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EDITORIAL

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

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

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

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INTRODUCTION

Marital rape though has gained attention recently, still remains an unstable concept. The legal definitions of this concept differ from one country to another because the experiences and sufferings of women in every country have been of a different degree. While some countries are at one extreme where ejaculation is an important essential to prove rape\(^1\), there are countries at another extreme that define rape as sexual intimacy pressured on one individual.\(^2\) Like rape between two known or unknown individuals, rape in a marriage includes forceful anal and oral intercourse as well.\(^3\)

When there is a conversation about marital rape, there are three main controversies. Firstly, the legal offence of rape does not include the offence of marital rape because the legal definition and general understanding of the crime states that the victim of rape can be anyone but the wife of the perpetrator. Secondly, using the term “marital rape” becomes problematic because it gives a judgmental sense to label the interpersonal relationship and feelings between husband and wife as rape. Thirdly, the entire concept is questioned when an issue is raised as to whether a woman being sexually assaulted and raped by her husband is itself problematic.\(^4\)

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\(^1\) Irene Hanson Frieze, ‘Investigating the Causes and Consequences of Marital Rape’ (1983) 8 Signs 532.
\(^3\) Katz and Mazur.
In most of the countries the two criteria for marital rape are constant i.e. as stated, the perpetrator and the victim are married when marital rape is being committed and rapist is immune from prosecution in such a case.\(^5\) This is the major issue with all the countries. The debating parties i.e. the opponents and the defendants in today’s world agree on the fact that the issue of the debate has only recently arisen. The Women’s Movement in the 1970’s has increased the sensitivity of the women towards this crime.\(^6\) Therefore the defendants of the exemption of marital rape as an offence argue that the women began challenging their husbands on this issue only twenty-five years ago. The American judges also state that the women never challenged the subject until the 1970s.\(^8\)

There are various implicit and explicit factors that cause marital rape of the women in the marriage. Broadly there are two main categories of these factors. Firstly, whether the marital rape is caused due to the woman’s fault, fault of both the parties or fault of the husband. If the women blame herself or is to be blamed in one kind of this situation, she would be unlikely to report the same in comparison to the other two situations. They might try to solve and suppress their sufferings through therapy.\(^9\)

Secondly, whether the attributions of the parties in the marriage are stable, uncertain or unstable. The stable factors depict that the marital rapes are continuous and are not going to stop, uncertain factors mean that there is no certainty in the situation i.e. the situation might get better or worse and unstable factors are those factors that make marital rapes short lived and stop after a period of time.\(^10\)

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<th>Stable Factors</th>
<th>Uncertain Factors</th>
<th>Unstable Factors</th>
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<td>Woman is to blame</td>
<td>She was raped in the past. She is unresponsive sexually. She doesn’t love him anymore. She doesn’t like men.</td>
<td>She is not affectionate enough</td>
<td>She refused to have sex with him. She was raped by someone other than her husband.</td>
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<td>Joint Responsibility</td>
<td>Their sex drives are different. They are not compatible. He does not respect her.</td>
<td>They have a communication problem</td>
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<td>Husband is to blame</td>
<td>He has emotional problems. He enjoys using force. He is an alcoholic. He is a sex maniac. He feels it</td>
<td>He is insensitive. He needs to prove his manhood.</td>
<td>He was emotionally upset. He was drunk.</td>
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\(^6\)Ibid.
\(^8\) Warren v. State, 336 S.E.2d 221, 223 (Ga. 1985).
\(^10\)Ibid.
Table 1. Hypothetical Causal Explanations for Marital Rape, Source: Irene Hanson Frieze, ‘Investigating the Causes and Consequences of Marital Rape’ (1983) 8 Signs 532.

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OBJECTIVES OF THE STUDY
1. To compare the marital rape laws and debates in for major countries of the world
2. To understand whether the countries which have made marital rape an offence will be able to guide the countries with no laws on the same.

METHODOLOGY
The paper is a qualitative research that relies on certain facts and data. It has attempted to lay down the status of marital rape as an offence in mainly four countries that is India, UK, USA and Singapore. With this structure, the paper aims to explain the details of marital rape as an offence in UK and some states in USA whereas the debates have been laid down for the other countries that try to understand the reasons behind not making marital rape an offence.

DISCUSSION
CURRENT POSITION IN INDIA-
In India, marital rape is still not a crime. The struggle for criminalizing marital rape has been huge but couldn’t beat the orthodox foundation of the legal norms that allow the husband to indulge in sexual activity with his wife any time at his will but without her consent. This foundation rests on the notion of marriage as a sacramental bond between the husband and wife, where the wife is in a subordinate position to the husband. There is no legal development with respect to the criminalization of marital rape even after filing plethora of petitions in this regard. October 11, 2017 can be remembered as an important stepping-stone for the issue of marital rape being made a criminal offence. The Supreme Court on this day recognized this offence as a crime for wives below 18 years of age and made it punishable in the case of Independent Thought v. Union of India and Anr. While Justice Madan B. and Justice Lokur recognized the second exception of section 375 of the Indian Penal Code as against the fundamental rights of the women, it clearly refrained from commenting on the issue in general.

POSITION OF MARITAL RAPE IN SINGAPORE
Marital rape is partially allowed in Singapore. Section 375(4)11 of the Singapore Penal Code – No man shall be guilty of an offence under (1) against his wife, who is not under 13 years of age, except where at the time of the offence-
(a) his wife was living apart from him,
(b) his wife was living apart from him and proceedings have been commenced for divorce, nullity or judicial separation, and such proceedings have not been terminated or concluded;
(c) there was in force a court injunction to the effect of restraining him from having sexual intercourse with his wife;
(d) there was in force a protection order under section 65 or an expedited order under section 66 of the Women’s Charter (Cap. 353) made against him for the benefit of his wife; or
(e) his wife was living apart from him and proceedings have been commenced for the protection order or expedited order referred

11 Section 375(4) of the Penal Code – No man shall be guilty of an offence under (1) against his wife, who is not under 13 years of age, except where at the time of the offence-
Penal Code, which deals with rape, clearly states that a man will not be held liable for sexual intercourse with his wife unless the wife is under 13 years of age or the man has been living separately from his wife due to an injunction, court order or under another procedure. Sir Matthew Hale originated this exemption rule when he wrote extra-judicially to state that when a man and woman marry, the woman contractually and consensually gives herself to her husband. Hence the husband can never be guilty of raping his wife.\(^\text{12}\) There is no evidence of any authoritative support to this argument.

The first case where Hale’s doctrine was being discussed in detail was R v. Clarence\(^\text{13}\) in 1888. In this case, the man was accused of occasionally causing bodily injury to his wife and having sexual intercourse with her when he was suffering from gonorrhoea without informing her of the condition. The wife claimed that if she had known of his condition, he wouldn’t have consented and therefore this amounts to assault. The husband was convicted at the first instance but later his decision was overturned. The six judges who were pronouncing on the exemption rule on marital rape had conflicting views. The first judge Will J. stated that sexual intercourse between married couples in a situation like above would constitute rape unless the offence of marital rape does not exist in the first place. He, personally, did not believe in the absence of marital rape as an offence.\(^\text{14}\) The second judge was also concurring with Wills J. to state that though Hale C.J. is a high authority to comment on such laws, no higher authority has been cited to support his claims. Therefore, it becomes difficult to accept such claims because there can exist legal situations in a marriage where the wife can refuse sexual intercourse with her husband. For example, when the wife is sick, and the husband forced himself on her by bringing a third party into the equation. Therefore, there should be provision left to state that marital rape might become an offence.\(^\text{15}\)

Smith J. and Stephen J. have agreed on similar lines to state that when two individuals get married, the woman gives herself to the man and consent to allow her husband to exercise his marital obligations, rights and duties. However, if the wife rejects or revokes her given consent, the husband should no longer be allowed to exercise his right of sexual intercourse. An interesting observation to make is that the judges don’t disagree with the slight possibility of marital rape as an offence, rather only keep the interpretation of revoking the consent open.\(^\text{16}\)

Hawkins J., the fifth judge, was in alliance with Sir Mathew Hale to state that a marriage is a contractual relationship between two individuals and the consent of the wife given to the husband is irrevocable which is not the option a woman being forced upon by anyone other than her husband has.\(^\text{17}\) Pollock B. is a concurring judge with Hawkins J. and claims that the husband and wife should feel connected in a marriage of which sexual intercourse is an

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\(^{12}\) Id. 629.  
\(^{13}\) (1888) 22 Q.B.D. 23.  
\(^{14}\) Id. 33.  
\(^{15}\) Id. 58.  
\(^{16}\) Id. 37.  
\(^{17}\) Id. 53.
essential element. In order to maintain this connection and the marital relationship, the woman does not have the right to refuse to give her consent to her husband for the same.\footnote{Id. 63-64.}  

The exception of a man to be held liable for rape if he has sexual intercourse with his wife when the wife has obtained a separation order from the court was carved out in the case of \textit{R v. Clarke}\footnote{(1949) 2 All E.R. 448.}. The facts of this case were that the wife had obtained a separation order from the court against her husband. When the husband forced himself upon her, she approached the court for punishing him for marital rape. The counsel of the husband argued that the latter couldn’t be held liable for a crime that is not known to criminal law. The judge squashed the argument of the husband and decided that if the wife had been granted a separation order from the court, she does not have the duty to follow marital obligations and her right to refuse sexual intercourse with her husband revives again.

By analysing both the cases, it can be concluded that Singapore, though speedily moving towards development, has not been able to evolve in the ideological aspect. These cases were decided approximately half a decade ago, yet the decisions of these cases still stand as the law for the entire country. Their husbands are raping around 90\% of the total population of women. The law on marital rape is archaic and needs to change according to the current demands and needs of the women in society. The marriage is and will always be a sacred contract between two individuals, however, no man should have the right to oppress the woman’s sanctity and take away her right to consent, not even her husband. The women deserve to live a healthy and consensual life as well alike men.

\textbf{POSITION OF MARITAL RAPE IN UK-}

Rape in UK is defined in Part 1 of Chapter 42 of the Sexual Offences Act, 2003. Section 1 of the act states that when a person intentionally penetrates the vagina, anus or mouth of another person with his penis, without reasonably believing that the other person consents, the person is said to rape the other person. Section 75 defines consent as the freedom and capacity to make a choice.

Torture against wife in the form of physical assault, whipping and forced sex can be traced to a long history in UK. The male prerogatives of exercising a superior right of over his wife and subordinating her to an inferior position were enshrined in the English Common Law which again recognised the contractual nature of marriage giving husband the right to treat her wife as a subject of domination. \textit{Sir Matthew Hale}, in his \textit{Legal History of the Pleas of the Crown}, wrote that "\textit{The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.}"

The principle that marriage created conjugal rights between the spouses and that it cannot be annulled except by a private Act of the Parliament was framed in the \textit{East's Treatise of the Pleas of the Crown} in 1803 and repeated in \textit{Archbold's Pleading and
Evidence in Criminal Cases in 1822. Hence, the spouse cannot revoke the conjugal rights created by the contractual marriage and hence no rape can exist between the spouses. The first concrete case to exempt forced sexual intercourse between the spouses from the category of rape was R v. Clarence20 where the husband had sexual intercourse with his wife knowing that he was infected with the gonorrhoea. The Court held that, as sexual intercourse within a marriage was consented to, therefore fell short of the requirements for a conviction under s 47 of the Act. It was not long until this position of law was completely changed in the case of Rv.R where the House of Lords found that it was possible for a man to rape his wife and even within a lawful marriage, any non-consensual sexual activity amounts to rape.21 The court examined Section 1 of the Sexual Offences (Amendment) Act 1976 which used the word ‘unlawful’. This perhaps had been the biggest stumbling block to progress since it implied sexual intercourse within marriage could never be unlawful. 22 The court, declared the immunity of the husband as propounded by Hale as obsolete and went on to say that times have changed and the modern society sees marriage as a union between two equal partners, therefore the old notion of woman being a property of man is preposterous. This judgement was welcomed by the Judiciary as well as by various commentators.23

The General Sentencing Council Guidelines issued in 2014 suggested some offences for the inclusion of some offences in the category of marital rape and provided for the sentencing range for the offence. It provides that, the sentences can range from 4-14 years depending on the facts and circumstances of the case with some aggravating and mitigating factors. Three categories of offences are specified by such guidelines: In category one, the offences with the aggravating factors present attract a punishment of custodial sentence ranging from a 5 years and 19 years. on the other hand, the offences with mitigating factors range from 10-15 years of sentencing. The sentencing of category two along with the aggravating factors range up to 9-13 years and 10-15 years for the offences consisting of mitigating factors. Category three offences provide for low sentencing range for 6 to 9 years in case of aggravating factors and 4-7 years in the cases of mitigating factors.

It is thus inferred that; the offence is punishable more severely with the presence of aggravating factors. These factors include previous conviction of the defendant, betrayal of trust, planned assault, abduction and detention of the plaintiff, plaintiff being blackmailed and coerced, use of any weapon, drugs or alcohol, committing the offence in the presence of children,

20 R v Clarence [1888] 22 QBD 23
preventing the plaintiff from filing the complaint, tampering the evidence. On the other hand, the presence of the mitigating factors reduces the overall sentence passed which include, the previous good character of the accused with no previous convictions or when the defendant successfully shows remorse after committing the crime.

In addition to these aforesaid punishments, the defendant husband when found guilty of marital rape also faces consequences in the form of inclusion on the Sexual Offenders’ Register and enforced adherence to notification requirements.

There is no provision which punishes a woman for committing rape as the offence requires penile penetration, however the laws of UK provide some remedies to the victim husband. A woman committing a sexual act without the consent or against the will of her spouse, will be said to be committing a sexual offence under UK laws. She will be charged for causing a person to indulge in sexual activity without consent, sexual assault and sexual coercion.

POSITION OF MARITAL RAPE IN USA
The criminalization of marital rape in USA can be traced back to the history which stretched over several decades. The attempts to criminalize marital rape although began in the 1990s but until 1976, marital rape was legal in many states. In the United States, prior to the mid-1970s marital rape was exempted from ordinary rape laws. The exemption is also found in the 1962 Model Penal Code, which stated that, a male who has sexual intercourse with a female not his wife is guilty of rape. It was not until the decision in Oregon v. Rideout, which led many American states to allow prosecution of the husband. Moreover, the New York Court of Appeal’s decision in the case of People v. Liberta, set concrete laws for marital rape by holding its exemption as unconstitutional. The Court stated that "a marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity".

It is however a sexual offence now in about 50 states of the USA. Some states still do not consider marital rape as a serious offence. While some states have successfully made no distinction between rape and marital rape and as a result it is treated as a crime under one section of the sexual offences code. The states that have laws that make no distinction between marital rape and stranger rape are Colorado, Delaware, Florida, Georgia, Indiana, Massachusetts, Montana Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Texas, Utah, Vermont, Wisconsin and the District of Columbia. There is no exemption given to the husband from the rape prosecutions in at least 20 states including the District of Columbia.

In the remaining 30 states, the husband may be exempted in cases of statutory rape or in cases when he does not use force but however commits a sexual act without her

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25 Id.
27 People v. Liberta, 64 N.Y.2d 152 (1984)
consent because the wife in such a case finds herself in vulnerable position. In South Carolina, a prosecution for spousal battery (rape) may not proceed unless the offending spouse's conduct was reported to law enforcement within thirty days of the event.\textsuperscript{28} The laws of Virginia aim towards personal marital counselling instead of court proceedings in cases of marital rape.\textsuperscript{29} There is thus no general criminal procedure and sentence for marital rape, there are different procedures in different states ranging from severe or even mild punishments depending on the facts and circumstances of the case. Most states penalize marital rape like any other rape—that is, with fines that range between several thousand dollars in some states, to over $50,000 in others; and with prison terms that vary between several years and life in prison without parole.\textsuperscript{30}

CONCLUSION

It can thus be concluded that except for United Kingdom and some states in USA, marital rape is not seen as an offence in the other countries discussed in this paper. There are various stigmas attached to marital rape being a punishable offence in the context of the cultures being observed. The most widespread stigma is the concept of patriarchy where it is believed that a woman is the property of her husband and therefore, she needs to comply with all the demands of her husband including his sexual needs. What is still not understood and accepted that a wife is first a woman and she should be able to give her consent out of her own free will, even if the man she is having sexual intercourse with is her husband.

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\textsuperscript{28} South Carolina Code, Section 16-3-615
\textsuperscript{30} Id.
THE MARITIME ARBITRATION: ISSUES, RECENT TRENDS AND COMPARATIVE PROSPECTS

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ABSTRACT

Alternate dispute resolution is used for getting speedy justice without going into the procedures of the Court. This form of dispute resolution is used by maritime people as it has various advantages to them such as keeping the confidentiality of their work, no tension of getting into the dispute of jurisdiction, no time taking procedures.

Arbitrators are also chosen by the people itself who have proper knowledge in this field, keeping in mind many other factors for choosing arbitrators. Many more such advantages and disadvantages of using this method will be discussed in the paper such as the fact that Arbitration was traditionally developed to give speedy and affordable justice to the parties, however it has lost its essence nowadays.

Although using judiciary as a form of resolution may on the other hand help in less expense to the parties. Therefore, advantages of judiciary as a method shall also be discussed. Maritime arbitration is different from the general method of arbitration that is used these days.

Many recent developments have been made in maritime arbitration such as proper procedure for making counter-claims, more detailed statement of claims and statement of defects etc. These help in proper functioning and effective resolution of the disputes with less trouble to the parties involved.

KEY WORDS:
Alternate Dispute Resolution, Arbitration, Judiciary, Judicial Settlement, Maritime Arbitration,

INTRODUCTION

Alternate Dispute resolution methods had been developed for speedy and easy decision making keeping in mind the burden of work on the judiciary. One of which is arbitration. 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. Arbitration has been a successful alternative to litigation for the maritime community for hundreds of years. For example, organizations like the Society of Maritime Arbitrators have thrived as resources for alternative dispute resolution by adopting rules based in part on the Federal Arbitration Act (“FAA”) to achieve the goals of cost efficiency, speed and fairness. The advantage of using this method rather than litigation is that the parties involved are allowed to choose judge(arbitrators) and procedure of their

33 Ibid.
own choice, which results in faster and burdensome justice. Uniformity in ancient international maritime law developed in response to inevitable disputes that arose in trade, in order to minimize surprises and support, rather than restrict, commerce.  

Nevertheless, Maritime Arbitration is somewhat different from the general arbitration in following ways:

1. It has some form of distinctiveness as far as sources of law are concerned, the arbitration agreement is usually included in contracts based on uniform forms drafted and periodically updated by maritime organizations such as the Baltic and International Maritime Council (BIMCO), the Association of Ship Brokers & Agents (ASBA) and the Japan Shipping Exchange (JSE): these are, among others, time and voyage charter-parties and other kind contract for transport of goods (e.g. bareboat charter agreements, contracts of affreightment), shipbuilding, ship repairing and ship scrapping contracts, salvage agreements.

2. The arbitrators make their decision by an alternative to International and National source of law which is the lexMaritima i.e. rules that have been evolved through the use by maritime community.

3. Another difference is the object of the matters involved i.e. under maritime arbitration, the disputes are usually related to non-fulfilment of transfer of goods, damaged goods, insurance claims, tort liabilities etc. These issues basically do not involve the arbitrators getting into proper factual or legal questions but rather demand the arbitrator’s knowledge of history of maritime traders etc.

4. Usually this is the reason, maritime arbitration generally required the use of Ad Hoc arbitrators who have certain expertise and knowledge of the dispute in hand relating to maritime issues.

5. The choice of arbitrators is also based on an important aspect i.e. nationality. Generally, the disputes may involve the parties to be of different nationality. E.g. As in the case of collision at sea, so the arbitrators are required to be unbiased and not favouring a particular nationality rather than deciding on the basis of law.

ADVANTAGES OF MARITIME ARBITRATION

The advantages of Maritime Arbitration are classified as follows:

1. The parties can choose to avoid the procedural and structural characteristics involved in litigation.

2. Generally, the courts do not have judges that have experience in maritime disputes so it is likely that they will decide the matters in hand by applying general methods of law or the laws if their states etc. rather than applying the traditional customs of maritime.

3. Another advantage of using arbitration in these matters is that, if national courts are involved in solving the disputes it may result in biasness as one of the parties may get advantage from it.

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34 Supra Note 2.
36 Ibid.
4. Using arbitration as a method of resolution may also prevent disputes regarding jurisdiction which are generally the matter in maritime disputes.

5. Another advantage is that, it may keep the confidentiality of matters involved.

6. The finality of the award, which implies the preclusion of judicial redetermination of arbitrated disputes and a general limitation of the right to judicial review granted by national regulations.\textsuperscript{37}

**Issues & Challenges Involved in Maritime Arbitration:**

Although, the Maritime arbitration is very popular and advantageous method of dispute resolving, it also has some issues that are needed to be solved. These are:

1. The Maritime arbitration suffers from some procedural problem i.e. the arbitrators generally does not have that much power as compared to the judiciary, therefore some matters require the support from the judiciary.

2. Arbitration was traditionally developed to give speedy and affordable justice to the parties, however it has lost its essence nowadays. A recent survey on the use of international commercial arbitration conducted among a number of major corporations, across different industry sectors (including shipping and commodities trading), shows that while, overall, arbitration remains the preferred dispute resolution mechanism for transnational disputes, many respondents express concern over the issues of costs and delays of international arbitration proceedings, as well as fear of “judicialisation” which results in a procedure more and more sophisticated and “regulated”, with control over the process moving towards law firms and away from the actual users of this process.\textsuperscript{38}

A famous case involving maritime arbitration is **Mauritius v. United Kingdom**, which involved the issue of the Government of UK to create a Marine Protected Area in British Indian Ocean Territory. An arbitration proceeding was held on this matter between the two countries. The government of Mauritius challenged this action of the UK government on the ground that there is involvement of Sir Christopher Greenwood in the proceedings which can result in biasness as he was the foreign and Commonwealth legal adviser of UK. Although, this claim was not accepted by the arbitration tribunal. Another dispute that arose in the proceedings was regarding jurisdiction. The matter was finally resolved in 2015 by announcing the award that the marine protected area cannot be made by the UK Government as it was not in accordance with the provisions under Article 2(3), 56(2) and 194(4) of the convention.\textsuperscript{39}

Another case is, the case of **Philippines v. China**, relating to the South China sea and four issues were raised in the proceedings. Firstly, the challenge was regarding the rights over the South China Sea, Secondly, issues relating to entitlements of certain maritime zones, Scarborough Shoal and Spratly Islands, lawfulness of China’s actions in the South China sea were also

\textsuperscript{37} Supra Note 5.

\textsuperscript{38} Supra Note 5.

\textsuperscript{39} Supra Note 5.
challenges, lawfulness of action of China by restricting the access of Philippines at Second Thomas Shoal.\textsuperscript{40} The tribunal by the use of Satellite imagery etc. found that China has no entitlement to any maritime zone. It further found that China has breached Articles 77(25) and 56(26) of the conventions and Lastly, the Tribunal did not find it necessary to make any further declaration, owing to the fact that both the parties are already parties to the Convention and are already obliged to comply with it.\textsuperscript{41}

**Advantages of Solving Maritime Matters Through Judiciary:**

Solving maritime disputes through judicial process can be done under three courts of law. These are:

1. International Court of Justice (ICJ)- It is the major international judicial organ which has fifteen members or judges, elected separately by the U.N. General Assembly and the Security Council for a term of nine years.\textsuperscript{42}
2. International Tribunal for the law of the sea- Particularly for the settlement of maritime disputes, the International Tribunal for the Law of the Sea is one of the notable creations established in October 1996 with its seat in Hamburg, Germany.\textsuperscript{43}
3. Commission on the limits of the continental shelf-Commission on the limits of the continental shelf has been established under Annex 2 of the LOS Convention, the Commission consists of 21 members, experts in the field of geology and physics.\textsuperscript{44}

The decisions made by an arbitrator may often be put to appeal in front of judiciary and thereby the decisions are not as strong as the verdict of a judge. In Judicial settlement, no extra expenditure for the appointments of judges of court or tribunal is necessary like arbitration.\textsuperscript{45} Judicial process does not involve high expenses and high fees paid to the Judges and court registrars, together with rental expenses of premises in which proceedings are carried on; all costs of the ICJ are borne by the UN.\textsuperscript{46} In this process there is no scope of making delay regarding appointment of Judges or member of court or tribunal like arbitration because the court or tribunal is established institution.\textsuperscript{47}

**RECENT DEVELOPMENTS IN MARITIME ARBITRATION**

New Rules of The Maritime Arbitration has been development in 2017 by The Maritime Arbitration Commission. The summary of these rules are as follows:

1. **Statement of Claims:** The statement of claim should be more informative e.g. Contact details of parties, phone no., email for urgent communication etc. Previously the time for making any changes in the

\textsuperscript{40} http://rsilpak.org/case-brief-on-the-south-china-sea-arbitration/
\textsuperscript{41} Ibid.
\textsuperscript{43} Ibid.
\textsuperscript{44} Supra Note 9.
\textsuperscript{45} Supra Note 9.
\textsuperscript{46} Supra Note 9.
\textsuperscript{47} Supra Note9.
statement of claims was 30 days, which was reduced to 15 days by the new rules.

2. **Statement of defence:** The content for the statement of defence is also different now, a new procedure was developed for submitting counter-claims and set-offs.\(^{48}\)

3. A proper procedure was developed for calculating the amount of claim for the parties and the fees amount to be calculated by 3% of the total amount claimed money.

4. Recent rules also involve that if different disputes are governed by same arbitration agreement then they can be consolidated together in order to save time and money. The only point is that they should be same in merits and all parties to the disputes should agree for the proceedings to be consolidated.

5. Third party making no claims against the parties to the arbitral proceedings may be involved or joined in the arbitral proceedings provided that there is an arbitration agreement covering parties to the proceedings and the third party, or all parties to the proceedings and the third party agree to such effect.\(^{49}\)

6. The tribunal from the very beginning had the rule of 2 arbitrators, according to the new rules it came about that if the claim of a dispute is not more than USD 15,000 then one arbitrator should solve the dispute.

7. The introduction of an appointing committee was also part of the new rules, according to which if a party fails to decide who should be an arbitrator for their dispute, the committee shall decide the same for them. The Committee shall also decide on matters of termination of arbitrators.

8. In accordance with the new MAC Rules, the confidentiality requirements are extended not only to MAC and its staff, and arbitrators, but also to the parties, their representatives and other persons involved in arbitration.\(^{50}\)

**CONCLUSION**

The issues involving maritime disputes can be solved by two ways i.e. judiciary and arbitration. These differ from each other in various aspects such as number of judges, parties spend more money in arbitration, arbitration decisions are arbitrary in nature while court’s decisions are binding in nature, arbitration procedures are governed by agreement while court procedures are governed by law, judicial method is more time consuming etc. Although both have their advantages and disadvantages, maritime arbitration is more popular in usage than the other. It has many advantages such as confidentiality of matters, prevention from biasness, does not involve jurisdiction issues etc. While using judiciary as a method for solving issues on the other hand may involve less expense as the expenses are generally borne by the government. Many recent developments have been made in maritime arbitration such as proper procedure for making counter-claims, more detailed statement of claims and statement of defects etc. These should be properly complied with for the justice to be served timely and with efficiency.

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\(^{49}\)Ibid.

\(^{50}\)Ibid.
PROFESSIONAL ETHICS

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It is widely acknowledged that the legal profession, as it exists in India today, is a product of the legal system which came into being with the advent of British Rule in India.

It is thus believed that the history of the legal profession in India begins with the Establishment of the British Court in Bombay in 1672 by Governor Gerald Aungier. The first Attorney General appointed by the Governor was George Wilcox, who was ‘acquainted with legal business and particularly in the administration of estates on deceased persons on granting of probate’.

By a Charter granted by King George I on 24th September 1726, a Court of Record in the name of Mayor’s Court and a Court of Record in the name of Mayor’s Court and a Court of Record on the nature of a Court of Oyer and Terminer and Gaol Delivery was established in Madras, Bombay and Calcutta. It is said that in Madras there were four Attorneys at the Mayor’s Court in 1764 and the same number at Calcutta in 1764. Over the years, the Mayor’s Court improved the quality of justice and gave importance to the pleading of case because they were Crown Courts with a right of appeal, first to the Governor in Council and, if necessary, over him to the Privy Council. During the era of the Mayor’s Court two important professional principles were established. The Charter establishing the Mayor’s Court did not lay down qualifications for persons who would act and plead as legal practitioners in those courts.

The expression ‘Advocate’ then extended only to England and Irish Barristers and Members of the Faculty of Advocates in Scotland and the expression ‘Attorneys’ then meant only the British Attorneys or Solicitors. It is significant that cl 11 made an express provision that ‘no other persons whatsoever’ would be allowed to appear and plead or act. The Court was therefore the exclusive preserve of members of the British Legal Profession. This was the position in what was known as the King’s Courts.

On the other hand, Indian Legal Practitioners would appear in the Company’s Courts. Immediately before the advent of British power in India, the administration of Justice in Northern India was in the hands of the courts established by the Mughal Emperors or ruling chiefs owing allegiance to them. Apart from them, pretty chieftains and big zamindars had courts exercising civil and criminal jurisdiction. After the arrival of Warren Hastings in 1772, the civil and judicial administration of the Mofussil territories outside Calcutta was undertaken by the East India Company itself.

Significantly, the Bengal Regulatories VII of 1793, which was created for the first time a regular legal profession for the Company’s Courts, permitted only Hindus and Muslims to be enrolled as pleaders. The Indian High Courts Act, 1862 authorised the creation by
Letters Patent of High Courts in various presidencies.

In Calcutta, the qualifications required for admissions as a Vakil were a degree of Bachelor of Arts or Science followed by degree of Bachelor of Laws and two years of Service as an articled clerk to an approval practicing Vakil of five years standing.

The High Court has these three different classes of legal practitioner, namely Advocates, Attorneys and Vakils. Besides the pleaders there was another class of legal practitioners in the subordinate courts called Mukhtars, who after passing the matriculation examination were required to pass the Mukhtarship examination held by the High Courts.

A major feature of the Act is that disciplinary control is vested with the Bar Councils. Since 1973, by virtue of ability, standing at the Bar or special knowledge or experience in law, he deserving of such distinction.

However in Bombay and Calcutta, solicitors still exist as a class, and their societies conduct examination to grant registration. The Supreme Court rules also give recognition to solicitors, by providing for their enrolment as Advocate-on-Record without the requirement of their having to pass the examination conducted by the Court for Advocate-on-Record.

While efforts are being made to modernize the legal system through amendments to the Code of Civil Procedure and the Code of Criminal Procedure and by devising speedy arbitration procedures, setting up of fast track courts, computerization, etc. A notable feature of the Indian legal profession in the last two decades has been the emergence of public interest lawyers. In a liberalized economy, these lawyers specialize in ‘Transactional’ practice as against litigation practice. On the other hand, the transactional lawyers has to be more result oriented. It is in the context that the present work seeks to examine issues like advertising and multi-disciplinary partnerships.

**Establishment of Bar Council of India**

The Bar Council of India is a statutory body established under the section 4 of Advocates Act 1961 that regulates the legal practice and legal education in India. Its members are elected from amongst the lawyers in India and as such represents the Indian bar. It prescribes standards of professional conduct, etiquettes and exercises disciplinary jurisdiction over the bar. It also sets standards for legal education and grants recognition to Universities whose degree in law will serve as a qualification for students to enroll themselves as advocates upon graduation.

**Purposes of Bar Council of India**

Section 7 of the Advocates Act provides for the following statutory functions of the Bar Council of India:

1. To lay down standards of professional conduct and etiquette for advocates;
2. To lay down the procedure to be followed by its disciplinary committee and the disciplinary committees of each State Bar Council;
3. To safeguard the rights, privileges and interests of advocates;
4. To promote and support law reform;

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5. To deal with and dispose of any matter which may be referred to it by a State Bar Council;
6. To exercise general supervision and control over the state bar council;
7. To promote legal education and to lay down standards of legal education in consultation with the Universities in India imparting legal education and the State Bar Councils. With respect to this point, the Supreme Court has made it clear that the question of importing legal education is entrusted to the Universities in India and not to the Bar Council of India. All that the Bar Council can do is to suggest ways and means to promote such legal education to be imparted by the Universities and for that purpose it may lay down the standards of education. Sections 7 do not entitle the Bar Council itself to frame rules laying down pre-enrolment as Advocate;
8. To recognize Universities whose degree in law shall be a qualification for enrolment for an advocate for that purpose visit and inspects Universities, or direct the State Bar Councils to visit and inspect Universities for this purpose;
9. To conduct seminars and organise talks on legal topics by eminent jurists and publish journals and papers of legal interest;
10. To organize legal aid to the poor;
11. To recognize on a reciprocal basis foreign qualifications in law obtained outside India for the purpose of admission as an advocate in India;
12. To manage and invest the funds of the Bar Council;
13. To provide for the election of its members who shall run the Bar Councils.
14. To perform all other functions conferred on it or under this Act;
15. To do all other things necessary for discharging the aforesaid functions;
16. The Bar Council of India may constitute one or more funds in the prescribed manner
   a. giving financial assistance to organise welfare schemes for indigents, disabled or other advocates;
   b. giving legal aid or advise in accordance with the rule made in this behalf;
   c. establishing law libraries.
17. The Bar Council of India can also receive grants, donations, and gifts for any of these purposes mentioned under point no 16.

In Ex c. Captain Harish Uppal v. Union of India, the court held that section 7 provides in respect of the functions of the Bar Council of India, but none of its functions mentioned in section 7 authorizes it to paralyze the working of the Courts. On the contrary it is enjoined with a duty to lay down standards of professional conduct and etiquette for advocates. No Bar Council can ever consider giving a call of strike or a call of boycott. In case any association calls for a strike or boycott the concerned State Bar Council of India must immediately take disciplinary action against the advocates who gives a call for a strike. It is the duty of every advocate to ignore a call of strike or boycott.

In Raveendranath Naik v. Bar Council of India, AIR 2007 Kar. 75 the court held that the resolution passed by the Bar Council India directing advocates not to participate in any programme organised by the Legal Services Authorities in any Lok Adalat or
any legal aid programme has been held illegal and void.

Section 7-A of the Advocates Act makes it clear that the Bar Council of India may become a member of international legal bodies, such as, the International Bar Association or the International Legal Aid Association, contribute such sums as it thinks fit to such bodies by way of subscription or otherwise and authorised expenditure on the participation of its representatives in any international legal conference or seminar.

Section 7(2) of the Advocates Act provides that the Bar Council of India may constitute one or more funds in the prescribed manner for the purpose of:

(a) giving financial assistance to organise welfare schemes for indigent, disabled or other advocates;
(b) giving legal aid or advice in accordance with the rules made in this behalf;
(c) establishing law libraries.

It may receive any grants, donations, gifts or benefactions for all or any of the purposes specified above such grants, donations, etc., shall be credited to the appropriate fund or funds constituted under this sub-section.

**General Powers of BCI to make Rules**

An advocate shall not act or plead in any manner in which he is himself pecuniary interest.

An advocate shall not stand as a surety or certify, soundness of a surety for his client required for the purpose of any legal proceedings.

**Disciplinary Committee**

- Constitute one or more disciplinary committee.
- Each of which shall consist of three persons.
- Two shall be person elected by the Council from amongst its members.
- One shall be a person co-opted by the council from amongst advocate.

**Bench Bar Relation**

Bar-Bench Relation in law refers to the cordial relationship between the Advocates and the Judges. The Bar (Advocates) and Bench (Judges) play an important role in the administration of justice. The judges administer the law with the assistance of the lawyers. The lawyers are the officers of the court. They are expected to assist the court in the administration of justice. As the officers of the court the lawyers are required to maintain respectful attitude toward the court bearing in mind that the dignity of the judicial office is essential for the survival of the society. Mutual respect is necessary for the maintenance of the cordial relations between the Bench and Bar.

The opinion of our Supreme Court in the context of Bench-Bar Relation has been clearly laid down in *P.D. Gupta v. Ram Murti and Others* as follows: "A lawyer owes a duty to be fair not only to his client but also to the court as well as to the opposite party in the conduct of the case. Administration of justice is a stream which has to be kept pure and clean. It has to be kept unpolluted. Administration of justice is not something which concerns the Bench only. It concerns the Bar as well. The Bar is the principal ground for recruiting judges. Nobody should be able to raise a finger about the conduct of a lawyer. Actually
judges and lawyers are complementary to each other. The primary duty of the lawyer is to inform the court as to the law and facts of the case and to aid the court to do justice by arriving at the correct conclusions. Good and strong advocacy by the counsel is necessary for the good administration of justice. Consequently, the counsel must have freedom to present his case fully and properly and should not be interrupted by the judges unless the interruption is necessary."

**Power to punish for professional or other misconduct:**
Section 36 of the Advocates Act empowers the Bar Council of India to punish an advocate for professional or other misconduct. It provides that where on receipt of a complaint or otherwise the Bar Council of India has reason to believe that any advocate whose name is entered on any State roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee. The disciplinary committee of the Bar Council of India may, either on its own motion or on a report by any State Bar Council or an application made to it by any person interested, withdraw for inquiry before itself any proceedings for disciplinary action against any advocate pending before the disciplinary committee of any State Bar Council and dispose of the same.

The disciplinary committee of the Bar Council of India, in disposing of any case of professional or other misconduct of advocate shall observe, so far as may be, the procedure laid down in Section 35 of the Act. In other words in disposing of such case, it shall fix a date for its hearing, cause a notice thereof to be given to the advocate concerned and Attorney-General of India, Thus after giving the advocate concerned and the Attorney General of India an opportunity of being heard, it will dispose of the case and may make any order which the disciplinary committee of a State Bar Council can make under Section 35(3) of the Advocates Act. Thus, in disposing of such case it may dismiss the plaint, reprimand the advocate, suspend the advocate from practice for such period as it may deem fit and remove the name of the advocate the State roll of advocates. Sub-section (4) of Section 36 makes it that if any proceedings are withdrawn for inquiry before the disciplinary committee of the Bar Council of India the State Bar Council concerned shall give effect to any such order.

### RIGHTS AND PRIVILEGES OF ADVOCATES

#### 1. Right of Advocates:

**Right to Practice:** The most important of right conferred to a lawyer is his/her right to practice but there are a plethora of conditions which has to be fulfilled for allowing a lawyer to exercise his right to practice. This is the only right of advocates that has been codified and placed in the Advocates Act, 1961 with the duties and code of conduct of lawyers. This is an exclusive right and has been conferred to a set of people who are deemed to be qualified to represent others. Earlier even friends and family could represent an accused on facts but due to demand of unification of bar, Section 29 was incorporated whereby there will be only one recognized class of persons entitled to practice the profession of law i.e. the advocates.³ Advocates have been conferred rights to practice not only in all
As a rule, a person who is not an advocate on roll of a high court can not represent accused but there are situations where the courts have used their discretion to allow a power of attorney holder to plead on behalf of the parties. However it is imperative to mention here that an advocate does not include a person in whose favour a power of attorney has been executed to take proceedings in court as he cannot be placed in the position of an advocate, who has been given a vakalatnama.

However, the right of a lawyer to practice is not an absolute right as there are a number of fetters placed upon the same. Section 34 of the Act empowers high court to make rules prescribing conditions subject to which an advocate will be permitted to practice in the High Court and the courts below. Hence, an advocate’s right to practice in all courts is subject to the rules made by High Court.

One thing to be noted in this regard is that Section 30 has not come into operation as yet. Section 1(3) of the Act suggests that the provisions of the Act will come into effect from the day notified by the Central Government and since no such date has been notified in the Official Gazette, the Act has not come into full force. This position was substantiated by the Supreme Court in the case of Altmeish Rein v. Union of India, AIR 1988 SC 1768 at 1771, wherein the Apex Court held that a person enrolled as an advocate is not ipso facto entitled to a right of audience unless this section is first brought into force. This also means that Section 30, in its present form, does not confer an absolute right to practice but is subject to other provisions of the Act.

There have been several instances where this right of advocates has upheld by the Courts for instance in case of Jaswant Kaur v. State of Haryana, AIR 1977 P&H 221, where a Full Bench of Punjab and Haryana High Court held that the provisions under Haryana Agricultural Holdings on Holdings Act prohibiting an advocate from appearing before any authority except Financial Commissioner, were unconstitutional in light of the Section 14 of the Bar Council’s Act, even though Section 30 has not been brought into effect.

However, there have been enough instances wherein the right has been restricted for other reasons. One of the most important cases in this regard is that of Paradip Port Trust v. Their Workmen, AIR 1977 SC 36, where Section 36(4) of the Industrial Disputes Act that forbids parties to industrial dispute to be represented by a lawyer except with the consent of other parties and permission of the labour court, tribunal etc. The court held that Section 30 of the Advocate’s Act would not be applicable in this case as Industrial Disputes Act is legislation with avowed object of labour welfare and representation before adjudicatory authorities has been specially provided. It was also held that a special Act
would override the provisions of Advocate’s Act which is a general law.

There are a number of other restrictions placed upon the right to practice of a lawyer as they do not have a right to represent others in departmental enquiries. It is also to be noted that the Section does not confer any right on the litigant to be represented by the lawyer but only on a lawyer to practice. Once a lawyer has been engaged in a case, his right continues to be in existence unless and until it is terminated by writing signed by him or his client with the leave of the court; it will also come to an end with the termination of the proceedings or with the death of the lawyer or that of the client.

It is however to be noted here that the right to practice the profession of law is a statutory right and not a fundamental right. It is also to be noted that only advocates, who are enrolled as per this Section can practice, while others not so entitled and illegally practicing are punishable under Section 45 of the Act.

Section 32 of the Act provides for an exception to the application of Section 30 and provides for situations where persons other than advocates enrolled with the Bar can represent others with the permission of the court. This provision acts as an antithesis to the provision under Section 30 as the court has been given discretion to allow any person, not an enrolled advocate to practice law. However, this might be a necessity in certain cases and we need to reply upon the wisdom of the courts to take the right decision in this regard. This position was substantiated by the case of T.K Kodandaram v. E. Manohar, where no lawyer was ready to defend the case, the court decided to allow the petitioner’s brother to represent him. However, it is to be kept in mind that the powers under this Section have been given to the courts and tribunals for special circumstances and they ought to be exercised judiciously.

Another important aspect that is needed to be considered here is the power of High Court to make rules regarding right to practice of the advocates. However, it has been specified that the words ‘laying down the conditions subject to which an advocate shall be permitted to practice’ under Section 34 must be given a restricted meaning of permitting physical appearance of the advocate and not his general right to practice.

### 2. Right to Fee:

One of the important rights of the advocate is right to fee. An advocate has a right to his fee and this right is absolute as it does not depend upon winning or losing of the case and in either case the client will have to pay up the fee. A lawyer has no legal remedy if his/her fee is not paid, but he accepts what the client is willing to pay in accordance with the bargain but in such cases advocate can refuse to appear before the court. The advocate has also a right to waive this right and take up a case without charging any fee at all.

Another aspect to be taken into account here is that an advocate can be denied agreed fees when he makes default or is found guilty of misconduct but he cannot be deprived of agreed fees where the case has been withdrawn for policy reasons and the
advocate has done some work in that particular case.

3. Lawyers Right To Lien Over Client’s Papers:
Before India attained independence different High Courts in India had adopted different views regarding the question whether an advocate has a lien over the litigation files kept with him. In P. Krishnamachariar vs. The Official Assignee of Madras, a Division Bench held that an advocate could not have such a lien unless there was an express agreement to the contrary. A Full Bench of the Patna High Court in In re B.N. Advocate, held the view that an advocate could not claim a right to retain the certified copy of the judgment obtained by him on the premise that an appeal was to be filed against it. The Bench further said that if the client had specifically instructed him to do so it is open to him to keep it.

After independence the position would have continued until the enactment of the Advocates Act 1961 which has repealed a host of enactments including India’s Bar Council Act. When the new Bar Council of India came into existence it framed Rules called the Bar Council of India Rules as empowered by the Advocates Act. Such Rules contain provision specifically prohibiting an advocate from adjusting the fees payable to him by a client against his own personal liability to the client. As a rule an Advocate shall not do anything whereby he abuses or takes advantage of the confidence reposed in him by his client, (vide Rule 24). In this context a reference can be made to Rules 28 and 29 which are extracted below:

Rule 28. After the termination of the proceeding, the Advocate shall be at liberty to appropriate towards the settled fee due to him, any sum remaining unexpended out of the amount paid or sent to him for expenses, or any amount that has come into his hands in that proceeding.

Rule 29. Where the fee has been left unsettled, the Advocate shall be entitled to deduct, out of any moneys of the client remaining in his hands, at the termination of the proceeding for which he had been engaged, the fee payable under the rules of the Court, in force for the time being, or by agreement of bailment. When settled and the balance, if any, shall be refunded to the client.

The issue was settled by the decision of the Supreme Court in R.D. Saxena v. Balram Prasad Sharma wherein the Supreme Court declared in the negative. In holding that giving the right of lien (unlike what is allowed to a Solicitor in England) would lead to disastrous consequences in as much as the flow of justice would be impeded. Court also noted that given the socio-economic conditions prevailing in the country, holding such a right of the legal practitioner may be susceptible to great abuse and exploitation. The Court setting aside the technical objection that such papers were under an agreement of bailment declared that it was upon the ordinary process of law that the lawyer should recover his dues but not by retaining the files of the client. The Supreme Court also went on to declare that while it was a professional duty and moral obligation of the lawyer to return the brief when the client required to change counsel but also declared that not returning the files would be
the term “Service” and its care and skill in performance of these professional activities. It is fundamental principles that to protect the interest of consumers and to restore the faith of general public in legal system the judicial interpretation of the term „Service“ and deficiency of service” with respect to the legal services keeping in to account the intention of legislature and a objective of the act is the need of society in present time.

A significant number of decisions given by the consumer forums against the professional service providers has brought home, the clear message that the consumer are not going to tolerate the unethical practices of professionals and are liable to pay the compensations for their deficient services.

The legal profession is one of the most maligned one. Literature abounds in disparaging remarks against them, like this quote from Shakespeare: “The first thing we do, let’s kill all lawyers.” There are several remedies against erring lawyers, thought most people avoid confrontations with them as in the case of doctors. Lawyers can be sued like doctors for breach of contract and negligence. Claims for compensation can be filed before the consumer forum for damages suffered due to lawyer’s negligence. A lawyer has duty to take care and be skilful while handling your case, through there is no remedy against bad advocacy. If you do not like your lawyer, you are free to try another. But it is not advisable to change him just because you do not like his advice or he warns you that you may lose. A lawyer who is sought to be replaced may also strike back by not returning the case filed until a hefty bill is paid. He can claim a lien over it.

The conduct of lawyers is governed by the Advocate Act, 1961. Under this law, Bar Council have been set up in states and at the Centre to enroll law graduate as lawyers, to hear and decide cases of misconduct against lawyers, to lay down standard of professional conduct, and to establish procedure of disciplinary committees. They have other functions, which are more from the welfare of the lawyers than for their clients. Bar Councils are also enjoined to set up legal aid committees.

A client may complain against his lawyer to the state Bar Council which will refer it to its disciplinary committee. This committee
has the powers of a civil court and can summon witnesses and records. If the complaint is found to be true, the lawyer may be reprimanded, suspended from practice, or permanently removed from the roll of advocates. Since only advocates are allowed to practice in the courts, the last step would throw him out of the profession. Some of the instances of professional misconduct are, Handling over the brief to another lawyer without the client’s consent, representing conflicting interests without telling the clients, soliciting briefs, undercutting fees, and putting indecent questions at trail. A lawyer could be tried as any other offender in case of cheating or other criminal offences. Proof of misconduct must be beyond reasonable doubt.

C.P. Act, 1986 is the largest development in India to protect the interest of consumers. Any person can claim compensation under the provision of Act including negligent doctors. To get relief under C.P. Act, 1986, the complainant should be a consumer as defined under S-2(1)(d) of the Act and the “service” for the deficiency of which the complaint has been made should comes within the circle of “service as defined under S-2(1)(o) of the Act. As soon as the person, who is trying to file a suit for compensation in the Consumer Forum under the C.P. Act, 1986, proves that he is in the status of consumer, and the act against which the complain is there “service” under C.P. Act, 1986, he becomes entitled to do so. The question is, whether the service of medical professionals comes within the limit of “service”. Except the some earlier decisions courts have include the service of the doctor under the term service and the patient as a consumer as under the Act, on the basis that they receive service on payment. There is no clear cut definition, whether Govt. hospitals comes under the purview of the Act. Hence the policy maker or the judiciary should take necessary step to bring Govt. hospitals under the umbrella of the C.P. Act, 1986 taking into consideration that these hospitals are maintained from the taxes paid by people and on larger humanitarian grounds so that the ordinary people who are the victims of negligent doctors either of Govt. or private hospitals and who are unable to approach ordinary court file the complaint before the consumer court to get redressal.

Since there is no express provision in CP Act, 1986 to include the medical professionals service within the purview of the Act, therefore the role of judiciary has become very important with this regard, before the enactment of the Act the liability of the doctor was decided on the basis of “forn” by taking some principle like res ipsa loquitur and the principles laid down by the British court like Bolom test etc, but after the enactment the question has been raised, whether patients are being saved by applying the C P Act, 1986 in case of medical professionals.

In this scenario, judiciary has played very significant role to protect patient from legal and medical negligence. In the landmark decision of the supreme court delivered in Indian Medical Association v. V.P. Shanta, a clear and effective law has been laid down by the Supreme Court and has given a clear cut ruling with regent to the inclusion of service under C.P. Act, Supreme court make it clear that service render to a patient
by medical professionals by the way of consultation diagnosis and treatment both medicinal and surgical would fall within the ambit of the „service”, as defined in Sec. 2(1)(o) of the act except those service which are render by the doctor free of charge.

It was further made clear that service rendered by non-government hospital/medical professionals where all the person receives the service free of charge are outside the expression of service but persons those are poor who get free service then it come within the ambit of „Service” as in C.P. Act, 1986 because these institutions provide free service by casting these charges open those patient who are economically competent.

It was also made clear in this case that a person who has taken health policy thought not paying charges but are consumer and are entitled to get relief under C.P. Act, 1986 because in such condition the payment was given by insurance company.

I tried my best to put the view of various courts in the test of medical profession and consumer protection while I am thinking as a common citizen. I find that poor people who cannot afford costly legal and medical aid cannot get the compensation for deficiency of service by Government legal and medical professionals I do not at all agree with the view of National Commission as well as Madras High Courts view that medical profession does not come under consumer redressal whether private of Governmental. But I am much agree with present view of Supreme Court in Dr. Suresh Gupta’s case and very recent in Martin D’Souza case including Jacob Mathew’s case in which courts brought the service rendered by medical professionals under the preview of C.P. Act, 1986 and also has given direction to save them from false litigation.

Suggestions:
For better expeditions and effective redressal of the victim of legal the following suggestions are made:

- The Constitution of the consumer for should be modified and the representatives of the legal and medical profession with integrity and proven track record should be incorporated to the forum, so that as and when a case of legal and medical deficiency in services comes up before the forum, it can be decided in a professional manner by following the strict professional standards.

- In order to assure the lawyer and doctors and to prevent cantankerous litigation, Sec.26 of the Act should be amended so that a false complainant may be fined heavily and penalized.

- The Lawyer would not come within the ambit of s. 2(1)(o) of the Consumer Protection Act, 1986, as the client executes the power of attorney authorizing the Counsel to do certain acts on his behalf and there is no term of contract as to the liability of the lawyer in case he fails to do any such act.

- Consumer Redressal Agencies should carry out preliminary inquiries and screening of all the cases filed against the lawyer and doctors to detect the existence of a prima-facie case. This should be made mandatory at the time of admission of the case itself.
Consumption and intoxication of liquor by lawyer and doctors should be forbidden during working and duty hours.

Private practice by the government legal professionals should be banned strictly.

Legal should be encouraged to follow ethics and model code of conduct.

The doctrine of „Informed consent” should be adopted. The client and patient’s right to self determination which forms the basis and enables him to form a rational and informed choice should be respected and enforced.

No attempt should be made in diagnosis and treatment to amend cases of gross negligence of glaring deviations from the accepted norms of code of ethics for legal and medical professionals.

Private/corporate hospital, also should be made responsible at par with government hospitals in paying compensation when right to life is infringed which is protected under Art. 21.

There should be a greater coordination between the various professional association and bodies like the Bar Council of India, Indian Medical Council and several associations like Bar Association, Indian Medical Association in ensuring the compliance with the code of ethics and minimizing the cases of deficiency in legal and medical profession.

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STRIKING DOWN OF SECTION 497 OF IPC: AN ANTI-WOMEN OR PRO MALE LAW; A DISSECTION OF A 158 YEAR OLD LAW

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ABSTRACT
Adultery, a social concern whose occurrence can be outlined as coevality with the existence of marriage as an institution. This is a critical issue since it postures a severe threat to the sanctity of marriage. There is a dreadful need to address this issue since with a passage of time mentality and demands of the Indian society which is remarkably known for its conservatism is shifting. Through this paper, we have tried to trace the progression of this offence and social beliefs and reactions towards this act. We have also analysed how different religion, as well as regions around the globe, treat this act, and further a comparison is being made with UK and Iran's culture and society. For further recognition, revealing study of United Nation's report on adultery is also presented. Efforts are made to find out the intention behind crafting this law and making it female friendly and further comparative analysis is also done demanding the change in colonial-era law. Through this research series of events and committee formed with regards to adultery is being discussed. Attempts are being made to probe the existing Indian laws for adultery and latest judgement decriminalising adultery as a crime. To analyse the effect of the latest ruling on the Indian societies particular hypothetical analysis is being made with different situations and further its effect on dependent and independent wife are also analysed. The Constitutionality of Section 497 is dissected in the light of previous to latest apex Court Judgements.

Keywords: Adultery, Social Beliefs, UN Reports, Section 497 Of IPC, Various Committee, Hypothetical analysis, Joseph Shine case law.

1. INTRODUCTION
“There exists no culture in which adultery is unknown, no cultural device or code that extinguishes philandering.” 51
Adultery is not an unfamiliar word nor a bizarre activity rather an act grown all way along with human civilisation. The only matter of contention is that the word is not clear to us in several aspects its definition and meaning, the law against it or the actual implication of the law in view of tremendously changed society in recent scenario.

Adultery, also known as ‘infidelity’ or ‘extra-marital affair’, is certainly a moral crime and is thought-out a sin by almost all religions. There is, however, difference in the literal, social and legal definitions 52. The dictionary meaning of ‘adultery’ connotes voluntary sexual intercourse of a

51 Helen Fisher, Helen Fisher Quotes, BRAINY QUOTES (Jan 06, 2018, 10:05 AM).
52 The definition of ‘adultery’ that occur in the dictionary is gender neutral, where, it may be committed by either of the sex. However, under most of the statutes, it gender favoured and mostly prescribe ‘female adultery’ which has been webbed around the married woman whose consensual extra-marital sexual involvement without the consent of her husband is an essential condition of ‘adultery’.
married person other than his or her spouse.\textsuperscript{53}

As per the legal definition - (Sec 497) whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man such sexual intercourse not amounting to the offence of rape, is the offence of adultery, and the guilty shall be punished with imprisonment of either description of a term which may extend to five years, or with fine, or with both. In those cases, the wife shall not be punishable as an abettor.

