverse types and there are no set rules for functioning of their activities. Also, it is a fact that corporate person is an artificial legal entity, hence can be liquidated. But an individual is a real person, there is no way the term liquidation will fit him, he has to be declared a bankrupt. The Code applies to all those individuals and partnerships that make a default above Rs. 1000.
Cited Case
Smart Timing Steel Limited V/s National Steel and Agro Industries Limited

The issue before the Hon'ble NCLAT was whether filing of a "copy of certificate from the "financial institution" maintaining accounts of the operational creditor confirming that there is no payment of unpaid operational debt by the "Corporate Debtor" as prescribed under clause (c) of sub-section (3) of Section 9 of the I&B Code 2016 is mandatory or directory.

The said Appeal was filed by the Appellant, who was an operational creditor who has filed a petition against the Respondent for initiating the Corporate Insolvency Process which was rejected by the Adjudicating Authority (NCLT), Mumbai, who had held that “On perusal of Section 9 of Insolvency and Bankruptcy Code, it is evident, that it is mandatory to file copy of Certificate from the Financial Institutions reflecting non-payment of the operational debt impugned, for the operational Creditor has failed to annex copy of the said Certificate as required u/s 9(3) of the Code, this petition is liable to be rejected.”

The Hon'ble NCLAT, while rejecting the appeal filed by Operational Creditor held that it is clear that the word “shall” used in sub-section (3) of the Section 9 I&B Code’ is mandatory, including clause 3 therein. The Hon'ble Tribunal while deciding observed that one of the cardinal principles of interpretation of statute is that, the words of statute must prima facie be given their ordinary meaning, unless of course, such construction leads to absurdity or unless there is something in the context or in the object of the statute to the contrary. When the words of statue are clear, plain and unambiguous, then, the courts are bound to give effect to that meaning, irrespective of the consequences involved. Normally, the words used by the legislature themselves declare the legislative intent particularly where the words of the statute are clear, plain and unambiguous. In such a case, effort must be to give a meaning to each and every word used by the legislature and it is not sound principle of construction to brush aside the words in statute as being redundant or surplus, and particularly when such words can have proper application in circumstances conceivable within the contemplation of the statute.

India currently ranks 136 out of 189 countries in the World Bank’s index on the ease of resolving insolvencies. India’s weak insolvency regime, its significant inefficiencies and systematic abuse are some of the reasons for the distressed state of credit markets in India today. The Code promises to bring about far-reaching reforms with a thrust on creditor driven insolvency resolution. It aims at early identification of financial failure and 270evitalize the asset value of insolvent firm.

The unified regime envisages a structured and time-bound process for insolvency resolution and liquidation, which should significantly improve debt recovery rates and 270evitalize the ailing Indian corporate bond markets.

*****
UNIFORM CIVIL CODE

By Tushar Bhardwaj & Abhinav Mohan Goel
From New Law College, Bharati Vidyapeeth (DeemedTo Be) University, Pune

Abstract:-
India celebrates 70 years of glorious independence and has gone through various tragic and victorious moments. India is claimed to be a secular country and every citizen secures its rights to practice any religion in the country. But due the secularism, there has been a misuse of the personal laws for selfish purpose in the country. From time to time the court and the politicians have laid down the importance of the uniform civil code in the country but no one has been successful to influence the lawmakers or the legislative assembly who is empowered to make laws for the same. Uniform civil code has been embedded in the constitution by the its makers in Article 44 but the implementation of the article stills with the dignitaries. The implementation of the same brings pros and cons with it. Article 25 & 26 i.e. Right to practice any religion being as one of the main pillars of our constitution would need to be scrapped off or amended. Also, if the implementation of the Uniform Civil Code is done it may lead to the disintegration of the nation and this would lead to the breakdown off the peace and harmony among the people. Because India is the biggest democracy in the world and has the highest level of diversified population. So, to resolve this issue a flexible law is the need of an hour rather than a rigid one. Therefore, this paper tries to evaluate the entire dialogue around Uniform Civil Code and the arguments on its necessity and the various doubts on its nature.

Introduction: -
India is a secular state and nation, which implies that it doesn't follow any particular religion or there is no official religion of the country. It further means that the state will not be dependent on any kind of religious institutions for taking decisions of the state, it will not interfere with the religious matters and the religion will not interfere with the efficiency of the state. India is known as the world's largest democracy and is the second most populous countries in the world. India has a strong military and has cultural influence almost over everything. India is a highly diverse country with so many linguistic, cultural and religious identities. This diversification of culture and people are also reflected in India’s federal political system, whereby the power is shared between the central government and the states. Religion in India has been serving as the foundation of culture in India but on the contrary has enormous effect on Indian politics and society. In India religion is the way of life. It is an integral part of the Indian constitution and tradition as well. As it has already been said that India has numerous religion and languages, the people of various religions have been governed by their own personal laws since time immemorial. There are different personal laws for different religions in the country like for Hinduism there are Hindu marriage act, Hindu succession act, Hindu adoption and maintenance act for different purposes such as adoption, marriage, inheritance, etc. Christians and Muslims are governed by their own personal laws and the reason why we have separate personal laws in every
religion is because of different beliefs, customs and practices. It can be often noticed that when the question of marriage, inheritance, divorce, adoption, Maintenance, etc arise personal laws face difficulty. The difficult portion of them arise because different kinds of judgements have to be given with taking into consideration the different personal laws. The part of the distribution of justice does not remain uniform in its application and faces a lot of difficulty and so to solve, these decisive steps were taken towards the national consolidation in form of idea of uniform civil code which was for the first time mooted seriously in the Constituent Assembly in the year 1947.

The Uniform Civil Code has been envisaged in the Article 44 of the Constitution which includes inter alia, entire gambit of family law. There is no uniform civil code applicable to almost any law in the country. Every religion has its own personal law, along with difference of opinion. So, through Article 44, the modern State is called upon to perform its onerous responsibility of giving uniform civil code throughout the entire territory, applicable to all the citizens of the country.

India being a secular state, there has been intense scrutiny of the topic during the Constituent Assembly Debates & the Muslim members were very defensive against this provision because Muslim personal law has to be very carefully amended with keeping in mind the core of the personal law. The Uniform Civil Code would include laws relating to adoption, marriage, inheritance, divorce, etc.

**Historical background:**

**The Lex Loci report:**
The initiative for UCC first began in India in the 19th century by the feminists who demanded equal rights for women. The Lex Loci report of 1840 said that the Indian laws relating to criminal, contract and evidence should be codified while the personal laws of the territory should be kept outside the reach of it. The British initially were speculative about the inclusion of religion into a uniform civil code. They refrained from interfering with the religious demography of the country, fearing a communal backlash. Uniformity was restricted only to the laws that excluded the matters of religion.

**Post-Colonial period:**
The framers of the constitution were convinced about the fact that there is a need of uniformity in the law prevailing the territory. Dr. B. R.Ambedkar being the epicentre of the drafting committee felt the need of a Uniform Civil Code that would govern the masses, while Pandit Nehru was convinced to an extent that the UCC needed modernisation due to its communal sensitivity and it would be seen as an annexation into the cultural fold of the country. The country was still soaked in the blood of the victims of partition which also was a matter of concern for the government. The times changed but the dream of a uniform civil code still remains unrealised even after 70 years of Indian independence.

**Present day scenario:**

861 [http://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/UNIT%204.pdf](http://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/UNIT%204.pdf)
UCC has been a hot topic of debate for the past 6 decades. Even today people are still unclear about the consequences of the implementation of the UCC. Many believe it to be a majoritarian agenda which will favour only a single community while others see it as a force that will unite the nation and bind it together. The ongoing debate is about the violation of the fundamental rights and the eradication of religious autonomy. The provisions of UCC should relate to matters where human rights are violated and the autonomy of practising the religion prevails. The fire that started with the rights for equality for women has now spread to other institutions of the society. The crux of the code is to ensure equality for all irrespective of religion, caste, class or gender. Many laws today which place restrictions on people from a particular community will cease to exist, and uniformity will be observed, but are we ready to accept it?

Uniform Civil Code & Personal Law:
The people of India belong to different religions and faiths. They are all governed by different sets of personal laws belonging to their respective religions. India is a secular country and everyone has the right to practise any religion and religion is one of the major issues that hampers the applicability of UCC. Political parties refrain from interfering with this topic with the fear of losing their vote bank which is backed by the religious communities. India has always been a patriarchal society. Women have always been considered inferior and as possession of men, who are no equal to men. This inequality extends to the topics of matrimony, succession, adoption and even inheritance. The women were the first individuals to demand for a UCC that would not only be for the protection of their rights but also grant them an equal status in the society alongside their male counterparts.

The personal laws in India are mostly in compliance with the religion of the people. With numerous religions practiced across the subcontinent there are numerous laws that govern the laws relating to marriage, adoption, succession and inheritance.