Although under Indian law the wife or the abettor of the crime is not punished. In this much-debated topic which is marked by tussle of rights amongst the male and female activists claiming the tilt towards the particular gender has led to significant changes in this law.

Supreme court on 5th January 2018 in \textit{Joseph Shine vs Union of India} decriminalised the act of adultery as an offence in India. However, it remains a ground for divorce which leads to polarity in the concept of adultery laws and its consequences. This concept leaves the layman in bafflement as to whether it is a socially accepted act or an act contradicting the cultural scenarios. Through this paper, efforts are made to detangle the polar aspects of adultery law in India.

\textbf{1. HISTORICAL PERSPECTIVE}

The term adultery has an Abrahamic origin, though the concept predates Judaism and is found in many other societies. Though the definition and consequences vary between religions, cultures, and legal jurisdictions, the concept is similar in Judaism, Christianity, and Islam.\textsuperscript{54} Hinduism also has a similar concept.\textsuperscript{55}

Adultery is not a new act in society. Since the age of Old Testament or ancient Indian era of Great laws of Manu, adultery is a matter of consideration. Historically it was rigorously condemned and punished, usually only as a violation of the husband's rights.\textsuperscript{56} in Jewish land, the penalty for adultery was stoning for both partners- if they act despite warnings by two independent witnesses.\textsuperscript{57}

\textbf{2. ADULTERY IN A DIFFERENT RELIGION}

The history of Adultery can be traced as always seen as a sinful offence in different religions, the initial laws were based on the religious sentiments of the people. If we consider history adultery was treated as an severe offence for which severe punishments like the death penalty, mutilation and torture were given, mostly the woman were the victims charged for the act, but in some places, men were also held liable for the act. Manusmriti was the enduring code of conduct of ancient Indians, and the general public regarded it religiously which say - “day and night woman must be

\begin{itemize}
  \item \textsuperscript{54} Dr. Vijaykumar Shrikrushna Chowbel Ph.D, \textit{Adultery – A Conceptual & Legal Analysis}, MMCJ, Sep-Oct 2000, at 14.
  \item \textsuperscript{55} Ibid 4.
  \item \textsuperscript{56} Kanchan T and Nagesh KR, \textit{Adultery and the Indian law}, TLLM, 28 Jan at 21.
  \item \textsuperscript{57} Payne-James J, \textit{Forensic Medicine: Clinical and Pathological Aspects}, GREENWICH MEDICAL MEDIA LTD, Aug 14, 2003 at 31-35.
\end{itemize}

\footnotesize{\textsuperscript{53} “The Concise Oxford Dictionary of Current English”; Sixth Edn; Oxford University Press; p. 15.}

\footnotesize{\textsuperscript{54} “The Concise Oxford Dictionary of Current English”; Sixth Edn; Oxford University Press; p. 15.}
kept in dependence by the males of their families and if they attach themselves to sensual enjoyments they must be kept under one's control.” 58

In Hinduism, it has always strictly disciplined adulterous liaisons and considered it as a moral sin. Individuals who have been involved in illicit relationships were to encounter a lot of public disrespect and chagrin. As Hinduism considers marriage to be a religious connection, it becomes imperative to maintain the purity of marriage and to brace marital vows. In Islam, The Quran says “And do not approach unlawful sexual intercourse (zina). Indeed, it is ever an immorality and is evil as a way”. 59

Christianity is one of the dominant religion of the world. Therefore Christianity views on adultery must have played an imperative role in the history of adultery as an offence. They believed that the marriage should be held in trust by all and the marriage bed should be kept pure, for God will assess fornicators and adulterers. 60 The word ‘Marriage bed’ can be described as the sexual relationship between husband and wife, keeping it undefiled means not developing any sexual relationship with anyone else.

3. Adultery: In Jammu & Kashmir
In a state of Jammu and Kashmir, it is evident that laws were far more progressive as compare to India since back to the date when the crime of adultery was punishable only against males in India, in Jammu and Kashmir makes the errant wife punishable along with her paramour an abettor. The question of constitutionality of sec 497, i.e. whether it is ultra vires of the constitution is as much as it exempted the wife from being punishable as an abettor and thus infringed the provisions of articles 14 and 15 of the constitution, has crept up sometimes before the courts but it, has been upheld even by Supreme Court(AIR 1985, SC, 1618)62.

4. Insertion of Adultery Under the Penal Code
In India, the provision on ‘adultery is given under Indian Penal Code, under section 497. This provision of adultery was questionable from its inception as the architecture of this code, i.e. Lord Macaulay was himself against the insertion of such section in the original draft and wanted to keep it out of the purview of penal statutes. His perceptive was that this section would unnecessarily and unwarrantably burden the society to take care of additional non-criminal activities. However, it was included later on.

The enacted first penal legislation in India contained the offence of adultery which was put under Chapter XX that deals with the Offences Relating to Marriage. It contained

59 The Quran 17:32.
62 Smt. Sowmithri Vishnu vs Union Of India &Anr, AIR 1985, SC, 1618 (India).
four sections [494-498]. Thus the section as it was standing in the penal statutes prescribed that if a man, married or unmarried has voluntary and consensual sexual intercourse with a married woman, without the connivance of her husband, he would be criminal held liable for the offence of adultery. The plain reading of this section clearly manifested the original prejudices in the mind of the framer of this section. Thus from the inception of S. 497, it was so drafted to make a man guilty, and complete shield to the wife, even she may be the active participant in the commission of an offence.

The further analysis of this section unequivocally conveys that a man alone can commit adultery and the woman (adulteress) is not liable even as an abettor. Whatever may be justification, or social necessity, this section clearly from its inception put this presumption on legislative agenda that whether the woman is a martyr of adultery or is herself an adulteress, she is entirely free of being penalised for an offence of ‘adultery’.

5. **Argument by Feminist Activists**

This law portrays wife as property of her husband. Accordingly, an argument has been raised that dubious meaning of all the words in Section 497 of IPC entrenches male control over women. There is a twofold inference that can be drawn from this section. One that the man owns his wife sexually and his consent are necessary to gain sexual access over her. Second, the offence of adultery is legally equivalent to that of theft, the goods being the wife’s body. Women are, therefore, denied agency, whether they themselves have committed adultery (as understood generally) or are married to men committing adultery.63

6. **Origin and Development**

In the draft of Indian Penal Code, the offence of Adultery was put as an offence as the creator Lord Macaulay himself was not in favour of the insertion of the provision and was of the opinion that if adultery made as an offence, observed, "There are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives." 64

The primary objective of keeping ‘adultery’ out of the penal statute was the social norms which have already provided the values and norms which take care of such instances. The circumstances he applied to included practice of child marriage and polygamy which was prevalent in those era. Macaulay, therefore, suggested that it would be enough to treat it as a civil injury. Thus, framers of the Code did not included adultery as a crime; which was further added on the recommendation of second law commission. Thus it is evident to note that in the first law commission it was not considered as an offence however in the Second Law Commission, after giving mature thinking to the matter , proceeded to the conclusion that it was not prudent to exclude this offence from the Code.65

63GANGOLI GEETANJALI, INDIAN FEMINISMS : LAW PATRIARCHIES AND VIOLENCE IN INDIA 61(1st ed. 2007).
64GAUR K.D,INDIAN PENAL CODE 388(2nd ed. ).
The second law commission supported the section keeping in mind the situation of women in the country, and they gave the following arguments:66

The argument given that why the wife would not be punished has been provided as follows: — “Though we well know that the dearest interests of the human race are closely connected with the chastity of woman and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is, unhappily, very different from that of the women of England and France; they are married while still children; they are often neglected for other wives while still young. They share the attention of a husband with several rivals. To make laws for punishing the inconsistency of the wife, while the law admits the privilege of the husband to fill his ‘zenana’ with a woman, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking by law an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the individual, operation of education and of time. However, while it exists, while it continues to produce its never failing effects on the happiness and respectability of women, we are not inclined to throw into a scale, already too much depressed, the additional weight of penal law.”67

Thus, in India, a wife is not punished as an adulteress or an abettor for the offence of adultery. It is only the man who is punished for the crime of adultery; the wife of the adulterer has no locus standi to file a complaint against her deviated husband. It is only the husband of the (adulteress) wife who can file a complaint and upon whose complaint the Court can take cognisance of the offence. This position of law regarding making a complaint has been explicitly provided under Cr. P.C Section 198(2), Cr. P.C. treats the husband of the (adulteress) wife an aggrieved party and not the wife of the adulterer husband.

The object of making ‘adultery’ as an offence and restricting it to ‘Man’ alone was to deter ‘Man’ from taking advantage of a woman starved of the love and affection of her husband and deter Man from having sexual relations with the wife of another man. Since men had the social sanction to indulge in those relationships and women were deprived of the love and warmth from their husbands, women were negotiated as the victims and not as the authors of the crime. When Section 497 was implemented there were no codified personal and matrimonial laws like today, but they were unequal and inoperative.68

However, S. 497 provides immunity to the wife despite she portraits to be actively involved in ‘adulterous’ act. The provision

67 Gaur K.D, Indian Penal Code 734/2nd ed.).


www.supremoamicus.org
relating to ‘adultery’ has been so drafted to protect the family as an institution, protection of woman from dominated class and prevent any damage to either spouse due to the ‘adultery’ which has already hampered the ‘faith’ amongst them. In V.Revathi⁶⁹ case Apex Court had to express its view about the object of a penal provision of ‘adultery’.

First of all, it has to be conjectured that S. 497 on ‘adultery’ is a shield to defend, not sward to tear off the marital relationship. It does not provide any of the spouses to use it as a sword to settle account against each other. Therefore, the law relating to ‘adultery’ under Indian Penal Code has been drafted and designed in such a way that a husband cannot prosecute the wife for defiling the sacredness of the matrimonial tie by indulging in adultery. Thus the law does not permit either the husband of the wife to sue his wife or the wife to sue the offending husband for being deceitful to her. Thus both the husband and wife are disabled from striking each other with the weapon of criminal law.⁷⁰

The underlying object of the S. 497 of IPC is to promote the interest of marriage institution. S. 497 of the IPC, 1860 does not enable either Husband or wife to send each other to jail.⁷¹

Another probable object of a provision on ‘adultery’ is that it has been designed to protect the interest of the children. Perhaps it is as the children (if any) are protected from the trauma of one of their parents being imprisoned at the instance of the other parent. Whether one does or does not subscribe to the wisdom or philosophy of these provisions is of little consequence. For, the Court is not the arbiter of the wisdom or the philosophy of the law. It is the arbiter merely of the constitutionality of the law.

8. INDIAN PENAL CODE (AMENDMENT) BILL, 1972
When by virtue of amendment bill an effort was made to make woman equally liable for the offence of adultery, 42nd Law Commission headed by John Romily opposed the opinion by stating that women at that time were at a deplorable situation, hence letting women out of this crime.

This committee favoured the preservation of marriage and further showed its support for making the law gender neutral.

10. NATIONAL COMMISSION FOR WOMEN (2006)
This commission supported for the decriminalisation of the adultery and further asked for the amending the provisions of CrPc for making the wife is also competent for filling complaint of their adulterous husband.⁷²

II. JURISPRUDENTIAL ANALYSIS OF ‘ADULTERY.’

⁶⁹V. Revathi v. Union of India &others, AIR 1988 SC 835.
⁷⁰Ibid 20 (para 5,6)
⁷¹Ibid 20.
⁷²Faizan Mustafa, Marriage is a civil contract — adultery or divorce should have only civil consequences,T(JANUARY 11, 2018, 12:02 AM), https://www.thehindu.com/opinion/op-ed/not-a-criminal-act/article22413886.ece.
To understand the need and utility behind inserting the offence of adultery, it is essential to understand the modality of the legislative framework. There are certain dotes that can be joined to understand its true essence. Firstly, it has been placed under Chapter XX of the IPC describing ‘Of offences relating to marriage’. Thus the four sections 494 to 498 (including 498A) are related with marriage. Thus, the close scrutiny of these provisions clearly revealed that the provisions are so drafted to preserve the sanctity of marriage institution. May it is bigamy, adultery, cruelty or criminal abduction of wife, all provisions are drafted keeping the central theme in mind focusing the marriage institution, its preservation, protection and promotion of harmony. Society abhors marital infidelity. The object of Section 497 of the IPC is to preserve the sanctity of marriage.73

Yet another object underline the offence of ‘Adultery’ and not punishing woman but still existed in the code because at the time when the law was enacted, polygamy was deeply rooted in the society and woman shared the attention of their husbands with several other wives and extramarital relations. A woman was treated as victims of the offence of adultery as they were often deprived of love and warmth from their husbands and was easily give in to any person who offered it or even offered to offer for it. The provision was therefore made to restrict Man from having sexual relations with the wives of other man and at the same time to restrict their extramarital relations to unmarried women alone.74

12. Hypothetical Analysis

Hypothetical Situation:
Where Section 497 is administered as it is without any amendments:
Since section 497 steers no punishment to the wife who is involved in physical intercourse with the third person, and further, the law says that only if done without husband's consent its amounts to a crime of adultery.

Thus from these clauses, few hypothetical situations can be modelled:

Hypothetical Situation 1:
A husband might force her wife to have sex and fall in illicit relations with his boss or colleague for mere promotion or some other benefits.

Hypothetical Situation 2:
A husband might use her wife as a prostitute and might force her to make illicit relations with other men.

In both the hypothetical situations the apathy of wife is vulnerable since in both the cases wives couldn't complain by virtue of section198(2)of CrPc and further the humiliation of wife will remain inaudible due to hollow section which will not make it as an offence merely because here the consent of the husband is involved.

73 Recommendation of V.S. Committee Chaired by Justice V.S. Mallimath; “The Report of the Committee on Criminal Justice Reforms”; 2002; Para 117. The committee has however, recommended for modification of S. 497 of IPC to bring it on the line of gender neutrality.

13. **Lack of Gender Neutrality**
Since only husbands are held liable according to the previous law. On more profound analysis of this, one could decode that if adulterous women procure children by that man then that children will be regarded as a legitimate child, this was further proved in *Shivakumar vs Premvathi.*

14. **Probable After Effects of Striking Adultery as Criminal Offence**
Let us try to probe the new law and its impression on women belonging to both the categories, i.e. Independent as well as dependent women.

1. **For Dependent Women**
   Since according to section 497 only male involved in adultery in punishable so on a practical note although it is a ground for divorce, a dependent woman will fail to gather the nerve to claim for it despite knowing it. Henceforth this will lead to toxify the sacred matrimonial bond and failing to serve the purpose of bonding the marriage.

2. **In case of Independent Women**
   Although they can file for divorce but again there is an inferior ratio seen since it leaves a disturbing effect in the life of the children. Also, further by decriminalising something it implies that act is not criminal and anything that’s not criminal is not wrong too. Hence it leaves the sacred matrimonial bond at the worst terms.

Other Effects of decriminalising

There can be other effects too, one could be disintegration of families, and distorted physiological minds of kids whose parents involve in these activities and some of them may even develop criminal minds to take revenge from their parents since this act is no more a crime but anyhow leads to the harmful effect to the family lives. Also, making this act not punishable may destroy the holiness of sexual rights of legal partner and therefore lead to toxification of the marriage institution.

15. **Constitutional Validity of Section 497**
The constitutional validity of this section has been challenged on several occasions by petitioners as well as a women rights activist. The section making only men liable supports the old age patriarchal society concept that women are weak and not capable of taking charge of their actions and hence must be protected by men. The section is most offending to the Art 14, Art 15(1) and Art 21 of the constitution.

On several occasion the constitutional vires of the section was challenged in the supreme court, in the following grounds:

1) In this consensual act where both the individuals contribute to the act, only men are held liable for the act whereas women despite being abettor in a certain case are not held liable. This goes against the spirit of equality.

2) Further granting only husband right to file against the adultery and not the women draw discriminative boundaries between men and women.

However, the Supreme Court before its ruling in *Joseph Shine vs Union* case

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75 Shivakumar vs Premvathi, AIR 2004 Kant 146(India).
rejected all the arguments advanced against adultery to uphold its constitutionality vires. The apex courts ruled that section 497 does not violate the gender equality under clauses; Art 14, Art 15 and Art. 21 of the constitution.

The Supreme Court in Yusuf Abdul Aziz vs State Of Bombay 76 held that section 497, IPC is not ultra vires. It does not offend Article 14 and 15 of the Constitution of India, 1950. The reasoning given was sex is a sound classification accepted under article 15(3) of the Constitution. The same was reaffirmed in Sowwmithri Vishnu v Union of India 77. Similarly in V. Revathy v Union of India and Ors. 78 The Apex Court declared that section 497 had been formulated to prevent a husband from filing a suit against his wife for committing adultery. Therefore, neither the law permits the husband to bring an action against offending wife, nor the wife can initiate a suit against the offending husband for being disloyal to them.

In Dwaraka Bai v. Nainan 79, the High Court of Madras decided that Article 15 was not contravening the law which discriminated between men and women in requiring desertion and cruelty, besides adultery, when a woman wanted to divorce her husband.

16. ADULTERY LAWS IN INTERNATIONAL PANORAMA.

The Adultery has been defined as a criminal offense in some countries as well as mere a matrimonial civil wrong in others. When it comes to comparing the adultery laws in India versus other countries, the Indian laws nowhere matches with any other country. Almost every country had the penal laws for the offense of adultery. Later on, with the passage of time certain amendment took place which struck down this law of adultery. The legal consequences of committing adultery have varied according to place, community values, the historical era and prevailing ideology. One of the big reason for such changes because those laws were strongly against women’s rights. Here is the succinct of adultery laws of the different country mentioned below:

1. United Kingdom (UK):

In the Earlier, UK was also a country of penalising the guilty of adultery. It all started way back in the early century era of the country. The act of adultery between a married woman with other men than her husband was the serious crime in England. In 1707, English Lord Chief Justice John Holt stated that a man having sexual relations with another man’s wife was "the highest invasion of property" and claimed, in regard to the aggrieved husband, that "a man cannot receive a higher provocation". Even the honour killing was done by the family member if they found the woman suspect of adultery. Later on, the adultery was abolished in 1857. Adultery was decriminalized then after.

2. Iran:

77 Sowwmithri Vishnu v Union of India, AIR 1985 SC 1618.
78 V. Revathi v. Union of India & others, AIR 1988 SC 835.
79 Dwaraka Bai v. Nainan AIR 1953 Mad 792.
In a Muslim country like Iran, Adultery is defined as a serious breach of the criminal breach. It is capital punishment in the Islamic Republic of Iran and punishable by flogging, hanging and stoning. Iran penal reads adultery as:

“Article 63 - Adultery is defined as the intercourse between a man and a woman whose intercourse is inherently forbidden “haraam”, even if it is from behind, other than those cases where the person has had a doubt [i.e., mistaken identity].

Article 64 – Adultery is punished when the adulterer is mature*, sane, and acting by free will and is also aware of the offense and its punishment.

Article 65 – If a man or a woman is aware that the intercourse with the other party is forbidden, and the other party is not aware, thinking that the intercourse is legitimate, then only the party who has been aware, that the intercourse is forbidden shall be sentenced to the punishment.**

17. UN GUIDELINES ON ADULTERY LAWS
United Nations has released the Guidelines under which the issue of calling governments in order to repeal the criminalizing the adultery raised. UN mentioned that the laws made with respect to act of adultery is not gender neutral. After a closer analysis to these laws which criminalize the act of adultery was found that they are discriminatory in nature and gender biased. It was found that strictness is majorly deliberated upon the women whereas it is more liberal on the side of man.
A tragic example was reported by UNICEF: a 13-year-old Somali girl, Aisha Duhulow, was stoned to death in a stadium of spectators in Kismayo on 27 October 2008 after having been found guilty of adultery. Reports indicate that she had been raped by three men while travelling on foot to visit her grandmother in the war-torn capital, Mogadishu. Following the assault, she sought protection from local leaders, who then accused her of adultery and sentenced her to death.###

The UN Working group analysis the early laws of the various country. In their report, they submitted that adultery as a criminal offense violates women’s human right. The very reason for such report through UN Human Rights is because there is gender-based discrimination with women. If the laws were made properly with no biasedness and with gender equality, then there won’t be such report by UN.

18. CONCLUSION
The Hon’ble Supreme Court of India has been decriminalized the offense of adultery. Adultery is no more a criminal offense in India. In the case of Joseph Shine v. Union of India, SC has unanimously struck down the Sec. 497 of Indian Penal Code as it was arbitrary and unreasonable on the part of the woman, also only a male can be prosecuted for the offense of adultery. However, adultery still remains one of the grounds for

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80 The Islamic Penal Code of Republic Iran, Book II, Section 1, Chapter 1, Article 63 - 65.
81 Report from UN Office of the SRSG for Children and Armed Conflict (Press release published on 07 Nov 2008, OSRSG/081107
the divorce in India under Hindu Marriage Act, 1955\textsuperscript{83}. Now when we talk about the sec. 497. Two question raise per se. First, Whether the clause has given under Sec. 497 of IPC is justified? Second, whether decriminalizing the offense of adultery is justified considering India’s environment, ethics, old Manu’s, and even present scenario. India’s rank is 130 out of 189 countries in the latest human development ranking released by the United Nations Development Programme (UNDP)\textsuperscript{84}. India’s population is more than 1.3 billion \textsuperscript{85} & out of which approx. 68% lives in rural areas \textsuperscript{86}. India is stills a developing country. India is not ready for such huge changes which openly allows people to have the extra-marital relationship. Instead of decriminalizing, India was in much need of the amendment in the Sec. 497 of IPC.

It’s not like I am advocating the stoning or mutilation of adulterers like they do in Afghanistan but there should be a law governing over such acts of the people, a law to protect the marriage of two individual. The consequences of this act of adultery not only affect the two individual but also gives mental agony to the rest of the members of the family i.e., children and parents of the parties concerned. People get seriously pissed off if even a boyfriend or girlfriend cheats on them, but to do it within a marriage is to break vows said in front of dozens of the witness. In my knowledge marriage is the biggest social & societal ceremony in one’s life. How could a husband or wife bear the news that their spouse is cheating and has affection and sexual relation to some else? It is quiet expected to hear the provocation crime then after. As happened in the landmark case of K. M. Nanavati vs The State of Maharashtra\textsuperscript{87}. The court can stop someone to prosecute other for the offense of adultery but how would court stop someone to do the provocation crime takes place due to the act of adultery. No one actually can stop it because mere asking for the divorce is not a serve of the justice for the victim, not at all. Divorce should only help to proceed their life with his/her adulterers' partner. All the consequences then after would be bear by the victim only.

This whole discussion leads to the answer of the above mentioned two questions. Answer of the first question leans towards No. The clause has given under Sec. 497 of IPC were not justified at all. And answer of the former question also lean towards No, which says that decriminalizing the offense of adultery is not justified instead of which Sec. 497 of IPC i.e., adultery should have been amended and be framed as it come to the conclusion that

a. “anyone either husband or wife, does the offense of adultery without the permission of other spouse, he or she be prosecuted for the crime of adultery.”

b. The adulterer partner involving in the act of adultery shall be prosecuted if he or

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\textsuperscript{83} Sec. 13(1)(i) of The Hindi Marriage Act, 1955 (Act 25 of 1955).

\textsuperscript{84}http://www.in.undp.org/content/india/en/home/sustainable-development/successstories/india-ranks-130-on-2018-human-development-index.html

\textsuperscript{85} http://worldpopulationreview.com/countries/india-population/

\textsuperscript{86}http://censusindia.gov.in/Census_And_You/area_and_population.aspx

\textsuperscript{87} K. M. Nanavati vs The State of Maharashtra 1962 AIR 605.
she is aware of the fact of others marital status.

By amending the particular clause, it will firstly protect the marriage or will make the adulterer party think before committing such an act. Secondly, it will serve the justice for the victim party for sure.

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KUMARI CHANDRA @ SATI LAJNANI V. STATE OF RAJASTHAN

By Ananya Singh
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ABSTRACT
Premenstrual stress syndrome (PMS syndrome) is disorder seen in females before onset of their menstrual cycles. The appellant in the case has taken PMS syndrome as a defence of insanity for committing murder of a child. Several authorities were relied on by the court to comprehend behavioural changes induced by PMS that can affect females to the extent that they can be violent and can even kill a person. The bench gave an order giving benefit of doubt to the appellant and acquitting her. The judgment was not highlighted by mainstream media yet it is controversial as only on the basis of theories and testimonies of three doctors, the bench has widened the definition of ‘insanity’ without any concrete or corroborative evidence.

BACKGROUND FACTS
Kumari Chandra (appellant) has been accused of pushing three minor children into the well with the intention of killing them. She took them from their school on the pretext that she would show them the temple. While two of the three children were rescued but the third drowned. The trial court convicted her for offence under sections 302,307 and 374 of the Indian Penal Code 1860. Hence the appeal was filed in Rajasthan High Court before the bench consisting Mohammad Rafiq J. and Goverdhan Bardhar J.

CONTENTIONS OF THE PARTIES
APPELLANT- the prosecution failed to prove any motive of the appellant to commit murder of children. At the time of incident, the appellant was suffering from mental disease called PMS. She should be given benefit under section 84 of IPC.

RESPONDENT- The three children were seen alive with the appellant immediately before the incident. Had the eye witnesses not seen the children drowning, the life of two children also could not be saved. The appellant accused was criticised for her conduct and for not maintaining sound character by the parents of the injured children and the deceased which is the motive to kill children. The clear motive behind the offence was taking revenge from the parents. Also, there was no evidence on record that could prove her insanity. Menstruation is natural phenomenon with every woman and it should be not taken as a defence for the criminal act committed.

ISSUE IN THE CASE
Whether at the time of the incident, the appellant was labouring under defect of reason and whether PMS can be a valid defence of insanity for the crime committed?

JUDGMENT AND REASONING
The court relied on the testimonies of three doctors who treated the appellant-accused on different occasions. One of them said that “females do not remain normal in the days preceding to their periods and may even behave violent and become aggressive.”88 Another doctor said that a woman can


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become so irritable during this stage that she may cause injuries to herself and others. The court did not rely on the testimonies of child witnesses as they could be tutored by the prosecution.

The bench also cited a report published in the Duke Law Journal that stated, “PMS syndrome is a disorder afflicting many women. The symptoms of PMS syndrome include excessive thirst and appetite, bloating, headaches, anxiety, depression, irritability, and general lethargy. The symptoms develop and increase in intensity from seven to fourteen days prior to the onset of menses and disappear rapidly thereafter. PMS syndrome can range in severity from mild to incapacitating, in both a physical and psychological sense.”

Another article stated that “hormonal changes cause women to commit crime during premenstrual stage and women are more liable to be detected in their criminal acts during this time.”

The neighbours and relatives of the appellant gave statements that she used to get fits since her childhood and on the date of the incident “she was frothing from her mouth and was looking mad.” The law laid down by the Supreme Court of India is that the burden lies on the prosecution to prove beyond reasonable doubt that the accused has committed the offence but if the accused by placing all the relevant evidences raises a reasonable doubt in the mind of the judge with regards to one or more ingredients of the crime then the judge has to acquit the accused on the ground that prosecution has failed to discharge its burden. The evidence placed by the accused may not conclusively prove his insanity at the time of commission of offence.

The court finally decided that the appellant was able to probabilize her defence that at the time of commission of act her cognitive faculty of understanding the nature of her act was impaired which was triggered by PMS and she was insane. She was given benefit of doubt and was acquitted of all charges.

CONCLUSION
In a country like India where menstruation is a taboo, which also bars women from

See https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1970933/?page=1
91 Supra note 1.
93 Supra note 1.
entering into places like temples, can now be considered as a cause for committing a crime. The appellant in this case has been acquitted by the Rajasthan High Court on the ground of insanity caused by premenstrual stress syndrome (PMS) at the time of commission of the offence by relying on few outdated research articles and statements of three doctors.

The use of PMS as a criminal defence became frequent in 1980s in countries like US and UK which is around the same time when this case was filed. In British cases where two women who, stabbed a barmaid\textsuperscript{94} and killed her lover with a car\textsuperscript{95} respectively, escaped their convictions by arguing they weren’t legally responsible for their acts due to PMS. They were given lesser punishment while in this case the High Court acquitted the accused from all the charges despite knowing the fact that she did commit an offence.

A similar issue has been raised in Battered Wife Syndrome (BWS) cases where women are so traumatised by their husbands that they feel unsafe and kill their partners. The foreign jurisdictions have relied on scientific knowledge and not on incomplete and unevolved research materials. The credibility of research papers cited by the bench in this case is questionable as some of them were not work of experts but students and subjects chosen for the research, to find link between PMS and crime, were actually not accused of any crime.

\textsuperscript{94} Regina v. Craddock, 1981, 1 C.L. 49.
\textsuperscript{95} Regina v. English, Norwich Crown Court, November 10, 1981.

The court did not anticipate the consequences of approval of this ground as a defence. The whimsical use of PMS can be anticipated as the judgment does not provide any clarity on its scope. The courts will have to ensure that without sufficient medical and scientific evidence, plea of insanity due to PMS is not accepted and it may not stigmatise women who are stereotyped of being overly emotional by the patriarchal society.

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LEGAL CHALLENGES OF SPACE TOURISM

By Ankur Singhal & Sakshi Srivastava
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Abstract
Space tourism basically denotes any commercial activity that offers customers direct or indirect experience with space travel. Such activities have many different designs, ranging from long-term stays in orbital facilities to short term orbital or suborbital flights, and even parabolic flights in an aircraft exposing passengers to short periods of weightlessness. This practice began after Dennis Tito, a private citizen, travelled to space aboard the Russian Soyuz capsule in 2001. Since then, the increase in the development of suborbital space travel and the rise in the public interest have encouraged the growth of this venture. Now, in order to provide a more accessible service, companies have made efforts to reduce the price of such trips.

However, the current legal regime is not designed to address these new commercial activities; it was solely drafted to assist in the progress of governmental and exploration of outer space. As a result, number of legal concerns arises for this big commercial venture. So, it is necessary to assess whether the current legal framework can deal with any shortcomings of this new Endeavour or not, particularly in regard to vital issues such as the legal status of space tourists, the potential conflict between air law and space law, and the liability regime for damage caused to states, tourists and any third parties.

In the light of above stated research methods researchers would like to attain a conclusion that now is the high time for the concerned authorities, legal professionals, a jurists and general mass to discuss about it and come out with solutions which is most probably new legislation or better enforcement of existing provisions for ensuring the fact that the state is primarily responsible for taking care of all the aspects of space tourism and ancillary issues.

With space tourism and law it is a typical situation. Basically ‘space tourism’ denotes any commercial activity that offers customers direct or indirect experience with space travel. Such activities have many different designs, ranging from long-term stays in orbital facilities to short term orbital or suborbital flights, and even parabolic flights in an aircraft exposing passengers to short periods of weightlessness. This practice began after Dennis Tito, a private citizen, travelled to space aboard the Russian Soyuz capsule in 2001. Since then, the increase in the development of suborbital space travel and the rise in the public interest have encouraged the growth of this venture. Now, in order to provide a more accessible service, companies have made efforts to reduce the price of such trips.

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assess whether the current legal framework can deal with any shortcomings of this new Endeavour or not, particularly in regard to vital issues such as the legal status of space tourists, the potential conflict between air law and space law, and the liability regime for damage caused to states, tourists and any third parties.

**Seeking legality of space tourist**

A big question arises that whether the tourist can be treated as astronauts when there is no legal definition there to differentiate them from one another. From a legal standpoint, defining an astronaut should consist of two main considerations: training and altitude. Firstly, tourists undertaking this type of training are more likely than others to be considered astronauts. But, if training is considered to be an element of achieving the status of an astronaut, then an assessment of the longevity and the extent of the training may also be required. To illustrate, before a space tourist can visit the International Space Station, they are required to have at least six months of training. By contrast, Virgin Galactic customers undertake only one week of training and, in some cases, as few as three days of training. Regarding the second component, altitude, there is no recognised boundary of space under international space law. Several countries and organisations have, however, suggested various space boundary heights. It is important to note, however, that no limit is universally accepted. If commercial passengers satisfy these requirements of training and altitude, it is possible to argue that they hold the status of an astronaut and are entitled to relevant protection and immunity. However, as noted above, it is difficult to determine the extent of training necessary for a passenger to be considered as ‘a person who has received professional training’, such as that of an astronaut. Moreover, the element of altitude is also difficult to determine and apply to space tourists due to the unresolved ambiguity between international regimes of both air and space law, and a need for further legal clarification on the issue.

Efforts to clarify the legal status of crew and passengers can be found in legal documents concerning space travel to the International Space Station (‘ISS’). For instance, the Inter-Governmental Agreement (‘IGA’) — an agreement reached between the spaces agencies participating in the ISS project — and the United Multilateral Crew Operations Panel Agreement (‘MCOP Agreement’) have divided crewmembers into two main divisions: space flight participants and professional astronauts or cosmonauts.

**Liability regime**

The current liability system thereby excludes space tourism and only extends to efforts by states or international non-governmental organizations sending equipment and astronauts into space for the purpose of exploration and scientific research. A No provision whatsoever sheds light on liability relating to private entities. In this regard, private entities have neither any recourse nor accountability under the Outer Space Treaty and Liability Convention. Thus, the current liability regime does not adequately address the issue of liability to space tourists, which is believed to be one major concern in space tourism. When considering space tourism from a legal perspective, addressing the issues and challenges of the current liability
The regime of the *corpus iuris spatialis in iuris gentium* should be prioritised in terms of space development and regulation. Ever since the 1963 UN Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, the OST, and the 1972 Liability Convention, regulating liability has been a crucial element in regulating space. When discussing liability, potential breaches will be worded in terms of state violations, as opposed to personal violations. The following sections will evaluate this aspect of liability by examining the state-oriented responsibility system under the OST, the dual liability system under the Liability Convention, and the applicability of these concepts under parallel regimes found in domestic law. It will also evaluate whether national legislation aids in the development of commercial space activities. It will do so by primarily evaluating the systems in the United Kingdom and the United States due to their well-established regimes. Due to the number of risks associated with space travel, there is a need to consider the implications of damage and injury that space tourists participating in commercial space activities could suffer. As discussed in Part II, the legal status of space tourists is still uncertain. Unless space tourists are given the status of an astronaut, the current space law regime does not provide sufficient regulation in relation to their rights and obligations. Nonetheless, it should be appreciated that in practice, it is a customary principle that governments are able to claim on behalf of their national corporations or individuals who are injured in space. Such claims must be brought forward through diplomatic channels within a year of the occurrence of the damage. In the event that a resolution is not achieved through diplomatic channels, the process will need to operate under Article XIV of the Liability Convention, which provides that the matter shall continue via a Claims Commission established at the request of either party related to the conflict. This Claims Commission has the power to decide on both the procedure and the amount of the reparation on a majority basis. The Commission’s decisions are reached and made public within a year of its establishment and are final and binding in nature.

**Space Insurance**

Space insurance has been available for a couple of years, especially in the field of satellite launching activities. Further development of space activities has called for more active involvement of private parties. However, a complete set of rules are still to be formulated to realize private financing for space programs. Reasonable space investors clearly know that they are dealing with a cutting-edge technology where there are inherent dangers. In view of the high risks in space activities, the availability of insurance has been a critical element for private parties. As one scholar rightly points out: Passengers are likely (at least in the early, pioneering days) to be required to sign comprehensive waivers of liability in favour of the operator. Appropriate passenger liability insurance will therefore be essential. The probable socio-economic profile of early space passengers (who are

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likely as a group to be more than averagely wealthy and to have high earning capacities) indicates the potential liability exposures will be high.\(^9^7\) In this regard, space insurance could provide effective relief for a whole range of liability risks currently associated with space activities, including space tourism. Two main types of space insurance exist for space activities: insurance of space objects and liability insurance (including third-party liability and product liability).\(^9^8\) Insurance of space objects can be further differentiated into: "(1) pre-launching insurance; (2) launch failure and initial operation insurance; and (3) insurance of the satellite itself.\(^9^9\)

Advocating for an International Convention

The development of space tourism no doubt calls for a legal regime to better regulate the market as well as to offer clear guidance and expected outcomes. It has been widely argued that the existing international space treaties are inadequate for space commercialization.\(^1^0^0\) Among these inadequacies are the current liability regime, which does not provide reasonable recourse and accountability measures for private parties in outer space, and the registration regime with its cumbersome registration requirements.


The current space law regime is unable to bear the burgeoning space tourism industry as _the backbone of international space law is too inflexible to be a stable basis for space tourism_. This article has advocated for a new international convention, one which is dedicated solely to the regulation of commercial space travel, thereby eliminating uncertainties. Such a uniform instrument should take into account the provisions of the already-existing air law regime and consider the regime as a model, particularly in regards to issues of liability. The creation of a comprehensive legal policy in this regard is a key element of the overall development of the commercial aspects of space.

With the strong demand for space tourism, the development of a clear and predictable legal regime is essential before space tourism becomes affordable for the masses. As long as the space travel technology is mature, there are always business opportunities for space tourism. On this basis, economic activity in space needs to be accompanied by the simultaneous implementation of a legal framework through which these activities will be regulated by an international organisation, with a view to gaining effective endorsement as a unilateral system.

Conclusion

The corpus of existing international space law represents an important base from which to develop the legal tools to properly regulate the next stage of space activities. Yet it is not sufficient even for present purposes, let alone for the coming decades. The advent of space tourism raises many unanswered legal questions and other legal
issues will also arise. As more space tourism (and other) activities take place, appropriate dispute resolution procedures must be agreed upon in order to deal with conflicts that will inevitably arise, both at the public and private international law level. Detailed traffic management systems must be developed. Also negligence standard should be adopted in the early stage of space travel. Limiting the carrier's liability will not necessarily deter potential space tourists since they can buy additional insurance, as is the case in aviation. The maximum damages payable to passengers should be well defined. An appropriate amount should be determined based on several factors, including the ultimate goal of promoting the development of space travel, the financial situation of the space travel industry, and the general background of space passengers in the early stage of space travel. The duration of liability should similarly be the period during which the accident takes place on board the space object or in the course of any of the operations of embarking or disembarking.47 In this regard, space objects should similarly be considered an extension of the jurisdiction of the launching state, whose law prevails; 4 8 disputes over liability in space travel could be effectively resolved in national courts according to the above general international law and/or national laws.

Moreover, a comprehensive legal framework must be established at the international level to reflect the wishes of the wider (global) community and provide certainty. At the same time, however, the broader philosophical and ethical aspects of human activities in outer should be applied. The issues represent considerable challenges as to how international law, incorporating the international legal regulation of outer space, will be able to cope with future activities in space, including the advent of commercial space tourism. The way in which the law is developed and adapted to meet the challenges will be important not only for outer space itself, but also for future generations living on Earth.

Outer space belongs to all of us. Our use of it should reflect underlying notions of cooperation and shared benefit, which must remain as the cornerstones in this next phase of human achievement. International law has a crucial part to play in this regard.

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LAND LITIGATIONS (A CASE STUDY IN INDIA)

By Anmol Singla
From Punjab University

Abstract

Introduction: The major chunk of pending cases in India is property and land matters which cover 2/3rd of the total number of pending cases. The major reasons for occurrence of land disputes are the “lack of knowledge” and weak land laws which results in clogging of cases in the Courts. This research paper is exclusively for the state of Haryana (India). Firstly, a concept of Legal scrutiny report of documents and procedures involved in a property transaction is introduced by this research paper. Secondly, a reform of “title of property” is suggested considering the geographical, economic and social factors of the state. The information is gathered by visiting various concerned departments of Haryana.

Methodology: It is a qualitative research paper where the case analysis of the Land Legislations of certain parts of India has been discussed.

Results and Findings: This research paper will focus on the major problem of pendency of civil cases in Indian courts which mainly includes the property litigations.

Keywords: Pending Cases; Property, Land Litigation; Haryana; Title Reform

Introduction
A total of 54,995 and 5, 90,343 matters were pending in the Honorable Supreme Court of India and in the State of Haryana under Honorable Punjab and Haryana High Court on June 2018 and April, 2017, respectively.\(^{101}\) The total number of backlog of cases has reached to 33 Million in India.\(^{102}\) There can be three possible reasons for the pendency of cases in any legal system; firstly, if a legal system is facing excessive red-tapes, secondly, if the judicial bodies are lacking the required workforce and lastly, an overflow of disputes in the society. As per the statement of ex-Chief Justice of India, Mr. Dipak Misra, the judges are hurriedly wrapping up their daily hearings, indicative of the frenetic attempts to wrap up the pending cases, thus, eliminating the first possible reason. Currently there are 16,728 judicial officers in Indian Judiciary whereas the sanctioned strength is 22,474 judges. This braces the second possible reason of pendency of cases in India. The major reason is found to be the increase in number of cases in a legal system.

\(^{101}\) statistics from www.sci.gov.in and www.highcourtchd.gov.in

\(^{102}\) Report of National Judicial data grid
As described in figure 1, the major chunk of the pending cases in Indian Judiciary are property related litigations which is about 66% or 2/3rd of the total pending cases followed by 10% cases related to family disputes. This is surely a whopping figure. This research paper briefly focuses on the reasons of the major chunk of property pending cases and majorly focuses on adding some concrete solution to it.

Statement of Problem
A dispute basically arises when either of the party tries to fraud the other party with malafide intentions. According to Section 25 of IPC, “fraudulently” means “A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.” A person faces this problem mostly because of lack of knowledge.

The major reason of lack of knowledge is that people are not aware about such tools or procedures which should be followed before purchasing a property. The literacy rate of Haryana has dipped down to 67.91% in 2018 from 76.64% in 2011 is a relevant factor to be considered for the reasons of lack of knowledge. This research paper focuses aims to enhance the Knowledge which the purchasers of property lack during various transactions of property in a simplified way.

Objective of the Study
Firstly, the purpose of this research paper is to spread awareness among the people about the various documents, formalities and procedures to be followed to safeguard themselves from any future disputes.

Secondly, this research focuses on other possible reforms which can be introduced in India to reduce the clogging of matters related to property.

The average pendency of any case in 21 High Courts of India is about 1,128 days, that is, three years and one month. It is a need of the hour to get some concrete solution to it. If there is awareness among the people in the society about the various tools to be used before buying a property and more effective laws are introduced then will surely decrease the clogging of litigations in the Courts.

Background of the Study
Scope
In order to get the desired results, this research paper can be printed in a form of a handbook which can be made available for everyone at the time of such need. Variants differing in the information according to the type of property, that is, residential, commercial and agriculture can be introduced. In addition to this, if the legal reforms mentioned in the paper are introduced then it will surely lead to a transformation in the field of litigation of property disputes in Haryana (India). Conclusively, it will reduce the arising of

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103 research of a registered NGO named “Daksh” source: www.dakshindia.org

104 Section 25, Indian Penal Code, 1860.


106 research of a registered NGO named “Daksh” source: www.dakshindia.org
disputes and decrease in litigation clogging forthwith.

Discussion of “Property”

By Jurists
“Salmond” classifies law of property to be a ‘right in rem’ which is a proprietary right; the ‘rights in personam’ is distinguished from it as the law of obligation.

Austin states that property includes all assets whether personal or proprietary and it is a holding of greatest enjoyment for human beings.

Hobbes and Blackstone supports the property which is entitled by law offered to the public i.e. Legal rights.

Position of Property in India
The term “property” has not been defined anywhere in the Constitution of India and it is very difficult to give a conclusive definition of property. However, the word is taken of the same meaning in Article[195](1)(f) and Article 31(2), which means that property which can by itself be acquired, disposed of or taken possession of.

The Supreme Court of India has explained the term “property” in various cases but in the case of State of West Bengal v. Subodh Gopal, Supreme Court gave a wide explanation to the term “property”. According to the Apex Court, property can be understood as anything that is influenced by private appropriation and also enjoyments of it. In legal sense, these are the rights of the owner which the owner can practice against the whole world during the use or enjoyment of the property.

Real Estate (Regulation and Development) Act, 2016
This act was introduced for the promotion and regulation of the real estate sector followed by protecting the interests of the consumers in this sector. This act introduced a concept of “Real Estate Regulatory Authority” to exercise the powers conferred on it to achieve the objectives of the act. Highlighting some of the sections of this act, according to Section 3(1), it safeguards the consumer from unregistered real estate projects in the market, under this section, government has made it mandatory for all the promoters of real estate to get every project registered before offering them to the consumer, which further implies certain rights and duties on the consumer as well provided in the “Real Estate (Regulation And Development) Act, 2016”.

This act further specifies certain functions and duties on the promoters. Though, the position of consumers in such property transaction has improvised but at the same time it has not reached to its appropriate level. The “Real Estate (Regulation and Development) Act, 2016” is universally

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108 AIR 1954 SC 92
109 id.p. 101 these observations have been quoted in MC Setalvad, The Indian Constitution, 1950-1965, pp. 124-25 (1957)
110 Chapter (iv), section 20 of Real Estate (REGULATION AND DEVELOPMENT) Act, 2016
111 section 3(1) of Real Estate (REGULATION AND DEVELOPMENT) Act, 2016
112 Chapter (iii) of Real Estate (REGULATION AND DEVELOPMENT) Act, 2016

www.supremoamicus.org
applicable to all the states of India except Jammu and Kashmir.\textsuperscript{113}

**Haryana Real Estate Regulatory Authority (HRERA)**

This research paper exclusively focuses on the state of Haryana (India). According to the Chief Minister of Haryana, the State is among the fastest developing states of the country. The urbanization of Haryana has grown at the rate of 4.42\% per annum in the last 10 years. For such a developing State, two regulatory bodies have been introduced for the transparency and harmonizing the state which constitutes a body one for the district of GURUGRAM and other for the rest of Haryana.\textsuperscript{114} Therefore, the state of Haryana has introduced two Real Estate Regulatory Authorities in Haryana. As provided in Section 20, the appropriate government may, if it deems fit, may establish more than one Authority in a State or Union Territory, as the case may be.\textsuperscript{115}

**Methodology**

This Qualitative Research paper. The research is done to provide mainly two solutions to the problem:

**Section 1:** It deals with providing the list of required documents and procedures involved in getting those documents in the form of LSR’s.

**Section 2:** It deals with the changes and amendments which can improvise the working of the property litigations in India. This research is purely academic. Various policies and acts introduced or followed around the globe have been studied. Haryana needs a “Property title reforms”,

The research has been done in the form of Legal Scrutiny Reports which includes the information collected by various departments of Haryana which includes DTCP (Departments of Town and Country Planning) Panchkula, HSVP (Haryana Samaj Vikas Pradhikaran) Panchkula, HSIIDC (Haryana State Industrial and Infrastructure Development Corporation) Panchkula etc. and also by visiting the websites and documents provided by the officials of these departments.

The information collected is from the reliable sources of the departments which include the Superintendent, Assistant superintendent, Registrar, Assistant Registrar and other office staff of the departments in the form of one-on-one questioning sessions.

The data is divided in three Appendices.

- Appendices 1: Commercial Property*
- Appendices 2: Residential Property**
- Appendices 3: Agricultural land

*commercial property includes LSR’s for factories, shops, godowns and malls.

**residential property includes LSR’s for plots, houses, floors and flats.

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\textsuperscript{113}section 1(2) of Real Estate (REGULATION AND DEVELOPMENT) Act, 2016

\textsuperscript{114}Statement of Chief Minister of Haryana. Source: www.haryanarera.gov.in

\textsuperscript{115}proviso of section 20, Real Estate (REGULATION AND DEVELOPMENT) Act, 2016
the research paper suggests a reform which can be implemented in Haryana to improvise the status of “title of properties” which is the major dispute in properties of Haryana. The policies which have been researched includes Building Act of France; Rural Zones Act, Denmark; United Kingdom’s urban planning and Development programme; Town Planning Ordinance of Japan; and other local laws of India which includes Rajasthan Urban Land (Certification of titles) act 2016.

Results and Findings
Section: 1
These are some of the important documents which a buyer needs to check before buying a property. The procedures involved in getting such documents have been elaborated in APPENDICES.

- **Title of property/ Title of ownership/ Title search**

According to Austin a prominent jurist, “Ownership” means a “right in rem” which means a right which can be practiced everyone in the ambit of law.

According to Salmon, “ownership” is an individual right which is exclusive of all others.

According to my study, it is the document of utmost importance as it ensures the ownership of the property. In most of the cases of property, title of ownership is the main dispute. To check the status of the property it can become the greatest proof.

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Appendices 1: Commercial Property

In case of “Shops or showrooms” to check the title of ownership refer to Appendices 1.1 Step 1 and 3 of the LSR’s provided.

In case of “Godowns/warehouses” refer to Appendices 1.2 Step 1 of the LSR’s provided.

In case of “Malls/shops in malls” refer to Appendices 1.3 Step 2 and 4 of the LSR’s provided.

In case of “Factories” refer to Appendices 1.4 Step 1 and 2 of the LSR’s provided.

Appendices 2: Residential Property

In case of “Flat in a building” refer to Appendices 2.1 Step 1 of the LSR’s provided.

In case of “House” refer to Appendices 2.2 Step 1 and 2 of the LSR’s provided.

In case of “Plot/land for house” refer to Appendices 2.3 Step 1 and 2 of the LSR’s provided.

In case of “Independent floors in a house” refer to Appendices 2.4 Step 1 and 2 of the LSR’s provided.

Appendices 3: Agriculture Land

In case of “Agriculture land” refer to Appendices 3 Step 1 of the LSR’s provided.

- **Occupation Certificate**

According to “Real Estate (Regulation And Development) Act, 2016"occupation certificate" means the occupancy certificate, or such other certificate by whatever name called, issued by the competent authority.
permitting occupation of any building, as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity. In simple words, occupation certificate certifies the occupation of land to which the land will be used in the future. In case of Re-allotment of properties, it is very important to check the OC certificate.

- **DPC certificate/Approved building plan certificate**

It is the certificate which certifies that the building made is safe for human use. It is mandatory for every building with more than two storeys.

- **Non Encumbrance Certificate/No Dues Certificate**

This certificate certifies the dues or encumbrances over the property. The dues over a property can be from banks or from private lenders. In most of the cases, it is found that there are some dues which are left by the seller for the buyer and the dues has to be incurred by the buyers in this case. For instance, electricity bills, property tax etc.

- **No Objection Certificate (NOC)**

This certificate certifies the property to free from any objections laid down by various government bodies, local bodies or the bodies or organizations of the society. For instance: Storm Water and Drain, Airport authority, pollution department etc.,

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119 *[section 2(zf) of Real Estate (REGULATION AND DEVELOPMENT) Act, 2016]*

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<table>
<thead>
<tr>
<th>Serial No.</th>
<th>Name Of The Document</th>
<th>Purpose</th>
<th>Origin/Photocopy</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>CONVEYANCE DEED</td>
<td>a conveyance deed transfers property in the case of a gift, lease, mortgage, or exchange</td>
<td>Original</td>
</tr>
<tr>
<td>2</td>
<td>Receipt of payment</td>
<td>To check if there are any backlogs in the property.</td>
<td>Photocopy</td>
</tr>
<tr>
<td>3</td>
<td>Possession certificate</td>
<td>to know that the applicant who is putting an application for transfer of plot is genuine allottee of the plot</td>
<td>Photocopy</td>
</tr>
<tr>
<td>4</td>
<td>No objection certificate</td>
<td>To ensure that there is no objection from the dept.</td>
<td>Photocopy</td>
</tr>
<tr>
<td>5</td>
<td>ALLOTMENT LETTER</td>
<td>to know that the applicant who is putting an application for transfer of plot is genuine allottee of the plot</td>
<td>Photocopy</td>
</tr>
<tr>
<td>6</td>
<td>NO DUES CERTIFICATE</td>
<td>to know that the applicant who is putting an application for transfer of plot is genuine allottee of the plot</td>
<td>Photocopy</td>
</tr>
<tr>
<td>7</td>
<td>Layout from HUDA</td>
<td>To check the location of the plot</td>
<td>Photocopy</td>
</tr>
<tr>
<td>8</td>
<td>Transfer permission</td>
<td>To ensure the valid transfer of the property</td>
<td>Original</td>
</tr>
<tr>
<td></td>
<td>certificate</td>
<td>property</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>-------------</td>
<td>----------</td>
<td>---</td>
</tr>
<tr>
<td>9</td>
<td>Title of ownership</td>
<td>To check the good title</td>
<td>Photo copy</td>
</tr>
<tr>
<td>10</td>
<td>Indemnity bond</td>
<td>Bond of sale</td>
<td>Original</td>
</tr>
<tr>
<td>11</td>
<td>Completion certificate</td>
<td>To check if the property is complete as per the norms of huda</td>
<td>Original</td>
</tr>
</tbody>
</table>

**Figure 2:** This figure shows the most common documents to be checked in a property transaction

**Source:** Author

**Section: 2**

This research paper strongly suggests to introduce a “PROPERTY TITLE REFORM” in Haryana, an act similar to Rajasthan Urban Land (Certification of titles) Act 2016. According to the economical, geographical and social factors this act suits the best to the state of Haryana which will reduce the disputes in properties and will act as a property title reform in the state.

Property title reform: The title guarantees the ownership of an immovable property. The most common reason of any property litigation is the title of the property, that is, the “ownership title” of the concerned property. To regulate the “Titles” of property in a state there should be an authority which rectifies the fraudulent land/property titles which exist in the State. This will clarify the titles of the property/ownership and will restrain the fraudulent agents to claim the properties of others. This reform can reduce the occurrence of disputes to 65% if worked in an appropriate manner.

“Property Title Reform” is an effort to provide a solution to clogging of property disputes in Indian Courts from the grass root level. If the titles of the properties will be clear then there will be less number of disputes and with the less number of disputes related to properties, it will help Indian Courts to free up from the chunks of pending cases.

**Objective:** During a transaction of property, persons are generally are in a state of dilemma that whether the title of the property is real or not. In simple words, whether the seller has the right to sell it or not. Due to the successive transfers, the documents representing the title of the property become a lengthy legal phraseology. This legal phraseology becomes the base of the title of property for the seller. The objective of such Act is to safeguard the transferee from such fraudulent transactions and to ensure hassle free transactions in the state.\(^\text{120}\)

**Conclusion**

Indian judicial system is paralyzed due to the delay in disposal of cases. In today’s time, Indian society is facing many issues which are more serious and heinous in nature than the cases related to properties and which needs a speedy disposal. The need of the hour is to reduce the load of cases in the Courts by framing effective solutions to it. This research paper has focused on the major problem of pendency of civil cases in Indian courts which mainly includes the property litigations. With the

\(^{120}\text{objectives of Rajasthan Urban Land (Certification of titles) act 2016}\)
discussion of the problem, it provides two solutions to it. Firstly, simplifying the documents and procedures to check the genuineness of the seller and the property in the form of a handbook. If buyer will be aware about certain documents and procedures involved in checking the status of the property, then it will safeguard them from getting into any scam or fraud and attracting any litigation to them. Secondly, application of a “Property title reform” in Haryana. If the Haryana Government introduces an act similar to Rajasthan Urban Land (Certification of titles) Act 2016 then it will eliminate the problem of litigation clogging from the ground level. It can be found to be a very effective way to eliminate such problem.

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SHREYA SINGHAL V/S UNION OF INDIA (2013) 12 SCC 73

By Anshika Bhadouria
From Banasthali Vidyapith, Bansthali.

Abstract

“The internet is the first thing that the humanity has built that humanity does not understand, the largest experiment in anarchy that we have ever had”

Eric Schmedit.

Fundamental right of speech and expression is an indispensable right granted by the Constitution besides the question stands whether such right can be defied where the legislature creates a law having an overriding effect over the fundamental rights? This case iron out the position that regardless of importance of a provision, The Fundamental Right of Speech and Expression shall withstand. “Law changes according to society; Society changes law” this phrase meticulously epitomizes the case as by the virtue of Information Technology (Amendment) Act, 2008 Section 66A, Section 69A and Section 79 were introduced because of technological shift in the society, whereas in 2015 Section 69A was struck down as it was against the interest of society and is ‘Contradictio in Adjecto’. Section 69A was much mooted amongst the denizens, but as an ‘infamy’. Stepping to the fore, Honourable Supreme Court of India has declared a censorship law as felonious.

Background

Two girls namely Rim Srinivasan and Shaheen Dhada were arrested in 2012 as they communicated trepidation at Bandh on demise of Bal Thackrey. One girl shared her views on facebook and also mentioned that, an attack has been conducted by Shiv Sena activists on her Uncle’s clinic, this post was liked by another girl and hence both the girls were arrested under Section 66A, as it is a cognizable offence under which an arrest can be made even without warrant. This incident turned last nail in the coffin and was protested all over the world. The petitioner in the said case contended, that Section 66A is not clear in phraseology i.e. the words are ill-defined and even an innocent can come under the jurisdiction of such law as it gives the government authorities a wide spectrum of arbitrariness. Also, it is similar to the concept of “Censorship” and is insidious to Article 19. Section 66A is discriminatory, in the light of Article 14 and Article 21 as there is dearth of differentiation between crime committed by spoken words/writing v/s the crime committed by the means of using internet.

Issues:

✓ Whether Section 66A of IT Act infringes the fundamental right to speech and expression envisaged under Article 19?
✓ Whether Section 66A of IT Act is covered under the parasol of Article 19(2)?

Analysis of Arguments:

Petitioner’s argument:

✓ Section 66A infringes the fundamental right of speech and expression as well as is not protected under Article 19(2).
✓ Phraseology of Section 66A is vague and ambiguous in nature, as there are no limitations defined and is open to the law authorities to put forward any interpretation as the terms ‘insult’,
“annoyance”, “obstruction”, “hatred”, etcetera are ill-defined.

- The veracity of Section 66A is questionable.
- Section 66A is “Self-discriminatory” in nature as there is dearth of a firm assertion, to target digital technology only.
- Article 19(2) includes ‘discussion’, ‘advocacy’ and ‘incitement’ and mere ‘advocacy’ is protected under Article 19.

Respondent’s Argument:

- Contention of “prone to abuse or misuse” is no valid ground for declaring a provision as unconstitutional.
- The Court is vested with powers to construe a law as to make it functional.
- Courts can only actuate when there is question of clear violation regarding Part III of Indian Constitution.

The United States First Amendment

Whether the judgements of the Courts of United States shall be considered in the context of Article 19 or not. It was hence concluded that indeed they can be referred because US First Amendment is absolute in nature and provides for complete freedom of speech and is similar to Article 19.

Court’s Verdict

- “Clear and Present Danger Test”
  On invoking the clear and present danger test under Article 19(2) ,it was held that mere advocacy of speech is not an offence or prohibited under Article 19(2). However, incitement finds a room under Article 19(2).
- “Vagueness and Ambiguity”
  The words used under Section 66A are not clear for the citizens to elucidate as to what is an offensive conduct and what is not an offensive conduct.
- “Wider Concept”

The concept of Section 66 is wider and is prone to obstacles regarding the interpretation also to layman as to understand the nature of Section 66A. Therefore, Section 66A has a chilling effect.

- “Intelligible Differentia”
  The provision lacks differentiation between media as well as internet as a medium.

Effects of Judgement

- Section 66A of Information and Technology Act has been declared as unconstitutional being violative of Article 19(1) (a) and is also not saved under Article 19(2).
- The Court upheld the constitutional validity of Section 69A and Information Technology (Procedure and Safeguard for Blocking for Access of Information by public) Rules.
- Section 118(d) of Kerala Police Act has been struck down with regard to public order.
- Section 79 was regarded as a valid subject.

Snippet of case

The court declared section 66A as unconstitutional, stating ‘what may be offensive to one necessarily is not offensive to other’. The writ was concerned with the phraseology along with the ambit of Section 66A, 69A and Section 79 of the IT Act. The provisions have been regarded as ‘Broad’, ‘Vague’ and simultaneously ‘Susceptible to draconian activities’. Indeed the case is a real win , which proves that even a legislature cannot intervene with the fundamental rights. The court, in its judgement has improved the legacy regarding freedom of speech, indeed the justice is achieved in the ‘courtroom’, what about the scenario beyond the courtrooms?
Even in 2018, the police authorities are arresting innocents under section 66A. This depicts the scenario of our country where on one hand people fight for their rights and on other hand ignores their rights. As well said ‘I wish you knew more about what to do with information once you get it, but that’s a private wish’, Peter Drucker.

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RELIGION, SECULARISM AND PERSONAL LAW: A CRITICAL ANALYSIS WITH SPECIAL REFERENCE TO UNIFORM CIVIL CODE AND RIGHT TO EQUALITY

By Avinash Singh Vishen
From Symbiosis Law School Noida

ABSTRACT
The Constitution of India in Part III through Articles 25-28 has given the Right to Freedom of Religion. Article 15 (1) of the Indian Constitution states that “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them” and though in practice, the state has made separate provisions in the Family Laws of India for different religions. The ethical irony comes in whereby on one hand the legal framework recognises the principles of Right to Equality and does not define religion but on the other hand engages in practices relating to religion and makes provisions separately on the basis of religion.

Through the years 1954 onwards, began the era of Post-Independence enactment of religious laws in India. This provided in codification, the provisions governing marriage, family and divorce laws with regards to different religions in India. The term Secular was first inserted into the Preamble of the Constitution of India through the 42nd Constitutional Amendment Act, 1976. It was widely perceived by many that even though the Amendment was enacted in 1976, the concept of Secularism was enshrined in our constitution through Articles 25-28 effectively knows as Freedom of Religion.

Through the means of this paper, I aim to do a critical analysis of the provisions of Personal Laws, Secularism and Equality in India with special reference to the Uniform Civil Code of the Directive Principles of State Policy, Constitution of India.

INTRODUCTION
The Judicial Framework of India often tries to seclude itself from matters pertaining to religion and beliefs sighting it to be ‘sensitive’ and rarely that it does involve itself actively in such matters, it takes a diplomatic stance. Recently, it reflected in the Ram JanmBhoomi – Babri Masjid Dispute wherein the Honourable Apex Court advised the parties to make fresh attempts to find a solution which leads to amicable settlement to the Ayodhya dispute, citing it as a "sensitive" and "sentimental matter". The passive nature of the Legal Fraternity in India, towards the issues of religion and personal laws are somewhat responsible for the non-applicability of Uniform Civil Code in India yet.

The Constitution of India does not define the term secular, however, through the 42nd Constitutional Amendment the term has been instituted to the Preamble of the Constitution. It is undisputed that the Personal Laws find their legal validity through Part III of the Constitution through Articles 25-28 talks about the Right to Freedom of Religion. It is worth pointing out that the bare text of Article 25(1) is “Subject to public order, morality and health and to the other provisions of this Part”.

121(42nd Constitutional Amendment Act, 1976)
Article 15 (1) of the Indian Constitution states that ‘The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them’ and though in practice, the state has made separate provisions in the Family Laws of India for different religions. The ethical irony comes in whereby on one hand the legal framework does not define secularism but claims to be a secular state but on the other hand engages in practices relating to non-secular acts while making provisions separately on the basis of religion.

The 42nd Constitutional Amendment 1976 was enacted to our constitution in January 1977 during the period of the Indian Emergency which lasted from 1975 to 1977. With the enactment of the 42nd Constitutional Amendment, the word Secular was added to the preamble to the constitution and thereby it made evident, in principle, that the country does not associate itself to any particular religion but is rather not connected to religious matters at all. However, in reality, the term secularism fails to justify its presence in the constitution. On one hand, the constitution proclaims the nation to be a ‘Sovereign Socialist Secular Democratic Republic’ and on the other hand in judicial proceedings oath is taken in the name of god and thereby engaging in a non-secular practice. Though there is a provision to give affirmation before pleading evidence but it is least in practice.

The presence of Personal Laws in India takes away the essence of being a secular state. It is illogical to be a Secular State, to preach the concept of Equality and then to have separate legal provisions for different religions and thereby engaging in the policy of Differentiation. To catch up with the needs of the 21st century and to strengthen its status in the International Community, it is essential for India to move towards a Uniform Civil Code which would ensure that the concept of Secularism is actually practised and its presence in the Preamble to the Constitution is justified.

**BARE TEXT OF THE RELEVANT ARTICLES OF THE CONSTITUTION OF INDIA**

**Part III**

**Article 13. Laws inconsistent with or in derogation of the fundamental rights.**

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,—

(a) “law” includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) “laws in force” includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be
then in operation either at all or in particular areas.

[(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.]

Right to Equality

Article 14- Equality before Law

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15- Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to— (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

[(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.]

[(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.]

Right to Freedom of Religion

Article 25- Freedom of conscience and free profession, practice and propagation of religion

(1) Subject to public order, morality and health as to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law— (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice, (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II.—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.
PART IV
Article 44 - Uniform civil code for the citizens
The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

UNIFORM CIVIL CODE, NATURAL SCHOOL OF LAW AND DWORкиN'S LIBERALISM
The very concept of having equality as a basic principle of the constitution and then having separate laws for people professing separate religions is violative of the maxim of lexiniusta non est lex. This maxim is the very basis of Natural Law Theory and is essential to have public order. If we place this maxim in connection with Article 13(2), Article 14, Article 15, Article 25 and Personal Laws, it can be clearly inferred that since Personal Laws are violative of the maxim of LexIniusta Non EstLex they abinito become violative of Article 14, and 15 and in affect cannot be protected by the umbrella of Article 25 hence void as per Article 13(2) of the Indian Constitution.

Ronald Dworkin’s theory of liberalism talked about the principle of equality before law and how the government should “treat all those in its charge as equals, that is entitled to equal concern and respect”. This concept also seems to be envisioned by the drafting committee of the Constitution of India which included Uniform Civil Code in the Directive Principles of State Policy, Part IV.

Shri. A. ThanuPillai while discussing the matters related to the directive principles said “If you wish to provide for a common civil code for India, that must be in consonance with modern advanced conceptions of life. Our women are free; our marriage laws are in consonance with the up-to-date concepts of social existence. Have, we to go back to conceptions unacceptable in the modern world? I want only the future legislature to consider these aspects of the matter.”

However, later on through the years, due to political motivations and the fatal political nature of thriving on religious differences, saw the government introduce personal laws and thereby an unjust society. Uniform Civil Code is a must for an egalitarian society as it is impossible to achieve equality while having separate set of rules for people of different religions.

DIFFERENCE BETWEEN AN ATHEIST STATE & A SECULAR STATE
State Atheism
According to Oxford University Press's A Dictionary of Atheism, 'State Atheism' is the name given to the incorporation of positive atheism or nontheism into political regimes, particularly associated with Soviet systems. Essentially an atheist state does not recognise religion and customs. The policies and legislature in an atheist state have no regards to religion or religious practices whatsoever. The role of religion is limited to the people and the state

122 (Theories of Justice: An Overview)
123 (Dworkin, 1977)
124 (Kelly)
125 (Constituent Assembly Debates Official Report; Volume XI)
126 (Lois, 2016)
has nothing to do with it. People’s Republic of China is an example of a state that follows state atheism.

Secularism
The Oxford Dictionary\(^{127}\) defines secularism as “The principle of separation of the state from religious institutions.” In practise, this amounts to only recognition of religion and religious practices. A secular state is one which is neutral in matters of religion and it does not support religious practices but is not against it either\(^{128}\).

In a secular state, equality of law is prevalent in all fields of the society and there is no differentiation on the basis of religion. Freedom from religious institutions and customs is fundamental for the working of a Secular State. The Russian Federation is an example of a state that follows secularism.

JUSTIFICATION OF THE STATUS OF INDIA AS A SECULAR STATE DESPITE THE PRESENCE OF SEPARATE PROVISIONS FOR SEPARATE RELIGIONS.
The term Secular was added to the Preamble of the Constitution through the 42\(^{nd}\) Constitutional Amendment, 1976 along with the term Socialist. It is widely considered that even though Secular was introduced later on, the concept of Secularism was an innate quality of the Constitution of India. The Drafting Committee of the Constitution indeed wanted it to be a Constitutional Democracy with Secularism as one of its main principles the same is reflected in the Directive Principles of State Policy wherein through Article 44 the Drafting Committee made it expressively clear the Uniform Civil Code was an expectation from the governments to come.

When the Special Marriage Act, 1954 was enacted, it was seen as the first step towards Uniform Civil Code. However, with the Hindu Marriage Act and subsequent Personal Laws coming into picture, the focus shifted from Uniform Civil Code to Personal Laws which were codified and gave a legal backing to the customs and practices prevalent in the society.

It is argued that it was always perceived that the definition of the concept of Secularism would be different for India as compared to the generally accepted meaning of Secularism. It is argued that for India Secularism means respecting all religions by making separate provisions for them within the legal framework.

This entire argument is absolutely demolished when we put into perspective the Directive Principles which envisions a Uniform Civil Code along with Right to Freedom of Religion which is subject to public order, morality and health and to the other provisions of Part III. Part III includes Article 14 which talks about equality before law and Article 15 which talks about the obligation of the state not to discriminate on the basis of religion, race, caste, sex or place of birth. Hence being subject to the provisions of Part III, Freedom of Religion as per Articles 25-28 will fail to justify the validity given to personal laws by the legislature because the Personal Laws clearly discriminate on the basis of Religion.

\(^{127}\) (Definition of Secular)

\(^{128}\) (Temperman, 2010)
and also provide for separate provisions for citizens belonging to different religions. In the face of it Personal Laws are nothing but State Sponsored Religious Discrimination. Unless Uniform Civil Code is enacted, India can never justify itself as being a Secular State or reach the normative standards of equality. Shri Alladi Krishnaswami Ayyar in the constituent assembly stated “A Civil Code, as has been pointed out, runs into every department of civil relations, to the law of contracts, to the law of property, to the law of succession, to the law of marriage and similar matters. How can there be any objection to the general statement here that the States shall endeavour to secure a uniform civil code throughout the territory of India?

The second objection was that religion was in danger, that communities cannot live in amity if there is to be a uniform civil code. The article actually aims at amity. It does not destroy amity. The idea is that differential systems of inheritance and other matters are some of the factors which contribute to the differences among the different peoples of India. What it aims at is to try to arrive at a common measure of agreement in regard to these matters. It is not as if one legal system is not influencing being influenced by another legal system. In very many matters today the sponsors of the Hindu Code have taken a lead not from Hindu Law alone, but from other systems also. Similarly, the Succession Act has drawn upon both the Roman and the English systems. Therefore, no system can be self-contained, if it is to have in it the elements of growth. Our ancients did not think of a unified nation to be welded together into a democratic whole. There is no use clinging always to the past. We are departing from the past in regard to an important particular, namely, we want the whole of India to be welded and united together as a single nation. Are we helping those factors which help the welding together into a single nation, or is this country to be kept up always as a series of competing communities? That is the question at issue.

Now, my friend Mr. Pocker levelled an attack against the Drafting Committee on the ground that they did not know their business. I should like to know whether he has carefully read what happened even in the British regime. You must know that the Muslim law covers the field of contracts, the field of criminal law, the field of divorce law, the field of marriage and every part of law as contained in the Muslim law. When the British occupied this country, they said, we are going to introduce one criminal law in this country which will be applicable to all citizens, be they Englishmen, be they Hindus, be they Muslims. Did the Muslims take exception, and did they revolt against the British for introducing a single system of criminal law? Similarly, we have the law of contracts governing transactions between Muslims and Hindus, between Muslims and Muslims. They are governed not by the law of the Kuran but by the Anglo-Indian jurisprudence, yet no exception was taken to that. Again, there are various principles in the law of transfer which have been borrowed from the English jurisprudence. Therefore, when there is impact between two civilizations or between two culture, each culture must be influenced and influence the other culture. If there is a determined opposition, or if there is strong opposition by any section of the community,
it would be unwise on the part of the legislators of this country to attempt to ignore it. Today, even without article 35, there is nothing to prevent the future Parliament of India from passing such laws. Therefore, the idea is to have a uniform civil code.”129

THE CONSTITUTIONAL VALIDITY OF PERSONAL LAWS IN THE LIGHT OF RIGHT TO EQUALITY (ARTICLE 14 AND 15) AND ARTICLE 13(2) OF THE INDIAN CONSTITUTION.

Article 13 (2) of the Constitution of India states that “The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.” Personal Laws are void ab initio considering that they are violative of Article 14 which talks about Equality before Law and Article 15 which talks about Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. Personal Laws are categorically applicable to people belonging to a particular religion and not open to any other. In practice, they amount to disparities in the way family law ought to be. For example, according to Muslim Law, bigamy is allowed and they are exempted from punishment under IPC whereas according to Hindu Law, bigamy is not allowed and they are not exempted from punishment under the IPC. Similarly, for Hindu Women to remarry their divorced husband, they don’t have to go through any process whereas for Muslim Women to remarry their divorced husband they have to first go observe the period of iddat and after two divorces they have to practice NikahHalala. These examples are proof that Personal Laws place citizens on different platforms on the basis of their religion and in turn are violative of Article 14 and 15 and in effect unconstitutional as per Article 13(2).

In the landmark case of State of Bombay vs. NarasuAppa Mali130, the Hon’ble Bombay High Court observed that Personal Laws are not law as per the definition of Law under Article 13 and hence not covered under Part III of the constitution. However, the Hon’ble High Court failed to appreciate the fact that Article 13(2) of the Constitution of India confers the right to make Personal Laws and hence for the purpose of Part III not including Personal Laws under Part III is Arbitrary. It is worth noting that the Personal Laws were codified by the parliament in years after the judgement. The Hon’ble Supreme Court in the landmark judgement of Ahmedabad Women Action Group v. Union of India 131 had an opportunity to reverse the precedent set by the Hon’ble Bombay High Court in the NarasuAppa Mali case but the Apex Court concurred with the opinion of the NarasuAppa Mali Case and held that the personal laws are matter of State policies with which Court do not have any concern. Later in the year 2017, while rendering its judgement in the landmark case of ShayaraBano v. Union of India 132 the Hon’ble Apex Court held the practice of Triple Talaq as unconstitutional and violative of Article 14 and 15 and did

129 (Constituent Assembly Debates Official Report; Volume VII)
130 (AIR 1952 Bom 84)
131 (AIR 1997 SC 3614)
132 (2017 SCCOnline SC 963)
interfere in the matter relating to personal law. However the Hon’ble Apex Court missed the opportunity to overrule its errored judgement in the 1997 Ahmedabad Women Action Group judgement. The Triple Talaq Judgement is considered a missed opportunity, “Though it declares instantaneous triple talaq unconstitutional, the verdict misses the chance to assert that personal laws cannot override fundamental rights.”

CONCLUSION
Uniform Civil Code is a necessary tool for a country as diverse as India to promote equality and justice. It is essential that all the citizens be subjected to the same laws with respect to everything. Till the time people are subjected to different laws for different religions, it will be impossible to attain Equality. It is essential that India becomes a Secular Country in the truest of its forms and distances itself from any provisions for Religious Laws or Institutions.

It is imperative to realise that the human rights of women in India have a direct connection with the personal laws that they are subjected to. Hence in the name of personal laws, the state itself is subjecting its citizens to inequality. If a uniform civil code would be enacted, it would be easier for the state to enforce rights of the people rather than taking them away.

It is worth noting that the current provisions are unconstitutional as per Article 13(2) in the light of Article 14, Article 15 and Article 25 of the constitution.

There can be no logical approach towards the notion that any law within the State cannot be covered under the ambit of the Indian Constitution. Part III of the Indian Constitution that deals with the Fundamental Rights of the Citizens essentially covers everything that happens in the country and affects its citizens; undoubtedly personal laws are also a part of it. Through the verdict in the Triple Talaq Case, the Hon’ble Supreme Court opened its leeway towards personal laws and Right to Equality.

In the words of Dr. BhimRao Ambedkar “we have in this country a uniform code of laws covering almost every aspect of human relationship. We have a uniform and complete Criminal Code operating throughout the country, which is contained in the Penal Code and the Criminal Procedure Code. We have the Law of Transfer of Property, which deals with property relations and which is operative throughout the country. Then there, are the Negotiable Instruments Acts: and I can cite innumerable enactments which would prove that this country has practically a Civil Code, uniform in its content and applicable to the whole of the country. The only province the Civil Law has not been able to invade so far is Marriage and Succession. It is this little corner which we have not been able to invade so far and it is the intention of those who desire to have article 35 as part of the Constitution to bring about that change. Therefore, the argument whether we should attempt such a thing seems to me somewhat misplaced for the simple reason that we have, as a matter of fact, covered the whole lot of the field which is covered by a uniform Civil Code in this country. It is therefore too late now to ask the question

133 (Vijayan, 2017)
whether we could do it. As I say, we have already done it.”134
In the light of the same it is time for the Personal Laws to make way for Uniform Civil Code. Obviously subject to Public Order, Morality and Health and to the other provisions of Part III of the Indian Constitution.

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134 (Constituent Assembly Debates Official Report; Volume VII)
CYBERCRIME: ARE THE LAWS OUTDATED?

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ABSTRACT:-
In the present day, people cannot live without the internet because everything from online transaction to online dealing is done on it. Some people use it for wrong purposes and commit crimes like cyber bullying, identity theft, hacking, spreading hate messages etc. To prevent these crimes cyber laws were made. In India, Information Technology Act came into being after the mid-90s when globalization and growth of computerization took place. This Act does not define cybercrime, but S.65-S.75 describes the offences and punishment for committing these crimes. Also, 2008 amendment in IT act added new sections to protect the people against cybercrime and help the victims that have suffered from it. Thus, Cyber law evolves and has become an important part of protecting our internet lives.

INTRODUCTION:
With the advent of technology, our lives have no doubt become easier, but it has also brought in the problem of cybercrime.

Cybercrime is a type of crime that involves a computer and a network. In simple words, cybercrime is an unlawful act in which a computer is used or where a user/network becomes a target. Cybercrimes involve criminal activities like fraud, identity theft, hacking, distribution of child pornography etc. Cybercrime can be generally be broken into two categories:

- Crimes that target computer networks or devices. These types of crimes include viruses and denial of services (DOS) attacks.
- Crimes that use computer networks to advance other criminal activities. These types of crimes include cyberstalking, phishing and fraud or identity theft.135

In cybercrime, there is generally criminal misuse of technologies in the following forms:

1) Phishing: - means a crime or fraud in which the attacker tries to gain personal information by sending a false email or message as a reputable individual or entity to the victim. E.g.: attacker pretending to be an employee of the bank and sending a message on the individuals mobile to get his account details.

2) Identity theft – it basically refers to people who cheat or fraud others by using another person’s identity. It involves stealing money or getting benefits by pretending to be someone else.

3) Hacking: - basically means to break into someone’s computer system and steals valuable information (data) from the system without any permission. Among all types of cybercrime, it’s the most dangerous and serious to the internet and e-commerce.

4) Spreading hate and inciting terrorism- is also a cybercrime because it attacks an individual based on race, religion, sex etc. E.g.: Gender based hate speech on Facebook

135 Definition of cybercrime, Technopedia, (Dec 9, 2018), https://www.techopedia.com/definition/2387/cybercrime
5) Distributing child pornography— Any persons who possess for the purpose of transmitting, distributing, selling, importing etc. or possess, transmits, sells or advertises child pornography is guilty of this cybercrime and is liable to imprisonment for a term not more than 14 years.

6) Grooming: means making sexual advancement to minors

For fighting these crimes Cyber laws were introduced in many countries, Punishments were also laid down.

**CYBER LAWS IN UK,US:**

In UK many legislations have been made for managing cybercrime such as the Computer Misuse Act (CMA) (1990), Regulation of Investigatory Powers Act 2000, Data Protection Act 2000, Offences under Fraud Act 2006, S.127 of the Communication Act (2003) makes it an offence to send a message or other material that is ‘grossly offensive’ or of an indecent, obscene, menacing character through a public electronic communication network and S.33 of the Criminal Justice and Courts Act 2015 created an offence of disclosing private sexual photos without the consent of an individual with the intent to cause stress to him or her. Serious Crimes Act 2015 amended the Computer Misuse Act 1990 and it ensure life sentence for Cybercriminals if the act has caused loss of life, serious illness, injury, or serious damage to national security.

In US, regulations for cybercrime are the Computer Fraud and Abuse Act, the Wiretap Act, and many other acts.

**Cyber Law in India:**

The Information Technology Act 2000 and IT amendment act 2008 have been dealt with in detail regarding electronic offences. Cybercrime has not been defined in the Information Technology Act 2000 or in its amendment Act nor in any legislation in India. Basically, the definition of cybercrime is a combination of crime and computer. offences or crime has been dealt with elaborately listing various acts and punishments for each under IPC 1860 and few other legislations too.

Offences against computer or the data itself is the target and where computer is a tool in committing other offence or it provided necessary inputs for that offence therefore it comes under Cybercrime.

**Origin of Information Technology legislation in India:**

mid 90s India saw a dire need to come up with a legislation due to globalization and growth of computerization in many nations and for e-commerce. Before lot of transactions use to take place through post and telegraph only. United Nations Commission on International Trade Law (UNICITRAL) made a model law on e-commerce and recommended all the States to enact and revise their laws keeping the model law in consideration. The Indian Government enacted the Information Technology Act in June 2000. The act mainly deals with legal recognition of electronic documents, legal recognition of

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Applicability of IT Act: -
IT Act 2000 is applicable to everything except:
- Negotiable Instruments
- Power of Attorney, 1882
- Indian Trusts Act, 1882
- Indian Succession (Will) Act, 1925
- Any contract for the sale or conveyance of immovable property or any interest in such property.

Provisions in IT ACT relating to cybercrimes: - S.65 to 75 deals with cybercrime and punishments related to those crimes.

S.65- Tampering with the computer source documents: -Whoever conceals, destroys or alters any computer source code used for computer network, computer program, computer network knowledge of or intentionally shall be punishable with imprisonment up to three years or fine that may extend up to Rs.2 lakhs or with both. This section is cognizable and bailable.

Case laws: Sayed Asifuddin case 139: - in this case the Tata Indicom employees were arrested for manipulation of the electronic 32-bit number (ESN) programmed into cell phones that were exclusively franchised to reliance info.com. Held: The court held that such manipulation amounted to tampering with computer source code as described in s.65 of the Information Technology, 2000.

s.66-hacking with computer system, data alteration etc. - (Computer related offences) whoever with the intent causes or likely to cause wrongful loss or damage knowingly to the public or destroys, deletes, alters any person’s information residing in a computer resource or diminishes its value, utility or affects it injuriously by any means, commits hacking. It can be read with S.43 (a) cause of S.77 which explains that a compensation, confiscation or penalty for not to interfere with or punishment which came after 2008 amendment.
- Hacking incidents in India: -
Atm System hacked In Kolkata 140: - A Canara bank atm servers was hacked by fraudsters On July 2018 and wiped off almost 20 lakh rupees from different bank accounts. The number of victims was over 50 and it was believed that they were holding the account details of more than 300 Atm users across India. On 5th August 2018, two men were arrested in New Delhi who was working with an international gang that used skimming activities to extract details of bank account.

Zomato (2017) 141: - The Restaurant app Zomato was hacked and suffered when data of some 17 million users were stolen.

141 8 big global attacks that affected India, (Dec 23, 2018), https://www.gadgetsnow.com/slideshows/8-big-global-hacking-attacks-that-affected-india/photolist/63720530.cms
Hackeread.com claimed that a user by the name of ‘nclay’ claimed to have hacked Zomato and was offering data of some 17 million registered Zomato users on dark web marketplace. Zomato had acknowledged the hacking attack, however, claimed that no payment information or credit card data was stolen / leaked.

**S.66A – Sending offensive messages through any communication services:**
Any electronic mail or email sent with the end goal of causing anger, difficulty or mislead or to deceive or sending any information that’s not true with the end goal of annoying, causing inconvenience, danger, insult, obstruction, hatred, ill will. The person could be sentenced up to 3 years of imprisonment along with fine.

Case laws:
Nikhil Chacko Sam V. State of Kerala (July 9th, 2012) – The accused was with the complainant in Chennai because it was a college reunion and all of them took photos, one of the friends had their boss with them. So, the accused later transmitted the photos and depicted the complainant in a bad light through internet which lost him his job. The Kerala Court charged the accused under S.66-A, ITA and was imprisoned.

Shreya Singhal case: It’s a landmark case which led to the deletion of S.66 from the IT Act. In this case two girls posted their comments on Facebook describing the displeasure of the bandh called in the wake of Shiv Bal Thackery’s death and later were arrested for it by Mumbai Police. The arrested women were released later on and it was decided to close the criminal case against them but the arrest had already attracted widespread protest. There were a lot of petitions to the Supreme Court that S.66A was against the constitution because it was vague, ambiguous and was being misused by law enforcement authorities. It was also contended that S.66A violates freedom of speech and expression. Supreme Court held that S.66A is unconstitutional cause it violates Article 19(1)(a) freedom of speech and is ambiguous thus was struck down entirely.

Exception of this section is that it is applicable to the Non- citizens of India cause its struck down only for citizens of India. If Non-citizens commit this crime as described above they will be charged under S.66A.

**S.66B- Receiving stolen computer resource or communication device:**
Whoever receives or retains any stolen computer resource or communication device dishonestly knowingly or having reason to believe the same to be stolen computer resource or communication device, shall be punished with imprisonment with the term extending to three years or with fine extending to Rs.1lakh or with both.

**S.66C- Identity Theft:**
Whoever uses the electronic signature, password or any other unique identification of another person fraudulently or dishonestly will be punished with maximum three-year imprisonment and also a fine up to RS.1lakh.

**S.66D- Cheating by personation by using computer resource:**
Whoever, cheats by personating through any communication device or computer resource; shall be punished with a term extending to three years and also a fine extending to Rs.1lakh.
Examples –

Woman in Gurgaon deceived into giving Rs.30 lakhs to ‘Ukrainian’ she met on matrimonial site (25th May 2017)- the complainant told the city police that she created a profile on a matrimonial site last year in February and got response by a person who identified himself as Deepak Frank Rich, Ukrainian. A case was then registered under S.66D Of IT Act and S.420 of Indian Penal Code. The accused student was booked under S.66D Of IT Act and S.420 of Indian Penal Code.

2) Jawaharlal Nehru University MMS Scandal - In this prestigious institute, a pornographic MMS clip was made in the campus by the two accused students who initially tried to extort money from the girl in the video but when they failed the accused put the video out on mobile phones, on the internet and even sold it as a CD in the blue film market. This would come under S.66E cause the transmitted this video intentionally violating her privacy.

S.66D - Punishment for personation and criminal liability: 

Whoever, personates or with someone who has consent, uses or causes the denial of any person without his or her consent, to read, see, or hear the matter which is indecent or appeals to the or prurient interest to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people. This section is cognizable and non-bailable. Anyone who commits or conspires to commit cyber terrorism will be punishable with imprisonment which may extend to life imprisonment.

S.67 - Publishing or transmitting obscene material in electronic form: 

Anyone who publishes or transmits or causes to access, attempts to penetrate or access a computer resource without his or her consent, introduces or causes to introduce any Computer Contaminant with the intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people. This section is cognizable and non-bailable. Anyone who commits or conspires to commit cyber terrorism will be punishable with imprisonment which may extend to life imprisonment.


144 Lionel Faleiro, IT Act 2000-penalties, Offences with Case studies Supra
conviction with fine extending to five lakh rupees. In the second or subsequent conviction with imprisonment of either for a term extending to five years and also with fine extending to ten lakh rupees. Cyber Pornography: - S.67, S.67B are provisions applicable for preventing this crime.

Case law: -

1) Suhas Katti case - in this case the accused started harassing a divorcee lady through false email account opened by him in her name. These emails contained obscene defamatory and annoying messages which resulted in annoying phone calls to the victim. On her complaint the accused was charged and found guilty of offences under S.469 and S.509 of IPC and S.67 of IT Act 2000. He was sentenced to two years of imprisonment and fine of four thousand rupees. This was the first case of conviction under S.67 of IT Act 2000.

2) Chennai techie jailed under S.67: - Srinath Nambudiria software engineer was working in TCS, Siruseri (Tamil Nadu). He was attracted to a colleague and expressed his love to her. When she rejected him, he started sending several obscene and derogatory emails to her in 2011. She had gone for trip then Nambudiri send a morphed nude picture of the woman to her brother. He continued to stalk and eve tease the women electronically for several months. After returning to Chennai she filed a complaint against him with cyber wing of CBCID. It was only then the police registered a case against Nambudiri and SC held him guilty under S.67 of ITAct, S.506 and S.509 of IPC along with S.4 of Tamil Nadu Prohibition of harassment of women Act, 1998. The court convicted him and slapped with fine of Rs.20,000.

S.67(A) is similar to S.67 just that the person will be imprisoned for 5 to 7 years and fined up to 10 lakhs. Both S.67 and 67(A) does not extend to any book, pamphlet, writing, drawing, representation or figure in electronic form.

S.67(B) Publishing or Transmitting of material depicting children in sexually explicit act, etc.in electronic form (Child Pornography): -

Whoever publishes or transmits, creates text or digital images, cultivates or entices or induces children to online relationship, facilitates abusing children online or records in any electronic form of others pertaining to sexually explicit act with children. Any person who commits this crime for the first time will be imprisoned for a term extending to five years with fine up to 10lakhs. Second conviction criminals could be sentenced for a term that could extend to 7 years along with fine up to 10 lakhs. This is a positive change as this section makes even browsing and collecting of child pornography a punishable offence.

The difference between S.66E and S.67 is that in one its fine if it’s done with consent and in the latter prohibits transmission and publication of obscene and sexually explicit material.

S.69-Power to issue direction for monitor, decryption or interception of any information through computers resources: -
This provision gives power to authorities for giving direction for monitor, decryption or interception of any information through computers resources if there is threat to integrity, security, sovereignty or defense of the country or state or to prevent any cognizable offence related to the above situation. The power is subject to the condition that authorized officer records reasons in writing. The power includes directing, intermediaries, subscribers or individuals to assist in providing access to the computer and also in decrypting, intercepting or monitoring or intercepting the concerned information.

S.69A - Power to issue directions for blocking for the public access of any information through any computer resource:
It vests with the central government or any of its officers with the powers to issue directions for blocking for public access for any information, through any computer resource if there is threat to integrity, security, sovereignty or defense of the country or state or to prevent any cognizable offence related to the above situation.

S.69B - Power to authorize to monitor and collect traffic data or information through any computer resource:
The central government vests the power to authorize to monitor and collect traffic data or information to enhance Cyber Security and for identification, analysis and prevention of any intrusion or spread of computer contaminant in the country.

There are few more important sections in IT Act, 2000:

- S.70 - Unauthorized access to protected systems
- S.71 - Penalty for misrepresentation
- S.72 - Breach of confidentiality and Privacy
- S.73 - Publishing false digital signature certificates
- S.74 - Publication for fraudulent purpose
- S.75 - Act to apply for contravention or offence that is committed outside India
- S.77 - Compensation, Confiscation or penalties for not to interfere with other punishment

Information Amendment ACT, 2008:
This act came due to some of the sections in the original Act being criticized for being draconian and others stating it to be diluted and lenient. The Act came into force in 2009. So, it introduced many changes to the existing IT Act which added several cyber offences. The eight new cyber offences added are as follows:

1) Identity Theft (S.66C)
2) Sending offensive messages through mobile phone or computer (S.66A)
3) Receiving stolen computer resource or communication device (S.66B)
4) Punishment for cheating by personation using Computer source (S.66C)
5) Cyber Terrorism (S.66F)
6) Punishment for violating privacy or video voyeurism (S.66E)
7) Child Pornography (S.67B)
8) Publishing or transmitting material in electronic form containing sexually explicit act (S.67A)
Non-bailable Offences: - In IT act 2000 all of the acts were cognizable and bailable but after the amendment in 2008 any offence punishable with death, life imprisonment or imprisonment for more than 7 yrs. And if an offence is punishable with more than three years but less than 7 yrs. These are cognizable and non-bailable offences. Sections which are non-bailable is S.66F because punishment is life imprisonment, S.67 because punishment is imprisonment extending to five years, S.67A and S.67B because punishment is imprisonment exceeding five years and 7 years, S.69 and S.69A because punishment is imprisonment for seven years.

**IPC Code 1860:** - Information Technology does not cover all aspects of cybercrime and therefore Indian Penal Code is applicable. Therefore, after the enactment of information Technology the law makers amended IPC to include offences involving electronic record. Most of the cybercrime come under the category of fraud but Information Technology Act has not defined the concept of fraud thus lot of the offences come under the preview of Indian Penal Code. S.25 of IPC defines fraud and element of intent to defraud must be present and defraud implies deceit and injury to the person deceived. In IT Act 66B talks about dishonest intention which is not defined in the IT Act then one can refer to IPC. When cyber fraud is committed it is cheating in real sense thus s.145 of IPC can also be applied. Apart from this S.345C deals with voyeurism and S.345 stalking are acts of IPC which are made for the internet and communication devices. Cyber defamation is not too different from the defamation in S.499 of IPC because it just means writing any derogatory statement, which is intended to injure a person’s business or reputation on the internet like writing defamatory matter about someone or sending an email containing defamatory material. Financial Crimes are also punishable under IPC and IT Act and these include cheating, money laundering, credit card frauds etc. Web Jacking comes under S.383 of IPC and the comes from the word hijacking. It means when a website is web hacked the owner of the site loses all control over it, the person gaining such kind of access is called hacker who may alter or destroy any information on the site. As it is one kind of hacking and IT cannot cover all kinds of hacking therefore IPC is generally applicable to such kind of unauthorized access.

These offences are subject to Indian Penal Code and without the general principles of criminal law, Cyber law cannot work in India.

**Conclusion:-**
India is a fast-growing internet user country. Today users are able to access internet at any time and from anywhere. Data Communication by way of emails and mobile applications have increased many folds. This brings progress but at the same

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**Notes:**

147 Rajkumar Dubey, India: Cyber Crimes “an unlawful act where in the computer is either a tool or a target or both”, (Dec 19, 2018), http://www.mondaq.com/india/x/28603/technology/
time makes the country vulnerable to different kinds of cybercrimes that is explained above. To counter the threats, India has implemented digital India project which attempts to minimize connectivity. In the past years, more than 50,300 cyber security incidents have been reported to Indian authorities - including denial of service attacks, web site infiltrations and, especially phishing. In 2017 alone 4,035 cybercrime cases were registered under IT Act. Cybercrime against women and children are also on the rise. One recent example is the online game -Blue whale. Most cities in India have a cybercrime cell where citizens can file a cybercrime complaint like online harassment, stalking, pornography etc. If there is no cyber cell in any place then FIR can be filed in a local police station. There is also an initiative by the government to start an online portal (www.cybercelldehi.in).

The law is not outdated as amendments were also made. The law helps control cybercrime but still there is a need to follow best practices and guidelines to minimize security risks of cybercrime. There is also need to review international law in this field. Cyber law needs to change and evolve constantly so the authorities are step ahead of the hackers and criminals. The law does deal with challenges of cyberterrorism but it may require additional security measures and strengthen criminal liability rules in the law. Law must also ensure that a proper balance is maintained between protecting the nation and its citizens while ensuring that their privacy and rights aren’t infringed. India has taken lot of steps to control cybercrime but we cannot be complacent in our vigilance and need to ensure that the laws keep evolving with time and technological advancement.

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Under the veil of the sacrosanctity conferred to the institution of marriage, centuries has passed down in denial of a basic right to women, the denial to criminalise marital rape. Marital rape or spousal rape is the act in which one of the spouse indulges in sexual intercourse with the other spouse without consent. The act is same as what we term as rape. The definition of rape remains the same, the only distinguishing factor is the relation that the perpetrator has with the victim. In this era when gender equality strives to find its purpose, our country is highly reluctant to recognize marital rape as a crime. As per the present notions that our legislation and judiciary hold, marriage in itself is a form of consent to sex and thus marital rape becomes antithetical. The county impetuously stuck on the age old beliefs, cultures and a highly irrational set of justifications, have in its various judgments and legislations, denied the criminalisation of marital rape and on the contrary have provided an exemption clause for the same in IPC. The perpetrators relation to the victim is being considered as a sufficient ground to not consider it as a crime even when marital rape exist as a most common and repugnant tool of masochism in the Indian society. The honourable Supreme Court of India has defined raped as “deathless harm and the gravest crime against human dignity.” This same judiciary, the legislation, and the society blinded by the veil of institution of marriage and cultural values thereby attached have ignored the same crime done to a “married” woman. These social ideologies date back to the time when women were considered merely as a property of their husband, and the husband was vested with complete rights over her. In the wake of women rights and equality, the denial of autonomy over their body to a married women, lays against the principles of equality. The paradox is at its peak when the Court agrees that “no positive

Section 375 in The Indian Penal Code [375. Rape.—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—
(First) — Against her will.
(Secondly) — Without her consent.
(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
(Fourthly) — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
(Sixthly) — With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) — Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

act of sex can be forced upon the unwilling persons, because nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of the law to a positive sex Act\textsuperscript{151}, but at the same time refuses to criminalise marital rape.

Rape laws in the country though have undergone tremendous changes in the wake of heart breaking incidents, it has however remained one step short in recognizing the rights of a married woman. Rape as defined in section 375 of IPC\textsuperscript{152}, expansively defines the term “rape” in legal parlance. The crux of the section is based on the notion of consent. In the exception 2 to this section, the application of this section in cases of non-consensual sexual intercourse between husband and wife where wife is above the age of 15\textsuperscript{153} has been excluded. Irony leaves a scar when section 376 B of IPC criminalizes non-consensual sex if the partners are living separate. The contrast between section 376 B and the exception 2 of section 375 is been justified by the frivolous argument that living together gives the presumption of consent to have sexual intercourse and that the institution of marriage comes with a pre-requisite of consenting to sexual intercourse. The larger picture protruded by such an argument is that in India “marriage is a license to rape”. What the society, the government and the judiciary have deliberately failed to notice is that marriage whether considered a sacrament or contract can in no way supersede the rights and liberties of an individual guaranteed by the Constitution. Non consensual sex is rape irrespective of whether it is performed under the institution of marriage or not. Personal laws or the institution of marriage cannot be weighed on a higher scale than that of the basic fundamental and human rights secured through the Constitution and natural law. The right under Article 14 is not absolute and the legislation has been conferred with the power to treat different persons differently if circumstances justifies it. However there is no such justification that can be provided for discriminating a married and an unmarried woman with respect to the control over their body. Denial of sexual autonomy to a married woman is in itself a direct violation of Article 14\textsuperscript{154} and Article 21 of the Constitution of India. This distinction between a married and an unmarried woman, with respect to their right over their body and dignity, so created by the existing laws in India is in no way warranted but is instead a portrayal of the age old cultural beliefs and customs that our country has clinged to, defeating the very notion of gender justice and equality. Women in India were always considered to be subservient to male. Marriage has mostly contributed to adding more mishaps to this downtrodden life of women. Marriage was and is construed as hackles binding women to the four walls of the house.

\textsuperscript{152} Id., at 1.
\textsuperscript{153} Exception to Section 375 of the Indian Penal Code, 1860.

\textsuperscript{154} Article 14 of the Constitution of India.

14. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

\textsuperscript{155} Article 21 in the Constitution of India, 1949.
The prevailing patriarchy has overarched to an extent of putting forward a myriad of obsolete, frivolous reasons to not criminalize marital sex. The erroneous justifications for not criminalizing marital rape goes on to the extent of stating that such criminalisation would result in excessive interference with the institution of marriage and encroachment into private space. This idea of private space in marriage stems from the old notion that law can only regulate public affairs and private world was immune to law. However, with the advent of time this is now treated as an obsolete notion.

The law has advanced to make reasonable interferences in the private sphere so as to uphold the purpose of the Indian constitution to provide equality. Enactments like PWDV, section 498A of IPC etc. are examples where the legislators has understood the importance of breaking into the private space to ensure the protection of certain rights. In this background, the question of trespassing the private space becomes highly irrelevant. It is a clear indication that the state itself defines the limits of the personal space according to its perspectives. The vexatious argument of the probability of such a crime being misused against the husbands, is in itself degrading the efficiency of judiciary. However the honourable courts in the country have always been prudent enough to distinguish between a false allegation and that of a genuine one. The concept of proving beyond reasonable doubt have always helped in punishing the deserved and sparing the innocent.

When the Indian society puts forward the concern of criminalisation of marital rape resulting in the destabilisation of the institution of marriage, the Indian legal system, is paying the cost of denying women the right over their body, the right over sexual autonomy. The denial of sexual autonomy of women is a further violation of their reproductive rights. The question is whether the so called preservation of the institution of marriage is worth such a humungous sacrifice. The institution of marriage is found on the principles of mutual love and respect rather than on sexual intercourse. Submissive sexual adherence to the husband is in no way a part of the institution of marriage. The bond of marriage in no way should be construed as to providing men a right to rape with impunity. Performance of non-consensual sex, wilfully forcing oneself on the other is a violation of the mutual respect that acts as the base of marriage. When the occurrence of such an act in itself destabilises the institution of marriage, criminalisation of such will only result in the stabilisation of the institution, for law has always demanded deterrence from criminal acts and obedience to the law.

While the government is busy pondering over the upholding of the institution of marriage, it has turned a blind eye towards the aftermaths that marital rape can cause. It leaves behind a trail of emotional and physical trauma to the victim. The weightage that the society gives to marriage has indeed forced the victims to stay within the marriage even after being brutally “raped” by their husband. The iron curtain of marriage coerces to shut down the pain.

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158 Austin’s concept of law.
and misery of an innocent victim. Rape in itself, doesn’t only put the victim through physical trauma but also mental hardship and pain. In cases of marital rape, the victim undergoes physical as well as mental trauma and in addition is forced to live together with the perpetrator. The victim undergoes through traumatic stages, living in fear of repeated sexual assault from the perpetrator, whom the law seeks to protect. The lack of legal framework to support these victims, forces them to live in this trauma forever. It is also seen that young children growing up witnessing such sexual violence being inflicted are seen to have the tendency of inflicting the same to others. It is not just the present generation or the victims that suffer the violence is being transferred to the coming generations, increasing the possibility of increase in such crimes during the coming years.

In a country like India, where there is still a lot of social stigma attached to a rape victim, it is of no wonder that there are only a few reported case of marital rape even when the statistical studies provides a whole different picture. As per the National Family Health Survey 2005-06 almost one in ten married women (aged 15-49 years) in India is reported to have been forced to have sex by their husbands against their will. Out of 9% of the women who reported sexual assault, 94% suffered it at the hands of their husbands. Also the report shows that 8.2% of women between the age group of 15 and 49 have faced sexual violence further the 2011 census shows that there are 230 million married women in this age group. This means that around 19 million women have faced sexual violence. The data released by the NFHS further shows that husbands were responsible for 6590 incidents per 100000 women. Only 0.6% cases were reported to the police. The ignorance adhered to this crime have only contributed to the worsening of the condition of married women. The true situation is that marital rape is not an uncommon phenomenon but an under reported one. What lacks is not the recurrent manifestation of the crime but the lack of legal machinery. The insufficiency of law to safe guard the victim coupled with social ignominy attached to rape are the reasons why marital rape in India still remains as an underreported but relevant crime.

Even though the legal framework in India provides for certain sections such as 498A of IPC in favour of married women, it cannot be an excuse for not criminalising marital rape. It is necessary to understand that even though section 498 A of IPC criminalises cruelty against married women, the construction of provision is not strong enough to include rape within its ambit. To

Section 498A of the Indian Penal Code.
498A. Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation.—For the purpose of this section, “cruelty” means—

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.


www.supremoamicus.org
be punished under this section it is necessary that the conduct has to be done repeatedly and over a long period of time. Such an act should also be of such intensity as to drive the victim into committing suicide, or causing grave injury to her life. The insufficiency of the section so as to protect the sexual autonomy of a married women is implied in the decision of the Court, where the honourable Court refused to punish the husband under section 498A in a case where the women bled severely due to insertion of a stick and fingers into the vagina. This calls for the need of criminalizing non-consensual marital sex despite of the existing laws for safeguarding the interest of married woman.

In India where the female literacy rate is as low was 65.45%, a larger potion living in denial of their rights, unaware of what their rights are, have been greatly jeopardized with the stand of not considering marital sex as a crime. The patriarchal notions coupled with illiteracy have entrenched the notion of legitimisation of such heinous crime even among women. India borrowed this concept of marital exemption from early British law, where women were considered as chattel. However today, women is no more considered as a mere chattel or property. They are being treated as living beings with equal rights and dignity. They are no more assets to husbands. In an effort to treat the women community in par with that of women, the parental country to this concept itself has declared this theory of implied

164 Hale, History of the Pleas of the Crown 629 (1778).
166 Section 147 of the Criminal Justice and Public Order Act, 1994.
167 Nimeshbhai Bharatbhai Desai v. State of Gujarat, 2017 SCC Online Guj 1386. The Gujarat High Court notes that marital rape is a disgraceful offence. However, it does not strike down the exception clause nor does it urge the government to do the same. See also Deya Bhattacharya, 'Marital Rape a Disgraceful Offence': Gujarat HC's Ruling Progressive, But Mere Condemnation of Practice Rings Hollow, Child Marriage, FIRSTPOST (India) November 9, 2017.
and came up with the infamous Criminal Amendment Act of 2013, with not the slightest trace of such a recommendation. Providing marital exemption in a male dominated country will only add to the self-proclaimed male superiority over women. It is high time to jettison this notion of non-criminalisation of marital rape. The suggestion and criticisms against India’s current position doesn’t confine itself to the national level. The United Nations has condemned India that refusal to criminalize marital rape is in contravention to the Sustainable Development Goals that India has adopted. The UNDP further went on to say that the question is concerning to consent and not to cultural beliefs.

The discussions on marital rape is a formidable one taking into account the cultural diversity in our country. The Indian legal machinery as it stands now is replete with paradoxes and lacunae. The section 375B should be struck down as unconstitutional since it is in violation of Article 21 and 14 of the Constitution of India. Focus should be on criminalizing the act and not on finding alternate measures. It is also necessary to provide sufficient sentencing for such a crime in order to establish deterrence. Sufficient amendment to the Evidence Act should also be put forward to assist the court in delivering justice. Educating the masses about the crime, enlightening women of their rights and getting away with the stigma of rape also falls in the priority list. Let the laws in our country find purpose in establishing a gender equal platform for its citizen. The criminalization of marital rape would come as a solace to millions of women out there seeking justice. This would be the ray of light in the otherwise relegated life of married women.

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DNA PROFILING & PRIVACY

By D. Sanjuktha
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Nearly fifteen years after the conceptualization of the maintenance of a DNA database for the purpose of criminal forensic investigation, the Law Commission submitted the final version of the awaited Bill – officially termed the DNA-Based Technology (Use and Regulation) Bill, 2018. Though DNA profiling instills a plethora of privacy concerns, its enormous potential to strengthen the justice delivery system of India can neither be overlooked nor debilitated. Various countries like the United States of America have set successful precedents of combating privacy concerns of DNA profiling by efficient anti-violation security measures. The article envisages a two-fold examination into–

1. The legality of the maintenance of a DNA database in the context of the widened connotation of “Privacy” post Puttaswamy v. UOI169.
2. The safeguards in the Bill of 2018 against privacy violations in comparison with established examples of other nation states.

Constitutional validity of DNA tests

DNA in forensic investigation

Although DNA Profiling is an unimplemented investigative technique, procurement of DNA samples with no provision for retention of the sample or the information thereof is found to be permissible analogous to the term ‘medical examination’ under Sec 53 of the Cr.P.C170. The Amendment Act of 2005171 added 53 A which lays down provisions exclusively for medical examination on persons accused of rape and attempted rape. Contrastingly, Sec 54 of Cr.P.C. allows a submission to medical examination at the insistence of arrestees on charge.

While determining the scope of the term ‘medical examination’ the Hon’ble Supreme Court172 determined that an unbound connotation to the term would not serve justice and would pro tanto violate the Fundamental Right against self incrimination.173 The Apex court while marking forcible administration of Narco – Analysis, Polygraph tests and BEAP tests as unconstitutional justified forcible collection of DNA samples under Sec 53 of Cr.P.C. The demarcation in favor of DNA sampling is the non-testimonial nature of the sample. For instance, a confession to a crime extracted from a subject under the influence of narcotics simply cannot stand on the same footing as a DNA sample extracted from the subject since the former in isolation can point toward the guilt of the subject. However, a DNA sample extracted from the subject has to be identified by comparison against another sample retrieved from a crime scene or other scenes of interest to constitute a circumstantial evidence in the chain of events, hence the non-testimonial character.

169 Puttaswamy v. UOI, AIR 2017 SC 4161.
173 Ibid.
Effectively, Selvi v State of Karnataka establishes two things-

a) The term ‘medical examination’ under Sec 53 of Cr.P.C includes forcible collection of DNA samples for the conduction of DNA tests.

b) These tests, even when performed forcibly, do not constitute a violation of Art 20(3) or Art 21 of the Constitution of India.

**DNA in Paternity suits**

Another area of litigation where DNA sampling raises issues are paternity and guardianship suits. A lot of speculation surrounded the power of the court to order a DNA /Blood test contrary to the volition of the parties and whether it would tantamount to a violation of Art 21 of the constitution. The Supreme Court of India, while deciding whether compulsory medical examinations can ensue from a divorce proceeding, held that the Matrimonial Court can order a medical test to determine paternity even in the absence of a special authorizing legislation provided that a strong prima facie case is shown by the applicant. Traditionally blood test to determine paternity was shunned on the theory that establishment of paternity by releasing the legal presumption u/s112 of the evidence act is more in the spirit of the best interests of the child. This position is seemingly altered in the last decade where the utility of scientific measures to determine the paternity of any child finds favor over the legal presumptions or inference or a long and acrimonious trial, all the while the paramount consideration being the child’s welfare.

**Working of the DNA Profile**

A specific DNA pattern, called a profile, is obtained from a bodily sample or an individual. The DNA-Based Technology (Use and Regulation) Bill, 2018 envisages that the profile thus obtained is stored in a database under relevant classifications (with provisions for anonymity under certain classifications). This is purported to be helpful in criminal investigations to identify offenders, victims etc and in disaster management to identify victims.