Marriage:
Different religions have different forms of marriages and different codified laws governing them. These are: -
1. The Conversion’s Marriage Dissolution Act,1861
2. The Indian Divorce Act,1869
3. The Indian Christian Marriage Act,1872
4. The Kazi’s Act,1880
5. The Anand Marriage Act,1909
6. The Indian Succession Act,1925
7. The Child Marriage Restraint Act,1929
8. The Parsi Marriage & Divorce Act,1936
9. The Dissolution of Muslim Marriage Act,1939
10. The Special Marriage Act,1954
11. The Hindu Marriage Act,1955
12. The Foreign Marriage Act,1969
13. The Muslim Women (Protection of Rights on Divorce) Act,1986

These are the acts governing the laws of marriage and divorce in the country. Under the Hindu law specifically in the years 1955-56 the women did not enjoy as compared to the men. Prior to 1955 polygamy was prevalent among Hindus as well. Hindu women could not hold any property as an owner except for their streedhan. In the matters of adoption Hindu women had no
Indian society was governed by laws which favoured patriarchy. Even though the Hindu law has been codified to a certain extent but some discriminatory provisions still exist.

When it comes to discussing the Muslim law, women have always been given a secondary status. The advent of Islam has contributed much when it comes to deterioration of Muslim women and the escalation of their problems. The holy Quran gives equal provisions to both the men and women however there are certain aspects of Islam that contradict the provisions provided in the Quran and render the position of Muslim women, specially the wives insecure and inferior. In Islam a man is allowed to marry four times while a woman cannot and the most derogatory practise of divorcing a woman(Talaq-e-Biddat) is practised in Islam. Though talaq-e-biddat was struck down by the hon’ble Supreme Court, not all primitive and discriminatory provisions can be struck and thus the need for a UCC. The Muslim Women act 1986 was passed to overrule the decision made in the case of Moth Ahmed Khan v. Shah Bano Begum. The court held that “section 124 of CRPC extends to the Muslim men as well and they have to maintain their wives beyond the idatt period”. The controversy began when the parliament passed the abovementioned act. The effect of this act was that muslim husband was not liable to maintain his divorced wife beyond the idatt period unless the spouses submit it the court that they would like to be governed by the CRPC. This was like having the provision but not using it for the welfare of the women who needed it the most.

Marriage in India is a sacred institution. India has personal laws that cover all forms of marriages in India, UCC aims at developing a single law that would govern all the citizens without hurting their religious sentiments. Talking about adoption, where it is permitted in Hindus, Muslims still are restricted from adopting. In India the all India Muslim law board is an institution which is an influential body when it comes to laws relating to the Muslim religion. Muslims prefer to settle their disputes before such institutions rather than going to the court.

Adoption:
Although there is no general law for adoption it is permitted by the Hindu adoption and maintenance act 1956 particularly amongst Hindus only. Since adoption is legal affiliation of a child, thus it forms the subject matter of personal law. Muslims, Parsis and Christians have no such adoption law and therefore have to approach the court under the guardians and wards act 1890. The drawback of this act is that the child adopted in this act is only taken for foster care. Once the child becomes major, he is free to break away all the relations, the child also does not have any legal rights of inheritance.

In Hindu personal law the father is known as the first guardian and then the mother. Prior right of mother is acknowledged only in cases of children below the age of 5. In cases of illegitimate children, the mother has a

---

862 Shayara Bano vs Union of India And Ors., (2017) 1 AIR, (India).
863 AIR (1985), SC (945)
better claim than the putative father. Under the Muslim law, the father is a dominant figure. Mother is not recognised as a natural guardian of the children even after the demise of the father. The rights of the father even extend to both property and person. There is no such codified law in Muslim personal law that provides equality to women in matters relating to adoption. Hence the need for UCC.

**Maintenance:**

It is the duty of a husband to maintain his wife which arises out of marriage. Hence right to maintenance forms a part of the personal law.

Under the Hindu Law absolute right is given to the wife for claim maintenance from her husband given that she doesn’t deviate from the path of chastity. This has been codified under Hindu Adoption and Maintenance Act, 1956. The court takes into account various factors like the labilities of the husband while accessing the amount of maintenance. The grounds of divorce are also accessed under that foresaid act, maintenance temporary or permanent will be borne by either husband or wife if the other spouse has independent income for his or her support.

Under the Muslim Law the divorced Muslim women are entitled to:

a. reasonable and fair provisions and maintenance to be made and paid to her within the iddat period by her former husband.

b. When she herself maintains children born to her before or after her divorce, a reasonable and fair position and maintenance to be made and paid by her former husband for a period of two years from the respective date of her children.

c. An equal amount equal to the sum of mehr or dower agreed to be paid to her at the time of her marriage or anytime there after according to the Muslim law.

d. Or property given to her at the time of marriage by her relatives or friends or her husband or relatives or husband.

In addition, the act also provides powers to the magistrate to pass an order in the favour of a divorced Muslim woman if she is unable to maintain herself after the period of iddat. These provisions are for in court divorce, Muslim personal law also incorporates out of court divorce. In such cases the woman although is legally entitled to maintenance, but there is no law that makes it a compulsion for the husband to maintain woman when the divorce is given out of court.

We can cite the case of Mohd. Ahmed Khan v. Shah Bano Begum as an example. In this case it was held that a husband is liable to pay maintenance to his divorced wife beyond the period of iddat, but the judgement was overruled with the enactment of Muslim Women Protection Act, 1986 by the parliament. This was done after a communal backlash from the Muslim community and a fear of losing their vote bank.

The Parsi Marriage and Divorce Act, 1936 recognises the right of women to maintenance both permanent and temporary. The maximum amount of amount of maintenance that can be decreed by the

---

864 The Muslim Women Protection Act, 1986

865 AIR (1985), SC (945)

www.supremoamicus.org
court is one-fifth of the husband’s income. In fixing the quantum of permanent maintenance the court will determine by keeping in mind the ability of the husband to pay, wife’s own assets and conduct of the parties. The order will remain in force as long as wife remains chaste and unmarried. The main motive of UCC is to compile all of these laws into a single law to rule them all, which does not discriminate on the basis of gender or religion and provides equal opportunity to all and such law will replace the existing law relating to the matters of marriage, divorce and maintenance.

Secularism and Uniform Civil Code:
The preamble of the Constitution states that India is a secular, democratic republic. This simply means that there is not state religion. India is a secular state that does not discriminate on the basis of religion. Religion is only concerned with the relation between man and god. Therefore, the process of secularisation is closely related with the goal of UCC like a cause and effect relationship. In the case S.R. Bommai vs Union of India866 it was held by Justice Reddy that religion is the matter of individual faith and cannot be mixed with activities and can be regulated by the state by enacting a law.

In India, there exists a concept of positive secularism while the US and European states have adopted the concept of doctrine of secularism which means there is a wall of separation between the religion and state. The positive aspect of the latter concept is that American and European states is that they can enact a law stating that state shall not interfere with the religion. On the contrary, in India, the responsibility lies on the state to interfere in the matters of religion so as to remove the impediments in the governance of the state.

The reason why India cannot undergo a renaissance is very clear. We have already discussed above how there exist not only diverse religions in this country but they also have their own personal laws. That is why there are a lot of chances of an increase in religious conflicts, showing a reverse effect on laws that are made. It is said that, we all want a change but no one accepts the change. In India people find it extremely difficult to accept or adapt to certain changes and when it comes to religion it defines the way of life, people connect with their religion. People find it difficult to realise the fact that people make religion and it is defined by them and not the opposite. This thought finds itself in the graveyard because some people still believe in burning. Thus, there is a need for a Uniform Civil Code which would govern and regulate the behaviour of people of all religions and not any particular section of the society.

Therefore, the Uniform Civil Code aims to strike balance between the protection between the fundamental rights and religious principles of the different communities existing in India. Issues relating to marriage, divorce, maintenance, etc could be taken up as matters of secular nature and law can regulate them.

Recommendations and Conclusion:
At last the question that arises is regarding the desirability of UCC. Is there a need of UCC or not? Many believe that if UCC is

866 AIR (1994 ), SC (1918)
enacted and implemented there are chances of communal tension and violence which would further lead to the disintegration the country. Secondly it would be very difficult to cover every aspect of personal law. When it comes to setting standard of UCC the problem that arises is that, which law will prevail over the other. In India religion is not just the way of life but is considered as something supreme and sacred. Implementation of UCC would not be warmly accepted by the people, the major reason being the diversity of the country. Thus, we personally feel that codification of UCC is of secondary value with the priority being an amendment in the various personal laws. As stated before, Pandit Nehru said that UCC should only be implemented in modern India. Though India is on the verge of modernisation, the aspects such as religion which are retrospective in nature should only be dealt with by keeping in mind the diversity and religious autonomy of the country.

*****
CULPABLE HOMICIDE AND MURDER

By Amritha Priya P.V
From CMR Law School

ABSTRACT: It is very important to understand the differences between criminal wrong and civil offence. The nature, punishment and liability incurred for both are different. The two have been called a viscous intermixture. Any conduct which harms an individual to some extent harms society; since society is made up of individuals; and therefore although it is true to say of crime that it is an offence against society, this does not distinguish tort and crime. Any conduct which a sufficiently powerful section of any given community feels to be destructive of its own interest, as endangering its safety, stability or comfort, it usually regards as especially heinous and seeks to repress with corresponding severity; if possible it secures that the force which the sovereign power in the state can command shall be utilized to prevent the mischief or to punish anyone who is guilty of it. Offences of this kind are termed crimes. The proceedings taken in court in respect of these crimes are called as criminal proceedings.