**Need for a special legislation**

The existing legal system is accommodative of DNA sampling. What new objective does the Bill satisfy?

It is pertinent to note that while DNA sampling under Sec 53 of Cr.P.C does not propose a system for retention of information collected from tests, DNA profiling requires the storage of information in a database for future references, predominantly identification. As such the legal framework in India is devoid of legislations that enable and regulate retention of sensitive data such as the DNA pattern of an individual. Since dangers of misuse and unauthorized breaches could potentially follow, it is a reasonable precaution that binding regulatory breaches are in place to foreclose privacy violation.

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174 Id.
175 Sharda v. Dharampal, AIR 2003 SC 3450.
176 Sec 112, The Indian Evidence Act, Act No.1 of 1872.
177 Gowtham Kundu v. State of West Bengal, 1993 AIR 2295.
There is a consensus amongst various international conventions that any “public interest” measure that oversteps into the privacy of an individual must be supported by a clear and precise legislation that authorizes the same. For instance, the Right to Privacy and Dignity under Article 11 of the American Convention on Human Rights\textsuperscript{179}, prohibits an illegal attack against honor and reputation, and imposes on the States the obligation to provide protection against such attacks. \textit{Owing to the inherent danger of abuse in any monitoring system, this measure must be based on especially precise legislation with clear, detailed rules.} \textsuperscript{180} Similarly the ECHR while examining an application claiming violation of Art. 8 of the Convention\textsuperscript{181} alleging unrestricted interception of all telephone communications by the security services without prior judicial authorization, under the prevailing national law observed that the Russian law did not meet the "quality of law" requirement.\textsuperscript{182}

The most prominent reason to enact a special legislation is to ensure procedural safeguards for the collection, storage etc and to limit access to the available information. But the \textit{DNA-Based Technology (Use and Regulation) Bill, 2018} does not propose a clear stratagem to combat privacy concerns. It is understandable that a technology neutral law as opposed to a technology specific law is preferable to ensure flexibility of a legal regime, but the Draft adopts a position that neutralizes the basic objective of ensuring a special governing legislation (i.e) precision as to the allowable extent of transgression into privacy of an individual in terms of –

- The extent of information that can be stored.
- The period for which it can be retained.
- The persons and entities that can access the information.
- Security measures employed against unauthorized access.

The Bill for the most part, vests the ‘DNA Regulatory Board’ with a blanket authority to frame rules that would determine the position adopted with respect to the issues raised above. Though commendable while considering the dynamic nature of technology and notions of what is acceptable to the society, the Draft fails to provide a doubtless guarantee against privacy violation.

For instance, the Law Commission of India in its 271\textsuperscript{st} report on the maintenance of a DNA Profile declared that the database would adopt the United state’s style CODIS loci using 13 loci (sequences of DNA at specific locations in a genome). A lot of the DNA in the genome does not give intimate information about a person’s behavioral characteristics, physiology or health. Such DNA is known as ‘non coding’ DNA. The US CODIS uses the ‘non coding’ part of the DNA from which it is impossible to glean information

\textsuperscript{179} American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143, art. 11.
\textsuperscript{180} Case of Escher et al. v. Brazil, Inter-American Court of Human Rights, Judgment of July 6, 2009.
\textsuperscript{181} Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art. 8.
\textsuperscript{182} Roman Zakharov v. Russia, European Court of Human Rights, Case no. 47143/06.
that is sensitive to the individual. But the DNA-Based Technology (Use and Regulation) Bill, 2018 leaves the determination of the modus operandi to the DNA regulatory Board.

The “crime scene index” at Sec 2(1)(vii) of the Bill is defined to include “DNA profiles from forensic material found on or within the body of any person, on anything, or at any place, associated with the commission of a specified offence.” “Specified offence” is defined as any of a number of more serious crimes, “or any other offence specified in the Schedule [to the Bill].” The Schedule lists various crimes from rape, to defamation, and unnatural offences.

Under sec 33(3) the Bill authorizes several states to maintain separate databases provided they forward copies to the national database. The national database will include sub-databases, each comprising of genetic information of people/samples classified under several categories, namely:

1. Unidentified crime scene samples
2. Samples taken from suspects
3. Samples taken from persons convicted or currently subject to prosecution.
4. Samples associated with missing persons
5. Samples taken from unidentified bodies
6. Samples taken from volunteers
7. Samples taken for reasons as may be specified by regulations.

The Bill has provisions for deletion of the information acquired during investigations, upon acquittal. This is in line with the ‘right to be forgotten’\(^{183}\), also recognized by the Personal Data Protection Bill, 2018.

Sec 33(6) of the Bill lays down that the identity of a person will be stored only when the information is that of an offender. In all other cases the case reference number of the Investigation associated with the bodily substance will be stored against the profile.

This section provides a reasonable safeguard against privacy by securing that the information under certain classifications will protect anonymity of individuals.

Criticism has been leveled against the sec 33(6) on the ground that it creates a sense of ambiguity and smudges the demarcation between a sample and a profile which causes apprehension because the said Section, as it stands now, could be interpreted to authorize retention of samples\(^{184}\).

The classification system purported to be established by the Bill is similar to that of The DNA Identification Act, 1994 of the United States as it stands amended by Justice for all Act, 2004. The database under the DNA Identification Act is known as the National DNA Index System (NDIS), and the system for analyzing and communicating data is called Combined DNA Index System (CODIS). The stark similarity in both the acts is the imposition of criminal liability for unauthorized divulgence of information stored in the database with a specified fine amount.

Privacy Protection Standards
Access and disclosure

\(^{183}\) Puttuswamy v UOI, AIR 2017 SC 4161.

\(^{184}\) Overview and Concerns Regarding the Indian Draft DNA Profiling Act, Council for Responsible Genetics.
The Bill does not exhaustively prescribe the standards and purposes for which disclosure shall be made /access be granted. This is in sharp contrast with the American system where Sec 14133(b) of the DNA Identification Act authoritatively prescribes privacy standards. DNA tests performed for law enforcement agency may be disclosed only –

- To criminal justice agencies for law enforcement identification purposes.
- In judicial proceedings , if otherwise admissible, pursuant to applicable statutes and rules.
- For criminal defense purposes, to defendants who shall have access to samples and analyses performed in connection with a case where such defendant is charged.

Additionally with adequate precautions of anonymity the data may be sent for census and research. On the contrary, in India, the Bill vests the Board with a blanket authority to determine such access to information at Sec 13(1). Through it is inevitable that the DNA Board should be vested with the responsibility of developing rules to protect privacy, the evasive provisions of the Bill leaves us with no clue of the position adopted by the legislation to the extent of invasion that is considered allowable under the Bill. A greater concern is Sec 41 which permits the Data Bank Manager to grant access to the database to any person or class of persons that the Data Bank Manager considers appropriate, without any administrative review or oversight of any kind.

The PACE\textsuperscript{185} act of the UK also authorizes the National DNA Board to lay down rules for retention and destruction of DNA Profiles. The secretary of state must publish rules of the National DNA Database Strategy Board and lay a copy of the rules before Parliament. The National DNA Database Strategy Board must make an annual report to the Secretary of State about the exercise of its functions. The Secretary of State must publish the report and lay a copy of the published report before the Parliament. This ensures that there is a check over the exercise of discretion by the DNA Database Strategy Board which is absent from the Indian counterpart. Though Sec 28 of the DNA-Based Technology (Use and Regulation) Bill provides for an audit of the Laboratories, the DNA Board is absolved from a similar scrutiny.

\textit{Destruction of samples}

Though DNA-Based Technology (Use and Regulation) Bill provides for destruction of information upon acquittal, there is no provision for a systematic deletion of DNA information collected under other heads after a stipulated period of time. For instance, in U.K there is a legislative mandate that the DNA information has to be deleted within 6 months.\textsuperscript{186} The DNA Identification Act 1994 of the United States under Sec 14132(d) is similar to the proposition of DNA Based Technology (Use and Regulation) Bill,2018 in as much as it mandates the Director to expunge the information stored in the profile upon acquittal or overturn of conviction.

In the landmark S & Marper v UK \textsuperscript{187}, the European Court of Human

\textsuperscript{185} Police and Criminal Investigation Act ,1984.

\textsuperscript{186} Protection of Freedoms Act, 2012.

\textsuperscript{187} S and Marper v. United Kingdom, [2008] ECHR 1581.
Rights held that a blanket and indiscriminate retention of DNA information is a violation of Art 8 of the ECHR. The major concern was the retention of information/samples of the arrestees even after their acquittal. Racial biases of law enforcing officers, while making arrests, elevated the problem endangering the privacy of a particular section of the population. Consequently the government of U.K made changes to the DNA retention regime through the Protection of Freedoms Act 2012. Under the new Act, which came into force in October 2013, the DNA and fingerprints of individuals who are arrested or charged but not convicted of an offence could now be destroyed after a certain length of time. The Biometric Commissioner’s 2015 annual report indicated that almost 7,753,000 DNA samples were destroyed even before the Protection of Freedoms Act 2012 came into force, in anticipation of the act. The Protection of Freedoms Act, 2012 requires that any information obtained as a consequence of an unlawful arrest or a mistaken identity should be deleted.

It is noteworthy that the retention of DNA samples poses a greater hazard than retention of information contained in a profile. The Nuffield Council on Bioethics’ report expressed concern over the possible misuse of the retained samples. For instance, a retained sample maybe used to falsely implicate someone in a crime. It can be used to glean information which lies beyond the scope of mere identification, like familial affinity and genetic susceptibility to certain types of diseases and conditions. While commenting on the reliability of DNA evidence Daubert v. Merrell Dow Pharmaceuticals held that the multiplicity of instances in the handling of the samples creates concerns as to contamination or deliberate misuse.

Monitoring Laboratories

DNA sampling could only be performed by approved laboratories. Sections 14 to 18 provide for the approval by the DNA Profiling Board of DNA laboratories that will process and analyze genetic material for eventual inclusion on the DNA database. Under sec 14, all laboratories must be approved in writing prior to processing or analyzing any genetic material. However, sec15(2), permits DNA laboratories in existence at the time the legislation is enacted to process or analyze samples that were destroyed even before the Protection of Freedoms Act 2012 came into force.

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189 Sec 63D, Police and Criminal Investigation Act, 1984.
190 Nuffield Council on Bioethics report, ‘Genome Editing and Human Reproduction: Social and ethical issues,

192 M. Dawn Herkenham, Retention of Offender DNA Samples Necessary to Ensure and Monitor Quality of Forensic DNA Efforts: Appropriate Safeguards Exist to Protect the DNA Samples from Misuse, 34 J.L. MED. & ETHICS 380, 381 (2006).
193 Seth Axelrad, Survey of State DNA Database Statutes 2005, AM. SOC. OF LAW, MED. & ETHICS.
DNA samples immediately, without first obtaining approval. There is no definitive prescription of security measures to be adopted by the laboratories. Sec 22of the Bill requires that labs ensure “adequate security” to minimize contamination without providing for accountability in the event of contamination.

**Violation of Privacy and misuse**

Privacy violations may occur when –

a) The information contained in the profile is illegally authorized or disclosed or sensitive information is derived from the sample.

b) The retention of information accrued with respect to an investigation is perceived as unreasonable as the retention of the sample after the completion of the investigation exceeds the object or purpose for which it was collected.

To enable a protection against illegal dissemination of information discussed in (a) the authority that determines access should be limited and should be held accountable. It is unclear as to what will become of the tissue samples, which may harbor all kinds of personal information regarding heredity and disease. Because they contain an individual's entire genome, tissue samples retained by the government threaten privacy interests the most, yet they receive less attention than the computer profiles contained within DNA databases. In the Bill there is no clear mandate about the deletion of samples.

**What if DNA profiling in itself violates privacy?**

Under the present Sec 53 of Cr.P.C DNA sampling is a valid ‘medical examination’. Sec 53, as discussed earlier has been held constitutional. But considering a situation where ‘X’ is arrested on charge of attempt to theft and his DNA is obtained, Sec 53 allows for a comparison of the DNA retrieved from the scene of theft. Now, if the same sample retrieved form ‘X’ is used to connect ‘X’ with a rape offence (even when he is not an arrestee on charge/even a suspect in the rape case ) will it be unfair?

People v. Baylor observes that "there is no constitutional violation or infringement of privacy when the police in one case use a DNA profile, which was lawfully obtained in connection with another case. Similarly, in State v. Hauge notes that "a number of jurisdictions have held that once a blood sample and DNA profile is lawfully procured from a defendant, no privacy interest persists in either the sample or the profile. While initial DNA sampling and analysis taken from defendant constituted a search, the reuse of this validly obtained DNA sample in a subsequent unrelated criminal investigation did not trigger privacy issues. An excerpt from Wilson v. State reads -"Once an individual's fingerprints and/or his blood sample for DNA testing are in lawful police possession, that individual is no more immune from being caught by the DNA sample he leaves on the body of his rape victim than he is from being caught by the fingerprint he

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195 118 Cal. Rptr. 2d 518, 521 (Ct. App. 2002).
196 79 P.3d 131, 144 (Haw. 2003).
leaves on the window of the burglarized house or the steering wheel of the stolen car.

In Maryland v King\textsuperscript{199} it was reaffirmed that though finding potential matches with help of DNA profile constitutes a search, there is no violation of privacy. Finding that the ‘special needs case’ test needn’t be applied to determine that the search is valid, the Court iterated that there was no reasonable expectation of privacy over the DNA samples of the arrestees.

On the other hand in S&Marper v The United Kingdom\textsuperscript{200} it was observed that Art 8 of the ECHR provides for the right to privacy. Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such

1) As is in accordance with the law and
2) Necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The proposed DNA profile cannot be regarded as a necessity in a democratic society so as to avail the prevention of disorder or crime. In other words S& Marper\textsuperscript{201} rejecting that the maintenance of a DNA profile is not unreasonable held-

“Given the nature and the amount of personal information contained in cellular samples, their retention per se must be regarded as interfering with the right to respect for the private lives of the individuals concerned. That only a limited part of this information is actually extracted or used by the authorities through DNA profiling and that no immediate detriment is caused in a particular case does not change this conclusion... The DNA profiles’ capacity to provide a means of identifying genetic relationships between individuals... is in itself sufficient to conclude that their retention interferes with the right to the private life of the individuals concerned. The possibility the DNA profiles create for inferences to be drawn as to ethnic origin makes their retention all the more sensitive and susceptible of affecting the right to private life.”

The reasonable expectation of Privacy test

In Katz v. United States\textsuperscript{202}, Justice Harlan articulated the "reasonable expectation of privacy" test that provides our modern analytic framework." Privacy is threatened only if the person claiming an illegal search exhibits both

1) An actual expectation of privacy and
2) One that "society is prepared to recognize as reasonable.”

The ultimate question is to determine if the maintenance of a DNA profile is acceptable to the people as a reasonable measure in a democratic society. There is no doubt that the maintenance of a DNA profile could create a panopticon, effecting deterrence. It can aid in closing

\textsuperscript{199} 669 U.S. 435 (2013).
\textsuperscript{200} Supra note 20.
\textsuperscript{201} Ibid.
\textsuperscript{202} Katz v. United States, 389 U.S. 347, 361 (1967).
cases and thereby weeding out deviants from the mainstream society. There are many cases where DNA profiling resulted in overture of wrongful convictions. For instance, the first DNA exoneration from wrongful conviction occurred in 1989. Till date there are 362 DNA exonerees. ‘Innocence Project’ is an initiative to exonerate those falsely convicted, enabling them to be a part of mainstream society once again. A study carried out by the project revealed that 70% of the wrongful convictions involved eyewitness misidentification, 28% involved false confession.203

Greater reliability and post-conviction DNA analysis contribute buttress to the argument that maintenance of DNA profile will strengthen the values of the criminal justice system. It can be argued that any evolved society expects the government to take measures against crime and to punish deviants to create deterrence, reformation and in some cases retribution. As social theorist David Garland observes, surveillance technologies are an essential part of modern societies that require some means of data gathering.204

The current structure of DNA Profiling can be favored in the perspective that in case of convicts the privacy expectation is even more diminished. Holding that drawing blood for DNA analysis was analogous to taking a fingerprint (a minimal intrusion) the court held that under the reasonableness theory, constitutionality would be determined by balancing the degree to which the database would advance the public interest against the severity of the resulting interference with individual liberty. Relying on the initial Rise v. Oregon decision, an eleven-judge panel in the Ninth Circuit recently announced a holding in Kincade that noticeably broadens the population subjected to DNA testing. Furthermore, Kincade increases the circumstances in which DNA testing may be used, and in the case of a federal parolee, the Kincade Court concluded that despite the alarmist tone of outraged opponents, the interests furthered by the federal DNA Act are undeniably compelling: In light of conditional releasees' substantially diminished expectations of privacy, the minimal intrusion occasion by blood sampling and the overwhelming societal interests so clearly furthered by the collection of DNA information from convicted offenders, we must conclude that compulsory DNA profiling of qualified federal offenders is reasonable under the totality of the circumstances.205

Similarly in United States v. Weikert, the First Circuit relied heavily upon the clarity provided by the Supreme Court in California v. Samson206 to conclude that governmental interests outweigh a parolee's privacy expectation.207

It is accentuated once again that the storage of DNA information under categories other than pertaining to convicts is protected by anonymity clauses.

Potential Misuse
The possible misuse can be categorized under two heads

203 https://www.innocenceproject.org/
205 United states v Kincade,379 F.3d at 831, 837, 839.
207 United states v Weikert, 504 F.3d at 8-11.
1) Unauthorized disclosure or access:
   Can be avoided by security measures and accountability.

2) Authorized disclosure or access:
   Arbitrary discrimination and stereotyping. Privacy over sensitive information is threatened, retention of information is antithetical to the right to be forgotten.

Under the Bill the Board has the authority to determine access and there is no legislative check limiting access. There is no prescription as to the purposes for which disclosures can be made. For instance if the information from the coded part of the DNA sample (like health/susceptibility to genetic conditions) is stored in the profile and if such information is disclosed to potential employers the right of the subject is affected. For example in the early 1970s, several states in the U.S. enacted laws to identify carriers of sickle cell anemia and to warn against the propagation of children that could potentially carry the gene. Because African Americans were the primary carriers of the gene, 'genetic discrimination' quickly turned into racial discrimination.

Genetic profiling, or DNA profiling, is also being utilized in some workplaces to discriminate against those employees whose profiles could pose potential financial risk to their employers.

This kind of discrimination may even occur within the law enforcing agency. A notable example occurred in Ann Arbor, during an investigation of a serial rapist described by one of the victims as a six-foot tall "light-skinned black man." Black men living in Ann Arbor, who did not appear to be linked to the rapes through any evidence, were asked to supply blood samples for DNA analysis. If they refused, police obtained a warrant to seize a sample. The police defended this "dragnet" procedure as necessary, because there was no other evidence from which to identify a suspect. Even after an individual was arrested, tried, and convicted of the rapes, the Michigan State Police insisted on retaining the blood samples taken from hundreds of innocent black men. All the data available in the Profile may one day be used to identify and segregate those who possess a "crime gene." The possibility of finding genetic causes for antisocial behavior is the most widely publicized research of "behavioral genetics." To explore that connection, the National Institutes of Health in 1992 funded a controversial conference to discuss the genetic basis of criminal behavior.

The safeguard against the violation of privacy with respect to sensitive content is that the Law Commission has issued that the DNA information will be gleaned by the Short Tandem Repeat technology tapping only the non-coding part of DNA also termed as 'junk DNA.' Sensitive information such as the genetic makeup eludes STR analysis and therefore the information that may lead to stereotyping or discrimination will not be stored in the DNA profile. However despite

208 Warren E. Leary, Screening of All Newborns Urged for Sickle-Cell Disease, N.Y. TInes, Apr. 28, 1993, at C11
the Law Commission’s assurance the Bill doesn’t provide any prohibition of other types of analysis.

One of the major concerns is the development in technology that might, one day, enable the government to retrieve sensitive information from ‘junk DNA’, should the government be interested in gleaning information from DNA samples other than matching profiles to crime scene samples.212

While answering these concerns the United States courts have leaned towards the theory that future possibility of violation cannot be taken as a consideration while evaluating the reasonability of an intrusive measure taken in public interest. In Weikert’s213 regarding the contention that the retention of DNA profile exceeds constitutional bounds—the court interpreted it as invoking two distinct concerns:

(1) The potential for misuse of information; and
(2) The possibility that future scientific discoveries will enable the government to obtain infinite personal information.

The court held that the first argument warrants little consideration on a general balancing test and the second fails because it refuses to consider "present circumstances."214

There are many instances where surveillance was allowed despite a looming possibility of future misuse on the grounds that the reasonability should be based on prevalent circumstances. For instance, in United States v. Knotts215, dismissing respondent’s claim that permitting the government to use electronic beeper technology to follow persons across state lines would allow twenty-four hour surveillance of any citizen in the country without judicial knowledge or supervision: “if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.”216

Conclusion

Technological innovation is available to all. Undeniably, it is also a tool in the hands of criminals to avoid detection. Alternatively it has enormous potential to aid investigations. Although the State cannot overstep its legitimate interests, technological innovation in investigative techniques cannot be blatantly disused on grounds of apprehension. DNA sampling has a huge reception in the identification of offenders and victims. The odds of unrelated people sharing genetic markers is as remote as 1 in 113 billion. A DNA sample is capable of analysis if there is sufficient quantity and reasonable quality of DNA present in the sample polymerase chain reaction (PCR) based testing is relatively

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www.supremoamicus.org
insensitive to degradation\textsuperscript{217}. Succinctly, obtaining DNA sample\,(hair, saliva etc) may be nonintrusive. Defining private space as being equivalent to ‘meat space’ is outdated\textsuperscript{218} in as much as identity is associated not just with the physical body.

The Right to Privacy must be viewed from the perspective of the innocent\textsuperscript{219} The structure of the DNA profile as envisaged under the Bill does not raise any reasonable concern of privacy though the lack of definitive protocol for disclosure and accountability causes alarm.

The maintenance of a DNA profile, with quality requirements, could assure a speedy justice delivery system.

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\textsuperscript{218} SIMON A. COLE, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION 310 (2001);

CRIME SPECIALISATION BY JUVENILES WITH SPECIAL REFERENCE TO FEROUCIOUS RECRUITMENT METHODS ADOPTED BY MAOIST AND OTHER EXTREMISTS GROUP IN INDIA

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ABSTRACT
Juveniles who are recruited by the extremists groups are victims of violence at multiple levels. The Maoist and other extremists groups expose the juveniles through ferocious recruitment methods making them dangerous instruments and using them for committing criminal offences. This leads the children to specialise in crimes and make them hardened criminals.

According to International legal framework, recruitment of children by terrorist and violent extremist groups is to be considered a serious form of violence against children as the consequences of such acts are devastating and its implications on the society and children are severe. States and society need to take responsibility to take measures and prevent this phenomenon.

This article analyses the reasons and methods of recruitment of juveniles by the Maoist and other extremist groups. Due to these recruitment process followed by Maoist and extremist groups most juveniles show specialisation in offence types and a progression over time from less to more serious categories of offences.

It’s high time that states take up preventive measures to curb with this menace of recruitment process taken up by the Maoist and extremist groups. Use of individual assessments can be a basis for taking appropriate measures by the state to stop such recruitment process.

INTRODUCTION
There has been an increase in the crimes committed by juveniles these days. There is a trend of increase in juvenile crimes world-over, with more and more involvement of the youth in violent crimes. Also, there is a popular conception that adult criminals begin their careers in juvenile years. So, reducing the juvenile crimes has been the key concern and one of the biggest challenges for the society. It is a serious concern for nations all over the world, and solutions to end this problem need to be sought very carefully.

The analysis of statistical data available at official sites in India indicates increasing involvement of the juveniles in heinous crimes. Studies have shown that juveniles tend to commit same type of offences in the process of specialisation of committing a particular crime. This specialisation in

221 Carlos Carcach & Simon Leverett, Juvenile Offending: Specialisation or Versatility, Trends And Issues In Crime And Criminal Justice, Australian Institute of Criminology, April 1999, ISSN 0817-8542
222 Supra Note 1
offences leads to progression from less to more serious categories of offences.\textsuperscript{223}

**Definitions** –

**a) Child**
As per Juvenile Justice (Care and Protection of Children) Act, 2015 “child” in India means a person who has not completed eighteen years of age.\textsuperscript{224}

**b) Child in conflict with law**
A child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence is said to be a child in conflict with law as per Juvenile Justice (Care and Protection of Children) Act, 2015.\textsuperscript{225}

**c) Juvenile**
The word juvenile has been derived from the Latin term juvenis, which means young. As per Juvenile Justice (Care and Protection of Children) Act, 2015 a juvenile is a child below the age of eighteen years.

**Crime specialisation by juveniles**
Crime specialization has been defined by preferences for a specific offense. Therefore, crime specialization by juveniles can be described as the tendency to repeat the same offense types in successive crimes by the juveniles.

Generally, in most of the countries Juvenile is the one who is under 18 and who is not yet old enough to be regarded as an adult. But the age of the juvenile under the Indian legislations has taken variation in temporal and spatial perspectives.\textsuperscript{226}

**Maoists and other extremists groups**
There are more than 40 banned organisations in the list of organisations banned by the Government of India. These banned organisations include terrorist organisations, extremists groups, Naxalites, Maoists groups and other groups which are a threat to the security of the Indian nation.

The focus of the article is upon Maoists and other like groups e.g. People’s Liberation Army, National Democratic Front of Bodoland (NDFB) etc. These groups cause threat to the internal security of the nation which and are non-state armed groups fighting against the government with weapons.

Mao Tse Tung (1893-1976), a Chinese communist revolutionary developed Maoism. It is a concept where state power is captured by armed insurgency, strategic alliances and mass mobilization. The central theme of Maoists is to capture state power through use of violence and armed insurrection.

In India, the largest and the most violent Maoist formation is the Communist Party of India (Maoist). There are a number of other extremists groups and organisations which are included in the list of banned terrorist organisations under the Unlawful Activities (Prevention) Act, 1967.

Maoist insurgency first originated in 1967 in Naxalbari village (West Bengal) that is the reason they are also called Naxalites. Since then the Maoists have become an organised

\textsuperscript{223} Supra note 2
\textsuperscript{224} Section 2 (13) of Juvenile Justice (Care and Protection of Children) Act, 2015
\textsuperscript{225} Section 2 (14) of Juvenile Justice (Care and Protection of Children) Act, 2015
force with well planned recruitment and training process. Others extremists groups just like the Maoists are a group of individuals whose ideology, values and beliefs are different from what society at large considers normal. Extremists use violent methods to convey their views to outsiders and can go to any extent to achieve their goals. Government of India identifies 106 districts in 10 states as Left Wing Extremist affected in the country.

Ferocious recruitment methods adopted by Maoist and other extremists groups
Children are recruited by the Maoists and other extremist groups because it is easier to train them to kill. These children are made to go through ferocious recruitment processes to specialise in a particular type of crime so that Maoists and other extremist groups can use them for specific purposes. Children are made to learn how to use guns and further to place explosives. Children are an easy target for recruitment in the Maoist and extremist groups because they can be easily manipulated and are more obedient as to they do not question the orders. During their training, they often have to kill friends or members of their own families in order to harden up which is a type of process and is applied by the Maoist and extremist groups to check whether the children recruited will remain honest.

RECRUITING THE ECONOMICALLY POOR
The Maoists recruit a lot from the tribal community which is very poor. They visit the village areas to recruit cadres and offer a steady income for their family. The villagers were left with no other option but to join as they were poor. About 70-80% of their cadre would be the tribal community who are economically poor. But for the new recruits (mainly child soldiers) the reasons to join the cadre are different. The Maoists provoke the child recruits to join the cadre by making them feel that they were discriminated against by the state. Also, these child recruits join the cadre not for any ideological or economic reason, but to settle personal scores. Children are threatened to join the force if they do not join voluntarily. They are given the bait of a good amount of money but if they are not lured then they are made to forcefully join the cadre. They are threatened that if they do not join the Maoists cadre then the consequences would be killing of their family members. In Parthari village of Lohardaga district of

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230 ibid
Jharkhand, recruiting children is one of the main objectives of the Naxals.\(^{232}\) If there are quarrels among children, they are exploited by the Maoists by handling them with guns and ammunition, and these children young and innocent consider it as a symbol of power which will make them money.\(^{233}\) Maoists in Jharkhand have started hiring Paharia tribes of which mostly are children. They use these people as shields to get protected from security forces. Paharias are very poor. Moreover, their life is also not long. Their average age is 40-45 years. They have very poor nutrition. All this makes them vulnerable to joining Maoist forces.\(^{234}\) The Maoist and other extremists groups promise the parents of poor families of providing food and better life if their children if they handover them. The children are toughly trained to handle sophisticated weapons.\(^{235}\)

**Why poor children are being recruited?**

1. **Easier to train them to kill**

The children are told to follow orders without any questions. They are disciplined like army personnel and if do not follow orders then will be given punishments. These punishments can be of any form and are often group based and physical in nature. These punishments are given to humiliate among the group and to make others fear. They are made to ignore thoughts, feelings, emotions and reactions and to only do what is ordered. The young minds are being brain-washed in such a condition that they should reach a tendency to commit crimes.

2. **Can use them for specific purposes**

The children can be used for specific tasks which adults cannot perform. There are some tasks which children can do easily and no one would doubt on the child being doing such tasks. There are reports in which children are being used to plant explosives and throw hand grenades in public to fulfill the objectives of Maoists and extremists groups. No one would doubt on poor children having hand grenades to destroy buildings, public structures. So, the Maoists and extremists groups misuse these children for doing specific tasks for specific purposes.

3. **Poor children can be manipulated**

People in the backward regions lack economic opportunities. They are deprived of fruits of development efforts. People in the socio-economically depressed regions often carry a deep sense of frustration and discrimination against their better of neighbours. Poor and disaffected people are often easily manipulated by anti-social elements and powerful vested interests. These pockets of poverty breed serious socio-economic problems. There is corroborating evidence that the problems of terrorism, Naxalism, increased incidents of crime, law and order and social strife in many pockets are attributed to social and economic depression of such regions.\(^{236}\)

\(^{232}\) ibid

\(^{233}\) ibid


\(^{236}\) Anshuman Behera, Maoist Conflict in Odisha, NIAS Backgrounder on Conflict Resolution, www.supremoamicus.org
Studies have shown that poor children experience learning disabilities which make them more vulnerable to manipulative tactics applied by the Maoists.\footnote{Jeanne Brooks-Gunn and Greg J. Duncan, The Effects of Poverty on Children, The Future of Children, Vol. 7, No. 2, Children and Poverty (Summer - Autumn, 1997), pp. 55-71, published by Princeton University, available at \url{https://www.jstor.org/stable/1602387} as on 04-11-2018 18:46 UTC} Poor children can be manipulated easily as they are gullible and Maoists exploit them stating that the rich neighbours have opportunities but the poor’s lack. Manipulative older comrades have routinely exploited children with heroic tales of struggle.\footnote{Salil Tripathi, Maostan of Arundhati Roy, Live Mint, First Published: Wed, Mar 31 2010. 09 02 PM IST, \url{https://www.livemint.com/Opinion/ZFxiTB8qTFW7NYrgHi3hMO/Maostan-of-Arundhati-Roy.html} as on 4-11-2018}

4. **Children are more obedient**

The poor children who have certain small desires have no other option but to obey the orders of the Maoists. The poor children are targeted by Maoists and lure them by offering them money. The poor children are more obedient and follow orders without second thought if paid well-off as their mental condition have been formed by the drastic effects of poverty.

5. **Children do not question orders**

As children lack the understanding of the consequences of their acts they do not question the orders of the Maoists. And the children are under threat that if they questioned the orders they will be punished by their leaders.

**Recruiting the poor Adivasi children**

Maoists have their own children’s wing (Bal Sangathan) which is specifically made to recruit children. Specific training is given to the new recruits to commit certain crimes like kidnapping, committing theft, killing, causing grievous hurt etc.

Maoist armed groups are recruiting and indoctrinating poor Adivasi children, and had constituted children’s squads and associations (Bal Dastas, Bal Sangham and Bal Manch) as part of mass mobilization.\footnote{Alexander Lee, Who Becomes a Terrorist? Poverty, Education, and the Origins of Political Violence, published by Cambridge University Press, World Politics, Volume 63, Number 2, April 2011, pp. 203-245 (Article)} One cadre of each Adivasi family has to be recruited.

The Maoists first offer steady income for the Adivasi family to convince them to join their children to the Maoist group and if refused they are forced and tortured. Maoists visit the village areas where the Adivasis reside and attack on them forcibly to recruit their children in their army. It is reported in many reports that 70-80% of the Maoist cadre is tribal community who are poor Adivasis and of these 72% are children.

**Maoists recruit economically poor unlike the terrorists**

Most individual-level studies of terrorist groups have concluded that these groups are composed of people who are wealthier and better educated than the average member of the societies from which they recruit.\footnote{ibid} According to studies Islamic Terrorists are
not poor and illiterate, but rich and educated.\textsuperscript{241} But Maoists and other extremists in India on the other hand, tend to recruit the economically poor as they are an easy target.

**Conclusion**

From its inception, the Maoist movement has derived support from the weaker and deprived sections of the society. Presently, the poorest regions of the country are dealing with the Maoist insurgencies. The percentage of population living below the poverty line in most of the Maoist-affected states is higher than the national average of 27.5\%.\textsuperscript{242} So, it is clear from the above detailed study that the Maoists tend to recruit economically poor.

**TARGETING THE SOCIA LLY MARGINALISED COMMUNITIES**

**Socially marginalized**

In the social environment, groups of people or communities may have the experience of being excluded. This can be because they speak a different language, follow different customs or belong to a different religious group from the majority community. They may also feel marginalized because they are poor, considered to be of ‘low’ social status and viewed as being less human than others. Economic, social, cultural and political factors work together to make certain groups in society feel marginalized.\textsuperscript{243} Maoists and extremists groups target the socially marginalized communities.

**Targeting the socially marginalised children**

Certain terrorist and violent extremist groups enjoy territorial control over specific areas. Their authority may extend to schools, which then are used as a forum in which socially marginalised children are indoctrinated, encouraging “buy-in” and identification with the group. The extremists groups develop precise propaganda strategies aimed at highlighting the advantages of joining the group or at triggering empathy. Joining a group may be portrayed as offering status and prestige, smart uniforms and weapons. The experience is shown as an opportunity for power, especially to children without educational opportunities or employment.\textsuperscript{244}

**Conclusion**

Amnesty International’s annual report for 2012, has painted a bleak picture of the human rights situation in India, particularly in the Adivasi and Dalit areas and regions where the Maoists are active.\textsuperscript{245}

\textsuperscript{241} Giulio Meotti, Islamic Terrorists not Poor and Illiterate, but Rich and Educated, Gatestone Institute, International Policy Council, November 19, 2016 at 5:00 am available at https://www.gatestoneinstitute.org/9343/terrorism-poverty-despair as on 4-11-2018


\textsuperscript{243} http://shodhganga.inflibnet.ac.in/bitstream/10603/97291/8/08_chapter1.pdf accessed on 28-10-2018 at 11:00 a.m.

\textsuperscript{244} Thomas Koruth Samuel, “The lure of youth into terrorism”, in SEARCCT Selection of Articles, Vol. 2 (Kuala Lumpur, South-East Asia Regional Centre for Counter-Terrorism, 2011)

The Maoists have been targeting the socially marginalised communities since a very long time. They make the Adivasis join the cadre who are socially marginalised and they manipulate the children and play with their young minds. The Maoists misuse the innocent Adivasi children to build up their empires. The Maoists and other extremists groups target specific communities for their recruitment purposes.

PREVIOUS CRIMINAL RECORD FOR RECRUITING

The previous criminal record of the juveniles does not play a relevant part for their recruitment in the extremist groups. The Maoists and extremists groups target the economically poor children and socially marginalised children and recruit them. The extremists groups themselves provide the children with specialised training in arms and ammunitions. The children are given training in field work and specially trained to commit certain acts like plant explosives, make bombs, kill people etc. Once the child recruits become experts they are then given specific tasks and the result in crime specialisation by these juveniles in specific crimes. The propaganda of the Maoists and extremists groups to recruit the child is to get advantages like show their power and ruthlessness. The increase in percentage of children upon overall population also has resulted in their recruitment. The Maoists and the extremists groups do not consider the previous criminal record as a necessary process for recruitment like the terrorists do. The major terrorists groups all over the world recruit members with expertise in fields such as communications, computer programming, engineering, finance, and the sciences. Terrorists groups also recruit members with expertise in fields such as communications, computer programming, engineering, finance, and the sciences. The purpose of terrorists recruiting such members is to give specific tasks to specific people and experienced criminals. But the Maoists and extremists groups in India target the economically poor and the socially marginalised communities as they are an easy target.

NATIONAL AND INTERNATIONAL LEGAL STANDARDS

Prohibiting the recruitment

The recruitment and use of children during conflict is one of the six grave violations identified and condemned by the UN Security Council. The six grave violations form the basis of the Council’s architecture to monitor report and respond to abuses suffered by children in times of war.246

The international legal framework guarantees children broad protection from serious forms of violence, including recruitment and exploitation of children by terrorist and violent extremist groups.

Convention on the Rights of the Child

Article 19 of the Convention on the Rights of the Child provides a broad definition of “violence against children”, which, as underlined by the Committee on the Rights of the Child (the body of independent experts monitoring the implementation of the Convention by its States parties),

246 Child Recruitment and Use, Office of the special representative to the Secretary-General for Children and Armed Conflict, available at https://childrenandarmedconflict.un.org/six-grave-violations/child-soldiers/ as on 4-11-2018
includes both non-physical and non-intentional forms of harm. Accordingly, Governments are required to undertake all possible measures to prevent and prohibit violence against children. The exploitation of children is addressed in article 32 of the Convention, which calls on States parties to recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to be harmful to the child’s health or physical, mental, spiritual, moral or social development. In article 34, States parties are called on to undertake to protect the child from all forms of sexual exploitation and sexual abuse and States parties are required to take all appropriate measures to prevent, among other things: (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in unlawful sexual practices; and (c) the exploitative use of children in pornographic materials. However, the term exploitation is considered to be broader, as article 36 requires States parties to protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare.

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts

Article 4

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.

2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

3. The application of the present article shall not affect the legal status of any party to an armed conflict.

The Optional Protocol, adopted in 2000, prohibits the compulsory recruitment of children under the age of 18 into the armed forces. The particular importance of the Optional Protocol is that it establishes stricter prohibitions with regard to non-State armed groups. Article 4 provides a blanket prohibition of the recruitment and use of children by non-State armed groups in hostilities, regardless of whether or not they are recruited voluntarily or compulsorily, or take a direct part in hostilities. States parties are required to take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

Indian legal framework

India ratified the optional protocol in 2005. In its initial report under OPAC submitted to the Committee on the Rights of the Child in 2011, India reiterated its long-held position that the armed violence taking place within its borders does not amount to international or non-international armed conflict, and

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highlighted existing protections for children guaranteed by the constitution. These included Article 21 (the right not to be arbitrarily deprived of life or personal liberty except according to the procedure established by law); Article 39(e) (directing the state to ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity, and that they are protected against exploitation and against moral and material abandonment); and Article 47 (imposing on the State the primary responsibility of ensuring that all the needs of children are met and that their basic rights are fully protected).²⁴⁹ Despite these guarantees, if children associated with left wing armed groups are detained during counter-insurgency operations they may be at risk of further human rights violations. According to India’s Juvenile Justice Act, such children should be treated either as “children in conflict with the law” (with a requirement to be brought before a Juvenile Justice Board (JJB) within 24 hours and a prohibition on being placed in a police lockup, etc.) or a child “in need of care and protection” (with a requirement that their case be dealt with by a Child Welfare Committee). Indeed, the same Juvenile Justice Act, 2015, criminalizes the recruitment and use of any child for any purpose by a non-state, self-styled militant group, or any adult or adult group using children for illegal activities. However, the Act also stipulates that children in conflict with the law aged between 16-18 years of age who have committed “heinous offences” may be tried as adults if so directed by a JJB. This could include children who are detained and charged under the Unlawful Activities (Prevention) Act and/or other security legislation due to associations with non-state armed groups.²⁵⁰ It remains unclear whether children associated with non-state armed groups will in practice be treated as children in conflict with the law or as victims of the crime of recruitment by non-state armed groups, leaving them at risk of stringent punishments instead of receiving appropriate rehabilitation, counseling and reintegration services. This lack of clarity also raises the prospect that they could be treated as adults and denied their fair trial rights as juveniles, and as such be placed at increased risk of being subjected to the widespread unlawful practices of illegal detention and torture carried out by the security forces.²⁵¹ Child recruits should be treated primarily as victims and protected, and should never be prosecuted solely for their membership of armed groups. If a child does face criminal prosecution for crimes arising from their participation in hostilities, they should be afforded all guarantees and protections under international juvenile justice standards, in addition to all legal protections available in national law, including provisions of the Juvenile Justice Act. In all


²⁵⁰ Ibid

²⁵¹ Dipak K. Gupta, The Naxalites and the Maoist Movement in India: Birth, Demise, and Reincarnation, ISSN: 1741-9166
cases, detention should be a measure of last resort and for the shortest period of time.

CONCLUSION

Juveniles who are recruited by the extremists groups are victims of violence at multiple levels. The Maoist and other extremists groups expose the juveniles through ferocious recruitment methods making them dangerous instruments and using them for committing criminal offences.

These juveniles are victims of crime and do not commit crime as they forced due to circumstances. These children are “victims of crime” and not “children in conflict”.

The Maoists and the extremists recruit the economically poor and target the socially marginalised communities and make children to join their cadre. These Maoists do not look into the past criminal records to recruit but randomly select and target the economically poor and the socially marginalised communities.

Unlike the major terrorists organisations in the world the Maoists tend to employ the poor and marginalised. The terrorist’s organisations recruit persons who are literate and educated in science and technology to use weapons of mass destructions. But the Maoists and other extremists groups in India employ the poor and illiterates.

The Maoists target juveniles those stricken with poverty and the previous criminal records do not come into much picture as the Maoists aim to enlarge their organisation and recruit new entrants (Adivasis) and are used as human shields against the government.

The Maoists give these children proper field training, mental training, and training in use of arms and ammunitions. These child recruits are made ready for situations where they can be given specific tasks to blast government buildings or kill civilians.

So, it is clear from the analysing the above study that the Maoists tend to recruit the economically poor. They target the socially marginalised communities. And, the previous criminal records of the juveniles don’t play a relevant part of the recruitment procedure of the Maoists and extremists groups.

The major concern is that the juveniles recruited by the Maoists and extremists groups in India are specialising in crimes due to training given by Maoists. This specialisation in crimes by the juveniles leads to increase in crimes in India.

According to International legal framework, recruitment of children by terrorist and violent extremist groups is to be considered a serious form of violence against children as the consequences of such acts are devastating and its implications on the society and children are severe. States and society need to take responsibility to take measures and prevent this phenomenon.

It’s high time that states take up preventive measures to curb with this menace of recruitment process taken up by the Maoist and extremist groups. Use of individual assessments can be a basis for taking appropriate measures by the state to stop such recruitment process.

Individual assessments would help to deal with these children case by case basis and their reasons for joining such extremists groups. It is the duty of the state to protect
the children to get recruited by the Maoists and extremists groups.

The state has to form strict laws and proper implementation at the ground level to curb such menaces.

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CHILD SEXUAL ABUSE IN INDIA: INCREASE, EFFECT, LOOPOLES AND CHANGES REQUIRED IN LAW

By Deepika Vijaywargia
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INTRODUCTION

Child sexual abuse or in other words child molestation is a severe form of child abuse in which a child is abused by an adult or by an adolescent for sexual pleasure. There are many ways in which the modesty of a child is exploited. Some of the most heinous one are pressuring a child sexual stimulation, physical sexual contact or penetration, indecently exposing genitals of a child and child pornography. In India too the problem of child sexual abuse is not new and children are made victims of this form of child abuse. The condition of children both male and female is worst in city slums, footpath dwellings and Indian jails. They are sexually exploited by the slum, ruffians— even neighbors in the slums and on footpaths in metropolitan cities. Since there are not many juvenile jails in India most of the child convicts are kept in regular jails. Sexual abuse is a regular feature. Hard core convicts and jail staff satisfy their sexual lust on these children.

In recent years there has been a tremendous increase in the rate of child sexual abuse in India and its impact are quite visible .Ignorance by family members, family honor, lack of awareness, pressure by elderly family members, and loopholes in laws itself are some of the major cause of this rise. Since the laws are not properly implemented and conducted, these innocent bodies are falling an easy prey .It’s the time when government should look upon the issue seriously and take proper action in order to curb this problem as soon as possible.

OBJECTIVE OF RESEARCH STUDY:

The objective of this research paper is to:

- Find out why the problem of child sexual abuse is increasing day by day.
- Explain the impact of child sexual abuse and its severe effects.
- Loopholes in laws made on child sexual abuse.
- Changes needed in these laws.

CHILD SEXUAL ABUSE: WHAT STATISTIC SAYS

The problem of child sexual abuse is increasing day by day. Not a single day passes when we don’t witness news on child sexual abuse. Rape, molestation, child pornography and incest are some of news which comes across newspaper or televisions daily. In a recent survey, it has been found that there is an increase of 336% in cases of child rape from last decade. This stats itself shows how this issue of child sexual abuse has reached to an alarming rate. Now let see some more data and numbers in order to find how this problem has spread its tentacles.

FACTS AND FIGURES

An estimated 150 million girls and 73 million boys under 18 experienced forced

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252 Asian Centre for Human Rights (ACHR),
253 RAHI, a N.G.O working for children rights and welfarement.
sexual intercourse or other forms of sexual violence during 2002. India has the world’s largest number of sexually abused children; with a child below 16 years raped every 155th minute, a child below 10 every 13th hour and one in every 10 children sexually abused at any point of time.

Major findings on sexual abuse in India:
- 53.22% children reported having faced one of more forms of sexual abuse.
- 21.90% child respondents facing severe forms of sexual abuse and 50.76% other forms of sexual abuse.
- 50% abuses are persons known to the child or in a position of trust and responsibility.
- Children on street, children at work and children in institutional care reported the highest incidence of sexual assault.
- Andhra Pradesh, Assam, Bihar and Delhi reported the highest percentage of sexual abuse among both boys and girls.
- Most Children did not report the matter to anyone.

ROOT CAUSE OF ITS RISE:

1. IGNORANCE
Ignorance is one of most important reason why this issue has reached an alarming rate. Most of the time a child is not believed or simply ignored when he/she complains about sexual harassment. Generally child is believed to be lacking in wisdom and knowledge and due to the very reason, there claims are not accepted at once. Moreover in Indian customs and traditions an elder person is always regarded as a father or mother figure and any allegations against them are treated as an insult for that person. Children themselves not reporting the problem is another major issue related to ignorance.

2. INCEST AND FAMILY HONOR
Incest means sexual relationship between family members or relatives. It may be between the ones who are tied with blood relationship or by any other ways like belonging to same clan, tribe etc. Sexual abuse by father, brother, uncles or by any other relative is very common in child sexual abuse. Majority of child sexual abuse is committed by a family person or relative in one or more ways. These persons are usually in position of trust and responsibility and they take advantage of this in a heinous manner. Most of the time such crimes never come out publicly as incest cases are generally not reported or filed in order to safeguard the family pride and honor.

3. LACK OF AWARENESS
Stigma around talking about private parts often leads to inability among children to communicate to their parents regarding sexual abuse they are facing. When there is freedom and awareness coming from parents, a child will know the limits of intimacy and beyond which the child will respond or report. There should be open interaction between parents on matters of sexuality. Unless the child feels free to tell her parents about what she/he is going through, these matters will never come out. According to Shekar Shehadri, children are intelligent and they have the ability to understand when someone is 'making a move'. "If they children are given the awareness and confidence,"

254 Child abuse. India . 2007

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255 Professor, department of adolescent and child psychiatry, NIMHANS
they will oppose the abuse when the first the signs are visible. To oppose an abuse at the beginning is the best way to stop it and parents should give the child the confidence where the child would push the abusers aside and say 'that's it, back off," he said.

4. PORNOGRAPHY
Changing lifestyles and the rising trend of internet pornography and obscene scenes on television also keeps the passions high of such culprits. Now access to internet is much easier than earlier and as a result of which online pornography has reached to each and every individual. From a very early age adolescent are familiar with such videos and clips and it leaves a very deep impact on these innocent minds. Adults and adolescent gets sexually violent and such materials instigate to commit such crimes.

5. SLOW JUDICIAL PROCEDURE
Judicial procedure in India often takes much time and due to this tiresome court procedure, cases drag for years together and the accused usually gets out of bail. Sometimes, the cases repeatedly get postponed and due to tampered evidences the accused ends being acquitted. Such long proceedings also effects financially and due to inability to afford the finance victims generally withdrew cases.

Due to slow judicial procedure accused gets enough time to tamper evidences. Use of coercion is also reported time to time where victims are threatened and harassed mentally and physically in order to withdraw the case.

6. LOOPHOLES IN LAW
There are not many laws regarding the matter of child sexual abuse. The parliament of India passed the 'protection of children against sexual offence bill, 2011’ 256 regarding child sexual abuse on may 22, 2012 into act. But again the law is not sufficient enough to cure the issue of child sexual abuse .it comes with a lot of loopholes and flaws. The demand of stronger laws and severe punishment for such crimes is increasing and government seriously needs to reforms these laws in order to make the provisions much stronger.

EFFECT OF CHILD SEXUAL ABUSE
Child sexual assault can have a number of effects, both physical and psychological, that last both in the short and longer term. Early identification and effective intervention can ameliorate the initial effects and long-term consequences of child sexual abuse and promote the recovery of victims. Outlined below are some common effects which can occur as a result of childhood sexual assault.

Psychological effects

- Fear. The offender may swear the child to secrecy and say something bad will happen if they tell. Coercion, bribery or threats usually accompany sexual abuse. Overwhelmingly, the child is afraid to tell because of what the consequences might be. E.g. punishment, blame, not being

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256 The Protection of Children from Sexual Offences Act, 2012 defines a child as any person below the age of 18 years and provides protection to all children under the age of 18 years from the offences of sexual assault, sexual harassment and pornography. These offences have been clearly defined for the first time in law. The Act provides for stringent punishments, which have been graded as per the gravity of the offence. The punishments range from simple to rigorous imprisonment of varying periods. There is also provision for fine, which is to be decided by the Court.
believed and ultimate rejection or abandonment.

- **Helplessness/powerlessness.** Children in this situation often feel that they have no control over their own lives or even over their own bodies. They feel that they have no choices available to them.

- **Guilt and Shame.** The child knows something is wrong, but blames him or herself not others. The offender will often encourage the child to feel that the abuse is his or her fault and as a consequence is a "bad" person.

- **Responsibility.** The offender coerces the child to feel responsible for concealing the abuse. The child then believes they are responsible for preserving the secret in order to keep their family together and to maintain appearances at all costs. The burden of this responsibility, however, interferes with all normal childhood development and experiences.

- **Isolation.** Incest victims feel different from other children. They must usually be secretive. This further isolates them from non-offending parents and brothers and sisters. This isolation often leads to the child being labeled as 'different', 'a problem', or in some way different from their siblings.

- **Betrayal.** Children feel betrayed because they are dependent upon adults for nurturing and protection and the offender is someone who they should be able to love and trust. They may also feel betrayed by a non-offending parent who they believe has failed to protect them.

- **Anger.** Children most often direct their feelings of anger in several ways.
  1. They may direct it outward at perceived 'little things'.
  2. They may more often direct it inward reaffirming their feelings of low self worth or value; and
  3. Almost never direct their anger towards the abuser whilst still in close relationship with them. The issue of anger is most often dealt with in the longer term, as an adult.
  4. Children may feel anger towards others whom they believe have failed to protect them.

- **Sadness.** Children may feel grief due to a sense of loss, especially if the perpetrator was loved and trusted by the child.

- **Flashbacks.** These can be like nightmares which happen while the child is awake. They are a re-experience of the sexual assault as it occurred at that time. As an adult, a survivor may experience the same type of omnipotent fear that they experienced as a child. Flashbacks can be triggered by many things. By a smell, a mannerism, a phrase, a place or a wealth of other environmental factors that may have significance.

**Other short term impacts may include:**
- Medical problems, such as Sexually Transmitted Infections, pregnancy or physical injuries;
- Behavioral problems such as aggression, clingingness, phobias, eating and sleeping disorders, school problems and school refusal.

**In the long term the child may also experience a number of effects as an adult**

These may include:
- Depression, anxiety, trouble sleeping;
- Low self esteem;
- Vulnerability to subsequent abuse and exploitation;
(g) Dissociation from feeling;
(h) Social isolation;
(i) Relationship problems such as an inability to trust, poor social skills or a reluctance to disclose details about themselves;
(j) Self-destructive behavior such as suicide attempts;
(k) Parenting problems such as fear of being a bad parent, or fear of abusing the child or being overprotective;
(l) An underlying sense of guilt, anger or loss;
(m) Post Traumatic Stress Disorder.

ROLE OF GOVERNMENT, LAWS AND LOOHOLES
The issue of child sexual abuse is not new in India, but it in the recent times it has reached to an alarming rate. Indian media is reporting this tremendous increase as an ‘epidemic’. The demand for stronger laws is increasing and the role of government has often been questioned. Though all possibilities are made my government to minimize the rate of child sexual abuse but the Indian government has failed to curb the rampant sexual abuse of children, especially in schools, state-run child care facilities, and in the matter of insect. Government responses are falling short in protecting children and in treating victims. Earlier there was only one act, goad children’s act, 2003 which dealt with the laws regarding child sexual abuse. While the government in 2012 passed a comprehensive law to protect children from sexual offences, its efforts to implement the law remained poor or nonexistent.

According to Goa children’s act, 2003, Child sexual abuse might be prosecuted as:

- I.P.C. (1860) 375 - Rape
- I.P.C. (1860) 354 238 - Outraging the modesty of a woman
- I.P.C. (1860) 377 - Unnatural offences
- I.P.C. (1860) 511 - Attempt

237 375. Rape.-- A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: First. Against her will. Secondly. Without her consent. Thirdly. With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt. Fourthly. With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly. Without 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 sixteen years of age. Explanation. Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Exception. Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

238 354. Assault or criminal force to woman with intent to outrage her modesty.-- Whoever assault or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will there by outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

239 377. 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. CHAPTER XVII OF OFFENCES AGAINST PROPERTY CHAPTER XVII OF OFFENCES AGAINST PROPERTY Of theft

www.supremoamicus.org 109
LOOPOLES IN THE LAW
• They aren’t specific to children’s needs.
• Laws have no provisions for repeat offenders
• Didn’t mention anything about teen who contently have intercourse with each other
• No provisions for bail-able and non bail-able offences and lots more.
• The age of Child varies in every law.
• IPC 375 doesn’t protect male victims or anyone from sexual acts of penetration other than “traditional" peon-vaginal intercourse.
• IPC 354 lacks a statutory definition of "modesty”. It carries a weak penalty and is a compoundable offence. Moreover, what about the outrage of the modesty of a male child?
• In IPC 377, the term “unnatural offences” is not defined. It only applies to victims penetrated by their attacker's sex act, and is not designed to criminalize sexual abuse of children.

Protection of children against sexual offence act 2011

The new Act provides for a variety of offenses under which an accused can be punished. It recognizes forms of penetration other than peon-vaginal penetration and criminalizes acts of immodesty against children too. With respect to pornography, the Act criminalizes even watching or collection of pornographic content involving children. The Act makes abetment of child sexual abuse an offense. It also provides for various procedural reforms, making the tiring process of trial in India considerably easier for children. The Act has been criticized as its provisions seem to criminalize consensual sexual intercourse between two people below the age of 18.

Some of the major upside and appreciation of the act was:
• Treating sexual assault as “aggravated offence” when a person in authority or position of trust commits the offence. It also considers the physical/mental disability and the long-term after-effects of the injury inflicted.
• Special provision preventing pornographic abuse or even possession of such material. It also places the media, studio and photographic facilities under obligation to report such matters.
• Designated special courts that will decide cases in a time-bound manner. It also spells out the various procedures of investigation, trial and sensitive dispensation of justice.
• Guidelines for media to sensitively and discreetly report cases without inflicting pain of identification of the victim.

Though these changes were welcomed by some section, again flaws were quite

511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.-- Whoever attempts to commit an offence punishable by this Code with 1[ imprisonment for life] or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with 2[ imprisonment of any description provided for the offence, for a term which may extend to one- half of the imprisonment for life or, as the case may be, one- half of the longest term of imprisonment provided for that offence], or with such fine as is provided for the offence, or with both.
visible and many social worker and legal bodies criticized the act.

Many activist like Amerada Sahasrabuddhe\textsuperscript{261}, Bharati Kotwal\textsuperscript{262} and Ingrid Mendonca\textsuperscript{263} point out its flaws:

- For the penetration sex the maximum offence was only 10 years.
- No mandatory counseling for victims and families.
- Nothing much written about child pornography.
- Consensual non-penetrative sex for twelve year olds.
- Giving green signal to consensual intercourse at 16 years of age and no provision for punishment.
- No specification of accountability or compensation from those accountable, including the judiciary.

**CHANGES REQUIRED**

Though the new act has brought some new reforms and stricter laws have been implemented but still some changes are needed to both by law making bodies and by individuals too to make these more powerful and to bring this issue of child sexual abuse to minimal. Some of the changes which should be welcomed are:

- Stricter provisions and punishment for crimes relating to child molestation and sexual abuse. Especially in the cases of penetrative sex punishment should be severe to deter the culprits and sending a message to the society. These cases should be brought under rare case and punishment be awarded according to that.
- Complete ban and filter on sexually explicit sites. Awareness programmers should be organized and counseling should be done to aware people about the consequences of pornography and its effect. Punishment should be awarded to any vendor selling or acquiring such materials. Complete cyber monitoring is needed.
- Families should be acknowledged and aware about incest sex. They should be inspired and counseled to report these problems in police.
- School authority and other educational institutions should authorize a committee to see that no such happenings take place in school premises and outside and if so happen it must be reported and informed to the highest authority.
- More fast track courts should be made in order to get proper and fast justice. Long court procedure should not be the reason of acquittal of accused, this should be made clear.
- Child welfare homes should also be checked and monitored regularly.
- No child should face the mental trauma during hearing and excessive media coverage should also be banned.
- More counselor and psychiatrist should be appointed to provide better counseling for victims and families.
- Proper compensation should be provided to the victim.

Apart from that some other changes which were recommended by different bodies\textsuperscript{264} were:

\textsuperscript{261} Juvenile justice board, India

\textsuperscript{262} Muskaan ( NGO )

\textsuperscript{263} ARC

\textsuperscript{264} Recommendations presented by CHILDLINE India Foundation
Specifically address circumstances of sexual abuse and the special needs of children.

- Be gender neutral.
- Deter crime through appropriate penalties and keeping a track of sexual offenders so they are not in contact with children.
- Establish guidelines and basic protocol to protect child victims, guide them through legal process and address their needs.
- Increase reporting and disseminate knowledge of children's rights.
- Impose mandatory reporting on professionals in contact with children.
- Protect children and reporters from harmful exposure through confidentiality guidelines.

CONCLUSION AND FINDING

Coming to end of this research work I find that child sexual abuse is an evil which is increasing rampantly and more and more number of children are proving to be a victim of this. Child rape, molestation, child pornography and other forms of child sexual abuse are much evident and visible in our society. But since no strong action is taken, culprits are roaming free and independent leaving the victims in a traumatic condition. Weaker role of government is the major reason of this increase and much stronger laws are needed in order to minimize this issue. But government alone can’t be blamed for the same. Parents and family members also play an important role in this increase. Due to social stigma they don’t file or report these issues and this encourages the wrong doers. In the matters of incest it has been found that children’s are abused repeatedly due to ignorance and silence of parents. Long court procedure, improper functioning of police authority, rise in pornography and lack of awareness among children are other contributing factors.

Laws implemented by government are with flaws and loopholes and these pits should be filled as soon as possible. Moreover awareness programs should be conducted to make children and their parents aware about child sexual abuse. Parental guidance is also needed. We need to talk about Child sexual abuse at home. We need to first start acknowledging that it exists and that it is increasing. To begin with, Child sexual abuse is rarely reported, perpetrators get away with it more often than not. In a society where boys and girls are not allowed to mingle socially, repression results in perpetrators selecting victims they can target easily, and who are easily accessible—children. From their own homes. We need to start talking to our kids about basics like good touch, bad touch in much the same matter of fact manner that we talk to them about traffic safety rules. Unless we stop brushing it under the carpet and putting family honour before the welfare of the child, unless we start gathering the courage to report any Child sexual abuse we come across and confront abusers, even in our own homes, Child sexual abuse in homes will continue, increase and generations of children will grow up scarred.

For the victims, proper counseling should be done and more number of counselors should be appointed. These children should not be isolated from society rather they should be treated with more care and affection in order to prevent them from long term effects. Proper compensation should also be provided and it should be made sure that no
cases should close due to insufficiency of a family. At last I conclude that just like any other evil issue, this issue also can’t be solved in a day or two. It is serious issue and the whole nation is suffering from it. We need to first start acknowledging that it exists and that it is increasing. To begin with, Child sexual abuse is rarely reportedly, perpetrators get away with it more often than not. In a society where boys and girls are not allowed to mingle socially, repression results in perpetrators selecting victims they can target easily, and who are easily accessible - children. From their own house. We need to start talking to our kids about basics like good touch, bad touch in much the same matter of fact manner that we talk to them about traffic safety rules. Unless we stop brushing it under the carpet and putting family honor before the welfare of the child, unless we start gathering the courage to report any Child sexual abuse we come across and confront abusers, even in our own homes, Child sexual abuse in homes will continue, increase and generations of children will grow up scarred. This increase is a wakeup call for the law making bodies at society at whole to come out from their house, discuss the matter and collectively cooperate each other to end this issue of child sexual abuse from its root. If the nation doesn’t react now and the silence predominates, it can seriously damage those innocence bodies that are yet to blossom.

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PRE-TRIAL CONFERENCE AND EXPEDITIOUS TRIAL: A CASE COMMENT ON N.R. BHAT V. STATE BY CBI/SPE, 2016(3) AKR 170; ILR 2016 KARNATAKA 4829

By Devansh Sarswat & Aman Guru
From Symbiosis Law School, Pune

Hon’ble Judges/ Coram: A.V. Chandrashekara, J.

BACKGROUND
A huge number of cases remains pending in the lower courts of our country and there seems to be no easy way out of this vicious circle of adjournments and delays in getting justice. This becomes more of a severe rather serious problem in criminal cases where we see people getting justice in the form of the guilty being punished after several years of the commission of the crime and in this discourse injustice is bound to happen because with the passage of time, authenticity of the evidences, availability of the witnesses and with this the hope of the victims to get justice keeps decreasing hence resulting in no proper justice to the victims or their families.

ISSUE TAKEN UP BY THE COURT
In the said case it came to the notice of the court that the trial in the trial court was concluded by the prosecution in 3 years and 3 months after commencement, in addition to that a lot of adjournments were given to record the statements by the trial court. So, the court decided to issue certain guidelines to avoid inordinate delay in conducting trial referring to Sec. 309 of the CrPC.

EXPEDITIOUS TRIAL: SEC 309
As per the above section criminal courts are required to conduct trial on day-to-day basis and adjournments should be allowed only when it is absolutely required and with reasons to be recorded. Furthermore, witnesses must be examined by both the sides on the same day otherwise he/she can be lured or won amounting to travesty of justice. Criminal courts have to ensure fair trial by allowing the trials to proceed smoothly.

DUTIES OF THE JUDGE: “THE JUDICIOUS JUDICIAL OFFICER”
ADJOURNMENTS: “AWAKE! ARISE!”
According to the Supreme Court it is a tactic of some unscrupulous lawyers to get adjournments for silly excuses till a witness is won over or is tired. It is the Court’s duty to protect the interest of the society in balance with that of the accused and hence all possible measures are required to be taken by the trial Courts to follow the spirit of Sec 309 and any breach of such conditions would amount to contempt of court.
If the Court finds that regular examination of witnesses cannot be complied with due to non-cooperation of the accused or his counsel, the court can invoke the sub-section and remand the accused to custody or

265 The Code of Criminal Procedure, 1973, Sec. 309
266 Talab Haji Hussain v. Madhukar PurshottamMondkar, 1958 SCR 1226
impose cost on such party or also if accused is not present and the witness is present, court can cancel his bail. Also, it is the duty of the judge to manage all this with the existing infrastructure and he cannot blame the system or other imperfections and has to perform his duty judiciously.

**PRE-TRIAL CONFERENCE**
To conduct a swift trial one of the measures needed to be taken in this regard is to conduct a conference consisting of presiding officer, public prosecutor, accused and his counsel and the concerned police officer wherein the prosecutor will present the list of witnesses and approximate time to examine them along with a brief background of the case. This conference will be effective in eliminating all those situations in advance which can hinder the swiftness of the trial at a later stage of the trial and this should not be a mere formality but a step to follow Sec 309 in its spirit. The judicial officers who violate the directions should be dealt on the administrative side. In a nutshell, the officer should figure out the obstacles in holding day-to-day trial and ways to get over them before trial.

**ANALYSIS: WORKMEN’S TOOLS**
One of the significant observations was that a reasonably expeditious trial is the fundamental right of the accused but it was also said that the court has to see that if the delay was due to overcrowding or understaffing of the courts, while on the other hand it was asserted by the Court that workmen can’t blame his tools to protect his inefficiency, hence, leading to a contradiction/ anomaly as to the practicality of the guidelines given by the Court. This is because we can’t overlook the fact that the workload on the judges is totally inconsistent with the infrastructure that he gets, apart from that in criminal cases where there are a large number of witnesses to be examined, the timeframe of them to appear cannot be ascertained in advance in the pre-trial conference leading to the whole point of conducting a pre-trial conference being infructuous. There is a whole vicious circle of hearings, examination, prosecution and defence in the trial courts where everyone is overburdened with work and “not for nothing a plethora of cases are pending in the lower courts of the country.

**CONCLUSION: “JUSTICE DELAYED IS JUSTICE DENIED”**
Laying guidelines for the judges to refrain from giving adjournments unnecessarily is not enough because “one swallow does not a summer make”, so apart from introducing the concept of day-to-day hearings, first of all, the number of qualified judges have to be increased, physical and technological infrastructure needs to be improved, a limited time frame or tab on deciding a particular case can be framed as done in rape cases(Proviso to Sec. 309), pass overs also are like adjournments and should be halted and last but not the least the efficiency of the investigating authorities has to be lifted. This means that in order to give expeditious justice to the stakeholders in criminal cases the overall framework needs to be modified. The Court has done a great job in taking a leap into the reorganisation of the criminal justice system of the country but the duty now is cast upon everyone including the

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269 Hussainara Khatoon v. State of Bihar. AIR 1979 SC 1360
judges, the parties and the investigating authorities to change their mindset so as to implement the judgment in its spirit and will have to awake and arise to deliver expeditious justice otherwise the time period for which the case remains pending it’s a denial of justice to the parties because “justice delayed is justice denied”.

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LEGALISATION OF SEX-WORK IN INDIA

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ABSTRACT
India is known to have a growing services sector that includes doctors, engineers, advocates and others. All professions require some sort of licensing, permitting the people to carry on their activity. This is because their activities are of such nature that they should be provided some rights and protection in order to work in an efficient manner. But when it comes to “Sex-work” then there is no licensing, no protection. The practitioners here are deprived of legal status and hence any sort of rights. India, a country, where history is not just what we read in textbooks, but about the values that great kings, scholars and religious texts has taught us, but when it comes to “sex-work” then history is forgotten, humanity takes a back-seat and the sense of brotherhood hardly comes in limelight.

In this paper the focus is on the history of sex-work, conditions of sex-workers in India and further on how the legalization of sex work in India can change the status-quo and can improve the scenario.

INTRODUCTION
If we search for the meaning of prostitution, Google says ‘the practice or occupation of engaging in sexual activity with someone for payment’. At the same time it also says ‘the unworthy or corrupt use of one’s talents for personal or financial gain’. It is evident that prostitution can be perceived in either ways.

Sex-work is an occupation where an individual accept money in exchange of providing sexual services. It has existed from time immemorial. However, today sex-workers face social discrimination, violence, disrespect and many other atrocities. Until the 1960s, attitudes toward prostitution were based on Judeo-Christian views of immorality. Much of the violence associated with sex work is worsened by its illegality. Violent people are more likely to prey on sex workers.

In a country like India which is defamed for the ill treatment of women and where crime against women is rising day by day, the matter of legalization of prostitution is a hot topic for debate. The fact cannot be denied that the sex workers are physically and sexually abused and they face violence from the pimps and even from the clients.

Sex is a need like any other need of human beings, whether we accept it in that way or not. **Sex-work is not per se illegal in India.** The Immoral Trafficking (Prevention) Act, 1956 (the principle statute governing activities involving sex-work.), instead of banning sex-work, indirectly discourages such activity by prohibiting sex-work in public places, in brothels and soliciting for sex in public places (Sections 7 and 8)\(^\text{270}\).

According to the latest data, there are about 2-3 million sex workers across India, where most of them have been forcefully abducted and thrown into this dark world, few came into it voluntarily, yet forcefully, taken up this because of poverty and other push factors. There are a lot of male sex-workers too, who are victims of the same fate. But as

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\(^{270}\) [http://lawreview.nmims.edu/licensing-of-sex-work/](http://lawreview.nmims.edu/licensing-of-sex-work/)
mentioned not every person ‘chooses’ to be a sex worker, most of them are forced into this business. They are sold to the middlemen, called “dalals”, by their own family members or by some other people by giving lure to provide employment or education. These victims of human trafficking have no other option than to obey their masters, face violence, etc.

HISTORY OF SEX-WORKERS
Everything that are in society today has a history of its own. Some practices started in history and ended their only but some practices are prevailing even today in modern society.

Indra, the god of rains and also the king in gods, had beautiful dancers called Apsaras. They were the biggest assets of Indra’s court; the Vedas do mention some of them, of which Urvasi and Menka are the most beautiful. Whenever his throne was in danger, he asked the Apsaras to seduce and distract his enemies with their beauty and dance. At times they lived together without any marriage ceremony. If we look closely, these Apsaras are the one which are called prostitutes in today’s world. The Apsaras were among the courtesans and highly respected and even today their names are taken with due respect. Not just the Vedas but also the Bible has the mention of prostitute, where Jesus Christ welcomes a woman in his kingdom knowing that she is a prostitute271.

It is our attitude which has made the prostitutes suffers. The concept of prostitution was even common in ancient times, from the Guptas till Aurangzeb. The literature is also not untouched from this, in earlier days the practice of prostitution was codified. For instance the work of Vatsyayan’s Kama sutra, etc. Even the historical caves of Ajanta Ellora and the temples of Khajuraho, have statutes depicting various sex positions.

In earlier days sex-workers were respected but today they are treated not less than garbage and even in more harsh manner. Is the Indian society is moving towards Modernization or Orthodization???

CONDITION OF SEX WORKERS IN INDIA
Poverty, discrimination, hopelessness, lack of knowledge, disrespect, and HIV- closely revolving around the life of a sex worker are some of the terms that clearly depict the condition of sex-workers in India.

Well, it is very rare to come across any woman who has taken up this profession by choice. Lack of employment, the realization of being not accepted at home, the hopelessness, false promises; often force them to accept the dark world of prostitution.

Most of these women neither have hope nor do they have any knowledge about their rights. Even if they try to come out of this, they do not have any other work to do or anyplace to live safely because of the non-acceptance in society. They struggle for their existence, sacrifice their dreams, self-respect, just for money. Majority of the sex workers are not aware about HIV. The workers represent a threat that cannot even be imagined. Mumbai and Kolkata are said to be the largest centres of this trade, over 50% of the sex workers in Mumbai have been found to be HIV positive. The sex

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workers undergo the extremities, and they face brutal violence by the Police which is not known to all. Harassment and violence are common, if they are arrested by the Police. They are forced to fulfill the demands of Policemen, be it in monetary form or by sexual activity. Even after working to earn their living, just like any other citizen, and toiling their way through, why should they not get their basic rights and recognition in the country?

Certain organizations have come up with AIDS education programs and vocational training classes. One such project aimed at educating women about AIDS is the ASHA. Comprising of sex workers, who go into the brothels as peer educators, they strive to bring a change in the society. The model AIDS prevention group in the country is the Sonagachi Project. Working with males as well as females, this project has made a tremendous impact on the lives of thousands of sex workers, some of whom have been rescued, and given a new lease of life.272

In southern India sex workers have responded to abuse and mistreatment by learning a new skill: karate.

**BENEFITS OF LICENSING SEX-WORK**

Licensing could give sex-workers legal rights as are provided in other services like advocates, doctors, etc. It could award benefits such as:

1. **Legal Protection**
   The state will recognize sex-workers as a class of professionals, governed by a regulatory body, if the sex worker has a license to practice their activity. Whenever necessary sex workers can demand for resources or can be open without any type of social stigma.

   E.g. a licensed sex-worker can access medical facilities with greater ease. They could maintain a record of their client and in case of any sort of issue, they can pursue legal action against the client.

2. **Healthcare**
   Many a times, sex workers are denied the proper medical treatment. Healthcare is the most important aspect of sex worker’s life as there can be a lot of health issues. By licensing the sex-work, practitioners will feel free to go for any sort of medical treatment. They can be in regular check-up under doctors.

3. **Targeting Real Criminals**
   The actual criminals in this business are pimps, traffickers and brothel owners. They act as agents that regulate the supply in the sex “market”. They force (mostly) women to be a part of the trade, restrict their movement, force clients upon them and even take their “fair share” from the sex-workers’ earnings.

   Licenses allow sex-workers to function independently of pimps. It will give them the freedom to choose the number of clients they can take on a given day (excess sexual activity could be fatal). With mandatory licencing, it becomes easier to contain child trafficking.273

4. **Taxation**
   By licensing sex work, Sex-workers could be made responsible taxpayers. It will contribute to the revenue of the state, since the global value of sex-trade is around $100

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273 http://lawreview.nmims.edu/licensing-of-sex-work/
billion (according to the website www.havocscope.com which analyses the black economy) as in present scenario, their income is not counted in the revenue of the state.

LAWS AROUND THE WORLD
States like Canada, Argentina, Germany and Netherlands have taken steps to decriminalize the profession. The states have taken steps to guarantee the fundamental right to life, liberty and profession to the sex workers. The sex workers are registered in employment category and the local government is responsible for maintaining a proper working condition. The sex workers pay taxes and also charge tax on the services that they offer. The brothel owners are required to take license if they serve food and liquor.

In Canada, recently the three main laws regarding prohibition of the profession were struck down by the highest court by 9-0, ruling. It is a win for sex workers who were seeking for safer working environment. U.K. does not have the profession illegal per se, however, has made the acts related to it as illegal. Some of the illegal activities are kerb crawling, soliciting, pandering, etc.

INDIAN LAWS
Prostitution is not illegal in India. Nowhere it is written that prostitution itself is illegal, though the activities related to it are illegal. The basic law is The Immoral Traffic(Suppression)Act,1856, which is also said as SITA. This law allows the prostitutes to ply their trade in private. Indian laws do not regard sex in exchange of money as prostitution. Clients can be arrested if they indulge in sexual activity in public. Prostitutes are called as “sex-workers” but they are not governed by labor laws. SITA has been changed to PITA or The Immoral Traffic (Prevention) Act. This law does not protect the rights of sex workers. The demand for the legalization of prostitution in India is high. PITA serves to punish even the middlemen and brothel owners involved, but it is not satisfactory in nature. Lawmakers will have to reconsider the foundations on which laws are passed. The focus should be on protection of the rights of sex workers and improving the conditions in which they survive.

CONCLUSION
In the light of above facts, it can be said that criminalization of sex-work is not the real solution. Sex work is existing and will exist in society, and by legalizing it, all involved parties can be benefitted. It will reduce the burden of government of passing anti prostitution laws. It will also contribute in minimizing the illegal trafficking of girls. Country would increase its revenue as they will be taxed and their income will also come in limelight. Most importantly the rights of sex workers will be protected which will enable them to live their life as a normal human being. Policy makers should make sure that policies must aim at increasing the safety of sex workers, improving the access to justice and promote free and non-judgmental mental heath services and peer-to-peer support.

One thing needs to be understood by everyone that- Sex workers are the sole owners of their body and have right to decide what to do with their body, unless it is not causing harm to others. No one has
the authority to decide what someone does with his/her body. Everyone deserves to enjoy basic human rights, and the sole authority over themselves.

So, LIVE AND LET LIVE!!!

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CHINA’S ONE BELT ONE ROAD AND TRANSNATIONAL CRIMES

By Harshita Chaarag & Keerat Kaur Virk
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Introduction
In 2013, President Xi Jinping of China made an announcement highlighting China’s intention of reviving the ancient Silk Route; the trade route that connected Asia, Parts of Europe, Middle East and Africa through trading routes on land and in the sea. The project was called the One Belt One Road (OBOR) or the Belt and Road Initiative (BRI). The plan caters to a ‘belt’ of roads called the Silk Road Economic Belt which connect China with Central Asia, Europe, Russia, the Persian Gulf, the Mediterranean Sea, South Asia and South East Asia. The plan also speaks of a ‘road’ as a reference to the 21st Century Maritime Silk Road. The other is a network of sea routes connecting China to Europe, Africa and the Middle East through the Indian Ocean, the South China Sea and parts of the Pacific Ocean.

Many countries have expressed their desire to participate in the initiative, and agreements have been made with many countries and negotiations are on with others. For most countries, the biggest ‘pull’ to the initiative is increased foreign investment, which should take care of their internal shortcomings related to infrastructure. Many people also believe that this will serve as an opportunity for the States involved to provide goods and services. This would help them capitalize their economies. 60 States have agreed to be a part of OBOR while 48 more have expressed a desire to be part of it.

For the proper implementation of this plan, the developed portions of China; mainly East China will have to be involved in trade with the developed economies like the US, European States, etc. Similarly, areas with lesser growth such as the Western and the Central provinces (some of which also have low levels of development and infrastructure) will be expected to trade with the Asian countries.

Image 1: The broken line represents the 21st Century Maritime Silk Route and the unbroken one represents the Silk Road Economic Belt. (Image Source: CLSA274)

Historical Perspective
The Ancient Silk Road was perhaps one of the most efficient network of trade routes to have existed in the history of mankind. Most prominently, from 130 BCE to 1453 CE, it

was a web of trade routes that spread across Central Asia, reaching the Mediterranean Sea, thriving for not just years, but centuries. The route became a medium for the spread of Chinese social links across the continent, therefore forwarding not just trade and commerce, but also promoting cultural exchange. Established by the Han Dynasty, the route actually began with the traders, owing allegiance to the dynasty, being harassed by the nomadic tribes in Xiongnu towards the West and the North. To defeat the nomads, Emperor Wu negotiated help from the Yuezhi people. This interaction lead to a contact with various civilizations and cultures of Asia, which further opened up the doors for trade with other empires in the region. When the silk route was closed off in 1453 by the Ottoman Empire, merchants began to trade through sea routes which eventually lead to the Age of Discovery.

Present Status
To facilitate the strategic planning and implementation of the project, China organized the Belt and Road Forum in May 2017 where heads of states from 29 States and other high level delegations from concerned states met in Beijing. India did not participate in the Forum stating that it undermines and violates India’s sovereigntysince the China Pakistan Economic Corridor (CPEC); one of the most important projects within OBOR, passes through territory that belong to India but currently under occupation by Pakistan.

For the proper implementation of OBOR, all important government policies in China have been interlocked with it. Policies have been divided into national and city level policies and three economic circles have been recognized to be the driving forces:
- Guangdong, Macau and Hongkong.
- Hunan.
- Beijing, Tianjin and Hebei.

The Chinese economy has traditionally been manufacturing based. Therefore, the surplus capacity in manufacturing has often been the most important factor in the growth of its economy. With OBOR, China’s aim is to use this surplus capacity to reach out to the beneficiaries with the associated lure of facilitating infrastructural and trade growth even within the areas of the recipient countries that will be connected via the OBOR. It is apparent that China will expand from the infrastructure it lays out for this project. After all, the eventual aim should that be of establishing trade and markets around the world, and not just the areas under OBOR.

If China is to establish OBOR successfully, it will need to improve the infrastructure in the associated States first, which will require for it to have deep pockets. While the country has better financial resources than most other States in the area, its total debt-to-GDP or total debt has crossed 304% of the GDP as of May 2017275. A high debt-to-GDP is considered bad since it means that the country is less likely to be able to pay back its debt. So, to raise funds for the

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projects under OBOR, China has dedicated USD 100 Billion for the setting up of the following 3 infrastructural funds:

- Silk Road Infrastructure Fund
- Asian Infrastructural Investment Bank
- New Development Bank

In addition to this, China has already signed twelve agreements for free trade with Singapore, Chile, Costa Rica, Switzerland, Taiwan, Pakistan, Peru, Iceland and Hong Kong while negotiations are on for eight more such agreements with Japan, Australia, Norway, Korea, Sri Lanka, the Regional Comprehensive Economic Partnership (RCEP), the Gulf Cooperation Council and the Association of South East Asian Nations (ASEAN).

At the Belt and Road Forum in May 2017, 270 deliverable goals were identified and agreed upon. 30 heads of States signed a joint communiqué for cooperation in infrastructure and trade across Asia, Africa and Europe. Despite all the agreements and the planning, there was no establishment of an institutional framework.

**Stumbling Blocks for China**

While all of the big plans have been made, and the processes begun for connecting the trade with the world, there are a few hurdles that China will have to somehow overcome.

1. **Poor Infrastructure in South East Asia:**
   The infrastructure in South Asia and South East Asia is poor, to say the least. Problems such as lack of education and employment, and poverty have created significant difficulties for countries to create a strong economy. Add to that the difficult terrain in the Himalayan region; the situation with regards to connectivity and infrastructure will continue to remain poor. From what is visible right now, China’s plan is to provide the financial assistance and the technological know-how to these States so as to help them overcome the infrastructural obstacles. The availability of funds notwithstanding, the poor educational and technical threshold of these countries will continue to be a thorn in the otherwise smooth plan. For free trade to happen successfully, the way OBOR envisions it, the existence of passageways and trunk roads passing over international borders, duly backed by a pool of trained technicians and support staff at each individual location is a necessity and not desirability. The economic corridors will require the development of roads and railway transport between China and Europe while passing through the 60 countries involved.

2. **Cooperation from Participating States:**
   According to data by the World Bank, the 60 countries falling in OBOR make for 62.3% of the total population of the world, 38.5% of the area in land and 30% of the global GDP. So if the plan is to be carried out successfully, it requires cooperation from all these states and support from their significant economies and population. Cooperation and intention will also depend on availability of resources and soft skills.

3. **Terror Related Hindrances in Participating Countries:**
   In countries like Pakistan where terror outfits take to vandalizing government projects, CPEC has become an easily available target. For the agitators that want freedom in Balochistan, especially, CPEC is a very easily available target. Such groups and

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www.supremoamicus.org

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fringe elements do exist in a fair number of participating countries.

4. **Opposition from India:** The plans under OBOR are a violation of India’s territorial sovereignty. Therefore India has made it sufficiently clear that it will neither participate in the project, nor lend any support. This could be problematic since India is the biggest threat that China faces in the region, both on economic as well as military level. China also needs India’s participation, especially for the construction of the multi-lateral economic corridor passing through Bangladesh, China, India and Myanmar. While China offers the carrot highlighting that the economic corridor would be beneficial for India since it will allow India to trade with economies in South East Asia and also implement (even more strongly) the Indian Act East Policy, the strategic and military risks are too major and India continues to refuse participating in any project under OBOR.

5. **International Discontent:** China’s influence in the participating countries has been increasing due to increased investment and presence of its technical and support staff. Slowly, many countries have already started becoming vary of China, since it could lead to a situation where China could attempt to interfere in the internal matters of the States. The nations that are not in a position to provide the requisite technically qualified pool of manpower are the worst affected. ASEAN and its member states donot have a unified approach towards the project. While some countries welcome it, others pose vehement opposition.

6. **Ongoing Dispute in the South China Sea:** China’s firm standin its claim on the South China Sea has made many countries apprehensive. They fear that it is possible for China to become a dominating party in the State if the financial investment is high. Such a situation may lead to a situation where China may become a de facto dictator.

7. **Suspicion from Russia:** While Russia has welcomed this move as a good investment and infrastructural growth opportunity for the countries in the region, they continue to be suspicious since an increased Chinese presence could lead to change in Russia’s position. Therefore, while overtly it would support the initiative, this support should actually be restricted to the point where Russia is the major beneficiary.

Test for **Global Superpower:** This will be China’s largest attempt at increasing its sphere of influence. This project will test China’s existing policies and show whether they comply with their aims and commitments under the project.

**China’s Aim Behind developing OBOR**

The Belt and Road Forum saw repeated mentioning of countries’ responsibility to create an ‘economic cooperation area’. The Chinese have called OBOR as an open platform for any and all countries that wish to contribute to connectivity around the globe. Orderly trade and free flow of economic factors along with efficient management and allocation of resources has been said to be the driving force behind the initiative. In fact many Chinese officials and authorities have claimed that the long term objective behind this project is peaceful development. Better jobs, medical facility, beautiful environment, education, social security and comfortable living conditions are what a State and its citizens should
expect upon the completion of OBOR and the resultant integration of world through peaceful development. China has claimed that its primary objective behind formulating and implementing OBOR is to make an area for economic cooperation in the concerned region, which will create an economic market in the region that is integrated and has fair opportunities for those involved.

This however does not justify why China has been fighting hook, line and anchor to implement the plan.

- **Counter to the Economic Slowdown:** China has been a strong nation historically, having a sphere of influence that has spread pretty wide. The last few decades have seen the country growing at an unprecedented rate. In the last three decades, China has turned itself into a hub for production with its own goods being exported around the world. However, the last few years have seen the country’s economy facing an economic slowdown. The government has always planned everything down to the very minute details so that its vast population is not just catered to, but also contributes to the growth of the nation. However, in the upcoming slowdown, it is quite possible that jobs become scarce. In such a situation, OBOR will be the perfect measure for China to resolve its problem of the economic slowdown, since it will help China create employment and investments outside the country and therefore boost its economy.

- **Fixing of Development lag in West and Central China:** The country has a good level of development and infrastructural expertise. Chinese products are sold around the world and its bullet trains are the best, second only to Japan. However if one is to look at the various sectors of the China, they would notice a certain discrepancy. For example, given below are maps of China’s population density, the transportation network and the distribution of industries across the country.
The maps show a clear lag between various areas of China. East China houses bulk of the Chinese population. In fact, its transportation network and industries are also much more prominent in the Eastern side. Central China and West China are much more unfortunate in all three parameters. There is a lag between the development level in East China and the rest of China. OBOR will connect China to all the planned regions within it through a network of land roads as well as sea routes. For these to work successful, a good connection to the internal parts of China will be crucial. Therefore, the transportation facilities within China will improve. Once the transportation is improved, automatically, industries will spread and therefore population will also spread along the industries and the transportation. Therefore, one possible aim behind OBOR could be to facilitate growth within China while improving growth around China.

- **Opening up of the Economy:** When an economy faces a slowdown, the best way to tackle the situation has been to open up its economy in some or the other way. For many developing nations, this move can change the entire structure of the economy. Many analysts around the world believe that OBOR will become a means for China to open up its economy to outsiders. In a recent move, China opened up its bond markets under specific rules and guidelines. Other such measures should only be expected to follow.

- **Becoming a Better Friend to the Surrounding Region:** As China has grown in power and influence, it has also become isolated. Many could say that China has become the bully in the playfield that most obey so as to avoid getting beaten up. A look into China’s treatment of neighbouring countries, especially those countries with which it has ongoing conflict shows colours of
pressure tactics in its behavior. China is not a part of G7 and other developed countries continue giving it a cold shoulder. China also has a rocky relationship with India, the other country in the region that enjoys the most power and influence. The truth is, China has grown to become quite isolated in the region. Many people believe that with OBOR, China is hoping to improve its relationships with other states in the neighborhood and become a better friend to them. With this plan, it might be able to integrate itself in the economics of the region in a better way. China has a tendency to tilt towards overcapacity and it is likely that it will redirect it towards ASEAN, Europe and Central Asia.

- **High Debt:** The debt-to-GDP ratio of a country is the ratio of a government’s cumulative debt amount to its Gross Domestic Product (GDP). A low debt-to-GDP ratio is an indicator of good economic condition since it means that the country is producing goods and services capable of being sold and generates revenues as needed to pay back its debt without incurring further debt. However, a high debt-to-GDP is not a good economic sign. This however is what exactly is going on with China. China’s debt-to-GDP currently stands at higher than 300%. A ratio this high means that the country may not be able to pay back its debt in an ideal manner. This is a precarious situation.

Successful implementation of OBOR will depend on heavy investments by China into the infrastructure of the participating states. This is why China has established the three financial funds mentioned before. These funds are expected to help China with projects under OBOR and consequently its debt-to-GDP ratio.

- **Shift from Developed Economies to Developing Economies:** China has focused all its actions in such a way that it benefits from any deal or trade it is to be a part of. Therefore, initially all of China’s trade was focused at the developed economies which were willing to take its cheaper goods. Now, however, the demand from the Western developed economies like the US has decreased.

Many strategists believe that through OBOR, China is shifting its attention to developing economies where the demand is high, but cost and quality of production is low. For e.g. in India as well, labour is cheap and goods are also produced at a cheaper price as compared to the other developed nations. However, Chinese goods are even cheaper. Therefore, people in India prefer to buy Chinese manufactured goods. Through its focus on the developing economies in the neighbourhood, China can sustain itself much better than it could under developed economies.

- **Utilization of Human Resource:** China is the most populated country in the world. Which means it has ample availability of human resource. Some of the countries in South East Asia like Cambodia, Singapore, etc. do not have a good human resource. Singapore, for example has a good availability for resources and technological know-how, but doesn’t have the manpower needed to access and further utilize them. When it comes to countries like these, OBOR could be one of those situations wherein multiple problems can be resolved by one simple measure. China’s population could be used
as a plus point to make up for the lack of human resource in those countries and the other countries would be able to gain access to the resources as well as make them available to others who might want to purchase them.

**Introduction to Transnational Crimes**

Due to globalization and many other factors, states are increasingly facing crimes which cross national borders. Transnational Crimes are crimes which may take place in one or more than one country’s territory but affect multiple countries. This highlights a need for more international cooperation between different states particularly with respect to the issues concerning jurisdiction, enforcement, due process, judicial cooperation, the serving of sentences, etc.

Transnational organized crime, in a literal sense, has a history as old as national governments and international trade. Piracy, cross-border brigandage, smuggling, fraud and trading in stolen or forbidden goods and services are ancient occupations that increased in significance as nation states were taking shape. Piracy and cross-border brigandage have now been banished to parts of the world where state authority is weak. However, the other occupations have flourished in recent years in most parts of the world, irrespective of the strength or weakness of the authority of individual states or the collective efforts of the international community.

The UN has identified 18 different categories of transnational crime. These are (i) Money laundering (ii) Terrorist activities (iii) Theft of art and cultural objects (iv) Theft of intellectual property (v) Illicit traffic in arms (vi) sea piracy (vii) Hijacking on land (viii) Insurance fraud (ix) Computer crime (x) Environmental crime (xi) Trafficking in persons (xii) Trade human body parts (xiii) Illicit drug trafficking, (xiv) Fraud bankruptcy (xv) Infiltration of legal business (xvi) Corruption (xvii) Bribery of public officials, and (xviii) Other offences committed by organized criminal groups.

**Definition of ‘Transnational Crime’**

Transnational crimes have been defined as by the UN Crime Prevention and Criminal Justice Branch as “to identify certain criminal phenomena transcending international borders, transgressing the laws of several states or having an impact on another country.”

The Fourth UN Survey of Crime Trends and Operations of Criminal Justice Systems held in 1976 defined transnational crime as “offences whose inception, perpetration and/or direct or indirect effects involved more than one country.”

Transnational Crime finds it most compelling definition in the United Nations Convention against Transnational Organized Crime, which China ratified in 2003 and which stipulated in Section 3.2 that

“An offence is transnational in nature if:

(a) It is committed in more than one State;

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(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

(c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or

(d) It is committed in one State but has substantial effects in another State.²⁷⁹

However, it should be noted that this definition has its potential gaps. For instance, the term “transnational” may be considered misleading, as most of the criminal activities are strictly local and may include only one transnational aspect (like the transport of drugs from the manufacturing site in one state to the market in another state). Nevertheless, the term “transnational crime” covers criminal activities that are not just domestically relevant but have “actual or potential transboundary effects of national and international concern”²⁸⁰.

Incidents of Transnational Crimes

1. North American Free Trade Agreement (NAFTA): A free trade zone was established in North America, signed by Canada, Mexico and the US in 1992 and came into effect from 1⁰ January 1994. Tariffs were lifted on a significant portion of the goods produced by the parties of the agreement. It was proposed that over a period of 15 years barriers to cross border investment would be eliminated as would the barriers to movement of goods and services²⁸¹. Drugs are smuggled into the US and the profits from it are used to purchase weapons. These weapons are then smuggled back into Mexico completing the cycle. This fuels the violence in Mexico and the insatiable drug demand in the US. All of this has become easier with the implementation of NAFTA. The flow of goods and persons has increased as a result if which opportunities for smuggling have also increased.²⁸²

India-Nepal Border: Nepalese men, women and children are trafficked from Nepal every year into India as well as other neighbouring countries. The United Nations estimates that approximately 7,000 Nepalese women and girls are trafficked into India every year.²⁸³ Human traffickers have utilized the India-Nepal open border to facilitate human trafficking routes.²⁸⁴ There are only 14 checkpoints

²⁸⁴Dr. Sarasu Esther Thomas, Response to Human Trafficking in Bangladesh, India, Nepal and Sri Lanka, United Nations Office on Drugs and Crime, (Apr. 9, 2018, 11.00AM), https://www.unodc.org/documents/human-
regulating the Indian-Nepali border, which spans over 1,500 kilometers which traffickers are able to exploit.

3. **Illegal Maritime Trade:** Large volumes of trade are shipped by containers. $5.3 trillion of global trade transits through Southeast Asian waters each year. Less than 2% of 500 million containers that are shipped in a year are inspected. Trade in illegal bulk goods such as drugs or counterfeits makes maritime trade a lucrative option. Synthetic drug trafficking has been rated as the most serious illicit trade issue by the UNODC survey in the region. Seizure of methamphetamine has increased from less than 12 tons in 2008 to 36 tons in 2012. The major producers for export are China, Myanmar and India. And it is estimated that the annual income in this region for drug traffickers is over USD 30 billion. The production and consumption of methamphetamine pills have also started to ‘spill over’ from older markets in the GMS into neighbouring countries, such as Brunei, the Philippines and Singapore.

Flow of illegal goods across the border between India, China and South East Asian regions has been increasing because of the poor security and control measures in countries like Myanmar. Conservatively speaking, the illegal flows in South East Asia is estimated at USD 100 billion per year.

**Scope for Transnational Crimes under OBOR**

There have always been opportunities to trade illegal goods across borders in Southeast Asia and in recent years the growth of multinational criminal supply chains has been apparent. As the region increases connectivity creating and strengthening trade linkages, threats arising from trafficking and associated criminality are becoming truly integrated within the region and in connections to regions beyond. The inter-regional economic integration plans connecting China, India and the ASEAN region are likely to increase the challenge and to make life easier for organised crime groups seeking to move bulk chemicals illegally diverted from illicit trade.

Transnational Crimes are global threats, but their effects are felt on a local level just as much as on a global level. When organized crime takes place, especially when at a large scale like transnational, including multiple jurisdictions and governments, it has the ability to destabilize regions, sometimes even entire Countries. Once crime occurs in an organized manner, it begins to hollow out...

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286 Drug Abuse Information Network for Asia and the Pacific (DAINAP), *Annual Report Questionnaire for Brunei Darussalam, the Philippines and Singapore*, United Nations Office on Drugs and Crime (UNODC).


288 *Id. at 12.*
the society, propelling locals and local criminals into corruption, racketeering, extortion and other sophisticated crimes. Money is laundered through banking systems and people become victims of identity theft. Human trafficking becomes one of the biggest threats.

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<th>CRIME THREAT</th>
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Table 1: United Nations Office on Drug and Crime, “Protecting Peace and Prosperity in South East Asia: Synchronizing Economic and Security Agendas”

When OBOR comes into creation and various infrastructure projects are made functional, the scope for transnational criminals is unlimited. With no clear cut laws or established jurisdiction, the criminals could get away with almost anything, starting from simple things like illegal migrations to major offences like human trafficking and smuggling of drugs across the border.

It can also fuel local crime, which in turn drives up costs like insurance premiums and adds to the general level of criminality and insecurity in society.290

Existing platforms against transnational crimes in Asia

There are currently a number of mechanisms within the ASEAN community that could be built upon to strengthen cross-border cooperation to secure economic flows against criminal threats. Useful initiatives in this area have been taken by the Association of Southeast Asian Nations (ASEAN), the ASEAN Regions Forum (ARF) and the Asia Pacific Economic Cooperation (APEC) Forum:

- South East ASEAN MLAT: There exists a Regional Treaty on Mutual Legal Assistance signed by member countries of ASEAN, November 29th, 2004. Among the countries in the initiative, Malaysia, Singapore, and Vietnam have signed and ratified the treaty. Cambodia, Indonesia, the Philippines, and Thailand have signed but not ratified it yet. The Treaty obliges parties to render to one another the widest possible measure of MLA in criminal matters, subject to requested state’s domestic laws. The Southeast Asian MLAT provides for many forms of MLA that are commonly found in bilateral treaties, such as taking of evidence, search and seizure, confiscation of assets.291

289 Id. at 15.


ASEANAPOL: This is an ASEAN Chiefs of Police forum, which meets regularly to discuss regional matters. They facilitate and coordinate cross-border cooperation on intelligence and information sharing and exchange. Furthermore, they coordinate joint operations and activities involving criminal investigations, the building and maintenance of the ASEANAPOL database, training, capacity building, the development of scientific investigative tools, technical support and forensic science.

Asia/Pacific Group on Money Laundering: The Asia/Pacific Group on Money Laundering is an intergovernmental organisation, consisting of 41 member jurisdictions, focused on ensuring that its members effectively implement the international standards against money laundering, terrorist financing and proliferation financing related to weapons of mass destruction. The APG Secretariat coordinates bilateral technical assistance and training in the Asia/Pacific region for its member countries in order to improve compliance with the global standards. They conduct research and analysis into money laundering and terrorist financing methods and trends to assist law enforcement agencies.

European Union
The European Union is a unique economic and political union between 28 European countries that together cover much of the continent. They have abolished border controls between EU countries so that people can travel through Europe freely. This makes it much easier to commit cross-border crimes. EU has kept the transnational crimes in their region under control because of increased cooperation between the member states and various agencies set up to deal with cross border crimes, including Europol, Euro just and CEPOL. Among them, Europol has arguably played the leading role in tackling transnational organised crime.

The European Community is a party to the UN Convention against Transnational Organised Crime and its Protocols on the trafficking in persons and the smuggling of migrants by land, air and sea. Legislation has been passed at the EU level to criminalise the trafficking in persons and the facilitation of illegal immigration and for the protection of victims.

The Financial Action Task Force (FATF) is an inter-governmental body established in 1989. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is therefore a “policy-making body” which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas. EU and

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China are members of this organization and so is the Asian Development Bank.294

**Recommendations**

Our recommendations regarding transnational crimes are given below:

1. A fool proof **legal framework** consisting of legislations and enforcement should be established. The framework should contain details of criminal offences along with clear cut punishments. This should be done under a **treaty** to be signed by all participating countries. Any such legislation must be ratified by all the participating countries. It is also recommended that a treaty is made under which issues and confusions related to jurisdiction are cleared out.

2. It would also be suggested that pressure is exerted on all countries to abide by the conventions and resolutions on transnational crimes.

3. Countries participating in OBOR need to strengthen their borders by **increasing cooperation with other member states**. And by setting up of various agencies to monitor and control organized crime. There are currently a number of mechanisms within the ASEAN community that could be built upon to strengthen cross-border cooperation to secure economic flows against criminal threats. Measures taken by the European Union should be adopted as well.

4. **Strong and effective partnerships should be established with the private sector** for the purposes of information gathering, crime prevention and raising awareness. Priority areas should include, the transport, financial, real estate, legal, pharmaceutical, communications and other various sectors.295

5. **Ongoing political instability** in countries close to the borders of the South East Asian countries and transit areas for illicit commodities has the potential to alter trafficking routes and create new illegal migration flows.296 All countries participating in OBOR should strive for stability and peace which can be achieved through international cooperation and intervention by other neighbouring countries.

**Conclusion**

India has held its position strongly since the announcement of the plan, hoping that the international community would realize that it is a violation of India’s territorial sovereignty through the CPEC. One would have also thought that China would succumb to the pressure since India is its biggest competitor and having a good relationship with India would be crucial.

It can only be hoped that the international community, especially those participating in the venture come to realize the threat that OBOR poses, not just to India but to the world at large since this could easily lead to a situation that ends in neo-colonialism.

With regards to transnational crimes, the recommendations are to promote political stability in countries bordering own country.

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296 Id. at 25.
Justice delayed is Justice denied is what we have heard when it comes to the Indian Judiciary. There is surplus of writings regarding the pendency of cases and hearings in the Indian courts, but apart from all these unflattering studies, the belief on the Judiciary still remains unquestionable in the Indian society and otherwise. This could be judged by the popularity of the phrases like ‘I’ll sue you’ or ‘I’ll drag you to the court’. Indian Judiciary has been subjected to many changes to suit the changing times but all these changes have somehow failed to catalyse the process of timely deliverance of justice. The amendments already incorporated in the court proceedings are applaudable but a lot is still needed to be done on this subject. Through this research paper, using certain technological advancements, I intend to explore the aspect of establishing a Judicial reforms institution with the sole purpose of enabling the judicial remedies to be delivered within the desirable and expected time frame. These technological advancements could mould the judiciary into a much smoother and comprehensive institution where decisions are reached way faster than the current rate. The judiciary would thus emerge as a place/office where Justice is always delivered, never denied. Technology has changed the way humans see things and functions. The advancements occurring on a daily basis render the same from the previous day look trivial. It’s like we are moving forward each day and the step of today is bigger and better than yesterday but smaller than tomorrow. The introduction of computers in everyday life has simply revolutionized the human civilization completely and enormously. The computers have managed to make sea changes in the day to day life of common people. Computers as well as electronic communication devices such as facsimile machines, electronic mail, and video conferencing provide the ability to process large volumes of data with speed and accuracy, exchange of useful information between different locations and support higher quality of decision making. These capabilities have contributed to more efficient and responsive systems not only in business organizations, but also in legal, governmental and other public systems. Taking explicitly the Indian society scenario, the information revolution has come to India a few years ago but the automation in the field of Judiciary has not shown the expected build out. The Indian judiciary is vastly dependent on the functions of the lower courts. If the subordinate courts functions to their optimum level the work load of the High courts and Supreme courts can be significantly reduced, the pendency of cases can also be affected severely to a positive side. The automation has been somewhat introduced at the pedestal of the Higher courts but has not been able to mark its presence in the premise of the district and other subordinate courts. There have been advances and developments to synchronize information technology with Judiciary but the process has been significantly slow and
the developments done are not being able to compete with the automation and use of technology being used in other institutions and industries. The idea proposed here is to introduce an autonomous institution as a Judicial Management Information System (JMIS) to the Indian courts which shall come up with ways, implementations, and ideas to speed up the judicial process or to put information technology in use for the development and management of the Judiciary in aspects that need improvement. To streamline the process the areas where JMIS can work and develop could be chalked out to be specific following are the areas that need to be improved in the Indian Judiciary in order to enhance productivity and reduce delays:

i. Legal Information Data Bases
ii. On line query system for precedents, citations, codes, statutes etc.
iii. Generation of Cause List and on line statistical reports
iv. On line Caveat matching
v. On line updating data, monitoring and “flagging” of events
vi. Pooling of orders and judgements
vii. Daily List generation with historical data of each case
viii. Word processing with standard templates including generation of notices/processes
ix. Access to international data bases
x. Feedback reports for use of various levels.

The above are some of the areas where information technology can be put to use for a much reformed Judiciary. In particular, tracking of cases would result in better monitoring and control of cases by the Presiding Officers, rather than by the lawyers. Computerisation should be supplemented by the use of Fax, E Mail, Video conferencing and other facilities for higher productivity and quicker decision making at all levels. The Judicial Management Information System talked about should be an institution which can function as an autonomous constitutional authority operating under the Constitution of India. This will give this institution the required authority to work and take proper measures to reform the Judiciary. The structure of the JMIS shall constitute a 6 member panel which shall include, 3 Retired Judges of the Supreme Court at the national level as Chief Judicial Commissioner. At the state level the Chief Judicial commissioner shall be assisted by the State Judicial Commissioner who shall be a retired judge of the High court. At the District level, 2 senior most judges or Retired judges of the district courts shall be assisting the judicial commissioners. There shall be a committee consisting of eminent IT, software and mechanical engineers recognised by the Government of India which shall be working in sync with the Judicial Commissioners to suggest them about the rectifications of the problems recognised by the judicial team through the technical aspect and streamlining the judicial process of the country. Also, there can be a process of inviting leading IT companies to work for the betterment of the Judiciary by applying their technical skill set which they already posses and can be given a terminable lease for a period of 3 to 5 years. Being a constitutional authority the JMIS will be amongst a few institutions which can function with both autonomy and freedom along with country’s higher authorities. This
institution shall be responsible to put forth the use of technology in courts, especially in Subordinate courts.

To talk about some of the technological advancement that can be a boon to the judicial pillars in the Indian society one among them is the newly introduced Block chain technology which is the fundamental principle of the crypto currency in use, for instance Bit coin. This technology in simple words can be understood as—a block chain is an incorruptible digital ledger of economic transactions that can be programmed to record not just financial transactions but virtually everything of value.\(^{297}\) This kind of technology when used to its utmost value can actually eradicate the possibilities of generating fake contracts, will, Sale deeds, Agreements, notary etc. Moreover using this in courts this technology can make the work of the courts easier as the information regarding the case history, cause list, court fee, international, database, client’s history, accuser’s history, everything will be available to every stakeholder of the case such as the lawyer, Judge and even the clients of each party. This will make the decision-making process highly accountable and quick. Imagine the number of legal documents that should be used this way. Instead of passing them to each other, losing track of versions, and not being in sync with the other version, why can’t all business documents become shared instead of transferred back and forth? So many types of legal contracts would be ideal for that kind of workflow.\(^{298}\)

In addition to this one of the best things about the block chain is that, because it is a decentralized system that exists between all permitted parties, there’s no need to pay intermediaries (Middlemen) and it saves time and conflict. Block chains have their problems, but they are rated, undeniably, faster, cheaper, and more secure than traditional systems. To put more, block chain technology has also evolved a much more sophisticated and precise method of establishing contracts known as Smart contracts. Smart contracts are a way in which the people can exchange money, property, shares and anything of value without the service of a middleman in a transparent and conflict free manner. Another mode working in this regard and extensively being experimented upon to make the judicial process quick is the Alternate Dispute Resolution (ADR) mechanism. The goal of ADR system as the expression itself suggests is to resolve issues of different kinds outside the conventional legal mechanism i.e. courts/judicial system. There is a wide range extending from the absolutely consensual mode of resolving conflicts like arbitration, conciliation or negotiation; however a mix of a portion of the procedure like negotiation, mediation, conciliation and arbitration may likewise be utilized to determine certain question. ADR in this way offers an alternative route for

\(^{297}\) Don & Alex Tapscott, authors Blockchain Revolution (2016)

\(^{298}\) William Mougayar, Venture advisor, 4x entrepreneur, marketer, strategist and block chain specialist
resolution of disputes. Electronic business is critical, and maybe, inescapable. In this way, to consider the legal inference of the development and improvement of electronic business is basic. However, the absence of dispute resolution mechanism on the cyberspace will lead to a genuine obstruction in the further advancement of electronic trade. At the point when Alternative Dispute Resolution moves to the internet, especially arbitration and mediation as the primary sorts of ADR, it tends to be that the type of Online Alternative Dispute Resolution (OADR) can amplify the development of web based business. Online dispute resolution is a branch of dispute resolution which utilizes innovation to encourage the resolution of disputes between parties. It basically includes negotiation, mediation or arbitration, or a combination of all of them. In this regard it is regularly observed as an online replica of ADR. However, Online Dispute Resolution can expand these customary methods for settling question by applying creative strategies and online advances to the procedure. ODR includes the formation of a virtual imitation of physical setting and direct procedures by utilizing different methods for data transfer – email, SMS, digitized records, grid computing and also video and teleconferencing. A portion of the advantages of ODR is that it is proficient, efficient, and non-fierce, requires less physical gathering and additionally less physical information stockpiling. The implementation of ODR in India has not been productive reason being the absence of knowledge and nonappearance of satisfactory resolve to utilize Information and Communication Technology for Dispute Resolution. Maybe, it is an extremely odd thought for Indian Industry and Commercial Entities to utilize ODR for Dispute Resolution. ODR can turn into an exceptionally viable Alternative Dispute Resolution Mechanism (ADRM) in India. The present ADRM in India is administered by the obsolete and problematic Arbitration and Conciliation Act, 1996. Except if adequate arrangements are made to help the consolidation of innovation into the field of ADR in India, online dispute resolution cannot be completely implemented. One crucial factor for the absence of improvement in the field of ODR in India and worldwide is the absence of uniform laws in this regard. The United Nations Commission on International Trade Law (UNCITRAL) has taken endeavours towards providing a uniform legal framework to the ODR. When this is brought into power and is appropriately consolidated into the laws of the nation, ODR can turn into a viable method for resolving conflicts in India.