BLACKSTONE defines crime as “an act committed or omitted in violation of public law forbidding or commanding it. “Actus non facit reum nisi mens sit rea” meaning “an act does not make a person guilty unless mind is also guilty”. It is to be noted that a person is guilty if they are proved to be culpable or blameworthy in both thought and action. That’s the general difference between murder and manslaughter (culpable homicide). There is very thin difference between murder and culpable homicide. The difference is only intention to commit murder. In culpable homicide the offender has used the intention of causing such bodily harm which is likely to cause death. In murder, the offender must know that his act will cause death or bodily harm will be sufficient in “ordinary course of nature to cause death”. For example if a person uses a sharp object and injures a vital part of body with a knowledge that such weapon would cause serious injury and subsequently the person dies, then it murder. On the other hand if a person uses a blunt weapon or something which does not injury a person and still the person dies it is a culpable homicide and not murder. In both the cases punishment is awarded but, the nature of punishment in murder is grave and the latter one is comparatively not serious as murder. There are also situations in which culpable homicide is treated as murder.

In this paper one would understand legal difference between culpable homicide and murder, in what circumstances culpable homicide would amount to murder and also the punishments, provisions with reference to case laws. Why is it important to understand the difference between culpable homicide and murder? In order to determine intention (important to hold one guilty), in determination of charges, determination of punishment to be awarded.

SEC 299: CULPABLE HOMICIDE:
Sec 299 of the INDIAN PENAL CODE 1860 lays down the provisions for culpable homicide. The word culpable means criminal and homi means “man” cide means “I cut”. Homicide means killing of human
being by a human being. There are two kinds of homicides a) lawful homicide b) unlawful homicide.

**HOMICIDE**

Lawful homicide: All those offences under general exception under Sec 76 – Sec 106 are justifiable and excusable. Under certain circumstances the criminal liability is lessened or completely waived off. This is because the offender was a minor, insane, intoxicated, or was under compulsion, or the offender was acting in good faith for the benefit of other person without consent, or necessity to avoid a greater harm, or was an accident. In these cases the burden of proof lies on the accused.

Unlawful homicide: all those offences under Sec299- Sec311 are unlawful. They are murder and culpable homicide/ manslaughter.

**INGREDIENTS OF SEC 299:**

1) Causing of death of a human being by a human being;
2) The death must have been caused by doing an act;
3) The act must have been done:
   i) With the intention of causing death; or
   ii) With the intention of causing such bodily injury as is likely to cause death; or
   iii) With the knowledge that the offence likely by such act to cause death;

**EXPLANATIONS:**

EXPL 1- A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity and thereby accelerates the death of that other, shall be deemed to have caused death.

EXPL 2- Where the death is caused by bodily injury to another who causes such bodily injury shall be deemed o have caused the death although by resorting to proper remedies and skilful treatment the death might have been prevented.

EXPL 3- The causing of the death of a child in the mother’s womb is not a homicide. But if may amount to culpable homicide to cause the death of a living child, if any part of that has been brought forth, though the child may not have breathed or been completely born.

Explanation of all the ingredients and explanations:

1) **Causes death:**- Death means the death of a human being and not that of a animal(a/g Sec 46 of IPC). The word death does not include the death of unborn child as stated in EXPL 3 of the section. If a person intends to kill A but kills B, he has committed the offence of culpable homicide. Though he did not intend to kill B, he shall be booked for the offence of transfer of malice under Sec 301 and the law presumes he intended to kill B because the nature if the act itself is an offence. Death occurs when brain dies.
completely. A person cannot be said dead if some brain activity is present.

CASE 1- ARUNA RAMCHANDRAN SHANBAUG Vs UNION OF INDIA
In this case petitioner Aruna was a staff nurse working in KEM hospital, Mumbai. On 27, November 1973 she was attacked by a sweeper in the hospital who wrapped a dog chain around her neck and yanked her back with it. He tried to rape her but finding that she was menstruating, he sodomized her. To immobilize her during this act he twisted the chain around her neck. The next day she was found unconscious on the floor. It was found that due to strangulation of dog chain the supply of oxygen to the brain had stopped and the brain got damaged. The petition prayed for mercy death; to die peacefully. She was on permanent vegetative state for 44 years.

The court held that Aruna was not brain dead, she was responding to certain situations in her own way. For example she likes light, devotional music and prefers fresh soup. She was breathing on her own without artificial ventilation. She was uncomfortable when the room was crowded and was calm when they were fewer. Based on this report and definition of HUMAN ORGAN ACT 1994, she was not brain dead. Though she was in permanent vegetative state her condition was stable. So terminating her life was unjustifiable.

But recently the Supreme Court has given legal sanction to passive euthanasia, by permitting “living will”. In this method the medical support for a patient would be withdrawn so that they slip into irreversible coma. It was observed that “a person cannot be allowed to continue suffering in a comatose state when he or she doesn’t wishes to live. A petition was filed in the Supreme Court by an NGO, “Common Case”, who contended that a person right to life includes right to die with dignity, keeping a patient alive by artificial means against his/her wishes is an assault on his/her body. On March 9, 2018 Supreme Court recognised ‘living will’ and laid down guidelines on procedure to be adopted.

2) **By doing an act:-** by doing an act which causes death, act includes illegal omission( under Sec 32 and Sec 43). Death may be caused by number of ways, such as by poisoning, starving, striking, drowning, or communicating some shocking news. For example jailer voluntarily causes death of a prisoner by omitting to supply food, a nurse voluntarily causes death of a child entrusted to her care, or a jail doctor omitting to supply medical care to the prisoner voluntarily they shall be liable for murder.

3) **Death caused by effect of word:** death may also be caused by effect of words such as by making some communication to another person, which caused excitement and resulted in death of other party. It is said to be culpable homicide. For example A with an intention or knowledge aforesaid, relates some excitement or agitation in the mind of B who was in a critical illness; and B dies. A will be held liable for culpable homicide.

3)(i) **With an intention to cause death:** the doer of the act must have an intention to kill a person otherwise he shall not be liable for the offence. As depicted in EXPL. 1 of this section where the doer had an intention or expected someone to die. Here if the word intention is subjective. For example A
intended to kill B but in the course of exercising the act C dies, here the court and law presumes that A intended to kill C (under Sec 301 TRANSFER OF MALICE) and is committed culpable homicide.

For example: A lays sticks and turf over a pit, with the intention of thereby causing death or with the knowledge that death is likely to be thereby caused. Z believing the ground to be firm, trends on it falls and is killed. A is held liable for the offence of culpable homicide.

3)(ii) With the intention of causing such bodily injury as is likely to cause death:- the intention of the offender may not have been to cause death but only injury that is likely to cause the death of the injured. For example A might intended only to hit on the skull of a person so as to make him unconscious, but the person dies. In this case the intention was to cause an injury which is likely to cause death. Thus the person is held for culpable homicide. However, if A hit’s B with a broken glass. A did not know that haemophilic. B bleeds to death. A is not guilty of culpable homicide but only of grievous hurt because he had no intention to kill B or had intention to cause a bodily harm which would amount to death.

For example: A knows Z to be behind a bush. B does not know it. A intending to cause, or knowing it to be likely to cause Z’s death, induces B to fire at the bush. B fires and kills Z. Here B may not guilty of no offence, but A has committed the offence of culpable homicide.

CASE 2- NARAYAN Vs STATE OF MP:- A sudden quarrel arose between the accused and the deceased. Accused stabbed the deceased. A single knife blow resulted in the death of the victim. The accused had no motive to kill the deceased. The court held that by doing such an act, the accused knew it would result to death of the victim. Hence he is liable for culpable homicide and awarded punishment under Sec 304 part II imprisonment for 10 years.

CASE 3- NAGA PO NYEIN- The accused gave one blow to B with a long wooden handle on the thinner part of the head. He was not liable for murder but for culpable homicide as the weapon could not be said to be a formidable one and the intention to kill could not be presumed.

CASE 3- With the knowledge that he is likely by such an act to cause death:- the word knowledge imports certainty and not merely a probability. Here knowledge of the person refers to the personal knowledge of the person who does an act. When a person does an act which he knows that it has a high probability to cause death, he is responsible for the death which is caused as a result of this act. In JAMALUDDINS CASE the accused while exorcising a sprit from the body of a girl beat her so much which resulted in death. They were held for culpable homicide.

For example: A, by shooting at a fowl with intended to kill and steel it, kills B who is behind a bush; A not knowing that he was there. Here although was doing an unlawful act, he was not guilty for the offence of culpable homicide, as he did not intend to kill B, or to cause to cause death by doing an act that he knew was likely to cause death.