A lot of work and research needs to be done on this subject but one thing is evident that the changes are necessary and needs to be done in this aspect as early and efficiently as possible. Our country has come a long way since the first initiative of computerisation was taken by us in the year 1990. Since then its advantages has obviously been felt and accepted as the judicial process has become a lot easier as compared to the time before the intervention of technology in this field as it has become easier and manageable for everyone such as lawyers, judges, and litigants to participate in the process of law. It has reduced great amount of efforts in various features of the judicial process and has thus brought down the delays and pendency of cases. The technology has a
positive impact in the amount of trust that the citizens have on public institutions and has also affected the access to justice and information as its use enables and ensures an increased amount of dialogue between the citizens and the public institutions. However, there remain a lot of obstacles that must be overcome so that the judiciary can function to its actual potential utilizing the usage of data and innovation. When our legal framework turns out to be totally effective in executing the utilization of present day innovations, equity can be legitimately served to all in a quick and proficient way.

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STATUS OF WOMEN IN INDIA AND THE RELATED LEGAL PROVISIONS: PROBLEMS AND PROSPECTS

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From Vivekananda Institute of Professional Studies

ABSTRACT
This paper aims to explore the challenges faced by women in India and highlights the problems and prospects with regard to women related laws. The paper starts with a brief introduction of the status of women in India throughout the historical phases, followed by the challenges to the dignity, integrity and safety of women in the country. The article is also an attempt to grapple with the several challenges which are faced by women in India like Rape, Harassment, Domestic Violence, Female foeticide, etc. Simultaneously, the paper discusses the steps taken by the government to deal with this threat to the safety of its female citizens. This paper seeks to further analyse the loopholes in the laws which have been made with respect to women. The paper is an outcome of an exploratory research carried out by the researcher in order to understand the impact of these laws on both – women and the society at large.

KEYWORDS- Women’s rights, Violations, Gender, Gender Equality, Violence

I. INTRODUCTION
The United Nations declared ‘Gender Equality and Women Empowerment’ as one of the eight ‘Millennium Development Goals’ in its Millennium Summit, 2000. However, observing the conditions prevailing in our country, these goals are too far from being realised. India became independent in the year 1947, however, women in the country are still struggling to gain recognition in the society.

The women play a multilateral role in the society as a care taker of the family, as a bread winner in many families, as a service provider to the society. But, in spite of the fact that they contribute to the society just as much as their counterpart (males) does, still they have to face several restraints upon themselves which hinders their progress as an individual in the society.

In the 19th century the women emerged as a distinct interest group which put forward its demands to gain equal rights as men in the society. The inequalities were merely gender-based and hence, were considered baseless.

The term ‘Women Empowerment’ implies the ability of a woman to take her decisions independently which will help her in ensuring a successful life.

It is very easy to talk about the sufferings of women i.e. ‘to sympathise’ but it is as difficult ‘to empathise’ with them.

“You never really understand a person until you consider things from his point of view…until you climb into his skin and walk around in it”. — Atticus Finch

The moment the entire society is able to understand the suffering of women, they’ll be able to help them in coming out of the clutches of the evils that they are tied down to, in the society. The Indian society claims to have modernised itself, which is true to some extent, but what about those sectors of society which are still not able to come out
their ‘imaginary bubble’ of the belief that ‘women are inferior to men’. Ignorance means being afraid of change and a society must be dynamic, it should change in accordance with the changing needs of its people. Thus, people must talk about these issues openly rather than ignoring them altogether. People in the society must put forward their opinions as an “Opinion is the only medium between knowledge and ignorance”.

It is a very difficult task to understand the status of Indian women across the historical phases. As remarked by Ms. Romila Thapar, a very famous historian:

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

The objective of this paper is to grapple with the challenges faced by women in India like Female foeticide, immoral trafficking, rape, dowry, denial of inheritance rights, domestic violence, etc. and to suggest the strategies to deal with these challenges.

II. POSITION OF WOMEN IN DIFFERENT HISTORICAL PHASES

VEDIC PERIOD

During this period, women enjoyed a fair amount of freedom and equality. They participated in all the activities as men and were even allowed to study in Gurukuls and to undergo Upanayana rite. Many women like Atreyi, Lopamudra, Indrani, inter alia, excelled and were accomplished in the art of music, dance and in some instances, even warfare. Women held a very respectable position in the society and they were considered the Ardhangini of their husbands in every sense; for instance, a man was not allowed to perform any religious rites without his wife. Therefore, a woman cherished the ideals of liberty, equality and cooperation in the society during the Vedic period, unlike, the contemporary western world.

This period can also be characterised by the freedom of women to choose the men they wanted to marry (Swayamvara concept was quite prevalent), the absence of purdah system, rare instances of polygamy. Widows were also not prohibited from remarrying. Widows even had the option to perform Niyoga.

POST-VEDIC PERIOD

This was the phase in Indian history when the status of women suffered a setback as various restriction were put on their rights and privileges by the Manusmriti. The society started transforming itself into a patriarchal character by giving increasing authority to man in all spheres of life. Education for women, which had been an accepted norm in the past was neglected in the post-vedic period and slowly and gradually, women were totally denied to get education. In this period, the women were not allowed to be a part of the Upanayana...

299 Romila Thapar,”Looking Back in History” in Devika Jain, Indian Women(Publication Division, Ministry of Information and Broadcasting, Government of India, New Delhi 1975)

300 An ancient Hindu tradition, in which a woman (whose husband is either dead or is incapable of fatherhood) would request and appoint a person for helping her bear a child.
ceremony, thereby closing the last door to formal education. The marriageable age of women was brought down to 9 to 10 years, which catapulted the evil practice of pre-puberty marriages. Even though the women were culturally and socially subordinated during this period, they had a very important right i.e. their right to own property, particularly the Stridhana. Stridhana, as defined by Manu is: “that which was given to her before the nuptial fire, in brid al procession, in token of love and which she has received from brother, mother, father or husband”. 301

BRITISH PERIOD

At the inception of the colonial era, the status of women and their identity was completely dependent upon their husbands, the men. 302. They were denied the access to education and many women were even denied their basic rights making their life a living hell. In short, it can be said that they had no access to social justice and equal rights in the society, they had no knowledge of their basic rights, due to illiteracy, economic and social subordination and many other factors. 303

Due to the western impact on the Indian society, a drastic change was witnessed in the behaviour, attitude and the pattern of living of Hindu society. The English language opened the gateway to the ideology of Liberalism. 304 Which stressed upon the ideals of liberty, equality and respect for individualism, etc.

During this period, two major movements took place in India which contributed a lot to the upliftment of women in the society. the two movements were – The Social Reform Movement Of 19th Century and The Nationalist Movement Of 20th Century. These movements were mainly taken up to raise the question of equal status of women in the society.

The 19th century movement brought attention to social issues like Sati, status of widows w.r.t. their ill-treatment and denial of remarriage to them, child marriage, education for women, etc. Social reformers like Raja Rammohan Roy, Swami Dayanand Saraswati, Aurobindo, etc. had a major role to play in this reform movement.

The 20th century movement paved way for active participation of women in various political activities by boosting their confidence and giving them strength to come forward and revolt, to demand for their rights in the society, in order to come at par with men.

Many important Acts were enacted by the British Government to do away with certain social evils in the Indian society, some of them are - Sati Abolition Act (1820), Widow Remarriage Act (1856), Ban on Female Infanticide (1870), Married Women’s Property Act(1874), Abolition of Devadasi System (1929), Child Marriage Restraint Act (1929), etc. 305

301 A.S. Altekar, The Position of Women In Hindu Civilisation (Motital Banarasidass, Delhi 1962)
303 Manu Smriti with six commentaries, Bombay (1886)
304 Liberalism is a political philosophy founded on the ideals of Liberty and Equality
III. A BRIEF MAPPING OF THE VIOLATIONS OF WOMEN’S RIGHTS IN INDIA

This section highlights a range of violations of the most basic human rights of women in India and the strategies which the government has taken up to deal with the same.

CHILD MARRIAGE (Bal-Vivah)

This practice was not prevalent in the Ancient India, it originated in the Medieval era. This concept had adverse effects on the female population at large who were already fighting to have a respectable position in society to make a life for themselves when this practice came in. Child brides often suffered a lot of emotional pressure from their families and were subjected to forced sexual intercourses and early pregnancy that largely affected their physical and mental health.

According to the National Population policy, ‘over 50% of the total population of girls marry before the age of 18 years, resulting in a typical reproductive pattern of ‘too early, too frequent, too many’, resulting in a high IMR' 306

The first attempt to curb this evil practice was made in the year 1929, when the Child Marriage Restraint Act was passed, thereby fixing the marriable age of girls as 14 and that of boys as 18 which was later on amended to 18 for girls and 21 for boys. However, this Act lacked implementation. So, in the year 2006, a new Act came in, which prohibited Child Marriage and made it a punishable offence.

SATI (Jauhar)

Sati practice is the self-immolation by a widow on the funeral-pyre of her husband. This practice got its name after Sati, the wife of Dakhsha, who immolated herself on the funeral pyre of her husband as she was unable to overcome the grief of the demise of her husband.

Sometimes, sati was even committed by women before the death of their husbands when their city or town was besieged by the enemies or was under the threat of being defeated. This practice was known as Jouhar/Jauhar.

A woman was considered as a part and parcel of her husband, in the absence of whom she was nothing. This attitude towards a woman has also been depicted in our legal literature (Dharmashastra) and important legal texts like Manusmriti.

There is an inscription of various hand-prints in the Sati Mata Mandir, symbolizing the no. of women who have performed Sati. Those women who committed Sati were said to have been endowed with a divine halo.

Fortunately, this evil practice has been criminalised after the passing of the Sati (Prevention) Act, 1987, which declared Sati to be a crime for which even death penalty could be given to the perpetrators of this crime.

FEMALE FOETICIDE

In the Indian society, the birth of a girl child was seen as a social and economic burden upon the family in which she was born.

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Earlier, a girl child was killed as soon as it was born, thereby following the practise of female infanticide. But, later on, people started engaging in the practice of female foeticide i.e. the termination of a healthy female foetus after 18 weeks of gestation from the mother’s uterus. The myth which guided this practice was that ‘boys give and girls take’. The birth of the female child was dreaded as it was seen as curse to the family, so they opt for an abortion outside of the legal methods.

With the passing of the Pre-Conception and Pre-Natal Diagnostic Techniques Act (1994), female foeticide and pre-natal sex screening has been banned and made punishable in India. So, currently, in India, it is illegal to determine or disclose the sex of the foetus to anyone.

The government of India also carried out several social schemes like ‘BetiBachaoAndolan’ to spread awareness about the importance of a girl child and the basic human rights of women.

**EDUCATION**

This is one of the most critical areas for empowerment of women in India. Women are a sub-class in the Indian society and it has been a constant challenge for the Indian government to provide education to all the members of the society, especially due to the fact that the population is growing at a high rate and it is becoming more and more difficult to maintain a balance between the increasing population and the decreasing education levels. Government has tried out various strategies to promote education in India like ‘Five Year Plans’ in order to achieve literacy level by providing free primary schools for all children.307

It is believed that educating the girl child would help in curbing the incidents of pre-puberty marriages and various kinds of sexually transmitted diseases. A lot of benefits can be achieved by the nation if effective measures are taken up for reducing gender, class and geographical inequalities in education, especially with regard to women and by providing them access to employment and resources.308

“Article 21 of the Indian Constitution have made it compulsory for the government to provide free education to everybody, but still, the high rate of women’s education is still a distant dream.

In spite of the fact that due to the efforts of the ‘SarvaShiksyab Abhiyan’, we have received a bit of success in the direction of education of the girl child, yet the rate of their retention in schools is still very low in comparison to their male counterpart. So, it is true to say that the dream of universalising primary education in India is a remote daydream for the females in India 309.

**IV. CRIMES AGAINST WOMEN**

In the year 2007, about 1,85, 315 cases of crimes against women in India were reported and about 75,930 cases among them were related to cruelty done to women by their husbands and relatives. One act of

307 ‘Girl Child’s Right to Education in India’ by Adv. Rajeev Jadhav

308 (https://rajeevjadhav.wordpress.com/2013/06/30/girl-childs-right-to-education-in-india/)

309 ‘Women’s Rights in India: Problems and Prospects’ by Sutapa Saryal
Sexual Harassment occurs every 59 minutes; One act of Torture occurs every 12 minutes; One act of Molestation occurs every 16 minutes\textsuperscript{310}.

**ACID ATTACK**

Acid attack or vitriol attack is a form of violent physical assault which involves the act of throwing acid or any similar corrosive substance onto the body of another person with the intention of disfiguring, maiming, torturing, or killing that person. Acid attack victims in India are mostly females. This offence has been made punishable under section 326B, Indian Penal Code, but still the rising number of the acid attack cases day by day is depictive of the inability of Indian law to grapple with such a heinous crime. Acid attack cases in India are the highest in number in comparison to other countries, but the conviction rates for the same are the worst. Usually the victims of Acid Attacks have been those women who either refused to the proposals of marriage or sexual advances of a man and suffered the consequences of hurting the so-called ‘male-ego’. Earlier, the law relating to this heinous crime was not very strict and the punishment was also not adequate, but, it was only in the year 2013 that India finally acknowledged its seriousness towards this issue and made separate sections for the offence of ‘acid attack’ in IPC i.e. sections 326A and 326 B and made it a non-bailable offence with a minimum of ten years of imprisonment. Section 326A (acid attack) and Section 376D (gang rape) are the only two sections under IPC wherein the amount of compensation goes directly to the victim.

**OUTRAGING THE MODESTY OF A WOMAN**

Modesty is the behaviour, manner or the appearance that is intended to avoid any sort of indecency or impropriety. As defined by the Hon’ble Supreme court of India in a plethora of its judgments, "the essence of a woman’s modesty is her sex".

“The act of pulling a woman, removing her saree, coupled with a request for sexual intercourse...would be an outrage to the modesty of a woman; and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence”, the Bench said in a judgment that has drawn from several verdicts by different courts\textsuperscript{311}. Whoever assaults or uses criminal force intending to outrage her modesty (1yr-5yrs imprisonment) or disrobing her or compelling her to be naked (3yrs-7yrs imprisonment) are liable under Sec 354 and Sec 354B respectively\textsuperscript{312}.

**SEXUAL HARASSMENT**

“Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognized human right. The requirement of this right has received global acceptance. Therefore, international conventions and norms are of great significance in the formulation of the guidelines to achieve this purpose”\textsuperscript{313}

\textsuperscript{310} National Crimes Records Bureau, 2007

\textsuperscript{311} The Times of India- ‘SC defines what is a woman’s modesty’ by Dhananjay Mahapatra (1\textsuperscript{st} March 2007)

\textsuperscript{312} Vishaka v. State of Rajasthan [(1997) 6 SCC 241; 1997 SCC (Cri) 932

\textsuperscript{313} Wen-Chen Chang, Li-annThio, Kevin YL Tan, Jiunn-rong Yeh, CONSTITUTIONALISM IN ASIA: CASES AND MATERIALS, Pg. 460
One of the most glaring examples of human rights violation. Gender inequality and injustice is sexual harassment at workplace. Earlier, the protection given to women in India was confined to be against the brutal offences like rape only, but over a period of time, it was realised that the law must also cover other aspects of men’s conduct towards women within its ambit in order to ensure that such conduct of men shall not be roadblock in the path of women to achieve the goal of social and economic independence. One such act of men that poses a threat to the economic independence of women is Sexual Harassment at workplace as it is incompatible with her dignity and honour in the society.

**STALKING**

It is the obsessive and unwanted attention of a person towards another person. Such behaviours are related to harassment and intimidation. And they may even include following the victim or monitoring her in person.

"Virtually any sort of unwanted contact between two people that directly or indirectly communicates a threat or places the victim in fear can be considered stalking."

According to LamberRoyakkers:

"Stalking is a form of mental assault, in which the perpetrator repeatedly, unwantedly, and disruptively breaks into the life-world of the victim, with whom they have no relationship (or no longer have)."

The acts, which separately make up the intrusion cannot by themselves be the cause of mental abuse, but they do when taken together."

In 2013, Indian Parliament made amendments to the Indian Penal Code, thereby making ‘Stalking’ a criminal offence under Section 354D

**RAPE**

Rape is one of the most heinous of sexual offences against women which shocks the conscience and shakes it till its roots. It is the only crime where the victim gets socially ostracised more than being sympathised, and is morally degraded with a lifelong stigma attached to her character and her dignity.

It was stated in the case of *State of Punjab v. Gurmit Singh*:

“Rape is not merely a form of physical assault- it is destructive of the whole personality of the victim. A murderer is the one who destroys the ‘physical body’ of the victim, a rapist degrades the very ‘soul’ of the helpless female. The courts, therefore, take on their shoulders, a great responsibility while trying an accused facing the charges of Rape.”

The statistics of occurrences of Rape in India are very shocking.

According to the reports of the *World Health Organization*: ‘EVERY 54 MINUTES, A WOMAN IS RAPED IN INDIA’

314 National Centre for Victims of Crime (Feb 2002). “Stalking Victimization”. Office for Victims of Crime

315 "CyberStalking: menaced on the Internet” http://www.sociosite.org/cyberstalking_en.php

316 (1996) 2 SCC 384: 1996 SCC (Cri.) 316

317 A study done by WHO

www.supremoamicus.org
According to the Centre for Development of Women’s Studies: ‘EVERY 35 MINUTES, 42 WOMEN ARE RAPED IN INDIA’\textsuperscript{318}

The offence of Rape finds its place in the Indian Penal Code, 1860 under Section 376 and the punishment for it is provided under Section 376 of the Code. But, with new cases coming to light, the loopholes in the rape laws come into light as well and puts forward the need to make these laws adaptable to the needs of the society.

The best example for this is the Delhi gang rape case of 2012.

In the Nirbhaya case, the bench of Hon’ble High Court of Delhi stated:

“The undying appetite for sex, the constant hunger for violence, the differential position of the empowered and the attitude of people’s perversity, to say the least, are bound to shock the collective conscience which knows not what to do…Thence, we hold that the high court has correctly decided and confirmed the death penalty and we don’t see any reason to differ with the same”

In her separate judgment upholding the death sentence on the four accused of gang rape, Justice R. Banumathi stated that the offences against women are not merely gender issues, but they are the issues of human rights as well. The increasing rates of crimes against women points out an emergent need to study in depth the roots of these problems and to remedy the same through a strict law-and-order regime.

Justice R. Bhanumati also stated: “There are a huge number of legislations and penal provisions to punish the offenders committing violence against women. However, it has become even more important to ensure that gender justice does not remain only on the papers”\textsuperscript{319}

DOMESTIC VIOLENCE

“Violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over women and discrimination against women by men and to the prevention of the full advancement of women…”\textsuperscript{319}

Around the world, women continue to suffer domestic violence, varying from 20% to 50%, throughout the years, from country to country.

1 out of every 5 married women in India are the victims of Domestic Violence and about 40% of every married woman of the age group of 15 to 49 years have experienced at least one of the forms of spousal violence i.e. physical or sexual or emotional\textsuperscript{320}. Physical violence is one of the most common form of domestic violence.

At least one case of cruelty is reported every 9 minutes in India\textsuperscript{321}. Domestic Violence manifests itself as physical, verbal or psychological abuse, which often occurs behind ‘closed doors’ by the perpetrator against the victim, in order to alienate that victim from receiving any kind of remedy for the same. Due to societal pressures, the victim tries to ‘adjust’ with

\textsuperscript{318} A study done by CDWS, nn. 2-6 reported in India Today, 9/9/2002

\textsuperscript{319} The United Nations Declaration on the Elimination of Violence against women. The General Assembly Resolution. Dec. 1993

\textsuperscript{320} National Family Health Survey, 2005-06

\textsuperscript{321} National Crime Reports Bureau
the family and is forced to reconcile with her perpetrator, and this subjugation of the victim by the society is a violation of human rights of living a life with dignity and liberty. This inability of the victim to have access to law is a failure of the law itself as it is rendered ineffective due to the incapability of the victim to come out from the ‘four walls’ of her home and demand justice.

In India, under Criminal Law, there are certain provisions which address the issue of Domestic Violence. Some relevant provisions are:
Section 498-A which was added to the Indian Penal Code in the year 1983. Other offences like dowry death (Section 304B, IPC), Hurt (Section 319, IPC), Grievous Hurt (Section 320, IPC), etc. are also used quite often, against the perpetrators of domestic violence.

In the year 2005, the ‘Protection of Women against Domestic Violence Act’ was passed, with the objective of providing a more effective protection of women’s rights as are guaranteed by the Constitution, who are the victims of any kind of violence that occurs within their family and with regard to incidental matters. This Act came into force in October, 2006.

V. CONCLUSION

All the history has attested that a woman has been subjugated by man; a woman has been merely used as an instrument to promote the self-gratification of man, to minister to the sensual pleasures of man and to provide him comfort; but has never been elevated to the rank which she deserves.

Man did everything to debase and enslave her mind; and now he looks triumphantly on the ruin he has wrought, and says, the being he has thus deeply injured is his inferior…322

The government has taken numerous steps to improve the condition of women in the society, but little has changed. The issues which threaten the safety of women in India cannot merely be dealt with by bringing in new laws or modifying the existing laws; what needs to be changed is the attitude of society in dealing with these laws.

Whenever a woman is victimised by offences like Domestic Violence, Cruelty, Hurt, Harassment, etc, she shouldn’t be told to keep mum about the same, rather, she should get enough support from her relatives and friends to speak up and fight against the injustice that she is facing. A woman who is victimised by any of the evil practices of her husband and his relatives should not be told to ‘adjust’, as such conditions may get even worse for her in the future. Now, it’s high time, the society should change its mentality and accept the fact that even God intended to make a biological creation i.e. two sexes, in order to keep the cycle going and make development a smooth process; he never intended to create two genders, he never fixed gender roles, these are sociological creations and this gender classification needs to be done away with, if the society has to progress.

Laws are created for the society and it is the society only that can help in the successful implementation of these laws.

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ENVIRONMENTAL REGULATIONS AND RULES IMPACTING THE REAL ESTATE INDUSTRY AND ITS ROLE IN PREVENTING CLIMATE CHANGE

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Abstract

This article seeks to explain the relationship between climate change and the construction industry and the various rules and regulations laid down by the Government of India in order to promote sustainable development in the real estate sector. Special attention has been paid to the development rules of the city of Pune as the research is centered locally. The researcher has also conducted empirical research with the students of law as well as members of the industry in order to assess the flaws and loopholes in the existing law. The literature review includes the Environmental Clearance Regulations, 2006, the Goel Ganga judgment, 2018 and the Paris Agreement on climate change.

The article also sheds light upon the impact of inefficient laws and the failure of the executive on the environment as well as on the development and lays down certain suggestions that will in the opinion of the researcher work towards the goal of sustainable development in the city.

Key words
Sustainable construction, Environmental Clearance Regulations, 2006, built-up area, waste and water management

Introduction

The Construction and Real Estate Industry is undoubtedly an environmentally taxing industry, that inevitably requires the felling of trees and causes air and noise pollution. The Industry must be regulated by a clear set of laws to minimize its impact on climate change and to ensure that it develops in a sustainable and environmentally responsible manner. The city of Pune has a booming and powerful construction Industry with several brands that are homed and headed in the developing city of Pune. The cosmopolitan and IT crowd with reasonable land rates makes it ideal for the industry to flourish. Therefore, Pune has a significant contribution to make to this Industry in India with leading brands like Goel Ganga Constructions, Gera Developers, Panchsheel Group etc. The builders of the city also have a nexus or union known as CREDAI- Pune Chapter where the emerging problems and solutions of the industry are discussed.

The relationship between the industry and the environmental authorities has always been fairly tense and has led way to several misunderstandings and ambiguities, which have harmed both the environment and the industry severely. These have been discussed and studied in this research paper. The issues have reached a new level of pertinence thanks to the Supreme Court judgment fining a local developer a whooping amount of Rs. 100 crores for what the developer claims to be an ambiguity in the law.

Impact of the Industry on the Environment

Small-scale individual project can have a significantly large impact on the
The impact of construction businesses on climate change is internationally recognized as the construction sector contributes to 28% of air pollution, 50% of the climatic change, 40% of drinking water pollution, and 50% of landfill wastes. The United Kingdom has taken due notice of these numbers and has published the “Green Guide” which lays down rules and principles on how developers can use the material in a more sustainable, ethical and responsible fashion. The United States of America, which is known for the worlds most eminent environment lawyers has the EPA that overlooks the construction activities and works to mitigate their impact on the environment.

**Environmental Clearance Regulations, 2006**

The first regulation regarding the construction Industry came around in the year 2006 prior to which there were no real safeguards or checks on the industry. In exercise of the powers granted by way of Section (3), sub section (2), clause (v) the government brought about the Environmental Clearance Regulations, 2006. The crux of these regulations was that projects shall be undertaken only after prior environmental clearances are granted by the State Level Environmental Assessment Authority. These clearances will be granted by way of a four step process, which is:

1. **Screening**, which entails a scrutiny of the application that seeks environmental clearance.
2. **Scoping**, in which an Expert Appraisal Committee will prepare an Environment Assessment Report for the project / activity.
3. **Public Consultation**, in which the local individuals who will be affected or impacted by the project are consulted and their concerns are addressed and taken into account.
4. **Appraisal**, in which a transparent final scrutiny will take place of all the applications, documents and reports and recommendations or terms and conditions will be made to the promoter, and grant or a rejection will be given to the construction company.

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It is also pertinent to note that the regulations create a clear distinction between Category A and Category B projects by way of an attached Schedule and the requirements differ for them both. Building and Construction Projects are listed in Item 8 of the Schedule and the threshold for Category B is all projects having a built up area of greater than 20,000 sq. m and less than 1,50,000 sq. m.

In furtherance to this, there is a Form 1- A given in Appendix II of the Schedule which provides a detailed checklist of environmental impacts for the construction industry. This has been divided into the impacts of the land environment, the water environment, the vegetation, the fauna, the air environment, the aesthetics, the socio-economic aspects, the building materials and energy conservation. The form addresses a comprehensive a vast variety of questions that will be scrutinized in the Screening stage of granting prior environmental clearance. The questions are broad and complex and in opinion lack the specificity required. However, in theory they are meritorious for the amount of planning they seek on the part of the developer and the self-assessment of environmental impact on the part of the companies.

This includes management plans of water supply and waste during the construction period, the health hazards of the construction debris, the yield and capacity of the proposed source of water, methods undertaken by the developer to prevent and mitigate water pollution, the amount of recycled water that will be used, the water harvesting methods that will be employed, the impacts of dust, smoke, odorous gases etc that will be released during construction.

The form also questions the social infrastructure around the proposed project and the adverse affects it will cause of local communities or cultural values etc. In furtherance to this there is reasonable importance given to energy conservation the energy consumption that is predicted for per square foot of built up area, the power back up plan, the use of energy efficient space conditioning. The form also studies the likely effects in the alteration of microclimate. In addition to this, a developer is also required to furnish an Environment Management Plan that would consist of all mitigation measures for every activity to minimize environmental impact and to promote sustainable development.

International nexus between Sustainable Construction and Climate Change

It is essential that construction companies take sustainable development seriously as it is clear that the industry has a significant role to play when it comes to climate change. It is also noted that the laws regarding the same are still insufficient. In my opinion, this calls for a specific law to be created for environmental impact by the construction industry. Environmental responsibility must be included in corporate responsibility of a firm. The pioneering landmark international law for climate change is the Paris Climate Agreement³₂⁶, which was formed by the United Nations Convention on Climate Change, which has been effective from the 4ᵗʰ of November, 2016. The treaty has been signed by 195 of

the 197 countries and its impact on the international construction industry is studied below.

In order to implement the Paris Agreement, the construction sector must internationally avoid growth in its energy consumption by 50% by creating net zero energy buildings. Further, in the 2030 agenda for sustainable development goals one of the objectives is sustainable cities. The private builders and firms have a significant contribution in the building of lifestyles and of the cities and if laws are made with care they can make sure that individuals live a more sustainable lifestyle. Also, laws have to be made in a manner in which they do not hamper development of a city, especially when the country in question is a developing nation like India. It is important that concepts like zero energy buildings come into India and more locally into Pune. Zero Energy buildings are buildings where the energy consumed is nearly equal to the amount of renewable energy produced. By substituting energy taken from heating fuel, money is saved and the carbon footprint of the building too will be considerably reduced. There are several other ways too reduce the carbon footprint of a project, that is for example by replacing furnaces with heat pumps, employing the use of solar panels, water treatment plants, harvesting equipment etc.

There is also an internationally recognized doctrine of green building, which is also known as sustainable architecture where the objective is to use the resources in the most efficient manner possible so as to minimize its impact on the environment. In furtherance to this, architecture plays a huge role in the way energy will be consumed in the building. This energy consumption will directly impact the carbon footprint of the building and thereby will have an impact on climate change. In my opinion, development plans must include architectural efficiencies to reduce energy consumptions and this must be a requirement for granting environmental clearances.

**Research Methodology**

For the purpose of collecting primary data for this research paper, two categories of people were contacted and two methods were used. The first was an online survey that was filled by around 40 students of environmental law who were concerned citizens and trying their best to be environmentally responsible in their lifestyle. The online survey questioned them on their views on the efficacy of

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327 Daniel Bodansky, The Legal Character of the Paris Agreement: A Primer, (December 2015).
330 JianZou, Zhen Yo Zhou, School of Natural and Built Environments, University of South Australia, Adelaide, South Australia, Green Buildings: Current Status and Future Agenda, (June 2013) https://www.researchgate.net/publication/259158759_Green_building_research_current_status_and_future_agenda_A_review
environmental regulations in India. Secondly, by way of interviews that were conducted by the researcher herself several eminent members of the city’s construction circuit were contacted. This group of people included senior members who have spent over 30 years in the industry. The researcher sought to understand the perspective of builders of the city towards the concept of sustainable development and its implementation by way of notifications and regulations issued by the executive.

**Empirical Research**

The first section of people who were surveyed for the purpose of this research paper were students of environmental law and concerned citizens of India. The sample space for this category consisted of about 40 students of environmental law. Maximum students believed that regulations regarding the construction industry were insufficient in theory, and a significant number of students believed that they were not implemented properly and believed that this was because of failure of the environment authorities to act in a fair and just manner. There were also a considerable number of students of law who were unaware of the tight and tense relationship between environment and property law. The students who were unaware of the regulations have been excluded from the sample space in order to study a more pertinent perspective. The results of the survey have been depicted in the pie chart below.

The second category of people that were contacted were closer home to the impact of regulations upon businesses and the industry and were serious stakeholders in the law. Further, by way of telephonic interviews, several real estate developers in the city were contacted and their views on legal aspect of sustainable development were questioned. The Managing Director of Pride Purple Group of Constructions, Mr. Arvind Jain, stated that the sheer number of notifications released by environmental authorities has made the law vast to a point of futility. Further, he said that the ambiguities in the law and the extremely time consuming process of obtaining clearances is hampering development in the city.

After speaking to several developers, most of whom preferred to stay anonymous, it was learnt that developers in the city almost unanimously feel intimidated and even harassed by the authorities. Some developers also admitted that there is rampant
corruption that is thriving in the environmental authorities and therefore the current state of affairs is problematic not only to them as developers but also to the environment and the cause of sustainable and responsible development.

Developers across the city were also extremely disturbed by the amount of time that was taken by the environmental authorities to grant clearances despite the law mandating a 60 day window. They claimed to have had to wait sometimes for over 2 years to seek a standard environment clearance thereby having a huge impact on the business financially.

In particular, developers were troubled by the Supreme Courts decision in M/s Goel Ganga Private Limited v. Union Of India through Secretary, Ministry Of Environment And Forests &Ors 331 where the project proponent, that is Goel Ganga Developers were fined Rs. 100 crore for a violation of the Environment Clearance terms and conditions. The developers argued that the violation was a mere technicality and this too was caused because of unclear and obscure law and fining in such an exorbitant and exemplary fashion was severe blow. The chief issue in question was the definition and interpretation of the term built up area and the case revolved around this interpretation of law. The 1986 Act does not define built up area, and in fact mentions little about the construction industry. The statute discussed above that is 2006 Clearance Regulations mentioned the concept of built up area in the categorization of projects but failed to define it. It was contended that developers calculated built up area as per the definition given in Development Control Rules (DCR) where the built up area was clearly to exclude basements, service areas and terraces. The developers of the city therefore, submitted the proposed built up area to the environmental authorities as per that definition. In 2011, however, a notification was released that clarified the definition stating that built up area is to include service areas, basements etc. This impliedly opens up all builders for potential violations and this actively illustrates high penalties for developers for clearances obtained between 2006 and 2011. Thus, the conclusion of this case is that the developers were fined and this case has set a stringent precedent for the industry.

Developers that were spoken to for the purpose of this research paper seemed to believe that the court has erred in this judgment and has penalized the project proponent, that is Goel Ganga Developers for a mistake and vagueness of the part of the State. However, this elucidates the impression that the courts will be extremely strict regarding violations that will impact the environment especially and specifically when it comes to the construction industry and the court and the National Green Tribunal will exorbitantly fine developers for intentional misrepresentations made to obtain environmental clearance and also the stringent following of the terms laid down during the grant of the clearance.

331M/s Goel Ganga Private Limited v. Union Of India through Secretary, Ministry Of Environment And Forests &Ors, CIVIL APPEAL NO. 10854 OF 2016

**Recommendations for Sustainable Construction**
With the advent of environmentally friendly technology on the rise, and emerging modern ideas of developing responsibly it is essential that these are implemented in India. Corporate responsibility and environmentally ethical practices in India are still vastly insufficient in practice. While it is unarguably most important that corruption must be erased from the executive there are also certain mandates that will ensure responsible practices in the industry.

The recommendations can be broadly classified into pre construction, work in progress and post construction laws. It is essential to achieve a balance between sustainability and development in a way that one does not burden and hamper the other.

**PLANNING**

The state authorities of a city create a master development plan of city, which lays down the permissible areas of construction. If this master plan is designed in consultation with the environmental authorities it would drastically reduce chances of violations by project proponents and also reduce the burden of seeking permission. Further, instead of granting clearances with a set of terms and conditions every time there must be a list of standardized rules laid down that must be followed during construction. Tax benefits must be granted to developers who are using environment friendly technologies and sustainable material. It is important that the government comes up with measures to recognize responsible construction practices and grants certain benefits to them.

**WORK IN PROGRESS**

In regards to rules that must be followed to mitigate pollution during construction, there must be a set of clear rules laid down, that govern timings of work, that mandate protection of dust from going out and harming the citizens living close by, and the proper disposal of debris into the environment. The pollution control board may also conduct site inspection and visits to ensure that the rules are being stringently followed by developers. Developers must also be required to inculcate sustainable practices by way of their infrastructure, whether it is instillation of Sewage Treatment Plants for effective water management, or solar energy panels, Composting equipment or even infrastructure to promote water harvesting.

**POST CONSTRUCTION**

Developers of the city must be mandated to ensure effective use of the sustainable infrastructure for at least 5 years after the completion of the project. This increases responsibility on the developer to provide high quality environment friendly equipment.

In conclusion, it is in the opinion of the researcher that if the status quo is maintained then nobody wins, neither the environment nor the development and it is essential especially in a developing country like India that both are protected. It is high time the Government takes the environment
seriously and aligns the interest with the up and coming developers of not only this city but also this country. Violations on technicalities caused because of misinterpreted law will have a drastic impact on both the causes leaving us in the middle of nowhere down the road of detriment and ruin.

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DIGITAL PRESERVATION AND INTELLECTUAL PROPERTY RIGHTS

By Mokshiv Malla & Charushi Jain
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Introduction to Digital Preservation
Digital preservation helps to deliver lasting impact from highly prized and valuable digital resources. This is often understood as a technical challenge but experience shows that a poor fit between technology, processes and regulations constrains preservation actions and significantly inhibits the benefits which long-term access ought to deliver. Operating within a complicated and evolving legal and regulatory landscape, the digital preservation community needs a clear understanding of what it is permitted to do and what risks might inhere within technical processes like format shifting, migration, bit replication and emulation. Foremost among these challenges is the management, protection and evolution of intellectual property rights. It has long been recognized that digital rights management and encryption present a barrier to preserving content. But intellectual property rights do not just impact on the contents of archives but applies also to the containers, wrappers and formats which make the contents accessible.

Digital Preservation & IPR
In terms of intellectual property rights (IPRs), the traditional concepts that governed the use of tangible works, such as books, are often difficult, or even impossible, to apply meaningfully to digital materials. In particular, the concept of “physical ownership” is declining in relevance as licensed access to electronic resources, as opposed to the purchase of tangible items, becomes more prevalent. For example, a library may now license access to an online database of periodicals for its users, instead of purchasing one or more paper periodicals for stack access. The library never takes physical delivery of the periodicals, thus saving storage space, and the ability to reduce some collection management costs, such as check-in, binding preparation, and shelving. But in licensing access, the library may be unable to guarantee users permanent access to the periodicals, be prevented contractually from fulfilling interlibrary loan requests, and run the risk of the licence charges becoming prohibitively expensive over time.332

Obtaining digital resources under licence may mean that publishers in effect use the contract between themselves and the library to alter the traditional balance between rights owners and the public that has been afforded by intellectual property law. This has major implications for the management of those resources. In addition, with regard to archiving and preservation, it may not always be clear who the IPR holder is for the digital resource.

If there has been an inadequate rights management process, in that there has been incomplete or inaccurate collection of documentation allowing the identification of IPR owners in a particular work or collection of works, this will inevitably complicate, and perhaps even prevent, the

identification of those persons who will need to grant permission for digital preservation process, as institutions are likely to wish to risk copyright infringement proceedings for copyright digital resources, without the explicit consent of the IPR holder.

Preservation is also very different in a digital environment. Thus, preservation actions for non-digital collections, if needed at all, may occur decades after acquisition. For example, a library might buy a journal that is delivered in three parts over the course of a year. When all the parts are received, the library may store them as separate parts, or rebind the parts as one volume. Over time, and with use, the bindings and covers of a volume may deteriorate, pages may be ripped out or defaced, poor paper stock may suffer acid damage. 333

Preservation must therefore be considered and planned for as early as possible, preferably from creation but if not as soon as possible after acquisition. In addition, their successful preservation will inevitably require copying, whether as a back-up in case of loss or damage, or as part of a regular maintenance programme of refreshment and migration. By way of example, in contrast with a paper journal, a library may buy access to an electronic journal, with each article stored as a file on a CD-ROM, or as a file on a remote server. The necessity to have the right to undertake whatever actions are required to preserve digital resources can cause tensions between commercial publishers and librarians. With regard to non-digital publications, the preservation process undertaken by librarians is unlikely to unduly compromise the position of publishers. Rebinding, replacement of damaged material by photocopying and similar preservation measures do not normally involve the type of copying activities that would affect the publisher’s ability to sell further copies of work.

Digital copying, however, is more contentious. Whereas copying of non-digital publications is subject to significant cost overheads and decreasing quality of copy, digital copying is inexpensive and produces perfect copies that are highly portable. Publishers are thus understandably concerned that their commercial return may be compromised by the actions of librarians in digitizing previously non-digital publications, and in making copies of existing digital publications. If a digital copy ‘escapes’ from a controlled environment, such as restricted access server, or library based CD-ROM, into the wider community, it can be almost impossible to exert control over its future propagation and use. Librarians are naturally concerned that the resources they are investing in, whether through licence or purchase, should continue to be available to their clientele for as long as they are required.

Intellectual property rights (IPRs) permit individuals to claim rights to their creative and innovative works in a similar way to which they can claim rights in physical property. Thus, the author of a manuscript can own a set of rights in his words that he can sell, lease, give away, or leave to his heirs just as he could sell, lease, give away,

333 Ibid. 158
or leave to his heirs, a valuable piece of furniture.

However, it is perhaps unwise to draw this analogy too far, as IPRs have several characteristics that are not easily equated to physical property, not least ease with which they can be divided into smaller component rights, and the fact that a particular work may have more than one type of IPR attached to it. There are wide range of public, such as copyrights, patents and trademarks, and others that are less widely known, such as trade secrets, plant varieties, geographical indications and performers rights.

IPRs often have to be applied for, the protection granted by them may be limited in scope to a particular country or trading area, and may vary in the degree of formality required according to national or international rules. While there is an increasing trend towards international harmonization of IPRs, at present there are often wide disparities between national and regional regimes. Thus, knowledge of the Indian IPR regimes is unlikely to be adequate to ensure complete compliance with regimes elsewhere in the world.

With regard to Indian IPR regime, probably the four best-known IPRs are:

- Copyright for various types of works including literary and artistic material, music, films, sound recordings, and broadcasts;
- Patents for inventions, meaning new and improved products and processes capable of industrial application;
- Trademarks used to provide brand identity of goods and services allowing distinctions to be made between different traders.
- Design rights relating to product appearance- the whole or a part of a product resulting from the features such as the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation.

While more than one of these IPRs may relate to a particular digital resource. Under Indian law, a copyright notice is not necessary, although many rights owners use such notices to indicate their intention to defend their copyright in the case of infringements. The basic framework of these rights is statutory, although explanatory case may be of great importance. There is copyright protection for specific classes of works, but not for ideas. Each type of work has a different status in law.

Copyright law is a particularly complex subject, not least because copyright began life in the 1600s as a monopoly right for printers, and is now expected to cover material as diverse as artistic works and computer programs. The wide range of media that copyright law covers has led to a diversity of types and lengths of protection with which librarians and archivists would be advised to acquaint themselves, as each may require different strategies and considerations to obtain clearance for use.

Copyright exists for a limited period only. This is called the “term of copyright”. All works will eventually emerge from copyright protection. However, different types of works still have different lengths (or lengths) of copyright protection. Under Indian Law, the copyright in works created in the course of employment will be owned by the employer. Ownership of copyright in
a work can change hands after its initial creation, and like any property, can be sold or assigned and may be passed on in a will.

**Digital Preservation Issues**

Digital collections face severe implications if action is not taken at an early stage to guarantee their survival. The media they are stored on are vulnerable to rapid and sudden deterioration and the digital content needs to be copied to newer media at regular intervals. Even more significant is the fact that they are dependent on hardware and software to make them accessible. The certainty that rapid changes in technology will render them inaccessible unless these inevitable changes are actively planned for and managed means that steps must be taken to safeguard them at regular intervals and this must occur within a very much shorter timeframe than for paper-based collection.

In terms of digital preservation, there are two primary IPR issues:

1) **The need to copy the digital resource:** In digital preservation, the first step is the ability to take a duplicate of the digital resource to place into a secure archival store. As can be seen in the above discussion of copyright, the necessary rights to copy for the purpose of preservation are not necessarily covered by legislation and such copying in the absence of legislation or the explicit permission of the rights-holder may result in the infringement of intellectual property rights. Permission may need to be provided before preservation of the digital resource is possible. The need to obtain permission is often further complicated by the fact that there may well be several intellectual property rights owners in a single resource, not all of whom may be easily identifiable. It may therefore, not be within the power of the commercial publisher to grant rights to copy for the purpose of preservation, even if they were so inclined.

2) **The need to modify the digital resource:** The technical strategy used to maintain the digital resource might result in it looking different from the “original”. The following modifications may be required while maintaining the digital resource:
   - Migration into suitable file formats;
   - Excluding elements of the digital resource in order to meet negotiated IPR restrictions;
   - Removing dependencies upon obsolete software protection mechanisms. If the IPR owner of the resource does not permit such modifications, cost-effective preservation may not be possible.
   - The trend towards licensing access as opposed to owning content. Libraries increasingly license digital materials on behalf of their users. However, it is a source of some concern that licensing agreements have not necessarily addressed how perpetual access is to be guaranteed once the licensing agreement ceases. Institutions licensing content need to be very clear on their requirements and on whether these requirements are adequately catered for before signing licenses. If access is required beyond the short-term, any license between the institution and the publisher will need to specify this. Work has progressed in terms of streamlining licenses primarily to avoid the need for costly one-off licensing negotiations for each resource.\(^{334}\)

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\(^{334}\) *Ibid.*

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Cedars has undertaken a range of activities associated with IPR. These have included:

- Preparation of presentations and discussion papers exploring the digital preservation implications of IPR. These presentations have been primarily concerned with raising awareness of the need to consider rights issues and the potential barrier they could present to successful digital preservation.
- Preparation of a bibliography on IPR. The Cedars Bibliography is searchable on certain topics, including IPR. The purpose of this bibliography was to provide a convenient source of information relating to a wider range of issues.
- Inclusion of rights metadata in the Cedars Outline Specification. While the Cedars Metadata specification was based on the OASIS model, the inclusion of rights metadata within the administrative role was a significant expansion of the OASIS model. The Cedars specification explicitly recognized the requirements for institutions to include and maintain information relating to rights.
- Hosting a seminar with publishers.

**Conclusion**

A European Union Copyright Directive designed to harmonize various aspects of copyright law amongst the Member States has recently been passed. The changes proposed by the Directive have been highly controversial and significant lobbying has taken place both by rights owners and by library groups and users to protect their respective interests.

As with the US Digital Millennium Copyright Act 1998, the Directive is designed to implement the WIPO Copyright Treaty of 1996 and Performances and Phonograms Treaty of 1996. The Directive allows Member States some discretion with regard to what libraries within their jurisdiction are permitted to do in order to preserve items within copyright.

In UK, discretion of the current government plays a pivotal role in such scenarios. The Directive seeks to offer protection to copyright works where these are distributed electronically. The aim is to facilitate cross border trade in copyright works. Member States may apply various specified exceptions to restrictions on copying, usually with provision for the copyright owner to receive fair compensation. There is an exhaustive list of permissible exceptions, and a single mandatory exception for various temporary copies. One of the permissible exceptions concerns libraries and archives. Member States may provide for exceptions or limitations to the reproduction right in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage. The wording of any exception will be a contentious matter, and further considerable lobbying from all affected parties is to be expected.

In India digital preservation will need to be a distributed responsibility. This is partly because of enormous amount of digital material being produced by a large number of organizations and partly because of the problems related to digital preservation mentioned. However, decisions regarding preservation of digital information need to be taken at an early stage so that those creating digital data are logically the ones...
best able to undertake that initial activity. In view of the above, it is proposed that in India we must set up a National Centre for Digital Preservation. The NCDP will not be a repository for digital data but will work towards a more effective and efficient infrastructure for digital preservation within the country. It will set tone for initiating digital preservation activities in a coordinated manner.

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DNA Profiling has become imperative with the change in technology and its significance in aiding the criminal justice system as well as for the administration of Justice. This has seen several countries enacting legislations in place. However, the legislations have been disputed to be tangents to Right to Privacy, leading to establishment of safeguard measures in various countries. In the case of India, although we have different legislations in place permitting DNA as evidence in courts of law. The various jurisprudential aspects through establishment precedents, sometimes showed hot and cold. Henceforth, with developments of technology, it is seen as necessary to enact a law in place, which resulted in the Present 2018 Act.

This paper commences as to how fiction influences the world of Eugenics in the socio-political and historical events in America & Russia and then proceeds to analyze the evolutionary aspects of Forensic Science with specific reference to DNA analysis as used for admission of evidence in India with a brief outline in other countries as well, and as a generalized perspective. Whilst the first half of the paper focuses on these origins as well as evolution of DNA analysis in countries, as well as in specific to India, the Second half of this paper focuses on the DNA Technology (Use & Application) Regulation Bill, 2018, along with emphasis on the Right to Privacy Aspect which has been a very debatable topic since the last decade. The paper finally concludes with the suggestions to the 2018 bill taking into consideration its lacunae’s.

Keywords: DNA Profiling, Eugenics, The DNA Technology (Use & Application) Regulation Bill, 2018, Forensics, discovery, history, privacy

1.1 The World of Fiction & DNA

1.1.1 The Tempest by William Shakespeare and A Brave New World by Audlous Leonard Huxley

This is the beginning to the Novel “Brave New World” by Audlous Lenoard Huxley, wherein his novel revolves around genetic engineering, and was set in the year 2540, but was written in the year 1932! By
analyzing the above quotation from the Tempest written by William Shakespeare, and Huxley’s novel, one can find both, similarities & contradictions as well as parody and one could construe, that the nature of Huxley’s novel could be taken to be a parody of the above quotation! For, there were too many goodly creatures, who were human embryos are made to travel through a conveyor belt in the bottles, during which time, they are conditioned (possibly by sleep learning or hypnopædia) to belong to one of the five castes, Alpha, Beta, Gamma or Epsilon.

The parody comes within purview as there were many of these goodly creatures that were produced, in a brave new world, set in 2540, only to turn out how beauteous the mankind is (meant to be taken in a satirical way)! Alphas were taken to be the top most, conditioned to be thinkers and leaders, tall and smart, with the succeeding classes in decreasing order of qualities, with Epsilon, destined to be menial labourers. The novel revolves around the characters of Bernard Marx, Lenina Crowne and the director and his son John, their lives, their castes affecting their behaviour. The similarities between the Tempest and this novel, begins with John, who gets excited about stepping out of his secluded atmosphere to the world of Bernard and the director, genetically engineered, and gets excited and quotes it from the Tempest comparing it to a brave new world, like the innocent Miranda in the Tempest, for as prospero, says, his initial excitement can be attributed as John was new to it, like Miranda in the Tempest, only to realize at the end how wrong he was. John growing angrier and angrier with the methods of the way the society is conditioned and him eventually committing suicide.

1.2 Literature Review of other Novels on Eugenics in various perspectives

The first attempts to use genetic-engineering techniques to cure genetic deficiency diseases have already been made, and the possibility of eliminating such diseases has become a commonplace background element. The notion that a radiation-affected world might desperately require such processes of repair is ironically developed in David J. Kal's When We were Good, 1981 and Christopher Hodder-Williams's Post-Holocaust: The Chromosome Game, 1984. The use of somatic engineering for cosmetic purposes is the focus of such stories as "Cinderella's Sisters", 1989, and "Skin Deep" by Brian M. Stableford. The possibility of further altering the human condition by genetic engineering remains much more controversial. The plight of ordinary humans growing old in a world already inherited by their engineered super children is explored in Anvil of the Heart, 1983 by Bruce T. Holmes. Other alarmist tales in a similar vein include Robin Cook's Mutation 1989 and Geoff Ryman's The Child Garden 1989, which feature very different developments of the assumption that programmes of improvement involving genetic-engineering techniques might have unforeseen and unfortunate side-effects. Twenty-first-century tales dealing with such issues include Orson Scott Card's Shadow of the Hegemon, 2000, a book in his extended Ender series revealing that one of its many ultra-gifted children is supremely so owing to a genetic tweak that also leads
to giantism and early death; Margaret Atwood's Oryx and Crake, 2003, whose Post-Holocaust setting comes after a bioengineered plague and is littered with genetic hybrids.  

1.3 Relevance of the Novels: Eugenics & the World

The relevance of the above novels to genetics and DNA has been one of the main reasons, for citing and discussing these novels in this dissertation to outline the foresight of a futuristic society based on DNA modifications which could lead to adverse consequences. The novel was set in the period between world war 1 and world war 2 and has addressed the concept of ‘Eugenics’ (coined by Sir Francis Galton in 1883) which is focused on improving the genetics of humans, by focusing on certain traits, to build an improved human race. However, there is negative Eugenics which is taken to mean as the exact opposite of positive Eugenics (focusing on improving favorable traits), which has been the face of researches conducted by several countries, particularly, America and Russia.

1.3.1 Influence in/by America

During industrial revolution, there was an outbreak of population in America and this was particularly so, in the labour class, which America believed to be a burden on the society. The conducted research on race degeneration and decreasing the population by reducing reproduction in this so called weaker class and studies were conducted in Eugenics Records Office (ERO), Cold Spring Harbour, New York. This movement took place in 1990’s led by Charles Davenport and Harry Laughlin. Laws were enacted for forced sterilization in various stated of America.

1.3.2 Influence in/by Europe

In Europe, it took a very horrendous with the turn of events. Whilst forced sterilization can be considered as a horrendous thing, Europe has taken the horror to the next level, with Adolf Hitler spearheading the way during the second world war in Eugenic Studies. His quest to eliminate inferior races, as was coined by him, to include jews and gypsies, and to make gene pool pure and the establishment of concentration camps and the resulting holocaust, shows the dangers of genetic and DNA Engineering.

2.1 Evolution in Researches that led to the Discovery of DNA

It is misleading to use the term ‘Origin of DNA’, for the DNA has ever been in existence in the human genome and had been ever evolving, henceforth, the term ‘discovery’ is made use of, for it is the man who discovered, not invented it, though the term as it is coined in its present day use can be studied etymologically. Nevertheless, the use of mere expiation of this term by the scientific community by merely shortening from its constituents particle, fails any attempt to explore its etymological origins.

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Although, the discovery of DNA has been increasingly attributed to James Watson and Francis Crick in 1950’s, one must ignore the efforts made by researchers in the past, whose efforts made possible the discovery of DNA by 1953. Kossel (1853-1927) started work on nuclein in Hoppe-Seyler's laboratory in 1879 and was able to demonstrate in that year the occurrence of a base, hypoxanthine, in the breakdown products of nuclein. In 1908 Phoebus Aaron Levene (1869-1940) entered the field of DNA research and soon became its leader. Experiments by, among others, Louis Pasteur and Rudolph Virchow demonstrated that new cells can only arise from other cells, Virchow in 1855, rebutting the notion of spontaneous generation of new cells from lifeless matter, which had prevailed for a long time. In parallel to these breakthroughs in cytology, the basic concepts of heredity and evolution were being worked out. The publication of Charles R. Darwin and Alfred R. Wallace's theories of evolution by natural selection occurred in 1858 by Darwin and Wallace, 1858. In 1865, Gregor Mendel discovered the laws of heredity through his breeding experiments with peas which were “rediscovered” in 1900 by Carl Correns Hugo de Vries and Erich von Tschemak. Observations by Theodor Boveri, Walther Flemming, Ernst Haeckel, and Edmund B. Wilson—to name but a few of the protagonists—combined the emerging fields of cytology and genetics and laid the foundation of cytogenetics.

As far as the study of the pure DNA was concerned, two ways were theoretically open to the investigators. They could either break up the DNA molecule and determine its components, or study the molecule as a whole, as was done after the 1920s when Staudinger had developed the principles of polymer chemistry. For the next fifty years the two great leaders in this research were A. Kossel and P. A. Levene. Yet it took another forty years before it was determined, in 1953, how these constituents are put together. Conclusive evidence for the hypothesis that DNA was the carrier of hereditary characters was obtained by the Americans Oswald T. Avery, Collin M. MacLeod and Maclyn McCarty in 1944. 19th century saw the rise of studies in molecular biology that marked a shift of the studies in macro-organisms as a whole to its micro constituents, like their cells. Matthias J. Scheiden and Theodor Schwann concluded that both animals and plants have


338 Supra note 2 at 814- 815

cells which are structured to form their respective organs and tissues, making these complex organisms. Hence, the tracing of the discovery of DNA inevitably brings us into light the preceding discoveries that led to the culmination of the discovery of DNA. Its success in genetically modified organisms and cloning and its extensive research in the future of DNA shows us exciting prospects.