BASUDEV Vs STATE OF PEPSU- The accused was alleged to have shot 16 years old boy in a marriage fest. The accused was
drunk and asked the boy to vacate his chair so that he could sit, but the boy refused to do so. Aggravated accused shot the boy and surrender himself to the police and plea the defence of intoxication. But the court held that the act of the accused was due to voluntary intoxication and he had sufficient knowledge of what he was doing. The court distinguished between intention, knowledge and motive.

In MANSEL PLEYDELL CASE the accused kicked the abdomen of B with such violence as to cause fracture of two ribs and rupture in the spleen which was normal. In the course of this B died. It was held that the accused knew that abdomen was the delicate and vulnerable part of the human body and should therefore be presumed to have kicked with the knowledge that by so kicking he was likely to cause death.

SOMETIMES GROSS NEGLIGENCE MAY ALSO AMOUNT TO KNOWLEDGE:- if a person acts negligently or without exercising due care and caution he will be presumed to have knowledge of the consequences arising from his act. In such cases death must be in direct consequence of the act of the accused.

CASE 4- LAXMAN KALU- A had gone to father in laws house to fetch his wife. He had an argument with A brother in law B. A lost his temper and gave blow on B chest with a knife, which resulted in B death. A was held guilty for culpable homicide under Sec304 part II, because death was caused by doing an act with knowledge that it was likely to cause death.

CASE 5- GANESH DOOLEY- A snake charmer exhibited in public a venomous snake, whose fangs he knew has not been extracted. To show his skill and not with an intention to kill anyone left the snake on a person head. The person was scared and was trying to push it off in the mean course the snake bit him, and he was dead. Here the court held the snake charmer to be liable because he had sufficient knowledge and was booked for culpable homicide.

4) Death caused without intention or knowledge:- in such cases it amounts to grievous hurt or simple hurt and does not amount to culpable homicide. This is because a person should be punished for what he intended to do or had knowledge it is likely to cause death.

EXPLANATION 1: this explanation lays down that the accused will be guilty of culpable homicide if he, voluntarily does an act which results the death of the victim who was already suffering from disorder, disease or some sort of infirmity. The law presumes that he had sufficient knowledge about the victim health and his act accelerated his death. But one of the elements of culpable homicide must be present.

EXPLANATION 2- According to explanations a plea that death could have been prevented by resorting to proper remedies and skilful treatment is not allowed to be raised to defeat a prosecution because it may not always be within the reach of wounded man. Therefore, if death results from an injury voluntarily caused, the person who caused injury is deemed to have caused death, although the life of the victim might have been saved if proper medical care was given, and even if the medical treatment was available and no proper care
was taken, provided the treatment was given in good faith by a physician or surgeon.

IN SOBHAS CASE, A caused simple injury to D and D died of septic meningitis which developed on account of the use of wrong remedies and neglect in treatment. It was held that in such cases dead did not occur due to the injury but due to lack of proper care and the accused was not punished under Sec 304 for culpable homicide.

EXPLANATION 3- this explanation provides that causing death of a child in mother’s womb is not culpable homicide because it is part of mother’s life, and is not separate and distinct existence. But, as soon as any part of the child has been brought forth from the womb, the child is regarded as a living human being, to cause whose death would amount to homicide. Thus complete birth is not a requisite.

PUNISHMENTS:
SEC 301: Causing death of person other than person whose death was intended. The law presumes the accused intended to kill the victim and TRANSFERS MALIC under this section. Hence such act is considered to be culpable homicide.

SEC 304: punishment for culpable homicide not amounting to murder. This Section is of two parts, part I the punishment is imprisonment for life or imprisonment which may extent to ten years and shall also be liable to fine. Part II punishment may extent to a period of ten years , or fine , or with both.

<table>
<thead>
<tr>
<th>SEC 304 PART I</th>
<th>SECTION 304 PART II</th>
</tr>
</thead>
<tbody>
<tr>
<td>The act was done with the intention of causing death, or of causing such bodily injury as is likely to cause death.</td>
<td>The act was done without any intention to cause death or to cause such bodily injury as is likely to cause death.</td>
</tr>
<tr>
<td>The accused shall be punished for imprisonment for life or imprisonment for a term which may extent to ten years and shall be liable to fine.</td>
<td>The accused shall be punished for a term of ten years or with fine or with both.</td>
</tr>
</tbody>
</table>

In this Section punishment is higher than in part II and Punishment is lesser when compared to part I.

Fine is compulsory as said in the phrase “and” shall be liable to fine. Fine may be imposed or may not be imposed. The phrase “or” with fine, “or” with both.

SEC 300: MURDER
The term murder is derived from the Germanic word ‘morth’, which means ‘secret killing’. Murder is unlawful homicide with malice aforethought. Murder is more serious offence than the culpable homicide. Culpable homicide is a genus, where as murder is a species. An offence cannot amount to murder unless it falls within the definition of culpable homicide. SEC 300 deals with the cases where culpable homicide is murder. So murder includes culpable homicide but culpable homicide may or may not amount to murder.

INGREDIENTS OF SEC 300:
CULPABLE HOMICIDE IS MURDER-
1 Intentionally causing death, or
2) Intentionally causing bodily injury with knowledge that it will cause death, or
3) Intentionally causing of injury sufficient to cause death, or
4) That the act is so imminently dangerous so as to cause death.
1) Intentionally causing death - Death means the death of a human being and not that of an animal (a/g Sec 46 of IPC). Death may therefore be caused by illegal omission as well. Hence an act which is illegally omitted is done with an intention of causing death is culpable homicide amounting to murder. It is the simplest at the same time most gravest of the species of murder. It is the action of a person with a clear intention of killing a person. If a person administers a deadly poison to a man, then it is very clear that he has an intention to kill that man, because the cause and effect of the act is very clear.
   • Thus where parents neglect to provide proper substance to their children although repeatedly warned of the consequences and his child dies, it will amount to murder.
   • When an accused, on seeing the deceased said that he was searching for him everywhere and stabbed him with knife, and especially when the knife was drawn downwards as if to cut the body into two, it was held that the intention to kill the deceased was clear from facts.

For example A shoots Z with the intention of killing him. Z dies in consequence. A commits murder

In R. VENKALU CASE- The accused set fire to the cottage in which D was sleeping and locked the door from outside so that D’s servant might not help him escape. He took active steps and prevented villagers from helping D. Here the man had sufficient to kill D hence he was held for murder.

   • ABU THAKIR Vs STATE:- It was held that motive loses importance when direct evidence is available.
   • FAKE ENCOUNTERS- This means cold blooded, brutal murders by person who are supposed to uphold the law. Supreme court held that ordinary people are given ordinary punishment, but for the offences committed by a public servant or police officers, when proved shall be given death sentence, treating it to be rarest of rare cases.

2) Intentionally causing bodily injury with knowledge that it will cause death- In case of an offence falling under this clause the mental attitude of the accused is two-fold. First, there is intention to cause bodily harm and secondly, there is the subjective knowledge that death will be the likely consequence of the intended injury. Here unlike in culpable homicide under Sec299, the offender knows such bodily injury will cause death of the victim. Here knowledge on the part of the offender imports certainty and not merely a probability. A case would fall under this clause if the offender having knowledge of that person was suffering from some disease or was of unsound mind and cause bodily harm which would result in death, which may not amount to death of a sound man, in the same situation, but knowing the condition of the diseased the accused takes advantage of the same shall be committing the offence of murder. Death can be caused due to poisoning, burning provided the prosecution proves the same.
For example:- A knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with an intention of causing a bodily harm which amounts to death. Z dies in the consequence. A is guilty of murder.

In **KARU MARIK Vs STATE OF BIHAR:**- The accused gave a blow with a sharp weapon on the chest of the deceased. When she tried to escape, the accused caught her hair and threw her on the ground and inflicted two more blows on the abdomen and back which resulted in grievous hurt amounting to death. Hence it was held that the accused had sufficient knowledge that such bodily harm would amount to death. Hence he was booked for murder.

**BN SRIKANTIAH Vs STATE OF MYSORE:**- There were 24 injuries on the deceased and 21 of them were incised. They were on his head, neck, shoulders and forearms. Since most of the injuries were on the vital parts and the weapons were sharp, it was held that intention if causing bodily injuries was established and was covered under Sec 300 of this act.

3) Intentionally causing of injury sufficient to cause death :- It speaks of an intention to cause bodily injury, which is sufficient in the ordinary course of nature to cause death. For the application of this clause two things must be proved, firstly the injury was intentionally inflicted and secondly, that the injury inflicted was sufficient in the ordinary course of nature to cause death of any person. The word sufficiency is used which means there is a high probability of injury resulting in death.

For example:- A intentionally gives Z a sword cut, or club wound sufficient to cause death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he did not intend to kill Z.

**STATE OF UP Vs VIRENDRA PRASAD**- The court held that clause3 of Sec 300( IPC) culpable homicide becomes murder when , a) the act which causes death is done with intention of causing death or is done with an intention of causing a bodily injury, and b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

4) That the act is so imminently dangerous so as to cause death :- The act described in this section is so dangerous that it would likely cause death. Under this clause, the act need not be directed to a particular individual or intention to cause death of a individual. It has to be a mere recklessness act, which is imminently dangerous.

Example: A without any excuse fires a loaded gun into the crowd of persons and kills one of them. A is guilty of murder, though he has no intention he is held for the offence of murder.

The essential ingredients in this clause are (i) the act must be imminently dangerous (ii) the person committing the act must have knowledge that it is so imminently dangerous (iii) that in all probability it will cause (a) death (b) bodily injury as is likely to cause death (iv) such imminently dangerous ct should be done without any reason or justification for running the risk of causing death or such injury.
The mental element contemplated in this clause “knowledge” that the act is so imminently dangerous that it is likely to cause death or such bodily injury is likely to cause death. The term “imminently dangerous” requires that danger should be immediate and close at hand. Hence under this clause the intention to kill anybody is not required in order to constitute the offence of murder.

IN STATE OF MADHYA PRADES Vs RAM PRASAD- In this case, Ram Prasad and his wise Raji had a quarrel. Villagers were called to mediate the dispute, but to no avail. The accused poured kerosene on his wife and set her to fire. She suffered extensive burn injuries and died as the result of injuries. The court held that under cl (4) of Sec 300 the accused had knowledge and no intention.

There are five exceptions to murder, when culpable homicide does not amount to murder-
1) Provocation – culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation or causes death of any other person by mistake of accident. There are few provisos (i) the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person. (ii) the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the power of such public servant. (iii) that the provocation is not given by anything done in lawful exercise of the right of private defence.

2) Exceeding the right of private defence – culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of a person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.
3) Act of public servant – it deals with situation where a public servant exceeds his lawful powers in the discharge of his duties and thereby causes death. The essential ingredients are (i) the offence must be committed by a public servant or by a person aiding the public servant (ii) the act must be committed by the public servant in exercising his duties (iii) he should have exceeded his powers given to him by law (iv) the act should be done in good faith (v) the public servant must have believed in good faith that his act was lawful and necessary for the duty to discharge his duties (vi) he should not have an ill will towards whose death has been caused.
4) Sudden fight – culpable homicide is not murder if it is committed without predetermination in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted cruel or unusual manner.
5) Death by consent – culpable homicide is not murder when the person whose death is caused, being above the age of 18 years, suffers death or takes risk of death with his own consent. The essential points to be proved are (i) the death was caused due to the consent of the deceased (ii) the deceased was above the age of 18 years (iii) the consent was free and voluntary, and was not
given through fear of misconception of facts.

PUNISHMENT FOR MURDER:- Sec 302 of IPC lays punishment for murder, whoever commits murder shall be punished for death (which is an exception), or imprisonment for life, and shall be liable for fine. Nature of offence: Cognizable- can arrest without warrant and start investigation with or without courts permission, Non-Bail-able, Tried only under session court, and Non-Compoundable - where charges shall not be waived off because of compromise between the parties.

Sec 303- Punishment for murder by life convict. When a person who is already under imprisonment for life commits an offence of murder he shall be punished with death. This SECTION was upheld in MITHU Vs STATE OF PUNJAB. The Supreme Court struck down SEC 303 which provided for mandatory death penalty for offender serving a life sentence.

DIFFERENCE BETWEEN CULPABLE HOMICIDE AND MURDER
Both culpable homicide and murder deal with killing of a person. Culpable homicide is the genus and murder is the specie. All culpable homicides are murders but not all culpable homicides are murders. The question of law arises whether the offence is culpable homicide amounting to murder or culpable homicide not amounting to murder. For the purpose of fixing punishment, proportionate to the gravity of this generic offence the code recognises three degree’s of culpable homicide.

- The first one is culpable homicide of first degree. This is the gravest form of culpable homicide which is defined under SEC 300 as “murder”. Punishment is death, imprisonment for life, and shall be liable for both (SEC 302).
- The second may be termed as, culpable homicide of second degree. This is punishable under part I of SEC 304. Punishment is may extend to 10 years or imprisonment for life or both.
- The third one is culpable homicide of third degree. This is the lowest of all culpable homicide and punishable under part II of SEC 304. Punishment is with fine only, or imprisonment up to 10 years, or both.

The only difference of culpable homicide and murder is the degree of intention and knowledge. Greater the degree of intention and knowledge the case would fall under murder. Lesser the degree of knowledge and intention, the offence would fall under culpable homicide.

The distinction between SECTION 299 and SECON 300 was laid down in R Vs GOVINDA, In this case the accused had knocked his wife down, put one knee on her chest, and struck two or three blows on the face with closed fist, she died in the consequence, either on spot, or very shortly afterwards, there being no intention to cause death and the bodily injury not being sufficient in the ordinary course of nature to cause death. The accused was liable for culpable homicide not amounting to murder.
<table>
<thead>
<tr>
<th>SECTION 299 – CULPABLE HOMICIDE</th>
<th>SECTION 300 – MURDER</th>
<th>SEC 304 lays down punishment</th>
<th>SEC 302 lays down punishment</th>
</tr>
</thead>
<tbody>
<tr>
<td>A person commits culpable homicide if the act by which death is caused is done -</td>
<td>Subject to certain exception culpable homicide is murder if the act by which the death is caused is done -</td>
<td>This Sec lays emphasis on probability of the act</td>
<td>This Sec lays emphasis on certainty of the act</td>
</tr>
<tr>
<td>INTENTION</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>With the intention of causing death; or</td>
<td>With the intention of causing death; or</td>
<td></td>
<td></td>
</tr>
<tr>
<td>With the intention of causing such bodily harm which is likely to cause death;</td>
<td>With the intention of causing bodily harm as the offender knows such bodily harm is likely to cause death of whom the harm is caused; or</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>With the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or</td>
<td></td>
<td></td>
</tr>
<tr>
<td>KNOWLEDGE</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>With the knowledge that the act is likely to cause death</td>
<td>With the knowledge that the act is so imminently dangerous to cause death</td>
<td></td>
<td></td>
</tr>
<tr>
<td>It is a genus</td>
<td>It is a species</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Punishment is less compared to Sec 300- murder</td>
<td>Punishment is relatively higher when compared to Sec 299- culpable homicide</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

SHALI HAI KADAR ALI Vs EMPEROR: The deceased was stabbed in the abdomen by the accused with a knife, and the deceased died due to gangrene and paralysis of intestine. It was held that if an operation would have taken place in an hour of infliction of abdomen injury then the life of the deceased might have saved. The court held it was culpable homicide not amounting to murder, thus convicted the accused under SEC 304 Part 1.

SITUATIONS WHERE CULPABLE HOMICIDE DOES NOT AMOUNT TO MURDER

The IPC has also laid down provisions where culpable homicide does not amount to murder. They are laid down under SEC 300 of the act.

Clause 1-4 of Sec 300 provides the essential ingredients where culpable homicide amounts to murder. This section also provides five exceptional situations, the existence of which will remove from the purview of Sec 300. Such offences which falls within the exceptions of Sec 300,
ceases to be murder. It will merely be culpable homicide amounting to murder. However it becomes necessary to take note of two significant propositions about the nature and operation of these exceptions to Sec 300. First, there are “special exceptions” to murder only. They are the “general exceptions” under chap IV Sec 76 – 106. The second kind of “special exceptions “ covers merely ‘murder’ to ‘culpable homicide not amounting to murder” and therefore reduces the criminal liability of its perpetrator. These exceptions to Sec 300, unlike the ‘general exceptions’, do not exonerate the wrongdoer. They only operate as mitigating Factors.

The general exceptions under this Sec are:
1) EXCEPTION 1- Grave and sudden provocation – Culpable homicide is not murder if the offender, on account of grave and sudden provocation loses his self control and cause death of a person. The person, whose death is caused may be the person who gave the provocation or any other person by mistake or accident. This act must be done under the immediate impulse or sudden provocation.

This exception has three exception- (i) the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person. (ii) the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the power of such public servant. (iii) that the provocation is not given by anything done in lawful exercise of the right of private defence.

The expression “grave” indicates that provocation be of such a nature so as to give cause for alarm to the accused. ”Sudden” means an action which must e quick and unexpected so far as to provoke the accused. Provocation should be both sudden and grave. If the provocation is grave and not sudden, sudden and not grave one cannot avail the exception. Further it should be shown that the provocation was of such nature that the offender was deprived of the power of self control.

While applying this principle, the primary obligation of the court is to examine from the point of view of a person of reasonable prudence if there was such grave and sudden provocation so as to reasonably conclude that it was possible to commit the offence of culpable homicide and as per the facts was not culpable homicide amounting to murder. The test of “sudden and grave provocation” is whether a reasonable man when placed in the same situation in which the accused was placed would be provoked as to lose his self control.

The provocation can be an act or series of act done by the deceased to the accused resulting in inflicting of injury. The mental background created by previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for commenting the offence. The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled done by lapse of time, or otherwise giving room and scope for premeditation and calculation.
K.M.NANAVATHI Vs STATE OF MAHARASTHRA- Nanavathi was working as second in command in Navy. His wife had illicit relationship with Ahuja a business man in Bombay. Ahuja had illicit relationship with several other women. When nanavthi returned home after work he noticed change in behaviour of his wife. He asked for reason and she confessed that she had illicit relationship with Ahuja. Nanavathi met Ahuja and got provoked with his behaviour. he went to the ship. He took his revolver and loaded the same. He went to the residence of Ahuja and shot him dead. Thereafter surrendered to the police.