2.2 DNA PROFILING: AMBIT & SCOPE

DNA profiling was developed a few years later in 1984 by English geneticist Alec Jeffreys of the University of Leicester, and was first used to convict Colin Pitchfork in 1988 in the Enderby murders case in Leicestershire, England. Thus began the journey of DNA research. This is the process of determining the characteristics of each individual’s genes and DNA and is often used in forensic investigation. Although, DNA profiling is exclusively discussed in respect of forensic science and investigation, its applications in various fields are far reaching including in medicinal research for finding solutions for incurable diseases, medical research plant, microbial soil research. This also included biodiversity and animal studies, studies of species and population, including plants, animals and humans etcetera.


http://science.sciencemag.org/content/260/5108/670


3. OUTLINES OF DNA PROFILING: FORENSIC MEDICINE & INVESTIGATIONS

“He decided to cut it up (using his butcher skills) and deposit the parts all over Brooklyn, apparently thinking police wouldn’t figure out that they belonged to the same person. Which poses the question: exactly how many people’s body parts did he think they would suppose were lying around the city?”

— Bridget Heos, Blood, Bullets, and Bones: The Story of Forensic Science from Sherlock Holmes to DNA

3.1 OVERLAP OF SCIENCE AND LAW FOR USE IN FORENSIC SCIENCE

Forensic science has always seemed as mysterious and intriguing aspect to mankind, for it held in its captivity, the answers to problems that one could not solve, in the very genes of the man kind who is predisposed to commit crimes in as much as his brethren who made revolutions in medicine through the study of genetics and DNA. No wonder that most of our generation has grown up watching Byomkesh Bakshi, CID TV series and reading Sherlock Holmes, Agatha Christie, Patricia Cornwell with her Dr Kay Scarpetta Val McDermid, James Patterson. Leaving the fiction apart and limiting this work to perspectives in Health law in India, DNA Profiling has become an essential element in Forensic investigations for its use in identifying criminals, absolving the innocent of the guilt, and aiding the court to deliver justice. Whether it is determining the paternity, post mortem analysis, fingerprint testing, identifying perpetrators of grievous crimes like rape, sexual abuse, murder and the like, the significance of Forensic science has come a long way from its beginnings with the development of medical science and innovative technologies. Forensic scientists can be viewed as archeologists in a crime scene wherein they recreate the entire scene from implausible situations using deductions, science and modern techniques and technologies. For instance, on arriving at the scene of crime, they might examine minutest details like knife, traces of hair, fingerprints, blood and document other details fullerine scene reconstruction.

Science and law are not exclusive or tangent subjects, although they differ in their approach and methodologies. Whilst science appears to be confined only to research and natural world and law that of the society and ethics, they are not mutually exclusive. Use of argumentation, hypothesis, experimentation and empirical studies in sociological aspects of law to study its functioning in the society is based on the scientific temper. Similarly, law does affect science in either encouraging or discouraging research, for instance, DNA profiling bill in India is being debated as to whether it is against right to privacy, if the court passes any judgment against it, research will be in turmoil and may not be able to proceed further. Science as relevance to Forensic science arose with the study of plants and their medicinal properties, especially the poisoning effect of certain plants. As medicine evolved, the fields of science have become specialized and

separated for specialization in study into various fields like chemistry, biology, physics and their subsequent sub divisions. It is also to be noted that the relation between law and science has been highlighted by rules overlapping WHICH INCLUDE THE RULES OF INSANITY, MCNAUGHTON RULES, AND VARIOUS LEGISLATION WHICH HAVE AN ELEMENT OF SCIENCE IN THEM, INCLUDING THE PRENATAL DIAGNOSTICS ACT, Narcotic Drugs and Psychotropic Substances Act, 1985, among others.

Ever since the discovery of DNA, its potential uses has not merely created ripples in medical society, but also in that of law and society and the mechanism of functioning in a society. Not merely can the doctors formulate medicines as per the unique characteristics of each person or affirm the paternity or maternity of a child, its use in forensic science have enabled to identify the perpetrator, absolving the innocent from the guilt, especially so, when prima facie evidence is lacking. The ambit of DNA profiling is wide and far reaching, extending to the domains of formulation of medicines by identification of diseases specific to genes, forensic science, establishing the paternity of a person, protection of Biodiversity, etcetera.

3.2历史发展与进化

It was believed that the origins of Forensic Science can be traced back to Romans and Greeks. We are all aware of reading about Archimedes, when studying about volume of objects in Mathematics in our high school years.

The tale goes on like this: the king complained that the goldsmith cheated on him by replacing gold with some other substitute metal, and Archimedes went on to determine the volume and weight of the crown and confirmed that the goldsmith cheated on the king. Can we consider this as the beginning of Forensics, on confirming the conviction of the wrongdoer by use of science? Well, one can only document in as much as it is included and documented, as to how far has forensic been in existence and in that specific terminology may be difficult to

3.2.1 Autopsy

Autopsy, which is also a part of forensic science to determine the cause, time and other reasons surrounding the death of a person can be traced back to 44 BC which was officially recorded and in Egypt in 3000 BC. Early Roman Dynasties also used forensics to acquit the innocent and punish the perpetrators in 1st century. “Etu Brutus”, sighed Julius Caesar when he died and if not for Antony’s orative skills, Caesar’s death would not have been avenged. This is what we read in literature. However, despite Antony’s persuasive speech, one cannot ignore the use of forensics wherein Antistius performed autopsy on the body of Caesar, which confirmed 23 stabs that Caesar put through, before finally giving in to the wound in his chest. It looks like literature became a symbolic representation of science when Brutus gave Caesar, heartbreak by betraying him, and the wound that caused the death of the Caesar which went through his chest!
In Bolgna, the first legal autopsy was performed in the year 1302, which was later copied by Italy and France. However, this may not be the actual origins as there was a Chinese book on autopsies published in 1247, titled “The Washing away of wrongs” or “Xi Yuan Lu” by Song Ci.

3.2.2 Microscope & developments in Forensic Science: Pathology, toxicology and study of weaponry

The discovery of microscope in 1590 led to the discovery of red blood cells and minute details which are beyond the power of human eye could now be examined with the help of microscope, which brought in many more discoveries in medicine. Walter McCrone was identified as the father of Microscopic forensics for his valuable contribution. In 16th century, the change in body, including that of organs, color changes, and internal changes due to diseases or violent deaths were studies in pathology. The origin of toxicology as a discipline can be traced back to the discovery of arsenic poisoning in the victim’s stomach to solve a murder case by the use of chemistry, which would otherwise be untraceable in 1832 by the chemist James Marsh who used the test to determine arsenic poisoning by in corpses by Carl Wilhelm Scheele in 1773. The father of modern Toxicology, Mathieu Bonaventure, helped in detection of blood through presumptive blood detection tests. Others who made valuable contributions in this field include Sir Robert Christenson. with the development of weaponry, the study of tools became an inclusive subject of Forensics and criminology, wherein bullet matching helped trace the weapon from which it is fired, for instance, the conviction of John Tams who used pistol in the murder of Edward Culshaw in Lancaster. However, due to dearth of expertise, it was not until 1926 that it was used as evidence in the court of law, which was developed by Henry Goddard of Scotland Yard and Calvin Goddard. In fact, something considered as aesthetic as photography also became a part of Forensic science to trace the criminals. One of the notable persons who used photography include Richard Leach for documenting the record of prison inmates in 1855.

3.2.3 DNA Fingerprints & analysis

Forensic science became more popular with the discovery of use of fingerprints to identify the criminal due to the uniqueness of each fingerprint as researched by Henry Faulds and William James Herschel and which was implemented in criminal investigations by Sir Francis Galton (classified fingerprints) and Edward Henry (development of fingerprint analysis). However, it is observed that the use of fingerprints in its crude form for identification purposes has been used from prehistoric times by pressing of hand and fingers into clay and rock in 700 BC, by Babylonians for business transactions, Arabia in 7th Century BC and Chinese use of clay seals, etcetera. It was further developed in minute details by Professor Marcello Malpighi characterizing details like the whorls, spirals, loops and ridges in 1686. The world’s first fingerprint bureau was established in the year 1892 in Argentina. Others who made significant contributions
A forensic scientist faced with a red stain on shirt, must first determine if it is blood, which requires a presumptive test that produces a color change if positive. These tests first appeared in the late 1800’s. Determining the species and type of blood requires techniques refined before the great depression. DNA analysis spilled out of molecular biology and the forensic world in the 1980’s. Leone Lattes was considered as the father of bloodstain identification. Nevertheless, many Scientists have played a peripheral and unintentional role in the creation of forensic sciences and few would have labelled them as such. The playbill includes: several Nobel Laureates; alchemists such as Jabir (700), Paracelsus (1493-1541), Albertus Magnus (1193-1280), Robert Boyle (1627-1691), Isaac Newton (1627-1727), chemists such as Whilhelm Bunsen (1811-1899), Eduard Buchner (1860-1917), and Johann Adolf Von Baeyer (1835-1917), biologists such as Gregor Mendel (1822-1884). Others in include Charles Darwin (1809-1882) and his cousin Sir Francis Galton (1822-1911), Joseph lister (1827-1912), and Karl Landsteiner (1868-1943), forensic practitioners such as M.J.B. Orfila (1787-1853), Kirk, Milton Helpern (1902-1977), and Bernard Spilsbury (1877-1947), and the occasional odd historical figures such as Alfred Nobel (1833-1896), Oliver Windell Holmes (1809-1894), several members of the Du Pont family, Sigmund Freud (1856-1939). 

The examination of fibers, dust and all the traces left by the criminal are used to confirm identity of the suspect. With the discovery of DNA and its analysis, the power of forensics for use in criminology increased tremendously. A UK database was first established in 1996. Fast forward to the 21st century, computer reconstructions have become more popular. In fact, the cause of death of the kings in tombs of Egypt could now, not only be discovered, but their bodily reconstruction as to how they looked like could now be made.

3.3 DEVELOPMENT OF FORENSIC SCIENCE IN INDIA

3.3.1 Ancient Era

The science of fingerprinting has always been a part of ancient Indian Culture and civilization. A Hindu Scripture, Samudra Shastra compiled by Samudra Rishi (though was used in the field of astrology and not forensic science, reference may be made to highlight the discovery of fingerprints) tells a great deal about fingerprinting, which

http://nopr.niscair.res.in/bitstream/123456789/19355/1/IJTK%202%282%29%2020126-136.pdf
identifies three types of fingerprints, two of the common types being, Sankhas (corresponding to loops), Chakras (corresponding to whorls), while the third type, seeps (corresponding to arches) and many other characteristics such as apuran java, padam, aax which are concurrent to fork, lake, hook and island.  

3.3.2 Medieval Era

It was a rather common practice among rulers of Medieval India to sign the routine documents, but to put their handprints on more important ones, who include Shah Jahan, Jahingir, and Aurangzeb.

3.3.3 British Era & Independent India

Sir William Herschel used fingerprints to prevent repudiation of signatures while working with criminal suspects as an Indian Civil Servant, when in 1877, the fingerprints of the pensioners are taken in order to prevent the relative taking the money after the death of the pensioner. While researching on the history of fingerprinting, they came across several archive records which throw light on the key role played by two Indian police officers, Sub-Inspectors Azizul Haque and Hem Chandra Bose, in the advancement of the science of fingerprints. The so-called Henry’s System of Fingerprint Classification was actually worked out by them. Today, nearly all the nations of the world follow Henry’s method for maintaining criminal record. The world’s first fingerprint bureau was set up at Calcutta (now Kolkata) in 1897, mainly by their efforts. In addition, Bose invented the telegraphic code system for fingerprints and published it in 1916.  

Nevertheless, their efforts were not as famously recognized in the world. In 1968, the Ministry of Home Affairs, Government of India, set up a Forensic Science Laboratory for Delhi Police and the Central Bureau of Investigation under the administrative control of the Central Bureau of Investigation. This laboratory now provides expert opinion on various aspects of Forensic Science concerning crime investigation. Apart from Delhi Police and the CBI, it also provides assistance to the Central Government Departments, State Forensic Science Laboratories, Defense Forces, Government Undertakings, Universities, and Banks etc. in criminal cases. The expertise available at the CFSL is also utilized in teaching and training activities conducted by the CBI, Lok Nayak Jai prakash Narayan, National Institute of Criminology & Forensic Sciences, Police Training Institutions, Universities and Gov.  

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348 Ibid 13


Dr. Gopal Ji. Misra & Dr. C. Damodaran, “Perspective Plan For Indian Forensicst”, 6, MINISTRY OF HOME AFFAIRS GOVERNMENT OF INDIA, NEW DELHI.
3.4 Forensic Laboratories: Establishment and Evolution

3.4.1 International Institutionalization & DNA testing

Professor Edmond Locard with his background in law and medicine (Father of Criminalistics, his important contribution being the Locard’s Exchange Principle) set up the first crime laboratory in the attic of the police station in 1910, France. In 1924, the first American Police Laboratory was established by August Vollmer. It is ironical that the successful Federal Bureau of Investigation which was set up in 1908 did not have its own forensic laboratory for crime till 1932. The Father of FBI is J. Edgar Hoover who served as a director in the 1930’s, wherein law enforcement agencies in US were offered forensic services by the national laboratory during his reign. Hence, it must be noted that the Jeffrey’s technology evolved and new technologies were developed by forensic experts, DNA profiling came into existence and laboratories were set up all over the world.

DNA was used as Evidence in the United States for the first time on a Florida man, Lee Andrews who was accused for rape in 1987 wherein the conclusiveness of the evidence led to his conviction for 22 years for all the rapes that he has committed. Although, DNA tests have become popular, especially as use as identity test which was made available by Dr Jeffrey’s, in 1980’s, it was not until 1988 that FBI started using DNA testing.

However, as regards to use of Forensic Science, FBI started using polygraph machines and using the lie detection tests. In its beginnings, about 200 pieces of evidence were worked by FBI for an year, and 200,000 in 1990’s and today over 600 per day as criminal evidence, which shows the widespread use of forensic medicine in legal system. O.J. Simpsons case is described as the crime of the century in 1994 and in the case of Tennessee, USA, mitochondrial DNA analysis was used for the first time in 1996.

In case of UK, DNA evidence as a basis for conviction was used for the first time for the conviction of Robert Melias in 1987. Fast forward to the present era, different countries are formulating for the process of standardization and harmonization as in the case of council of European Union, which in its attempt to create a European Forensic Area and that of European Forensic Infrastructure development created a “Vision for European Forensic Science 2020.” This includes exchange of information relating to forensic science between the states. A Project Committee CEN/TC 419 was formed for development of standards in EU for provisions in the processes of Forensic Science which span from the start to the reporting and exchange of data though the processes of recognition, recording and the like with an aim to ensure this integrity of forensic processes. It must be observed that this 2020 program is not confined to accreditation of forensic laboratories alone but also harmonization of knowledge of forensic experts and training, especially so due to varied regulations of EU countries which makes it an even more complex process.
The European Network of Forensic Institutes (ENFSI) will assist the European Commission to make progress in the following areas: 351

- accreditation of forensic science institutes and laboratories;
- respect for minimum competence criteria for forensic science personnel;
- establishment of common best practice manuals and their application in daily work of forensic laboratories and institutes;
- conduct proficiency tests/collaborative exercises in forensic science activities at international level;
- Application of minimum quality standards for scene-of-crime investigations and evidence management from crime scene to court room;
- recognition of equivalence of law enforcement forensic activities with a view to avoid duplication of effort through cancellation of evidence owing to technical and qualitative differences and achieving significant reductions of time taken to process crimes with a cross-border component;
- identification of optimal and shared ways to create, update and use forensic databases;
- usage of advances in forensic science in fight against terrorism, organised crime and other criminal activities;
- forensic awareness, particularly through appropriate education and training of the law enforcement and justice community;
- Research and development projects to promote further development.

3.4.2 Indian Scenario

Present day Indian forensics, as chronicled, owes its genesis to several British – initiated ventures such as Chemical Examiner’s Laboratory (Madras, 1849), Anthropometric Bureau (1892), Finger Print Bureau (1897) etcetera. Having subsequently undergone clubbing/ re-grouping / spreading, as of now, there are 28 State / Union Territory Forensic Science Laboratories (State / UT FSLs) along with their Regional FSLs (32 RFSLs) and Mobile FSLs (144 MFSLs); they are mostly with the respective Home Department either directly or through police establishment. 352 The first Chemical Examiner’s Laboratory was, therefore, set up for this purpose at the then Madras Presidency, under the Department of Health, during 1849. Later, similar laboratories were set up at Calcutta (1853), followed by one each at Agra (1864) and Bombay (1870). The British Government of Bengal felt the necessity of identifying the handwriting on the secret documents connected with the Indian independence movement and, therefore, created the post of Government Handwriting Expert of Bengal. Mr. CR Hardless, the then Superintendent in the

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A.G.’s office in Bengal, was appointed to this post in 1904.\textsuperscript{353}

This set-up was shifted to Shimla in the year 1906 and was placed under the control of the Director, CID. When the science of examining human blood developed in India, it became possible to examine blood and seminal stains in criminal investigations. Realising the importance of Forensic Serology, an institute named as Serology Department\textsuperscript{7} was established in Calcutta in 1910. During the year 1915, a Footprint Section was established under the CID, Government of Bengal, which helped the police authorities to identify criminals through the examination of footprints collected from the scene of crime. During 1917, a Note Forgery Section was set up under the CID, Government of Bengal, to undertake the examination of forged currency notes. In 1930, an Arms Expert was appointed and a small ballistic laboratory was set up under the Calcutta Police to deal with the examination of firearms.\textsuperscript{354} A Section was set up for examination of bullets, cartridge cases, firearms, etc., used in committing crime under the CID in Bengal was created in 1936. In 1952, Calcutta, the first state forensic science laboratory was established in India. 1960 saw the set up of The Indian Academy of Forensic Sciences (IAFS).

However, the role of CFSLs got diluted in mid 1990’s, as forensic laboratories were set up in most of the states in India. Hence the utility of three CFSLs at the national level was questioned. The First Forensic DNA Typing facility was established at CFSL, Calcutta in 1998.

3.5 Cold Cases & DNA Profiling: Forensic Science

Using DNA to Solve Cold Cases is intended for use by law enforcement and other criminal justice professionals who have the responsibility for reviewing and investigating unsolved cases. This report will provide basic information to assist agencies in the complex process of case review with a specific emphasis on using DNA evidence to solve previously unsolvable crimes. Although DNA is not the only forensic tool that can be valuable to unsolved case investigations, advancements in DNA technology and the success of DNA database systems have inspired law enforcement agencies throughout the country to re-evaluate cold cases for DNA evidence. The development and expansion of databases that contain DNA profiles at the local, State, and national levels have greatly enhanced law enforcement’s ability to solve cold cases with DNA.

Convicted offender databases store hundreds of thousands of potential suspect DNA profiles, against which DNA profiles developed from crime scene evidence can be compared. As law enforcement professionals progress through investigations, however, they should keep in mind the array of other technology advancements, such as improved ballistics and fingerprint databases, which may

\textsuperscript{353} RK Tewari, & KV Ravikumar, “History and development of forensic science in India” vol 46, issue 4, BUREAU OF POLICE RESEARCH & DEVELOPMENT, MINISTRY OF HOME AFFAIRS GOVERNMENT OF INDIA, (2000), (Nov 18, 2018, 7:47 PM) http://www.jggonline.com/article.asp?issn=00223859;year=2000;volume=46;issue=4;spage=303;epage=8;aulast=Tewari
\textsuperscript{354} Ibid 19
substantially advance a case beyond its original level. Moreover, it is to be noted that DNA Profiling is not merely used to solve cold cases, but also that of determination of propensities of being a criminal.

4. The DNA Technology (Use and Application) Regulation Bill, 2018: A Concise Note

The 2018 bill on DNA technology does not address as to whether this is applicable in case of DNA profiling for medical purposes and is seen as an ambiguity. However, it must be observed that DNA profiling does apply to civil matters, for instance in determination of paternity, which can be seen both from civil and criminal perspective, depending upon the circumstances of the case. DNA profiling with the consent of the individual in medical fields is a boon for research as well as the individual, but if the records that were taken for criminal matters are used for analysis in medical records of the convict, it will lead to his violation of rights. Nevertheless, the use in civil cases of determination of paternity shows the significance of DNA profiling. Hence, although in some cases, using DNA profiling beyond the matters of the criminal cases, can lead to blatant violation of rights of the individuals, it is not so in all the cases and safeguard have to be provided for.

Without the reports of committees like Malimath Committee, A.P Shah Committee, this bill would not have proceeded in the pace that it now finds itself. These committees would not have been formed without the explicit consent of the government to form an institutional framework to study on these issues. Furthermore, the analysis from other countries like US shows the necessity of institutional framework and government policies (for instance the new government that came in US back then, formulated the Justice for All Act, 2004).

5. Possibility of Misuse of DNA Profiling: Right To Privacy

Whilst one cannot turn a blind eye to the potential and current importance of DNA Profiling in the society, the recent spurt of invasion into privacy cases, is not merely confined to social media sites by world wide web governments and corporations, but also that of the human genome, vying for maintaining human genome data bank for research and inventions. Prima facie, it appears that research would endeavour to find innovative solutions for problems plaguing the society, including illness, crime and the like. Nevertheless, one cannot ignore the Right to Privacy of each individual is inherent in his Right to Life and it is not uncommon for the leak or misuse of such data banks, which might result in devastating warfare, including biogenetic weapons by genetic engineering and research, resulting in biological warfare or even in a minuscule level as to control the minds of the individuals, which though seldom seems like a near possibility, which

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is Nevertheless, not a impossible option in the distant future.

6. Suggestions to the The DNA Technology (Use and Application) Regulation Bill, 2018

- Although the 2018 bill on DNA Technology endeavours and places few safeguards to prevent violation of privacy, they are not sufficient. Hence, a separate Privacy Act has to be enacted.

- A separate databank for criminal and civil purposes has to be established, as the requirements and necessity of DNA Profiling in each case is different.

- The bill does not address as to whether medical profile could be created. Although this may to have been contemplated under the bill, the reference through express prohibition is necessary.

- Since, the bill authorizes the sharing of information with foreign governments, regulations have to be expressly mentioned in the bill, to prevent misuse of information, resulting in violation of rights of individuals, which is especially the case for unknown individuals an missing persons.

CONCLUSION

DNA profiling has been in the limelight ever since the discovery and its researches in Eugenics. With the development of technology, it is also widely being used in the administration of justice in courts of law. Various countries have different legislations in place in order to address this issue and ensure safeguards are provided for protection of Right to Privacy of the Individuals. Although, in India, by virtue of existing legislations, the admissibility of DNA as evidence in cases is considered and precedents are laid down, there is no specific Act which is passed for use and regulation of this DNA Technology. The DNA Technology (Use and Application) Regulation Bill, 2017 is yet to be passed by Rajya Sabha. addressing the roadblocks or hindrances to the present bill. Furthermore, the Right to Privacy is not just seen as hindrance in our country, but in all the countries across the world for the implementation of similar Acts. However, instead of viewing it from the perspective of a hindrance or a roadblock, if it is seen from the perspective of caution sign to protect the human rights of the people. Seen from this perspective, what appear as a roadblock is actually a constructive criticism and a warning signal to prevent violation of the rights of the people.

Furthermore, following A.P. Shah Committee recommendations which is considered as a significant report on Privacy as suggested after the 2012 Act in consonance or implemented in the present 2018 bill paves the way for a safe and secure technological developments, in general and in specific to legal mechanisms.

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ECONOMIC ANALYSIS OF COMPETITION LAW

By Naveen Meena
From Gujarat National Law University

INTRODUCTION

Competition is understood to mean as process of rivalry in order to attract more consumers to enhance profits. Competition law aims to protect the free market. It attempts to ensure that there is continuous competition between sellers. Competition law is about identifying market and checking if it’s a competitive one. It keeps a check on restrictive trade practices and abuse of dominant position. Competition law is about economics and economic behaviour. Therefore, economic analysis can play a major role in understanding various concepts of competition law. This is because economic analysis of law is the application of economic methods to the analysis of law. It helps in understanding how market works, detecting cartels, and identifying relevant market to prevent abuse of dominant position.

PERFECT COMPETITION

It is widely advocated that consumer welfare is maximized when a market is perfectly competitive. In a perfectly competitive market there are a large number of buyers and sellers who sell homogeneous products in a market where there is free entry and free exit of the players and everyone has perfect information.

In a perfectly competitive market, number of buyers and sellers is very large therefore, each of them influences a very small fraction hence, change in the behaviour of either of them will not affect the market price or market supply. The price in a perfect competition is determined solely by the forces of demand and supply. When consumers are willing to pay a certain price at a given level of output and the sellers are willing to sell that level of output at the same price because they are able to recover their cost of production and also earn normal profit, then at that level of output is the equilibrium point on which prices will be determined.

MONOPOLY

In the monopolistic market, the monopolist possesses maximum market power, having full control over the price and output level. The monopolist will set his output level in such a manner that he earns supernormal profits. This level will be below the level set in a competitive market.

A monopoly industry has the following characteristics:

• it has a single seller
• high barriers to entrance keep other firms from arriving in the industry, and
• no close substitute exists for its product

A monopoly industry can have a single firm or it can have a number of firms that organize and act together for their joint profit.

Equilibrium and Price Determination

There are two alternatives to arrive at the equilibrium point under a monopoly which will determine the monopoly price.

1. Total Revenue and Total Cost Approach.

1. Total Revenue and Total Cost Approach:

Monopolist can make maximum profits when variance between TR and TC is maximum. Difference between TR and TC is nothing but profit. Any rational seller would always strive to maximize his profit. Therefore, the level of output where monopolist earns maximum profits is called the equilibrium situation. This can be explained with the help graph produced below.

In Fig. 2, TC is the total cost curve. TR is the total revenue curve. OP represents the fixed costs.

TP is the total profits curve. It begins from point R, representing that at first firm is faced with negative profits. Now as the firm upsurgs its production, TR also growths. But in the preliminary stage, the rate of increase in TR is less than TC.

As the TP curve extents point E then the firm will be getting maximum profits. This sum of output will be termed as equilibrium output.

2. Marginal Revenue and Marginal Cost Approach:

There are two conditions which must be fulfilled at the point of equilibrium.

- Marginal revenue = marginal cost.
- MC must cut MR from below.

The equilibrium under this approach can be examined in short run as well as long run.

Short Run Equilibrium under Monopoly:

Short run is period during which a firm cannot change its fixed capital. Therefore, in the short run fixed cost remains constant and any increase in production which is desired
would through making fuller use of the variable factors of production. Capacity of production cannot be expanded. There are three possible outcomes in short run, that the firm will earn supernormal profits, normal profits or incur losses. This is because the monopolist might have to incur losses in short run due to various reasons like fall in demand, economic crisis but that doesn’t necessarily mean that the firm will stop production as soon as it stops earning profit. The firm can feasibly continue production till the time it’s able to recover the average variable cost of production from the price.

<table>
<thead>
<tr>
<th>Super Normal Profits</th>
<th>Normal Profits</th>
<th>Minimum Losses</th>
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<tbody>
<tr>
<td>• MC = MR.</td>
<td>• MC = MR</td>
<td>• MC = MR</td>
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<tr>
<td>• Price &gt; AC</td>
<td>• Price = AC</td>
<td>• Price = SAVC</td>
</tr>
<tr>
<td>Price is the Average Revenue earned by firm on each output.</td>
<td>Average cost includes normal profits</td>
<td>Short run average cost includes both fixed and variable cost.</td>
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In this graph: In the above: In the above

Long Run Equilibrium under Monopoly:
Long-run is the phase in which output can be altered by changing the factors of production. There is no fixed cost. The monopolist could chose to expand his plant capacity to whatever extent he finds desirable considering the demand. Here, equilibrium would be accomplished at that level of output where the long-run marginal
cost cuts marginal revenue curve from below.

In the graph point E is the point of equilibrium and the level of output OM is sold at a price OP which is definitely more than the average cost thus, resulting in supernormal profits. His over-all supernormal profits will be equivalent to shaded area PJHP₁.

The profit earned by the monopolist is at the cost borne by consumer and the cost of consumer surplus. Consumers are paying a higher price than the in a competitive market for the same product. The problem is that the production of output is intentionally low to create stringent supply and hence increase in prices.

Impediment to Innovation

Monopoly impedes innovation and cost minimization because the seller has no incentive to do so. When an industry is monopolized, price rises above and output falls below the competitive level. Those who continue to buy the product at the higher price suffer a loss, but this loss is exactly offset by the additional revenue that the monopolist obtains by charging the higher price. Other consumers, who are deflected by the higher price to substitute goods, suffer a loss that is not offset by gains to the monopolist. This is the "deadweight loss" from monopoly, and in conventional analysis the only social cost of monopoly. The loss suffered by those who continue to buy the product at the higher cost is regarded merely as a transfer from consumers to owners of the monopoly seller and has not previously been factored into the social costs of monopoly.³⁵⁶

However, Joseph Schumpeter argues that economic welfare is maximized over time as a result of succession of monopolies, a process of dynamic competition that he called "the gale of creative destruction".

The opening up of new markets, foreign or domestic, and the organizational development from the craft shop to such concerns as U.S. Steel illustrate the same process of industrial mutation—if I may use that biological term—that incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism.³⁵⁷

It means that Each monopolist wrests control of the market from his predecessor by cost reducing and improving and innovating, that give him a temporary monopoly that enables him to recoup the expense of his innovation with a sufficient profit to compensate for the risk of failure.

³⁵⁷ Joseph A. Schumpeter, Capitalism, Socialism, and Democracy (1942) 81-106.
However, another approach can be, firms in a competitive market try to become a monopolist by innovation. The only argument in favour of monopoly being the starting point of innovation is that the monopolist would be able to reap maximum benefits of the innovation, whereas in the competitive market the benefits will be shared by the other competitors as well. On the other hand, arguments against monopoly are innumerable. In a monopoly there is inertia to innovate if the firm is already earing a profit. It also depends on the ability of the monopolist to innovate and to improve the efficiency as a result. Odds of coming up with a better method are in a market where there are more firms trying to find it.

OLIGOPOLY AND CARTELIZATION

Oligopoly is a market structure in which a small number of firms has the large majority of market share so much so that a change in the output of any one of these firms will discernibly affect the market price, which would have to be maintained over a significant period of time. It is said that Oligopoly is the inception of cartelization.

GAME THEORY

One of the very prevalent instruments for analyzing oligopolistic behaviour is Game Theory. It deals with searching for a combination of strategies that represent the best strategy for every competitor or player who is presumed to make a rational decision in order to maximize profits after taking into account possible reactions of the other players.

There are several approaches to game theory. In reality however, the market game is played infinitely or indefinitely. Firms can choose to price low, to compete vigorously, to the detriment of all the sellers or choose to reduce the competition. The best strategies of each firm to maximize its profits, given the strategies chosen by the other competitors is known as ‘Nash equilibrium’. There exist plethora of different equilibria, amongst which collusive one is possible. 358

There is always an incentive to cheat in case of collusion by charging low prices to earn profits. The cost of ensuring that the colluded price is maintained includes cost of detection, monitoring and punishing the deviant. If such cost outweighs the loss arising from deviating from the colluded price then collusive equilibrium could not be maintained.

Many economists contend that oligopoly market structure creates the market price of the commodity inelastic, i.e. the market price doesn’t change freely in response to deviations in demand. The main reason for this lies in the manner in which oligopoly firms respond to a change in price commenced by any firm.

The graph shows the kinked demand curve model. It depicts that in an oligopoly firms are reluctant to change prices and indulge in non-price competition.

When an individual firm increases the price of the product, other firms will not respond with subsequent increase in price. As a result, there is availability of the same product at lower prices so the consumers shift to other sellers. This leads to substantial loss of earnings for the firm who increased the price in the first place.

On the other hand, if a firm wants to maximize its revenue by selling a larger quantity of output and therefore lowers the price at which it sells the commodity, other firms would subsequently lower their price as well to retain their customers. The rise in the total quantity sold due to the lowering of price is consequently shared mutually by all the firms, and the firm that had initially lowered the price is only able to reach only a small rise in the quantity it sells. A moderately large dropping of price by the first firm usually leads to a moderately small rise in the quantity sold.

Any firm therefore finds it irrational to change the prevailing price, leading to prices that are more rigid compared to perfect competition.\(^{359}\)

The postulation is that firms in an oligopoly are eyeing to guard and maintain their market share and that competitor firms are unlikely to match another’s price increase but may match a price fall.

**CARTEL**

Competition Act, 2002 under section 2(c) defines cartel as follow:

“cartel” includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services;

Section 3(3) of the Competition Act identifies four types of horizontal agreements (i.e., cartel agreements), which are presumed to cause an appreciable adverse effect on competition in India:

- Price fixing agreements
- Agreements between competitors that seek to limit or control production, supply or markets;
- market sharing agreements between competitors either by way of allocation of products, geographies or source of production
- Bid-rigging agreements which have the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process of bidding.

\(^{359}\) Introductory Microeconomics, Class XII Economics Textbook, NCERT.
Economic Methods to detect Cartels.

- Screening

Screening refers to a cost-effective method for identifying industries whose behavior is sufficiently suggestive of collusion so as to warrant verification; that is, an intense investigation that directly contrasts collusion and competition as competing explanations of market behavior. Structural approach identifies markets with traits conducive to cartel formation like homogenous products, stable demand and no large buyers, excess capacity whereas the behavioural approach focuses on the market impact of that coordination, studying the pattern of firms’ prices, quantities or other aspects.

- Inconsistency of firm’s behaviour with Competition:

There are certain properties which hold true in a competitive market. For example independence and exchangeability. So, first a model is created which will hold true in competitive condition and then it is seen whether the sellers in the relevant market are deviating from that model. If yes, then subsequently, it will be seen whether they are colluding or not.

- Structural break in firm behaviour

This method basically focuses on change in pricing methods. It can indicate either formation of a cartel or its demise.

Appropriate events for identifying a candidate breakpoint are those which either are conducive to cartel formation (that is, make collusion easier or more profitable) or are observed along with cartel formation (for example, events that allow the cartel to operate more effectively).  

It would also be helpful to test for a break in the relationship among firms’ bids around the time of the creation of the association. However, it is possible that there is a structural change even when there is no collusion.

The main object is to identify transition from non-collusion to collusion or from collusion to non-collusion which entails change in price or market share generating process.

Though must be used cautiously, another method is to use one feature of the data to identify a possible breakpoint for structural change in some other feature of the data. For example, one may plot the average price series and "see" a date at which it begins to follow a rising trend. That date could then be used as a breakpoint to test whether there is a break in, say, the correlation between firms’ prices.

RESALE PRICE MAINTAINENCE

While cartel is a horizontal agreement, the term “resale price maintenance” (RPM) refers to a particular type of vertical agreement in which an upstream firm controls or restricts the price (or on occasion the terms and conditions) at which a

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361 Ibid
downstream firm might on-sell its product or service, generally to final consumers.

Resale price maintenance arises when an upstream firm – usually the manufacturer, producer, or importer of a good or service – limits or restricts the ability of a downstream firm – usually a distributor or retailer – to set the prices at which it on-sells the products of the upstream firm.\footnote{362} In such agreements, manufacturer may prohibit the retailer to sell its product below a set price. In Dr. Miles case\footnote{363}, the Supreme Court held that since the result is the same as if the retailers got together and agreed to set a higher price, which would amount to illegal price fixing, resale price maintenance, too, is illegal per se.

However, in State Oil Company v. Khan\footnote{364}, the court adopted rule of reason approach in evaluating vertical price fixing agreements.

Sometimes, the manufacturer might be interested in increasing the quality of the presale services provided for its product. Suppose, if one retailer undertakes voluntarily to provide such services, he would be undercut by a competing retailer. The latter could free ride the efforts of the former. Once, the customers have availed presale service at the first retailers shop like a well-stocked showroom, pleasing salesman etc. they would be attracted to the second retailer who would be willing to offer at a lower price. This in turn would discourage even the first retailer to provide presale service.

Therefore, to eliminate such intra brand price competition the manufacturer may set a minimum price which would sufficiently ensure profits for the retailers at the same time would enable them to improve their services. This would promote intra brand non price competition.

In the above graph $p'$ is the Minimum price fixed by the manufacturer. The demand curve shifts to $D'$ because of the increase in demand due to better services. This increase in corresponding increase in revenue. In the above graph, shaded area between the marginal cost curves is the loss and the shaded area between the demand curves is the benefit derived by setting a price higher than the competitive price. In this figure, benefits are shown to outweigh the cost, but, the reverse effect can be easily shown too. That is, when due to increase in prices and thereby subsequent improvement in services, demand curve might not shift in the


\footnote{363} Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U.S. 373 (1911)

desired manner, if the consumer value the services less than the price increment.

Therefore, Resale price maintenance need not be abusive to the spirit of competition altogether. It promotes inter brand competition. It helps in increasing the quality of the product and also establishes a trust amongst the retailers as the manufacturer is guaranteeing profit margin.

**ABUSE OF DOMINANT POSITION**

Dominant position is always seen with respect to the relevant market. Explanation to Section 4 of the Competition Act, 2002 defines ‘dominant position’ as follow:

(a) “dominant position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to— (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.

Dominant position in itself is not proscribed. Abuse of dominant position is prohibited. In the Competition Act, 2002, section 4(2) lays down the situations in which abuse of dominant position takes place. These include situations where an enterprise

- imposes unfair or discriminatory condition or price in purchase or sale of goods or service which includes predatory pricing which is also a form of abuse because it amounts to selling the goods at a price below the cost of production to acquire market share if it is done with a view to eliminate competitors or reduce competition.
- limits or restricts production or technical or scientific development of goods or provision of services
- Restricts market access
- creates conclusion of contracts subject to recognition by other parties of
- imposing supplementary obligations which have no nexus with the object of the contract
- uses its leading position in one significant market to enter into, or safeguard, other relevant market.

**Market definition**

A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit maximising firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a small but significant and non-transitory increase in price,” assuming the terms of sale of all other products are held constant.\(^\text{365}\)

The Small but Significant and Non transitory Increase in Price (SSNIP) is either taken to be 5 % or 10 %. As a result, it is also well-known, occasionally, as 5-10 per cent test. The managing principle of Hypothetical Monopolist (HM) test is “a relevant market is something worth monopolising”.

It has been noted by the European commission that demand side

substitutability is of prime importance and this is a matter to be examined when determining whether there is market power. The SSNIP test was developed through judicial pronouncements to see whether particular products are within the same market or not.

In a market if a particular firm was to introduce a SSNIP and such change leads to sufficient number of consumers shifting their demand to other markets then the price rise would be unprofitable and the market is wide and competitive.

In case a HM knows that if he is affecting a SSNIP, either all the customers would take the products offered by him or take the substitute products which would be also below his control, he is more probable to affect a SSNIP. Hence, the HM would affect a SSNIP only if he is convinced that the consumers would not move out of this picked basket of products.

MARKET POWER

Market power refers to the ability of a firm (or group of firms) to raise and maintain price above the level that would prevail under competition is referred to as market or monopoly power. The exercise of market power leads to reduced output and loss of economic welfare.366

Three factors affect the market power: market share and concentration, barriers to entry and expansion, buyer power. Market power varies through various forms of market. In perfect competition no single firm is able to determine the price, sellers are price takers. In a Monopoly the firm has considerable market power.

In India, Sections 5 & 6 of the Competition Act, 2002 deals with Regulation of Combinations. These sections were introduced with a view to examine the potential effect of a combination (mergers and acquisitions) of shares/assets of enterprises in the markets and to prevent firms which may affect the competition in markets in India before gaining substantial market power than to control such market power after its creation. While deciding the application for approval following factors are considered: increase in prices of goods, innovation and the impact on consumer choice.

CONCLUSION

Competition law is concerned with those markets in which there is improvement in consumer welfare. The law protects competition on the premise that it provides more goods to consumer at lower prices and increases the efficiency. It is very important to curb anti-competitive practice for a healthy economy. However, at the same time a balance has to be struck between the competition law and other industrial and social policy. So, a stringent approach placing a blanket ban on all restrictive trade practices or anti-competitive markets is not feasible because sometimes dynamic efficiency can be enhanced only in a non-competitive market. There are certain goods and services which are provided in a better and more efficient manner in a non-

competitive market. The thing which needs to be considered is the maximization of consumer welfare as well as overall efficiency achieved through scrupulous and lawful practices. The most anti-competitive market would be where a monopoly thrives. It is very important to understand a monopoly or other forms of non-competitive market in order to formulate laws to regulate them. Economic analysis helps in understanding the impact of an existing market on the prices and output level thereby influencing the demand. It is of utmost importance that consumers are not deprived of goods or services because of exorbitant prices. Economic analysis can help in ensuring that the demands of the consumers can be fulfilled and there is free access to the market. It can also help to detect cartels and unfair trade practices. Competition is said to be harmed when prices in the market prevail at the level higher than the competitive level. Economic analysis can easily help in firstly identifying the relevant market and thereafter determining whether the market is competitive or detriments the consumer welfare.

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CONDITION OF WOMEN IN THE INFORMAL SECTOR IN INDIA

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Abstract
In the unorganized sector women are engaged in almost all kinds of activities such as agriculture, livestock, fishing, plantation, forestry, retailing, construction, domestic work, thread cutting, beedi making, bangle making, embroidery, stitching etc. Most of the women work as casual laborers in agriculture, construction, Masala Mills, brick making, or do their own business of handloom weaving, basket weaving and vending fish/vegetables. Even after this high level of participation, they remain invisible to the records. They are treated as ‘cheap labor’ and exploited in every possible manner. They are not given even the basic facilities like toilets and are forced to work ad nauseam for a meager pay.

Even after facing all this discrimination, they work arduously for the subsistence of their family, only to be rewarded with lascivious attitude of the males. Their work is considered to be ‘menial’ as compared to the work done by men resulting in half the pay for the same amount of work. Due to improper execution or the lack of policies and laws for their protection, they have no one to approach and have to stick up for themselves, only to lose their job.

Key Words: women, unorganized sector, laws,

Introduction
Anna Howard Shaw’s expression of working women is in line with the condition of women in India - “Around me I saw women overworked and underpaid, doing men’s work at half men’s wages, not because their work was inferior but because they were women.”

According to National Council for Applied Economic Research (NCAER), women constitute the largest segment of India’s unorganized workforce. More than 97% of women labor force is in the informal sector however, their pay is highly disproportionate, they face huge discrimination and are exploited in all sorts of manner making the environment horrendous to work in.

Women’s work on most occasions goes unrecognized and the benefits hardly ever reach them. Instead of getting them subsistence, it has a crippling effect on their health. They are pushed into the sector due to unstable financial conditions and are forced to do the contractor’s bidding at a meager pay.

This concept to work as a supplementing force in the family has made them vulnerable to all sorts of discriminatory treatment and exploitation (physically, economically, socially and sexually) in the field of employment. But that’s not all. Just like there is a ‘wage gap’ between men and women, there is also a ‘leisure gap’ between them as women are expected to attend to their ‘second shift’ at home soon after their first one at the workplace. They end up having a double burden of work and get
stuck in this pernicious cycle throughout their lives.

There is hardly any law that is directed to the protection of women in such conditions. The laws that are there for the organized sector are the ones extended to the informal sector. However, it is difficult for the workers to get benefits under them if they are not registered and recognized. The most vulnerable group among them all is the domestic workers. They were not even recognized as workers until the Domestic Workers (Registration, Social Security and Welfare act, 2008), making most of the female working population invisible.

### Share of Women in the Informal Sector

According to the ‘Report on Conditions of Work and Promotion of Livelihoods in the Unorganized Sector’ by National Commission for enterprises in the unorganized sector:

Women working as home workers constitute about 7.4 per cent of the unorganized non-agricultural workers. Among women in the prime age group, 15-59 years, 53 per cent in rural and 65 per cent in urban areas, were engaged in domestic duties. In contrast, only 0.4 per cent of the men were primarily engaged in domestic work.

Apart from working as home workers, women also play an important role in the agriculture sector. The society has a wrong contention that it is the males that constitute majority of the farmers. More than 80% of the woman population in the rural areas works in the agriculture sector for their livelihood. 47% work as agricultural laborers, 33% work as farmers and the rest 20% work in the animal husbandry or other activities. Their distribution in the various activities like farming, animal husbandry is shown in the graph below:

![Women in Agriculture Graph](image)

### Women in Agriculture

- **Agricultural Labourers**
- ** Farmers**
- **Animal Husbandry**

Apart from the agriculture sector, the other sectors are also a major area for work for these women. In the non agriculture sectors, women usually work in the manufacturing industries particularly handloom and cottage industries. However, their share varies from industry to industry. 48.2% working in the unorganized sector are working in the manufacturing, 15.8% in trade, 5.6% in construction, 5.5% in industry, 23.8% in other industries, 0.9% in transport and storage.
Fig 2: Proportion of women working in the non agricultural unorganized sector

Even though women form a fair share of the labor force in the informal sector, they remain invisible when it comes to getting the wages and the benefits of employment.

**Literature Review**

Various scholars have worked on the condition of women in the informal sector and have conducted their own studies to come up at a conclusion. A gist of their work is as follows:

Jan Breman (1988)\(^{367}\) reported that women workers are not able to obtain any kind of maternity benefit. They have to work till the last state of their pregnancy and resume immediately after the child birth, in turn exposing both, themselves and the child to considerable danger.

Kalpana Devi and UV Kiran (2013)\(^{368}\) found that women are forced with double burden of work as they are forced to do the domestic work as well as labor in the sites. It was seen that in 15 minutes, about 55 bundles, each weighing 7-8 kg, passed through the hands of women. Thus, In an 8-hour shift, therefore, an incredible 32,000 kg passes through a woman worker’s hands however, they are paid only a meager wage for their arduous effort.


While doing earth work women carried on their head 15 kg. of mud and walked 30 feet to deposit the mud and return. In an 8-hour shift a woman on average would have walked about 13 kms carrying about 21000 kg of mud without taking any breaks.

Rao Shanmukha P, Suryanarayana NVS observe that women participation in the informal sector is enormous. However, it is felt that jobs dominated by females are devalued and degraded. They are the least paid jobs and are considered to be of lower value just because they are done by women. They are placed with a double burden of work as they have to tend of their family and at the same time, help in their subsistence. However, this gender bias has not deterred women from contributing to their family as well as the economy.

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\(^{368}\) Kalpana Devi, UV Kiran, ‘Status of Female Workers in India : A Review’; International Journal of Humanities and Social Science, pp 27-30 (2013)

S Monisha and PL Rani (2016)\textsuperscript{370} state that women and children are the most vulnerable as women are exploited by the contactors, both sexually and by paying lesser wages. Older women are forced to employ their young daughters to please the contractor so as to keep her job and earn an extra commission over her salary.

MN Chitra (2016)\textsuperscript{371} conducted a study and found that there is a significant relation between the marital status of the respondents, the number of people earning and the overall problem checklist of working women and its dimensions like family problems, occupational problems, and personal problems. It opened a new horizon and confirmed some of the general notions of the society. It was found that most of the women in the sector were from the age group of 18-35 and it was in the early stages that they were sexually exploited by the employers as well.

Manju (2017)\textsuperscript{372} analyzed that workers irrespective of sex are exploited in the unorganized sector; however, women suffer more due to their gender. Women form 50\% of the population, 30\% of the workforce, but account for 60\% of the working hours and receive only 10\% of the world’s income. She has recognized various reasons why women tend to face such problems such as the insufficient skill and knowledge, insecure job, apathetic attitude of the employer, extreme work pressure, irregular wage payment, seasonal employment and seasonal employment.

Dr Laxmidevi Y (2018)\textsuperscript{373} conducted a study in which majority of the respondents worked for monthly wages and were unmarried. They had a family income of less than Rs 6000/month out of which most of it got spent for their subsistence. It was seen that women have to work as they face a lot of financial instability. However, the employer does not pay the women at par with man for the same job done. They are burdened with double responsibilities at home and at work. They are forced to work under pitiable conditions due to lack of laws to protect them.

### Laws for the Protection of Women in the Unorganized Sector

There are various laws that protect the rights of women workers in the organized sector but the unorganized sector remains untouched. There are some laws which can be extended to the informal sector for the protection of women.

1. Equal Remuneration Act, 1976

- Earlier, the general perspective of women was that they weren’t as serious as men in their work as family was their main priority and thus were paid lesser as


\textsuperscript{371} MN Chitra, ‘A Descriptive Study on Problems of Women Workers in Construction Industry at Tiruchirappalli’ International Journal of Humanities and Social Science, pp 46-52 (2016)


This act made it the duty of the employer to give equal wages to both men and women for the same work.

Moreover, this act states that a woman shall not be denied any work if she is capable of doing it. No work shall be restricted to only males.

2. Maternity Benefit Act, 1961

The act was made to regulate the employment of women in certain establishments for certain periods before and after child-birth and to provide for maternity benefit and certain other benefits. This came after Union of India v Nargesh Mirza375 where the employment of women as Air Hostess was terminated at the time of their pregnancy from Air India.

Maternity Benefit (Amendment) Act, 2017 makes the act applicable to all women working in plantations, mines, shops, establishments and factories in unorganized sector. They are supposed to be provided with Crèche facility as well.

However, domestic workers and other fields in the informal sector are still not considered.

3. Minimum Wages Act, 1948

The wages for workers in the scheduled employments fixed by the appropriate Governments are equally applicable to both men and women. The Act does not discriminate on the basis of gender and the female workers are entitled for same wages as fixed by the appropriate Governments for their male counterparts engaged in the scheduled employments.376

Moreover, no worker shall be allowed to work more than 9 hours and if a worker is made to work over time, the worker shall be paid 1.5 times his normal wage.

4. Plantation and Laborers Act, 1951

Section 12 of this act makes provisions for crèches and suitable rooms for children where more than 50 women are employed.

Section 25 provides that no woman shall be employed in any plantation between 7pm and 6am.

5. The Unorganized Workers' Social Security Act 2008

According to this act, every unorganized worker shall be eligible for registration subject to the fulfillment of the two conditions:

i. he or she should have completed fourteen years of age;

ii. Self-declaration by him or her confirming that he or she is an unorganized worker.

Every unorganized worker shall be registered by the District Administration.


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provided by the Central Government to the registered unorganized worker, while the rest would be mandated by the state i.e. i. life and disability cover, ii. health and maternity benefits, and iii. old age protection.  


- It calls for district boards, state boards and central advisory committee to regulate the work done by the domestic helpers and for their registration to officially recognize them as workers.
- According to this act the district courts can designate any one or more of the following as Workers’ Facilitation Centers (WFC) for the purpose of facilitating registration of workers:
  i. Local Panchayati Raj Institutions (PRI) or urban local bodies;
  ii. Resident welfare associations/society
  iii. Non-profit organizations working among the Domestic workers.
- They can ask for any documents and look into cases of sexual exploitation, or if any helper is wrongfully confined in any such place or premises or rescue any child being used employed as a domestic worker.

Research Methodology

Problem Statement

In India, most of the laborers in the unorganized sector are migratory. When the males migrate from one state to another, females are the ones who fill in for their gap. However, they have to face a lot of difficulties and problems. The ground-root problems never surface due to the non-reporting by the females. It may due lack of awareness of because of their timorous nature. One cannot be intrepid and open about their issues if the society chooses to believe the contractor over the workers. This influenced the researcher to find out the problems faced by the women workers in the unorganized sector with one on one interaction with both the workers and CSO’s working on the same issue.

Objectives of the Research

1. To find the problems faced by the women in the unorganized sector
2. To suggest some measures on improving their condition.

Research Design and Methods

The study is descriptive in nature. It focuses on the problems faced by women workers in various fields of unorganized sector. The universe of the study includes women from Orissa, Rajasthan and Delhi employed in the unorganized sector. Non probability sampling has been used to select women for the ease of process. The majority of the population consists of women from rural background.

Survey:

The sample consisted of 200 women between the age group of 20-35 employed in various fields as shown below:

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377 Ministry of Labor and Employment
The problems faced by them were recognized as follows:

**Payment related**

1. Our society is purely male dominated. The workplace considers the same. Work so done in the unorganized sector is termed not fit for a woman to do. No opportunity is given to a woman to expand. There is no equality of opportunity.
2. As, the work done by women is considered as menial, it is no surprise that they are not paid salaries equivalent to that of men.
3. Sometimes, it happens that a woman does not know whom she is working for and hence, she is not able to get her due. She just knows the contractor who does not pay her well.
4. It is said, work hard to get the best results. Having an astute contractor who would give them their due would be like serendipity for them. In reality, the contractor does not give them the amount agreed upon. If they had agreed on Rs 300, they are paid only Rs 250. They are made to do work that is worth more than they are paid. If they try to complain, they are fired.
5. Moreover, it has also been seen that contractors tend to exploit women as they are considered as cheap labor. This attitude is also in the government sector. Eg a woman is paid just Rs 40 per day for working in the schools for 5-6 hours preparing the midday meals.
6. Moreover, the wage rates are very less and the women are forced to have the double burden of work to ensure the subsistence of the family.
7. There is an oversupply of workers in the market and the lack of mobility in short durations which eventually leads to lack of facilities and humane working conditions for the workers, if they deny the work, somebody else will always be ready to take their place in the cut throat competition.

**Social Security and Basic Facilities**

8. There is a lack of sanitation and toilets at the workplace. Due to non access of these basic necessities, women have to face extreme discomfort. It is like taking away their right to a quality life.
9. There is no separate provision or no provision at all for food, shelter, water, or a common resting place for women to take their breaks at
10. Another problem of these women is that they have to take care of their young children as well. Anganwadis are located far away from their homes and it is difficult for them to manage both work
and children. Moreover, these women are not provided crèche for children making their task even more arduous.

11. Sometimes, the women have to work overnight. Even then, they are not provided with night shelters thus ignoring their security and well being.

12. Women are not paid with par to men. Even when they work arduously without any breaks ploughing through the fields, all they are given is excuses for lower pay. Men are paid a higher wage because they are considered to ‘work harder’.

13. Women are not even allowed sick leaves. If they take breaks or request for a leave to tend to themselves or any family member, they are simply replaced by someone else. There is no job security.

14. Unorganized sector has various accidents making workers prone to injuries, however, even if there is a major accident; women are not compensated nor are their heirs provided with any sort of help in case of death.

15. The workers safety is not considered as a priority as the contractor does not provide them with any safety measures or equipments. They work without helmets at the construction sites, without proper masks and gloves in the factories making them highly vulnerable.

16. Majority workers in the unorganized sector are not working in any registered companies. Thus, in case of mishapening, they are not able to take any action against them.

17. There can be other diseases that a worker may contract because of the nature of the job, this can be severe to women, as they shoulder more responsibility, but they are not compensated for that either.

18. Women are not given any maternity benefits. Moreover, when they get pregnant, they are forced to leave the job as they become unfit for it and are less efficient and need more rest.

19. Then there are problems of middlemen as well. Sometimes, they can be fake and thus, the workers can get duped. Or if they do not have any license, they are able to avoid any responsibility towards the worker.