Judgement – he was convicted for imprisonment for life by the Supreme Court. The Court also laid down certain principals – (1) the test of “grave and sudden” provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self control. (2) In INDIA, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring him under within the first exception. (3). The mental background created by previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for commenting the offence. (4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled done by lapse of time, or otherwise giving room and scope for premeditation and calculation.

2) EXCEPTION 2- Exceeding the right of private defence-This right, under certain circumstance even extends to the causing of death. The clause is in respect of cases where a person has exceeded his right of private defence. it may be pointed that the fact that a person has exceeded his right of private defence does not totally exonerate a person under this exception. It merely considers as a mitigating factor to reduce the offence from murder to culpable homicide not amounting to murder. Before this exception had to availed the accused has to prove that he had right of private defence under Sec 96 – Sec 106, IPC. It is only after the existence of the right is established the question is whether the accused exceeded the right of right of his private defence. If a person genuinely exercises hi right of private defence within the prescribed limits then he commits no offence. However if he exceeds the right of private defence, it will amount to a lesser offence than murder. Thus the exceeding right of private defence by the accused should be unintentional. Only then the accused can avail the exception.

NATHAN Vs STATE OF MADRAS- The accused and his wife were in possession of some land which they had been cultivating for several years. They fell into arrear in respect to the lease amount due to the landlady. The landlord tried to evict them forcefully and tried to harvest the crops. So the accused in right to private defence of the property killed the deceased. The Supreme Court accepted the contention that the incident took place when the accused had exercised his lawful right of private defence against property. However the deceased part had no harmful weapons to cause death or grievous hurt on the part of the accused; the right of private defence of property had limited only to the extent of causing death.
under Sec 104, IPC. It was therefore held that the accused exceeded his right of private defence and was held for culpable homicide not amounting to murder. The offender was convicted for imprisonment of life.

3) EXCEPTION 3- act of public servant - it deals with situation where a public servant exceeds his lawful powers in the discharge of his duties and thereby causes death. The essential ingredients are (i) the offence must be committed by a public servant or by a person aiding the public servant (ii) the act must be committed by the public servant in exercising his duties (iii) he should have exceeded his powers given to him by law (iv) the act should be done in good faith (v) the public servant must have believed in good faith that his act was lawful and necessary for the duty to discharge his duties (vi) he should not have an ill will towards whose death has been caused

A suspected thief was arrested by a police constable and was being taken in train. The constable persuaded him. When he was not in a position to apprehend him, he fired the gun. But in the process he hit a fireman and he was dead. It was held that the case was covered under this exception.

4) EXCEPTION 4- Sudden fight- there are four conditions for an offence to be termed under this exception- (i) it was a sudden fight (ii) there was no predetermination (iii) the act was done in the heat and passion (iv) the assailant had no taken undue advantage or acted in cruel manner (v) it is immaterial as to which party offered the provocation or committed the assault (vi) the fight must have been with a person killed.

Fight here means something more than a verbal quarrel. A fight is a combat between two or more persons whether with or without weapons. Fight must be sudden and not pre determined or pre arranged. Therefore the time gap between the quarrel and fight is important. Mere exchange of words is not enough, exchange of blows is necessary, but use of weapons is not necessary. The fight must be with the person who is killed and not with another person. Undue advantage means unfair advantage.

**GHAPOO YADAV Vs STATE OF M.P –**
It was held in case that a fight is a combat between two or more persons whether with or without weapon. There is not particular rule about what is sudden fight. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. A fight is said to be sudden and in a heat of passion when there is no time for the passion to cool down. To claim the exception it is important to prove that there was no predetermination and further it should be proved that there was no undue advantage or the offender acted in unusual manner or cruel.

5) EXCEPTION 5- Death by consent – culpable homicide is not murder when the person whose death is caused, being above the age of 18 years, suffers death or takes risk of death with his own consent. The essential points to be proved are (i) the death was caused due to the consent of the deceased (ii) the deceased was above the age of 18 years (iii) the consent was free and voluntary, and was not given through fear of misconception of facts.

**IN UJAGAR SINGH-** the accused killed his stepfather who was an infirm, old and
invalid man, with the latter consent, his motive being to get three innocent man implicated. It was held that the offence was covered by the fifth exception to Sec 300,IPC and punishable under Part I ,Sec 304 ,IPC.

CONCLUSION: From the above description it is clear to understand the difference between the two offences. Hence it is clear that intention of a person is very important to determine the nature of his act and award punishment.

*****
THE INFLUENCE OF SALES PROMOTION ON CONSUMER BUYING BEHAVIOUR IN THE TELECOM INDUSTRY: THE CASE OF VODAFONE

By Varun Joshi
From School of Law, University of Petroleum and Energy Studies, Dehradun

I. INTRODUCTION

The business condition has turned out to be extremely focused in the 21st century due to the development in innovation, foundation and access to data around the world. This has made the earth extremely mind boggling and shopper inclinations continue evolving on account of the low exchanging expense in the market. Because of this expanding request of purchasers in the market, administration of business associations need to expand their assets with consideration concentrated more on drawing in and holding its clients. The Telecommunication business in India as of now has developed hugely and as of now has five major telecom administrators quite are BSNL, Idea, Vodafone, Airtel and Jio. In the telecom business where rivalry is extraordinary, the foundation for progress would much rely upon making mindfulness, influence and educating clients of the presence of offers.

This expanded rivalry in the business, has anyway brought about a few specialized apparatuses being utilized by advertisers to enable them to prevail in this period of rivalries. One of the generally utilized specialized instruments by Indian telecom suppliers is sales promotion. Sales Promotion refers to the arrangement of motivating forces to clients or to the dispersion channel to animate interest for an item. It is a vital segment of an associations by and large promoting system alongside publicizing, advertising and individual offering. Sale promotion goes about as an aggressive weapon by giving an additional motivator to the objective crowd to buy or bolster one brand over the other.

Spending on promoting is gigantic. One frequently cited measurement by statistical surveying firm Pinnacle Optimedia gauges that overall spending on publicizing surpasses (US) $400 billion. This level of spending underpins a huge number of organizations and a great many employments. In reality, in numerous nations most media outlets, for example, TV, radio and daily papers, would not be good to go without income created through the offer of promoting. While overall promoting is a critical supporter of financial development, person promoting associations vary on the job publicizing plays. For a few associations little publicizing might be done, rather limited time cash is spent on other advancement alternatives such an individual offering through a business group. For some littler organizations publicizing may comprise of infrequent ad and on a little scale, for example, putting little promotions in the grouped segment of a neighborhood daily paper. In any case, most associations, vast and little, that depend on promoting to make client intrigue are occupied with predictable utilization of publicizing to help meet showcasing goals.
One of the pioneers in India's versatile organization, Vodafone's forceful expansion of portable clients and a more steady valuing condition before the finish of financial 2011 prompted incomes of Vodafone India ascending by 23.95 percent to $6.16 billion for the monetary year finished 31st March 2011 contrasted with $4.97 billion in the past monetary. Vodafone India's EBITA remained at $1.59 billion and the EBITDA edge was at 25.6 percent. Voice incomes rose to $4.93 billion while informing incomes enlisted at $277.32 million and information incomes at $400.58 million while settled line incomes were at $11.35 million. The administrator had 134.57 million associations in India as of March 31, 2011, of which 95.3 percent are paid ahead of time. Vodafone is as of now guiding its portable cash move stage in India. The stage has more than 20 million clients universally. After the dispatch of ZooZoo advertisement battles Vodafone has included an aggregate of 3.68 million GSM endorsers which is the most astounding number of new versatile supporter's augmentations in the long stretch of Walk 2011. Vodafone's GSM endorser base currently achieved 134.5 million, according to the COAI information.

II. CONSUMER DECISION MAKING PROCESS

Need Recognition is the initial phase in the buying behavior. In showcasing, promoting or on the other hand business people can enact a purchaser's choice procedure by demonstrating the weaknesses of contending items. The limitations as indicated by them may incorporate contrasts in costs, whereby the contenders' items are estimated generally higher than that of the organization. Premiums can likewise be offered in order to draw in her rival's clients. The shopper starts to look for data in the wake of perceiving the issue. The buyers may experience his memory for past encounters with the brand or items. The consumers may likewise attempt an outside look for data, this is particularly if the past experience or information is inadequate. Essential wellsprings of outer data are; individual hotspots for instance relatives and companions whom the client trusts, open hotspots for instance item evaluating associations like National Communication Expert, buyer reports and MV purchaser projects and advertiser commanded sources, for example, data from venders that incorporate publicizing, purpose of procurement shows in store and request from business people. The data scan organize clears up the issue for the customer by recommending criteria to use for the buy and yielding brand names that may meet the criteria. The data the shopper has may not be sufficient in light of the fact that it doesn't contain all the components to consider. It is accordingly vital for the customer to think of evaluative criteria that speak to both target properties of the brands they may think about imperative. This learning as indicated by them will help the advertiser to recognize the most critical evaluative criteria shoppers utilize when making a decision about items or administrations. The shopper in this way settles on a choice after analyzing the choices in the evoked set. Drive purchasing anyway happens frequently amid the buy choice stage and subsequently advertisers should in this way take favorable position of the motivation purchasing. Advertisers may offer customers something of significant worth so that the
buyers are enticed to purchase the items and if the esteem is persuading enough, they may simply wind up obtaining the item. Customers don't vital finish the procedure on their expectations. They contended that improvements at the buy stage may cause the buyer to settle on a less favored decision or not to purchase by any stretch of the imagination. The conditions at the time of offer may impact buy choices, the buyers favored brand might be out of stock which could prompt no deal or looking for more data from the deals people may move their image inclination that the purchaser had not proposed to purchase. Shoppers who participate in low inclusion basic leadership process are a test for advertisers. Brief period and exertion is spent on the buy decision, thus data gone for persuading buyers regarding the advantages of the brand is probably going to be specifically overlooked. To them, getting the customer to attempt the item on the last minute is essential. Free examples and coupons can be utilized to empower shoppers to attempt a low association item. The last advance in the buy choice process is the post – buy conduct of the purchaser. After buy, the buyer contrasts the genuine encounter and his desires and may either be fulfilled or disappointed. In the event that the buyer was disappointed, the probability of buying that brand turns out to be low while the likelihood of a fulfilled buyer buying a similar brand is high. In the post buy assessment organize, customers construct understanding and learning about the administration and make assessment whether the administration has lived up to their desires or not. Customers have a foreordained standard against which to look at the result. Buyer basic leadership process is balanced by the multifaceted nature of the bought administration. Basic leadership in more unpredictable contributions may include more data hunt and assessment than choices in straightforward contributions and in this manner procedure keeps going longer. In an extraordinary circumstance, the buyer can even feel that the administration is as well muddled and chooses not to buy by any stretch of the imagination. At the point when a need is actualized, buyer might move directly to purchasing without seeking data or assessing choices. In these circumstances, the buyer just purchases the administrations that is recognizable or moves to an administration that is contending administration.

RATIONAL FOR SALES PROMOTIONS

The idea of offers advancement comprises of assorted accumulation of motivation apparatuses, for the most part here and now intended to animate speedier as well as more prominent buy of a specific item by buyers or the exchange. It generally offers an impetus to purchase an item or administration. Sale promotion endeavors are coordinated at conclusive customers and intended to spur, influence and help them to remember the merchandise and gets that are advertised. There are in this manner a few reasons why firms are constrained to take off deals limited time bundles for its clients and potential clients. Sales Promotion dissimilar to the next limited time blend gives speedy reaction from clients and potential clients. It is for the most part for a brief span, for a particular period prompting a feeling of direness in purchasers to purchase now, since the business advancement isn't until the end of time. This
anyway makes a quick positive effect on deals. Administrations and items institutionalization in the worldwide market IV. has likewise offered ascend to the expanding utilization of offers advancement in contacting its purchasers and potential buyers. Brands and administrations particularly in the telecom business have been seen by shoppers to be pretty much comparable inside a given value run because of firm’s powerlessness to truly separate its items. In perspective of this issue, the other limited time blends are not ready to impact the customer’s observations and make mark establishment. As a consequence of these view of likeness among brands, firms have no alternative than to rival different contenders based on the additional advantage offered through sale promotion. Pressure from the competitors and expanded rivalry has additionally offered ascend to the requirement for sale promotion as of late. The expanded rivalry has left organizations to separate their administrations and item on cost and not alternate highlights of the administration or on the other hand item. For example if contenders offer value decrease, challenge or different motivating forces, a firm may feel obliged to likewise turn out with its own business advancement for purchasers to advantage from the administration keeping in mind that they look out of the opposition. All these basis of offers advancement, however special from one another, has a long haul impact on expanding the association’s piece of the overall industry, enhance deals volume, hold clients also, and diminish exchanging of clients.

**NATURE OF SALES PROMOTION IN THE TELECOM INDUSTRY**

Sale promotion is an interest invigorating action intended to enhance publicizing and encourage individual offering. This suggests, for sale promotion to be successful; it must be utilized together with alternate types of advancement. This is because of the way that every one of the different types of advancement has their qualities and shortcoming however when they are utilized together, they help limit the shortcomings and boost the quality. Sale promotion as per them is paid for by the support and as often as possible includes an impermanent motivating force to support a buy. The majority of offer advancements is coordinated at the last shopper and is intended to support the association's business group or different individuals from its conveyance channel to offer its items or administrations overwhelmingly. Promoting officers in the telecom business faces the strain to build its deals and sale promotion is progressively seen as a successful short run apparatus. In develop markets, firms are endeavoring to keep up piece of the overall industry through a harmony between long haul "share of esteem" picked up from promoting and here and now motivations for the buyer. As per them, there are two classes of offers advancement; exchange advancements which are coordinated to the individuals from the dispersion channel and purchaser advancements which are coordinated to the customers.
V. INFLUENCE OF SALES PROMOTION ON CONSUMER PURCHASE DECISION

At the point when a buy choice is made, the buy choice can be influenced by unexpected situational factors. A portion of these components as indicated by them could be straightforwardly connected with the buy, for example the outlet where the buy is to be made, the quality to be purchased, when and how to pay. Most cases, firms evacuate the need to settle on this choice by either including the fundamentals as sale promotion apparatuses like coupons, rebates, refunds and tests. The extra advantage whether in trade or out kind offered to shoppers through sale promotion is almost certain to impact their buy conduct or choice. Subsequent to thinking about the conceivable choices, the shopper makes a buy choice and the purchaser's decision depends to some degree on the explanation behind the buy. The purchaser may act rapidly, particularly if deals special instruments are utilized or the customer may defer making any buy. At whatever point the buyer makes a buy, they discover what items and administrations are accessible, what highlights what's more, benefits they offer, who offers them at what costs, and where they can be obtained. The organizations and its business group give purchasers the market data at whatever point they draw in purchasers in endeavors to illuminate or influence in an endeavor to speak with them. Sale promotion along these lines gives an appropriate connection by furnishing customers with tests of the items for them to test them in little amounts and give shoppers most required data concerning the item. The telecom business in India have understood the need to impact the basic leadership procedure of buyers along these lines enjoying expanded sale promotions of their items what's more, administrations. These business advancements are generally attempted to animate preliminaries of items, increment customer request or enhance item accessibility. The sale promotion completed in Indian telecom industry are for the most part custom-made in such an approach to fit the real choice the customer is confronting.

VI. VODAFONE’S PROFILE AND ITS ADVERTISING STRATEGY

Vodafone is one of the main worldwide brands in brand esteem positioning and it is positioned as the eleventh biggest media transmission organization on the planet and second in Europe. Similarly Vodafone Essar is one of the main media transmission specialist organizations in India. It serves around 35 million clients who are situated in various piece of the nation. It was amid the year 2007, a UK-based Vodafone Group assumed control Hutchison Essar in India and renamed as Vodafone Essar. Hutchison Essar was controlled by Li Ka-Shing who was a Hong Kong very rich person. Vodafone paid $11.1 billion with the end goal to get the 67% stake of Hutchison Essar. The securing of Hutchison Essar in India gave Vodafone an entrance to enter one of the quickest versatile developing markets, where the suppliers include around six million new associations each month. Add up to number of Vodafone Essar Subscribers: 127,364,342, i.e. 22.88% of the aggregate 556,683,683 Indian cell phone endorsers.

Vodafone is known for its extraordinary ad battle, for example, pug, upbeat to
encourage benefit furthermore, most recent discharged "Zoozoo" promotion crusade. As Vodafone was another brand in India, it had a testing undertaking to build up its own element. The past name of this Indian organization was related with a pug. Vodafone chose to accompany another persona for itself, so the general population of the nation can connect it with the organization. The organization accompanied a splendid persona for itself, which was extremely able for it, The "Zoozoo". Zoozoos are notice characters advanced by Vodafone amid the Indian Premier League Season 2 (IPL). Zoozoos are white animals with swelled bodies and egg heads who are utilized to advance different esteem included administrations of Vodafone. Every advertisement utilized a story which was established by the Zoozoos. These promotions however look energized are in reality genuine people in the Zoozoo outfits. The Zoozoo promotions were made in South Africa by Ogilvy and Mather, a global publicizing, promoting, and advertising organization and Nirvana Films (Bangalore base organization) utilized some enlivened characters to make these commercials. Ogilvy and Mather, were requested that by Vodafone make a arrangement of 3D ads which could be broadcast every day amid the IPL Season 2. The ZooZoos turned out to be exceptionally celebrated and famous at brief period. They spent close Rs. 30 million to make these ads. These days it is a standout amongst the most splendid promotions in India. The crusade made the buzz both in the customary media and additionally in person to person communication locales like Facebook and Twitter and video sharing site, YouTube, for instance, it has 2 million individuals on Face book page which is expanding quickly. As indicated by Neo@Ogilvy (computerized arm of O&M) who is in charge of dealing with ZooZoo’s Facebook image ZooZoo fan page has gotten around 2.6 million site visits in contrast with just 0.5 million of IPLT20.com. This advertisement battle has a few ramifications from the financial point of view. Vodafone works in what is known as "oligopoly". An oligopoly is a market structure that has one of a kind highlights on the grounds that it is portrayed by a couple of dealers and common relationship. It is where the each vender attempts to exceed the other through what is known as "value wars" (dropping down costs) and "non-value" wars. Promoting is a piece of "non-value war" where a firm attempts to exceed its contenders through promoting or potentially publicizing techniques to produce mass interest. Zoozoos are some portion of a one of a kind and imaginative ad procedure went for exceeding the methodologies of Vodafone s contenders. By the methods for ZooZoo Vodafone has endeavored to speak to a picture of the urban normal man who is the fundamental drive compel behind the expanded use of telecom and VAS benefits in the media transmission industry. Through ZooZoo character they have attempted to exhibit how the different offered by Vodafone can be helpful for a urban basic man. What Vodafone did was they anticipated the use of their VAS benefits through different notices in light of various subjects according to the item (VAS) that they were putting forth. The different administrations offered by Vodafone, for example, chota revive, gather SMS benefit, occupied alarm benefit, mold tips, energize anplace, bhakti tunes, stock alarm, voice SMS and so on were appeared
to the watchers not by ordinary notice courses however through some clever and infectious ZooZoo advertisements which were effective in quickly drawing the consideration of urban populace including all age gatherings. To the extent the compass of the notice is concerned, this promotion crusade could have been made more powerful by considering the rustic populace of our nation. In all these ZooZoo advertisements, since Vodafone attempted to advance all the Value Added Services offered by them, obviously the focused on clients were the general population who might utilize these Value Added Services. Consequently in their advertisements, Vodafone attempted to exhibit every one of the VAS benefits that they bring to the table to the clients through various subject particular commercials. Every one of the ad was particular to one specific VAS benefit and spun around the equivalent to make the client comprehend the administration. As a result of the uniqueness and engaging quality of these ZooZoos, Vodafone could draw the consideration of the groups of onlookers rapidly towards these promotions and these advertisements moved toward becoming before long extremely famous and consequently the VAS offered by Vodafone.

VII. SWOT ANALYSIS OF VODAFONE

STRENGTHS
Vodafone works in an oligopoly showcase which is described by couple of dealers and an immense number of purchasers. In this market every dealer endeavors to exceed the other through value wars and non price wars. Here notice assumes a vital job since it is a piece of non-value war where a firm attempts to exceed its rivals and win it through broad advertising and publicizing systems to create mass interest. Vodafone has possessed the capacity to infiltrate in the market as informal communication site and the buyer has acknowledged it. The most vital thing is that Zoozos are a piece of a one of a kind and inventive promotion system that gave Vodafone an in the aggressive market. Because of every one of these elements, the crusade has ready to infiltrate in media and also long range informal communication locales. Zoozoo is a semi outsider semi-human character living in earth-like spots which are extremely basic and expressive. They chuckle so anyone might hear, cry noisy and have a kid like straightness around them so the achievement of zoozoo is the accomplishment of moderation and straightforwardness. The zoozoo battle has possessed the capacity to produce a considerable measure of interest among the watchers. The fan club of zoozoo contacted to around 75,000 and different intelligent tests came up in nowadays as apparent in the backdrops and screensavers in the mobile phones. All these changed into an extraordinary viral promoting occasion. Another imperative preferred standpoint is that it includes minimal effort in the execution of the zoozoo battle as contrasted and the advantages it created was microscopic. There is no big name was required as a brand minister which brought about a double advantage.

WEAKNESSES
The ads have some of the time makes a sentiment of doubt and strangeness in their psyches of the country watchers where the education level is similarly low. Actually every one of the commercials were not
straightforward in light of the fact that a few notices have no voice clarifications and it is hard to get a handle on and comprehend for the provincial individuals. So obviously the urban and rustic populace was portioned out and the center focus of this promotion battle was the informed urban populace. The battle had an undermining impact on the brand Vodafone.

OPPORTUNITIES
The crusade has possessed the capacity to break the customary and traditional methods for publicizing through open figures and superstars. As the ads did not make utilization of famous people as mark envoys, it brought about reserve funds of colossal cash. So the utilization of this idea diminishes the cost of administration from the piece of the organization and individuals may hope to get the administration at lower cost. Alternate organizations may likewise be occupied with the achievement of zoozoo in rebuilding their ad systems.

THREATS
Because of expanding notoriety of ZooZoo individuals are more inspired by the advertisements as opposed to the item. It implies that individuals love to appreciate the ZooZoo advertisements on TV instead of utilization the item. It can likewise be said that the brand ZooZoo has turned out to be better known than the brand Vodafone.

industry what's more, buyers are particularly mindful of the different deals limited time methodologies honed by these telecom specialist co-ops. The different systems distinguished in the Indiaian telecom industry by buyers' backings the most as often as possible utilized sale promotions on the planet. The remarkable deals special procedures honed in India included reward for talk time, premiums, liberates tests, cost offs marked gifts, challenges and sweepstakes, and free talk time to family and companions. The business advancement technique that shoppers were for the most part mindful was the challenge and sweepstakes. The purchasers' familiarity with the deals limited time techniques in the telecom industry gives them access to enough data that aides their choice making. The business advancement rehearsal in the business attract these buyers to the item and influence them to do drive buy.

There was a huge impact of offers advancement on customer conduct. Inferring an enhancement in the business advancement procedures will prompt a comparing enhancement in purchaser purchasing conduct towards buying telecom administrations at minimum for the time being. Sale promotion assumes a critical job in affecting the customer choice process by shortening the choice procedure amid buy.

On account of post-buy activities of buyers, the discoveries demonstrated that, customers to a bigger degree protest and whine about their disappointment of the support of their companions and induce them not to buy that specific administration or item. It was understood that, the customer contrast the genuine encounter and their desires to decide their fulfillment. In the event that it lives up to their desires, the probability of

VIII. SUMMARY OF FINDINGS, CONCLUSION & RECOMMENDATION
Sale promotion rehearse is an extremely noticeable element in the Indiaian telecom


www.supremoamicus.org
300

ISSN: 2456-9704
acquiring a similar brand turns out to be high and the other way around.

Telecom specialist co-ops have a great deal of administrations and items that they make accessible to purchasers through their different specialized apparatuses. One of the key special instruments utilized in showcasing these administrations and items is sale promotion. The investigation uncovered that business advancement has an impact in the buy choice of purchasers. It was understood that the buyer may not experience the whole choice making process whenever they need to buy a telecom administration or item. This may be so on the grounds that the evoked sets which present the shopper with built up options may educate the shopper's judgments in choosing which administration or item to purchase. This may in the end keep the purchaser from experiencing every one of the phases of choice making as a result of involvement and accessible data to him. It was additionally watched that the buyer would generally consider which telecom benefit administrator is putting forth the best rebate and the sort of administration that fulfills their need. Sale promotion along these lines is an inescapable limited time device for telecom firms on the off chance that they truly need to keep up or increment their piece of the overall industry. A portion of the difficulties this investigation experienced was availability of data from Vodafone India. This really hampered the examination in light of the fact that the specialist proved unable get data from the Management of Vodafone to affirm the impact sale promotion has on their business, client fascination and client maintenance. The investigation too neglected to survey the effect sale promotion has on client maintenance after the sale promotion is finished. Taking everything into account, this investigation has exhibited that, the purchaser knows about the data around him and are continually anticipating exploit the sale promotions being controlled by these telecom specialist co-ops.

Suggestions have been made about measures that could be taken to enhance the routine with regards to sale promotion in the telecom business with the end goal to impact the customer purchasing conduct adequately. The next might be noted: The administrators must strengthen the utilization of offers advancement as buyers have indicated incredible intrigue and are profoundly affected by sale promotion exercises. Twofold reward throughout the day ought to be deliberately connected as it can lessen benefit. Along these lines it might be utilized related to other limited time apparatuses, for example, coupons what's sans more talk time. More noteworthy accentuation might be put on connection administrations to pick up most extreme favorable position. Sale promotion has here and now impact, thus benefits suppliers need to complete a nonstop follow up to set up long haul association with new clients obtained amid sale promotion period. Telecom specialist co-ops ought to take part in persistent research to accurately inexact shopper desires and plan to meet them to lessen buyer dissensions. Vodafone and other telecom administrators should improve the situational factors, for example, show of things, appearance of offers people, area of showrooms and in addition installment forms. These elements and other situational components will improve the viability of
their business advancements to impact their purchasers.

IX. BIBLIOGRAPHY

1. Websites:
     - www.studymode.com
     - www.marketing91.com
     - www.academia.edu

2. Books:
   - Advertising and Promotion: An Integrated Marketing Communications Perspective
   - Fundamentals of Selling
   - Advertising Promotion and Other Aspects of Integrated Marketing Communications
   - Advertising and Promotion
   - Marketing Management Kotler & Keller

*****