Domestic Workers and Harassment of women.

20. The main problem of the society is that even a large number of women are employed, their visibility is very low. So when we imagine a worker, it turns out to be a male where more than 50% of the workers are women. This leads to patriarchal thinking and harassment of women in the society.

21. Women are exploited at their workplace and even at their homes. At the workplace, the young women are segregated from the older ones and are subject to continuous harassment by the contractor against whom they do not raise their voices.

22. The main reason for this is that firstly they are not aware of their rights and the laws that are there to protect them. Moreover, if they do say something, they are under constant fear of getting fired and it is very difficult to get a new job in this cut throat competition.

23. Even if they do make complaints, it falls on deaf ears. The police are highly unsympathetic and refuse to believe the women. They do not file a case against the wrongdoer but blame the women for her own harassment.
This type of attitude from other women is highly pernicious as it destroys the trust of a woman in not just the government and the system but the society in general as well.

24. But the condition of Domestic workers is even worse. They are not governed by any specific law which makes them even more vulnerable.

25. They have to face constant discrimination at the hands of the employers and the society in which they work in. They sometimes make separate doorways, lifts for them and treat them cruelly. Doing this can be termed as unconstitutional.

26. Sometimes, these women are also sexually harassed by the employers. But the harassment is not limited to just sexual harassment, they face mental harassment as well. Eg. If they take a loan from anyone, they are forced to pay high interests on it. The women are even asked special favors in return for it. This puts them in constant mental agony as well.

**Recommendations**

1. The main problem was identified as the lack of awareness among both – the workers and the activists regarding some committees, schemes and various facilities provided by the government, where the complaints can be registered etc.

2. Sensitization of government officials should be done to make them aware of the suffering of women in this sector.

3. To ensure the success, the registration of women workers should be increased to maximize the visibility. This will encourage participation of women and make the working environment comparatively safer.

4. There should be strict implementation of laws so as to ensure that the workers are provided with the basic facilities like toilet, crèche, water and shelter facilities should be provided to women at their workplace.

5. The implementation can be made better by strengthening the labor department, increasing the capacity and the power of labor unions, gender laws should be integrated, employer employee relation should be made better and the contracts must be duly registered.

6. There should be assurance of the workers working in hazardous areas to ensure that they or in the case of death, their heirs get due compensation.

7. Proper data should be maintained of the workers in any industry, This helps in getting them relief and keeping a record and check on what happens at the workplace.

8. Mass Legal awareness campaigns should be organized to ensure that the workers become aware their basic rights, because it is only then that they will be able to fight for themselves.

9. As far as the employer is considered, he should appoint only registered contractors and should take responsibility when it arises. They should have a proper contract stating all the conditions and the liabilities of the work.

10. There should be fixed working hours for women so they are given adequate breaks and holidays while working and if they are working overtime, they should be paid extra for the same.
11. Every construction sites should also be registered to ensure transparency in the matter.

12. Maternity benefits should be extended to women all the sectors. They should be given paid leaves at least 2 months before the birth and for 3 months after the delivery.

13. The tokenistic representation of women in the society should be taken care of. Women should be included in the process of decision making. This will help in better formulating of laws as new issues would be easier to bring to light.

14. Helpline services for women should be opened so that they can get quick relief.

15. Female unions should be made who will focus specifically on women so as to get them more relief and empower them and bring issues of theirs to the government.

16. Occupation boards should be made to protect the interests of the domestic workers. Specific laws should be made to protect them from exploitation.

Conclusion

Studies reveal that the women workers in the unorganized sector face not only dual work burden or responsibility but the problems of gender discrimination, wage discrimination, poignant working conditions, lack of training, education and skill, low wages, job insecurity health problems and so on, at their workplace. The improvement in the conditions of livelihood of the women workers depends not only on their own attitude towards this injustice, but also on the implementation policy and a regulatory framework of the government as well as programmes, which create the conditions, which allow them to expand their livelihoods.

We cannot harness the talent in the country by excluding 50% of the talent. No country can achieve its whole potential without utilizing all its assets. But that does not mean that it should be done by sheer exploitation of women. The condition will improve only when women participate without fear. To make this dream a reality, we need more than just in-implementable laws. We need parity.

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SABARIMALA ISSUE: ALL MEN AND WOMEN HAVE EQUAL RIGHT TO WORSHIP

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ABSTRACT

Theoretically speaking, Right to equality is guaranteed under Indian Constitution, but practically it is not a case. Notwithstanding any efforts made by the Indian court, Indian legislature and Indian government, the practice of hurting humanity on the basis of certain point of views continue to operate. Since time immemorial, people have been searching for justification of such perceptions. Especially, a section of Woman is treated with inequality on the basis of such perceptions. It seems that, man is gifted with all the rights to do whatever they want. There is not at all equal protection in respect of even spirituality and divinity. Just on the basis of gender, it is assumed that a woman is not capable of doing that thing. On the one hand, Women are glorified as goddesses and on the other hand strict restrictions are imposed on such women. Such a dualistic mindset results in indignity to women and making them venerable. Only for the sake of purity and chastity of women, the rights of such women are fully infringed. Society is using biological and physiological factor of women as a weapon to target their rights. Sometimes, most of the rituals and practices are fully patriarchal in nature. However, the religion is basically a way of life to realize one identity with the divinity. But in reality there is discrimination on the basis of gender to achieve the way of divinity too.

Therefore, this paper tries to evaluate the issue of Sabarimala temple where entry of women of certain age group is prohibited on the basis of physiological factor and the analysis of current judgment of Supreme Court of India with respect to this issue.

Keywords – Right to equality, spirituality and divinity, Sabarimala temple, biological and physiological factor.

I. INTRODUCTION

About sabarimala temple

Sabarimala is a Hindu pilgrimage centre located at the Periyar Tiger Reserve in the Western Ghat mountain ranges of Pathanamthitta District, Perunad grama panchayat in Kerala. It is surrounded by 18 hills in the Periyar Tiger Reserve. It is believed that Lord Ayyappa was born out of the union between Lord Shiva and the mythical Mohini, who is also regarded as an avatar of Lord Vishnu.

According to legend, it is believed that Lord Ayyappa, the presiding deity of Sabarimala had his human sojourn at Pandalam as the son of the King of Pandalam, known by the name of Manikandan, who found him as a radiant faced infant on the banks of the river Pampa, wearing a bead (mani) around his neck. Manikandans feats and achievements convinced the King and others of his divine origin.

The Lord told the King that he could construct a temple at Sabarimala, north of the holy river Pampa, and install the deity there. The King duly constructed the temple at Sabarimala and dedicated it to Lord
Ayyappa. The deity of Lord Ayyappa in Sabarimala Temple was installed in the form of a Naishtik Brahmachari i.e. an eternal celibate. Lord Ayyappa is believed to have explained the manner in which the pilgrimage to the Sabarimala Temple is to be undertaken, after observing a 41-day Vratham. It is believed that Lord Ayyappa himself undertook the 41-day Vratham before he went to Sabarimala Temple to merge with the deity. The whole process of the pilgrimage undertaken by a pilgrim is to replicate the journey of Lord Ayyappa. The mode and manner of worship at this Temple as revealed by the Lord himself is chronicled in the Sthal Purana i.e., the Bhuthanatha Geetha.\(^{378}\)

It is one of the largest annual pilgrimages in the world. Sabarimala Sree Dharma Sastha temple is not open the year-round. It opens for devotees to offer prayers for the first five days of every month in the Malayalam calendar, as well as during the annual ‘mandalam’ and ‘makaravilakku’ festivals between mid-November to mid-January.

Thazhamon Madom" is the traditional priest family who has powers over the matters to be decided in Sabarimala Temple. Tantri is the highest priest and is the head of the temple. It's the privilege of the family to decide on matters relating to Sabarimala shrine. Tantris are to be present in all ceremonial poojas and functions to be held at temple premises and functions associated with temple. The installation of idols of the temple was also done by Tantri of this family.

**Sabarimala Beliefs and Traditions**

“When it comes to temple, each has its own set of beliefs and traditions that have been followed over the years.

The deity of Lord Ayyappa in Sabarimala Temple was installed in the form of a Naishtik Brahmachari i.e. an eternal celibate. Lord Ayyappa is believed to have explained the manner in which the pilgrimage to the Sabarimala Temple is to be undertaken, after observing a 41-day Vratham. It is believed that Lord Ayyappa himself undertook the 41-day Vratham before he went to Sabarimala Temple to merge with the deity. The whole process of the pilgrimage undertaken by a pilgrim is to replicate the journey of Lord Ayyappa. The mode and manner of worship at this Temple as revealed by the Lord himself is chronicled in the Sthal Purana i.e. the Bhuthanatha Geetha.

So, the whole process of the pilgrimage including the vratham, undertaken by a pilgrim is to replicate the journey of Lord Ayyappa. The 41 day Vratham is a centuries old custom and practise undertaken by the pilgrims referred to as Ayyappans. Before embarking on the pilgrimage to this shrine, a key essential of the Vratham is observance of a Sathvic lifestyle and Brahmacharya so as to keep the body and mind pure.

A basic requirement of the Vratham is to withdraw from the materialistic world and step onto the spiritual path. During the period of vratham, strict celibacy should be followed. The person has to separate himself from all family ties. The person is advised to

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take bath twice a day, to take only vegetarian food, to refrain from sensual pleasure. Mind should be full of devotion and prayers. If one can refrain from using footwear, it shows immense devotion. The person who is going first time, should wear black shirt and Mundu (Dhoti) while on his later visits, he can wear clothes of other colours. He should visit the nearby temple or should perform pooja at home to Lord Ayyappa, while observing vratham.

II. ENTRY OF WOMEN IN THE SABARIMALA

The practice of not allowing women between the age of 10 to 50 years has not a support of valid custom as this practice has not been continuously followed. It is necessary for a valid custom to be followed over a long period of time without any break in between. It has been observed that earlier the women irrespective of their age, were permitted to enter the sabarimala for the first rice feeding ceremony of their children. But in October 1955 and 1956, two notifications were passed by the Travancore Devaswom Board which controls the administration of Sabarimala that barred women between the age of 10 to 50 years from entry to places of worship. The restriction with respect to entry of women of a certain age group was subsequently also imposed by Kerala Hindu Places of Public Worship (Authorization of Entry) Rules 1965 in pursuance of the 1965 Act. Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules 1965 which prohibits women from entering or worshipping in a place of public worship based on the existing customs and usages of that particular place. This rule was framed to give legal support to the practice of debarring women of particular age group from entering into the sabarimala temple.

PAST COURT VERDICT ON SABARIMALA ISSUE

The practice of not allowing the women to exercise their right was challenged in the year 1991 in S Mahendran vs The Secretary, Travancore case. 379

The following questions were presented before The High Court:

(1) Whether woman of the age group 10 to 50 can be permitted to enter the Sabarimala temple at any period of the year or during any of the festivals or poojas conducted in the temple.

(2) Whether the denial of entry of that class of woman amounts to discrimination and violative of Articles 15, 25 and 26 of the Constitution of India?

(3) Whether directions can be issued by this Court to the Devaswom Board and the Government of Kerala to restrict the entry of such woman to the temple?

The High Court, observed thus:

The deity in Sabarimala temple is in the form of a Yogi or a Bramchari according to the Thanthri of the temple. Since the deity is in the form of a Naisthik Brahmachari, it is therefore believed that young women should not offer worship in the temple so that even the slightest deviation from celibacy and austerity observed by the deity is not caused by the presence of such women.” “We are therefore of the opinion that the usage of woman of the age group 10 to 50 not being

379 AIR 1993 Ker 42.
permitted to enter the temple and its precincts had been made applicable throughout the year and there is no reason why they should be permitted to offer worship during specified days when they are not in a position to observe penance for 41 days due to physiological reasons. In short, woman after menarche up to menopause are not entitled to enter the temple and offer prayers there at any time of the year.” The restriction imposed on women aged above 10 and below 50 from trekking the holy hills of Sabarimala and offering worship at Sabarimala Shrine is in accordance with the usage prevalent from time immemorial. Such restriction imposed by the Devaswom Board is not violative of Articles 15, 25 and 26 of the Constitution of India. Such restriction is also not violative of the provisions of Hindu Place of Public Worship (Authorisation of Entry) Act, 1965 since there is no restriction between one section and another section or between one class and another class among the Hindus in the matter of entry to a temple whereas the prohibition is only in respect of women of a particular age group and not women as a class.”

This Judgment was not challenged for 4-5 years. Then it was found that in 2006, Indian Young Lawyers Association filed PIL in the Supreme Court to preserve the rights of women by allowing their entry in the temple as it violates their rights to equality under Article 14 and freedom of religion of female worshippers under Article 25 of The Constitution of India. It was also observed that there were so many cases in the past where women were allowed to enter into the temple either because of film shooting purpose or because of other purposes. So, in this way it was unfair and unjust for those women who were not allowed to enter into the temple merely by saying it as an essential practice. On the other hand this practice has not been continued consistently.

After receiving the PIL, The Supreme Court issued notices to the parties. Then, this matter was referred to a three-judge Bench. It came up for hearing seven years later, on 2016. On 20th February 2017, the Court observed that this matter involves a question as to interpretation of constitution and must be heard by Constitution Bench. Finally, on 28th September 2018, the Constitution Bench delivered its judgment.

III. ANALYSIS OF PRESENT VERDICT OF SUPREME COURT

In the series of the controversy over the Sabrimala temple, the latest petition was filed by the Indian young Lawyers Association under article 32 of The Constitution of India against the Government of Kerala, Devaswom Board of Travancore, Chief Thantri of Sabarimala Temple and the District magistrate of Pathanamthitta to ensure entry of female devotees between the age group of 10 to 50 years to the Lord Ayyappa Temple at Sabrimala which is done on the name of custom and also to declare rule 3(b) of Kerala Hindu Places of Public Worship rules,1965 framed in exercise of the powers conferred by section 4 of Kerala Hindu Places of Public Worship Act,1965

380 Indian Young Lawyers Association vs The State Of Kerala on 28 September, 2018.

unconstitutional as being violative of Articles 14, 15, 25 and 51A(e) of The Constitution of India.

Now the bench of 5 judges delivered its judgment on the present case where 4 of the judges who were male were of the opinion that all women must be allowed to enter the temple whereas Justice Indu Malhotra in her dissenting opinion was in the favour that the current practice is a custom which can be followed.

The whole discussion in the present case was mainly focused on the fact that whether the worshipers of Lord Ayyappa and the Sabrimala temple constitute to be a religious denomination as mentioned under Article 26 of The Constitution of India or not. And if yes then whether the present custom or tradition of not allowing the women of a particular age group to enter the temple constitute an essential religious practice or not. Further whether this custom or tradition is a violation of several other fundamental rights present under part III The constitution of India such as right to equality, freedom of conscience and free profession, practice and propagation of religion, abolition of untouchability etc.

The petition filed also challenged rule 3(b) of Kerala Hindu Places of Public Worship rules, 1965 framed in exercise of the powers conferred by section 4 of Kerala Hindu Places of Public Worship Act, 1965 and it was discussed whether these two are compatible to each other or not.

Another aspect which comes into light is that if the custom is abolished then whether or not it would violate the Fundamental Right of Freedom to manage religious affairs.

**Religious Denomination**

The expression “religious denomination” as interpreted in *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* was “a collection of individuals classed together under the same name: a religious sect or body having a common faith and organisation and designated by a distinctive name”.

The Court held that each of the sects or sub-sects of the Hindu religion could be called a religious denomination, as such sects or sub-sects, had a distinctive name. In *S.P. Mittal v. Union of India &Ors.* while relying upon the judgment in *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Shirur Mutt*, held that the words ‘religious denomination’ in Article 26 of the Constitution must take their colour from the word ‘religion’, and if this be so, the expression ‘religious denomination’ must satisfy three conditions:

(1) It must be a collection of individuals who have a system of beliefs or doctrines which they regard as conducive to their spiritual well-being, that is, a common faith;

(2) common organisation; and

(3) designation by a distinctive name

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382 Article 14 of The Constitution of India.
383 Article 25 of The Constitution of India.
384 Article 17 of The Constitution of India.
385 Article 27 of The Constitution of India.
387 1983 AIR, 1 1983 SCR (1) 729.
Now if we see at the majority judges' opinion, they agree on the point that the worshipers of Lord Ayyappa doesn’t constitute religious denomination whereas Justice Indu Malhotra disagrees with the same.

The Chief Justice Deepak Mishra in his judgment clearly stated why the worshipers of Lord Ayyappa and the Sabrimala doesn’t constitute a religious denomination status as it doesn’t coincide with two of the conditions earlier laid down by Supreme Court in aforementioned cases.

First and the most important condition for a religious denomination, i.e., the collection of individuals ought to have a system of beliefs or doctrines which they regard as conducive to their spiritual well-being, there is nothing on record to show that the devotees of Lord Ayyappa have any common religious tenets peculiar to themselves, which they regard as conducive to their spiritual well-being, other than those which are common to the Hindu religion. Therefore, the devotees of Lord Ayyappa are just Hindus and do not constitute a separate religious denomination. For a religious denomination, there must be new methodology provided for a religion. Mere observance of certain practices, even though from a long time, does not make it a distinct religion on that account.

As for the third condition Chief Justice Deepak Mishra says the pilgrims coming to visit the Sabarimala temple being devotees of Lord Ayyappa are addressed as Ayyappans and, therefore, the third condition for a religious denomination stands satisfied, is unacceptable. There is no identified group called Ayyappans. Every Hindu devotee can go to the temple. We have also been apprised that there are other temples for Lord Ayyappa and there is no such prohibition. Therefore, there is no identified sect.

Hence it is not a religious denomination whereas on the contrary in her dissenting opinion Justice Indu Malhotra says that it is a religious denomination as The meaning ascribed to religious denomination by this Court in Commissioner, Hindu Religious Endowments case, and subsequent cases is not a strait-jacket formula, but a working formula. It provides guidance to ascertain whether a group would fall within a religious denomination or not.

It is further stated in her judgment that the conditions as they were put forward in the earlier cases. As it was contested that since the visitors to the temple are not only from the Hindu religion, but also from other religions, the worshippers of this Temple would not constitute a separate religious sect. On this in her judgment she states that this argument does not hold water since it is not uncommon for persons from different religious faiths to visit shrines of other religions. This by itself would not take away the right of the worshippers of this Temple who may constitute a religious denomination, or sect thereof. Also she agreed that the there are different names for the worshippers of Lord Ayyappa and hence since the conditions also gets followed the worshipers of Lord Ayyappa and the Sabrimala Temple does constitutes a religious denomination.

Essential Practice

It was further a challenge before the court that whether the practice of 41-days vratham was an essential religious practice or not. In
his assenting opinion Justice D. Y. Chandhchud disagreed with the respondents and said that it is not an essential practice. In determining the essentiality of a practice, it is crucial to consider whether the practice is prescribed to be of an obligatory nature within that religion. If a practice is optional, it has been held that it cannot be said to be ‘essential’ to a religion. A practice claimed to be essential must be such that the nature of the religion would be altered in the absence of that practice. If there is a fundamental change in the character of the religion, only then can such a practice be claimed to be an ‘essential’ part of that religion.

The texts and tenets on which the Respondents placed reliance do not indicate that the practice of excluding women is an essential part of religion required or sanctioned by these religious documents. At best, these documents indicate the celibate nature of Lord Ayyappa at the Sabarimala temple. The connection between this and the exclusion of women is not established on the material itself.

Whereas in the dissenting opinion Justice Indu Malhotra said that yes it was an essential practice. She took support of the long legend which exists that the Lord Ayyappa before merging with the idol professed the 41-day vratham. The idol which was installed in the temple was in the form of Naisthik Brahmachari i.e. an eternal celibate. The whole practice of the vratham and pilgrimage is observed with an objective to replicate the journey of Lord Ayyappa. During the vratham there is a lot of practices which are done by the Ayyappans such as refraining from all the social ties, cooking own food, being alone, eating food only once a day, offering prayer twice a day and maintain absolute cleanliness, walking barefoot and many more of which can not be practiced by women who has to observe naturally occurring phenomenon of mensuration which will definitely fall at least twice in the time of 41-day vratham and hence it is not physiologically difficult for them to practice the same. Therefore to save the women from such hardships the custom was prevailed since the inception of the temple and is followed there since.

In her judgment Justice Indu Malhotra said that the only possible way to determine the essential practices test would be with reference to the practices followed since time immemorial, which may have been scripted in the religious texts of this temple. If any practice in a particular temple can be traced to antiquity, and is integral to the temple, it must be taken to be an essential religious practice of that temple.

Hence for Justice Indu Malhotra the practice is an essential religious practice as the whole objective of the practice is to replicate the journey of Lord Ayyapa and also it is not Physiologically possible for women to observe 41-days vratham.

Also according to her The question whether Sabarimala is a denomination or not is irrelevant for the reason that even if it is concluded that Sabarimala is a denomination, it can claim protection of only essential practices under Article 26(b) and denial of entry to women between the age of 10 to 50 years cannot be said to be an essential aspect of the Hindu religion. Therefore, the practice can be continued as it is safeguarded by the Constitution itself.

In contravention of fundamental rights
According to Article 26 of The Constitution Of India

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law

Since the 4 judges of the bench refused to accept the Ayyappans and the Sabrimala Temple to be a religious denomination they said that the custom and usage since it is also not an essential religious practice is subjected to other provisions of the Constitution of India which includes fundamental rights also. Women of a particular age group can not freely profess their right to equality, is fully discriminatory as men can go and females of other age group can also go. Differentiating women on the basis of physiological factor and not allowing them to enter into the temple clearly affects their freedom of freely professing any religion and hence are being subjected to inequality and gives a clear sense of untouchability which is al opposite to provisions of The Constitution of India and hence must be stopped at once.

But for Justice Indu Malhotra the sect is a religious denomination and hence other provisions of the Constitutions doesn’t get applied to it as it is not mentioned in article 26 of The Constitution Of India. In article 26 of the Constitution of India the only conditions to which the article 26 is subjected are public order, morality and health and these are not the case in present petition. Even if these are subjected to fundamental rights they are not violated. In case of Right to equality not all the women are not allowed to enter temple but only a particular group of women are not allowed as per custom and only to a particular temple of Lord Ayyappa i.e. Sabrimala Temple as the idol is in the form of NaisthikBrahmchari. Hence this is not inequality. If we see it as untouchability then also it is not as the untouchability provision was incorporated in the Constitution as Dalits were not allowed in temple and were subjected to untouchability but not allowing women of particular age due to a religious belief doesn’t fulfill the requirements of considering the present case of untouchability and hence the custom and practice can be continued.

Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965 is ultra vires the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965

The petition filed also challenged declare rule 3(b) of Kerala Hindu Places of Public Worship rules,1965 framed in exercise of the powers conferred by section 4 of Kerala Hindu Places of Public Worship Act,1965 unconstitutional as being violative of Articles 14,15,25 and 51A(e) of The Constitution of India.

In the assenting judgment authored by CJI Deepak Mishra, the religious denomination of the worshipers and the Sabrimala temple
is not accepted and hence the rule 3(b) of Kerala Hindu Places of Public Worship rules,1965 framed in exercise of the powers conferred by section 4 of Kerala Hindu Places of Public Worship Act,1965 which is only subjected to one condition that is of religious denomination becomes ultra vires and hence unconstitutional but in the dissenting Judgment Justice Indu Malhotra accepted the religious denomination status and hence it is not ultravires in nature.

Since the majority of judges were of same opinion and in light of above discussion, by the ratio of 4:1 it was held that all women regardless of their age group or a physiological factor must be allowed to enter into the Sabrimala temple of Lord Ayyappa. And also the provisions of of Kerala Hindu Places of Public Worship Act,1965 is ultravires in nature and also unconstitutional.

Although the dissenting judgment of Justice Indu Malhotra must be also taken in consideration as it contains very reasonable points in relation with issues of the petition filed.

IV. CONCLUSION

In a country like India, where the basic foundation of a country are the ideals of freedom, equality, secularism and liberty, many so the practices are followed which ruins the basic foundation on which our nation stands. Even when the preamble of our constitution incorporates values such as equality, liberty of thought, expression, faith and belief, still issues such as gender discrimination roar on regular basis.

In the present case of Sabarimala temple, the same question was raised as the restriction was imposed on women of particular age group i.e. 10 to 50 years because of certain physiological factors specifically attributable to women to not to enter into a temple. This restriction was challenged by the petition in the supreme court of India and the majority of the judges, in order to preserve the spirit of constitution as well as the nation, upheld the challenge and held that the there is a right of Hindu women regardless of age or physiological factors such as mensuration to freely practise their religion and exhibit their devotion towards Lord Ayyappa particularly in Sabrimala Temple. By this, Indian Judiciary again enshrined the basic feature of the Constitution and protect the rights of women. Whereas, the dissenting judgment of Justice Indu Malhotra must also be taken into consideration which held that such a restriction is in accordance with the tenets of their religion irrespective of whether the practice is rational or logical. This dissenting opinion widely opens to interpretation as to another aspect which comes into light is that if the practice is abolished then whether, it would violate the Fundamental Right of Freedom to practice, profess and propagate religion or not. To conclude, the quote of J Krishnamurthi, can be taken into consideration which states-

“To ask the ‘right’ question is far more important than to receive the answer. The solution of a problem lies in the understanding of the problem; the answer is not outside the problem, it is in the problem.”

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DETERRED ENOUGH? – THE CRIMINAL LAW AMENDMENT ACT, 2018

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Abstract

The parliament on August 6, 2018, passed the Criminal Law (Amendment) Bill, 2018, which replaced the Criminal Law Ordinance, promulgated by President Ram Nath Kovind on April 22. The spectrum of the Ordinance provides for heavy punishments, speedy investigations and easy disposal of cases, and modifies provisions relating to anticipatory bail. The capital punishment prescribed, begs the question of effectiveness in deterring rape, as evident from the Criminal Law (Amendment) Act, 2013, which increased the minimum possible punishment, yet resulting in no significant change. The paper follows an exploratory pattern of research as it probes into issues that deserve attention in relation to the said ordinance. Although punishment for the rape of minor girls and women has been increased, the question of equivalent provisions for men is left unanswered. Further, with recent developments regarding the judgment on Section 377 of the IPC, the Ordinance should evolve to provide for the abuse of homosexuals and bisexuals. Therefore, this paper strives to study the possible limitations to the amendment that may subsequently lead to misuse of the said provision, thereby avoiding gross miscarriage of justice to the above-mentioned groups who have been overlooked in the ordinance.

Keywords: Criminal Law Ordinance 2018, deterrence, homosexuals, minor, punishment, rape.

I. Introduction:

In exercise of the powers conferred by Clause (1) of Article 123 of the Constitution, president Ram Nath Kovind promulgated the Criminal Law (Amendment) Ordinance, 2018. The said ordinance amends the Indian Penal Code, 1860, the Indian Evidence Act, 1872, the Code of Criminal Procedure, 1973 and the Protection of Children from Sexual Offences Act, 2012. The ordinance as promulgated by the President in the backdrop of national outcry, as a result of the rapes in Kathua and Unnao, subsequently became the Criminal Law (Amendment) Act, 2018 upon being approved by the Union Cabinet chaired by Prime Minister Narendra Modi. The ordinance makes an attempt to develop the existing law against rape from all possible aspects, bringing in speedy investigations [Section 14 of the Criminal Law (Amendment) Act, 2018], rigorous imprisonment [Section 4, 5 and 6 of the Criminal Law (Amendment) Act, 2018], extendable to death penalty [Section 5 and 6 of the Criminal Law (Amendment) Act, 2018], time limit for completion of trials [Section 20 and 21 of the Criminal Law (Amendment) Act, 2018] and provision against issuance of anticipatory bail [Section 22 of the Criminal Law (Amendment) Act, 2018].

II. Review of Literature:

The three primary aspects of the deterrence theory are severity of punishment, certainty of punishment and celerity of punishment, as propounded by Bentham. Of these, celerity is the least studied aspect. In essence, it refers to the swiftness with which punishment is administered, and therefore, this paper seeks to provide some real-world implications of such an aspect (Kennedy, 1983)\textsuperscript{389}. Despite several years of research, it is unclear as to how individuals form their perceptions of a sanction regime so as to threaten punishment to the end of deterrence. The assumption that people are rational and logical beings who will carefully and even economically weigh the benefits and the consequences of their actions has been systematically stumped by several researchers(Nagin, 2013)\textsuperscript{390}. The Justice Verma Committee Report succinctly summarizes the position of the law with regard to deterrence, and considers in detail the questions of life imprisonment and the death sentence, for the latter of which it discusses the tests laid down by the Judiciary in various cases beginning from Bachhan Singh v. State of Punjab\textsuperscript{391} and makes suggestions as to minimum imprisonment for various categories of sexual offences, and further considers possibilities such as castration as punishment. The 262\textsuperscript{nd} Law Commission on Death Penalty recommended police reforms and victim compensation schemes. Most importantly, the commission recommended the abolition of the death penalty for all offences except those related to terrorism and waging war. The absence of gender-equal criminal laws and their implications for men in India has already been discussed (Rajan, 2017). An empirical study was conducted with regard to deterrence, incapacitation and overloading theories, and patterns were devised which enabled choice between the theories (Geerken& Gove, 1997)\textsuperscript{392}.

III. Research Objective:

Through this paper, an attempt has been made to critically analyse the Criminal Law (Amendment) Ordinance, 2018 having regard to the conditions and the public outcry which prompted the President to promulgate the Ordinance. Considering that the object behind the move was to deter future crimes of a similar nature, the paper evaluates if the Ordinance and the subsequent Amending Act have effectively served that object which they purport to achieve. Researchers will also identify the possible abuse of the law as it presently stands post amendment. The aim is to explore aspects of the Ordinance such as the categorisation of victims based on the age, consent, gender bias, incapacitation and the role of media.

IV. Research Methodology:

The paper follows an exploratory pattern of research as it probes into issues that deserve attention in relation to the said ordinance. The data published by the National Crime Records Bureau, has been utilized, with specific emphasis on data relating to women.

\textsuperscript{390} Daniel S. Nagin, Deterrence in the Twenty-First Century, 42 Crime & Just. 199, 204-205 (2013).
\textsuperscript{391}(1980) 2 S.C.C. 684 (India).

www.supremoamicus.org
within the ages of 0-18. Further, the paper relies heavily on governmental data reports, decisions of the various Courts of Law in India, and journal articles on the subject.

V. Discussion and Findings:

To begin with, the intention behind the Ordinance is readily apparent: Deterrence and Incapacitation. In this regard, how effectively increasing punishment will serve towards these purposes is a question that has been left unanswered or perhaps even unconsidered by the legislature, as has been questioned by the Delhi High Court as well. The ordinance comes at a time when pendency percentage for rape cases remains at 30.3% for the year 2016. It is also interesting to note that over 18,552 cases in which trial were completed, only 4739 (34.30%) cases resulted in a conviction. The remaining 13813 cases resulted in the accused being acquitted or discharged.\(^{393}\) In this regard, the NCRB provides some, albeit limited, insight into the amount of cases which are dismissed as “true but insufficient evidence”. This finding points to the direction increased standards of interrogation and evidence. Therefore, it is fit to mention the Women’s Safety Division that was set up by the Ministry of Home Affairs,\(^{394}\) following the Ordinance, which purports to deal with these issues by seeking to increase the quality of investigations, setting up of Fast Track Courts and strengthening forensic laboratories among other measures. The effectiveness and the mode of implementation of these methods remain to be seen, and therefore, factors other than those preliminarily mentioned above shall be the primary focus of the paper. The Ordinance is perhaps most important for increasing the punishment contemplated by various sections of the IPC. In this connection, it shall be argued that while the intention behind the Ordinance appears sound, the Ordinance is not effective in accomplishing that goal. It is reiterated that the act of increasing punishment cannot be regarded as a miscalculated move per se since the increased punishment may serve the ends of the retributive theory, and there is no reason why those benefits must not be treated as a windfall gain of the Ordinance. However, considering that the need of the hour is deterrence of crime in India, it shall be discussed as to why the Ordinance fails in being effective in that regard, and what measures can be made to that extent. Further, considering that in 94.6%\(^{395}\) of cases of rape, the offender was in some way or the other known to the victim, it is questionable if an increase in punishment would deter rape, since the dynamics change drastically between situations in which the offender is a random passer-by and a situation in which the offender is known to the victim. On the contrary, the victim may be deterred from reporting the crime at all, due to the increased punishment, especially the death sentence, with the perpetrator being a family member whom a child may not want to subject to such sentences.

One of the strongest arguments against the effectiveness of the Criminal Law

\(^{393}\) Ministry of Home Affairs, National Crime Records Bureau 149, Indian Penal Code, Police Disposal of Crime Against Women Cases (Crime Head-wise) - 2016 (Concluded)(2016).


Ordinance of 2018 is that, when the Criminal Law (Amendment) Act of 2013 was enacted, Crime against women shot up by nearly 10% instead of decreasing. While it is conceded that these figures have not been calibrated for the increase in actual reports of crimes, it is submitted that the lack of decrease in crime owing to the 2013 amendment was no statistical aberration, since almost all extensive research on the subject consistently conclude that an increase in severity of punishment does not result in deterrence. While the present stance in criminal literature is dismissal of motive or what goals a person may expect from rape for the same reason that it would be impossible to determine why some people store their money in banks, others use it to buy entertainment, and still others use it differently, it is submitted that the realizing of cause-effect relationships with external factors that may not be goals or motivators in themselves, but a disabler of inhibitors is required for implementing deterrence.

The NCRB data for 2016 records different incidences of rape against women state-wise. While it is conceded that these figures have not been calibrated for their corresponding population rates, it is imperative to understand the factors that cause lesser rapes in a few states more than other states, for it would be a fallacious position to assume that the difference in population is the cause of rapes. However, it is important to note that incidence of crimes against women suddenly dropped by 3% in 2015 on average across India. Therefore, the endeavor of the legislature at the present moment must be to understand the patterns that caused the downfall and replicate those patterns for effective deterrence.

Surprisingly in Goa, only 61 incidences of rape (both under 376 and 376D of IPC) were recorded as opposed to Madhya Pradesh, with the highest score of 4882 in the year 2016. One possible inference for higher reported instances is that the female literacy levels in the region are better off than those regions that do not see as many reports. However, Goa fares well in female literacy as well. Therefore, it cannot be said conclusively that the only reason for reduced reports of rape is illiteracy. Secondly, upon calibrating the reports for the population rates in both states (instances in 2016/ Female Population as of Census 2011), we find that Goa records a ratio of 0.0000847 (61 instances/719405 women), whereas Madhya Pradesh records 0.0001394279 (4882 instances/35,014,503 women), a percentage difference of approximately 64.6%, implying that rapes in fact tend to occur more in Madhya Pradesh than in Goa. Hence, we find again that it is not owing to the state’s small population that there are lesser reports of rape. It is also worthy of mention that both states fare more or less equally on the Sex ratio figure: with only a difference of 42 women per 1000 men. To summarize our findings so far:

a. It cannot be said that the reason for lack of incidences of rape in Goa is due to lack of reporting, since Goa fares among the highest in literacy rates in India.

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396Id. at 133.
398Id. at 138.
399Id.
b. Nor can it be said that the reason for lesser incidences is because of the smaller population,

c. Nor can it be said that the discrepancy is owing to sex ratio, since the difference is almost insignificant.

Here arises the question: What could be that factor present in Goa which has resulted in lesser incidences of rape in the State, which has been absent from Madhya Pradesh? It may be posited that the answer could be that, owing to Goa being a tourist destination, and considering the situation of women safety in India, the Government has stationed more police troops in the State. Further, such a statement is empirically verifiable considering that the land area of Goa is 3702 sq.km., and since as of 2011 there were 4196 total civil police personnel, giving a police deployment density of 1.13. However, Madhya Pradesh with an area of 308252 sq.km., and a total civil police personnel count of 53658, thereby implying that the state has only 0.17 police personnel per sq.km. Therefore, it goes without saying that a typical resident in Goa is exposed to police personnel more than 500% of the time they may be exposed to one in Madhya Pradesh.

Further, considering that Goa has no SLL or local amendments to the IPC in this regard, it is evident that without any increase in the severity of punishment, deterrence can be achieved by providing a reasonable fear in the minds of potential perpetrators, that the possibility of them getting apprehended for the commission of a crime is extremely likely, and such a finding would be in conformity with most existing research on the subject. Further, in attempting to conclusively answer questions about discrepancies in population, it is submitted that there need be no matching of police power with the population of the State itself, since, on comparison with the police deployment data for 2011 and the census of 2011, we find that Goa had a females/police score of 171.45, whereas Madhya Pradesh performs several times better with a score of 652.54. It is also submitted that the answer also depends on factors that are not altogether extraneous to the prevailing attitudes of the residents of Goa, and therefore, it would not be absurd to hypothesize that since Goa is a tourist destination, the reason for lack of crime is due to the government floating more notices about public safety with posters also stating the punishment if caught, leading to firstly, increased safety consciousness for tourists, and secondly increased fear of being actually apprehended for a crime.

If the above hypothesis is proved to be true, the implications are that, given a region with the same socioeconomic status as India, deterrence does not, relatively speaking, require a lot of man power, or increased punishment (Goa does not have any SLL in this regard, nor are there any special amendments made by Goa to the IPC, but rather requires a simple exercise of making known the law to the masses.

In this connection, existing research suggests that humans may not always be logical actors, and therefore do not entirely weigh the consequences of the acts against the benefits, and a prime example is alcoholism. According to available

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401 *Id.*
Government data\textsuperscript{402}, there were no alcohol related accidents in Goa in 2015, whereas Madhya Pradesh saw 2357 alcohol related road-accidents that either resulted in injuries or death, which implies heavy alcohol overconsumption and thereby strong correlation with available crime data, suggesting yet another reason to rethink deterrence from the point of view of increasing punishment. Moreover, research suggests that recidivism is either unaffected or even increased owing to increased severity in punishment. However, the NCRB does not appear to have any disaggregate data on recidivism with regard to rapes simpliciter.\textsuperscript{403}

By seeking to increase punishment to sentences such as 20 years or life imprisonment, the object sought to be achieved by the Ordinance is incapacitation. Incapacitation is the means by which a potentially dangerous member of society is isolated so as to not allow the member to cause further damage to society. When a statute seeks to increase incapacitation, it follows as a matter of fact that the rate of imprisonment increases as well. In light of a division bench of Justices Madhan B Lokur and Deepak Gupta expressing their concerns over the inhuman conditions in prison,\textsuperscript{404} it is questionable if India can afford to generate further prison population. Moreover, it would be a higher ideal to seek effective deterrence, thereby not generating surplus prison population.

It is further interesting to note that while no relationships can be drawn that can be described as directly proportional, Uttar Pradesh, which has a startling amount of rapes against women has the highest amount of custodial rape as well. And so it is that certain States such as Madhya Pradesh and Maharashtra display high incidences of voyeurism, stalking, and insulting the modesty of women.\textsuperscript{405} It is also startling to note that there is virtually no incidence of child rapes in the state of Tamil Nadu, whereas Maharashtra fares the highest in terms of rape of a child under 6 years of age.\textsuperscript{406} It is submitted that for custodial rape to take place, the culture of rape must be rooted deep in the minds of society, with little apprehension of its consequences. In this regard, it can only be said that the Ordinance worsened the situation by making harder punishment more easily granted. Existing research consistently provides that deterrence as an objective is met only if the punishment contemplated is a rarity, and not the norm.\textsuperscript{407}

With regard to the disposal of cases, it is worthy of mention that over 249 cases of rape were disposed of as a “mistake of fact”, with Maharashtra disposing over 7.5\% of total cases for investigation as a mistake of fact (Which included cases reported during the year and cases which had been pending

\textsuperscript{402}Ministry of Electronics & Information Technology, National Informatics Center.\textit{State/UT wise Number of Accidents caused due to Intake of Alcohol/Drugs by drivers during 2006-15.}

\textsuperscript{403}Ministry of Home Affairs, National Crime Records Bureau 138, Indian Penal Code, \textit{IPC Crimes Against Women - 2016 (Continued).}

\textsuperscript{404}Re, Inhuman Conditions in 1382 Prisons, Writ Petition (Civil) No. 406 of 2013 (S.C.) (Unreported).

\textsuperscript{405}Ministry of Home Affairs, National Crime Records Bureau 141, Indian Penal Code, \textit{IPC Crimes Against Women - 2016 (Concluded).}

\textsuperscript{406}Ministry of Home Affairs, National Crime Records Bureau 141, Indian Penal Code, \textit{Women & Girls Victims of Rape under Different Age-Groups - 2016}

\textsuperscript{407} supra note 5.
from previous years).\textsuperscript{408} It goes without saying that such a position in law implies a lack of apprehension for facing punishment for the act of rape. Therefore, it is important to study and deprecate where necessary, the defense of mistake of fact. To do so, the standard of consent endorsed by the IPC must be improved to conform to that of the United States – affirmative and verbal consent,\textsuperscript{409} as opposed to the IPC contemplating non-verbal expression of consent as well.\textsuperscript{410} Further, as a result,a remark of an imputation of character as was unfortunately made in the case of Vikas Garg and Ors. v. State of Haryana\textsuperscript{411} may be avoided. The IPC also lays down a rider in this regard, which further complicates the issue: When a woman does not resist, such an act per se does not amount to giving consent. In light of the difficulties that arise in finding out if consent has been given at all, and secondly considering that amendments to the Juvenile Justice Act\textsuperscript{412} enabled minors to be tried as adults, it is submitted that increasing the minimum mandatory punishment has not received the due and cautious consideration that it should have.

Therefore, having considered two states on various parameters, it is concluded that the objective of deterrence is met only where certainty of punishment exists, and not merely severity of punishment.

Further, the statement of objects and reasons also mentions that the Ordinance was promulgated in light of increasing rapes against women (sic) under the age of 16 years and 12 years. There are two points of consideration with the aforementioned proposition – Whether or not child rapes have actually increased, and secondly, whether the differentia is sound. Insofar as the first point is concerned, suffice it to say that child rapes have actually increased, as is evident upon a comparison of the reports released by the NCRB firstly in 2013\textsuperscript{413}, and secondly in 2016\textsuperscript{414}. Upon aggregating the incest and non-incest rape data for the ages 0-18 from the 2013 report, we arrive at a total reported rape count of 13,304 whereas the figure stands at 16,863 for 2016, giving an increase of 26.7%. However, as to the second point, considering that the Amendment of 2013 increased the age of consent from 16 to 18, and the POCSO Act of 2012 also defines a “child” as any person below the age of 18 years,\textsuperscript{415} it is submitted that the basis upon which only gang-rapes of women (sic) below the age of 16 years is punishable by an enhanced sentence, is not based on any sound basis. Such a differentiation forces the judiciary to treat the same horrendous crime differently on the basis of the age of the victim.

\textsuperscript{408} Ministry of Home Affairs, National Crime Records Bureau 148, Indian Penal Code, Police Disposal of Crime Against Women Cases (Crime Head-wise) - 2016.

\textsuperscript{409} California Senate Bill 967.

\textsuperscript{410} Section 375(2), The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

\textsuperscript{411} (4) R.C.R. (Criminal) 924 (India).

\textsuperscript{412} Section 15, Juvenile Justice (Care And Protection Of Children) Act, 2015, No. 02, Acts of Parliament, 2016 (India).

\textsuperscript{413} Ministry of Home Affairs, National Crime Records Bureau 393-395, Indian Penal Code, Age-Group-Wise Victims of Incest and Other Rape Cases During 2013(2013).

\textsuperscript{414} supra, note 22.

Moreover, the ordinance is adding up to the pile of gender-bias laws in the country. The word “man” used for the offences under Section 354C of IPC (Voyeurism), Section 354D of IPC (Stalking), Section 354A of IPC (Sexual Harassment) and Section 375 of IPC (Rape) indicates the lack of equality in laws owing to the long prevailing presumption of innocence of women in such cases. Without prejudice to the foregoing proposition of men being treated as offenders, the stance of law as it stands today is such that it does not give due appreciation to the possibility that men may be victimized too.

All the changes brought in by the ordinance are in respect to the female victims and no provision for male rapes or rapes of homosexuals and bisexuals can be identified. Another major issue is the unreported crimes against sexual abuse of these genders, which is again a consequence of lack of recognition of these genders as victims. Despite laws relating to abuse of men and third-genders being recognised widely, one of the major changes being the Section 377 Judgement416, the Ordinance must evolve to give equal emphasis on these genders.

Regard must be had to the definition of “child” in the POCSO Act again – a “child” is defined as any person below the age of eighteen.417 The use of “any person” denotes not only girl child but all other genders. The question that arises here is: When the POCSO Act deals with the age of the victim irrespective of its gender, then the focus of the ordinance on only the girl child is discriminatory or not?

Further, upon a cursory look at the conviction rates of the nation, we find that the conviction rate dropped from 27% in 2013418 to 25% in 2016419, as opposed to 67.4% in the year 2000420. On a relevant note, with regard to charges of domestic violence, the Supreme Court implied in the case of Rajesh Sharma and Ors. vs. State of U.P. and Ors421, that where the conviction rates were staggeringly low, (in the instant case the rates were about 15%), there is an imputation that the majority of the complaints made are frivolous in nature. Here arises the question of if it would be justifiable to add provisions that provide protection to men against the filing of false complaints. At the outset, it even seems necessary, considering the heavily enhanced sentences of punishment, including a minimum mandatory punishment of 10 years for the rape of a female over the age of 12 years, and 20 years for a female below the age of 12. This is an intriguing question considering the difficulty of providing evidence for rape, and the dangerous threshold at which one would distinguish “lacking evidence” from “frivolous” or “actuated by malice”. On this ground alone, it can be said that the very purpose of the

419 Ministry of Home Affairs, National Crime Records Bureau 155, Indian Penal Code, Court Disposal of Crime Against Women Cases (State/UT-wise) – 2016 (Concluded)
legislation would be defeated if safeguards were enacted in this regard, as was observed by the Parliament\textsuperscript{422} with regard to Section 22 of the POCSO Act, where it was succinctly noted that fear of reprisal may prevent a person from coming forward to file complaints, perpetuating the cycle of violence. Therefore, the Section still came into force, albeit in a slightly modified form – The bone of contention with regard to Clause (2) and Clause (3) of the Bill, providing for sanctions against minors who made false complaints, were deleted. It is submitted if the same basis is to be followed, there can be no provisions providing for punishment for false accusations of rapes.

Further, the question of implications for men in light of toughened provisions, should an abuse of process be made cannot be ignored. In 2016\textsuperscript{423}, 3342 cases of rape and attempt to rape were disposed of as “false”, out of the total 62,603 cases reported, bringing it to a startling 5.3% of the total cases of rapes reported against women. It must be held in mind that these include only those cases that were identified as false. This submission becomes pertinent, considering the fact that an amendment to the Cr.P.C. has made bail and anticipatory bail provisions more stringent for men as well. In fact, it is presently a startling position that, an innocent man who is charged is regardless punished for 15 days because of the requirement of a notice to be given.

Moving on to the emergence of the ordinance, the impetus can be accredited to the infamous rapes of Kathua and Unnao along with the increasing number of rapes of minors. This raises an important aspect of law making, i.e., the influence of media over legislation. Despite the ongoing influence of media in democracies, there’s not much written about its influence in the field of law. In addition to playing the role of watchdogs, media provide people with news covering all events, and thus acts as a major platform to influence public opinion, which further affects the action of the government.

When media provides scrutiny of the law, the workings of the legislature, executive and the judiciary, it makes sure that as a result, these organs work appropriately in their field. Therefore, it can be submitted that the media has compelled the government to take public opinion into consideration before coming to any conclusion. The horrifying Delhi gang rape case\textsuperscript{424} highlighted the power of media in changing attitudes and the media succeeded in creating a huge impact in the minds of the people.\textsuperscript{425} It seemed that people were unwilling to accept such a gruesome act to be “normal”. The media has the power to create pressure on the government to act in a certain way, which has been a cause for the formulation of many legislations. The Criminal Law (Amendment) Act, 2018 is an example of such media influence. However, in this case, it is difficult to say if the outcome was an applaudable one or not.


\textsuperscript{423} supra, note 36.


\textsuperscript{425} Rishikesh Kumar Gautam &SonaleeNargunde, The Delhi Gang Rape: The role of Media in Justice, Pennsylvania State University (2012).
VI. Suggestions and Conclusion: Should the Ordinance be Reversed?

It has been suggested up to this point that the increase in punishment was not a well calculated move. This raises the subsidiary question of if the punishment must be lessened again. The argument of this paper has always been that the object of increasing punishment has not been met, and not that the increase in punishment itself is bad. If heinous offences such as these do not receive adequate punishment, very simply put, the people of the nation will lose faith in the criminal justice system and the judiciary, as was observed by the Supreme Court as well in the case of Mahesh v. State of M. P.\(^{426}\) Therefore as was observed in the comparison of Goa and Madhya Pradesh, to adequately meet the object of the Ordinance, the Government must invest in bringing to the knowledge of the people, the penalties that they shall attract as a consequence to the act. In this connection, the Hong Kong example of publicly displaying the faces of litter bugs from a recreation of their DNA found in the litter must be cited – Evidently, the purpose is effectively met: There was a real apprehension created in the minds of the people that there was a very likely probability that they would be publicly shamed if they littered. With regard to Gender bias suffice it to say that it is time that an amendment was made to make the Criminal Law of the country, gender-neutral.

In the long run, policy making cannot serve its end of alleviating crime if the conditions that trigger criminal behavior are not extensively studied. However, there is a dearth of literature in this regard and therefore it is questionable if any further ordinance or other legislation will effectively serve their purposes without having understood the root cause of these problems. In this regard the attitudes of rapists must be studied and a suitable course of action must be adopted.

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\(^{426}\)(1987) 3 S.C.C. 80 (India).
CYBER ARBITRATION: THE ROAD AHEAD AND CHALLENGES

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“At all events, arbitration is more rational, just, and humane than the resort to sword”
-Richard Cobden

The advent and rapid advancement in information technology has contributed to a transformation in the conventional arbitration practices. This has resulted in an escalation of creation and conclusion of arbitration agreements over the internet and thus has made popular, the emerging concept of cyber arbitration. Cyber arbitration is a mechanism that employs technology to facilitate disputes between the parties to a dispute. It is also known as virtual or online arbitration. However, cyber arbitration is still in the budding stage in India and not many segments of the population are aware of the undeniable advantages and benefits of online arbitration to the participating parties in the dispute. Therefore the focus of this paper will be:

1. The advent of cyber arbitration in India
2. The analysis of the Indian legal framework and comparison at a global level
3. The arbitral proceedings in the online system of arbitration
4. Challenges to Cyber Arbitration
5. Judicial Precedents
6. Conclusion
7. Suggestions

This paper endeavours an attempt to analyse the progress and challenges relating to cyber arbitration in the Indian scenario.

Keywords: Cyber Arbitration, Indian Arbitration, ODR, Judicial Analysis.

1. THE ADVENT OF CYBER ARBITRATION IN INDIA

Technological development is significantly overhauling the traditional methods of dispute settlement and electronic media to sort out disputes are rising and will become the future of dispute settlement-if it is channelized in a proper manner. Technological advancements have enabled us to tackle many disputes in the past and cyberspace with its endless possibilities has brought in a new dimension to the regime of international commercial arbitration. 427

1.1. Definition:
Online Dispute Resolution (ODR) “refers to a wide class of alternate dispute resolution processes that take advantage of the availability and increasing development of internet technology.” 428 Farah defined ‘Online Dispute Resolution’ to mean utilizing information technology to carry out alternative dispute resolution 429 Zondag and Lodder defined online dispute resolution as using internet for alternative dispute

resolution, constructing computer assisted dispute resolution system by developing generic language to analyse information exchange in conflict discourse.\textsuperscript{430}

Schiavetta explained that the online dispute resolution comprises of a process to resolve dispute exclusively online and also other dispute resolution process that use internet.\textsuperscript{431} According to Katsh and Rifkin, the three important factors, namely convenience, trust and expertise forms the essence of ODR.

1.2. Background & Characteristics:
According to the E Bay Census Guide, 2009, India has experienced a broad shift in e-commerce activity and online shopping has gained wide acceptance. The rising complexities in nature of disputes at a far greater pace than ever before, due to their cross-border and cross-culture character is a result of inter alia, the increasing use of internet worldwide. Hence, the global arena is witnessing a departure from traditional methods of dispute resolution to Online Dispute Resolution (hereinafter “ODR”) in its various flavors. It is also a positive judicial reform.

A number of arbitration institutes like WIPO (World Intellectual Property Organization), ICC, American Arbitration Institute already provide a platform for arbitration proceedings to be carried out online. Others exploring the potential for the same are for e.g. Virtual Court, Online Resolution, e-courts etc. In India, National Internet Exchange of India (NIXI), Perry4law and PTLB provide world reputed services in ADR and ODR (especially in domain name resolution).\textsuperscript{432}

With the advent of information technology, momentous changes can be seen in the conventional arbitral procedures. In this phase of significant transformation, there is an escalation in the number of arbitration agreements concluded over the internet and the procedures conducted with the help of VoIP (Voice over Internet Protocol) or video-conferencing. The cost-effectiveness and time efficiency of online or cyber arbitration is undeniable, which is why international arbitrators want to conduct proceedings and issue arbitral awards, in an electronic form. To serve this purpose many arbitration institutions are already providing the requisite platform to perform such proceedings.

2. THE ANALYSIS OF THE INDIAN LEGAL FRAMEWORK AND COMPARISON AT A GLOBAL LEVEL
The majority of legal studies on online arbitration agree that, neither law, nor arbitral principles, prevent arbitration from taking place online. Arbitration being a contractual agreement should be carried out within a regulatory framework to avoid challenges for the weaker parties. This, therefore, necessitates a legal examination of multiple layers of regulations including

\textsuperscript{430} International Review of Law, Computer and Technology, 21(2), 191-205.
\textsuperscript{431} Article 6 of European Convention of Human Rights pursuant to case law of European Court of Human Rights, Journal of Information Law and Technology, 2004 (1) JILT.
international conventions, bilateral treaties, “soft” or model laws and national arbitration law.

The basic idea is to facilitate dispute settlement rather than executing and enforcing an overarching international legal order. One major reason for this character of international adjudication is the lack of authority granted to international courts reflected in the most meagre and rare submission of states to jurisdiction according to Article 36(2) of the ICJ Statute. No enforcement of judgments against the will of the judgment debtor may be expected. The other major reason is that international law’s incoherent structure is more apt and ready to settle disputes than to enforce coherent doctrines rarely endorsed by the states as the ultimate standard of their international behaviour.

ADR is now a growing and accepted tool of reform in dispute management in American and European commercial communities. ADR can be considered as a co-operative problem-solving system. ADR is an alternative to adjudication, for example, court annexed arbitration or court annexed conciliation, but it may be complementary to the court procedures. There was a time when civil litigation was considered to be time consuming and costly method of dispensing justice and commercial people preferred to resort to arbitration. Now ADR has become popular and desirable in USA, UK, Canada, Hong Kong and Australia as it is effective, cost efficient and speedy form of dispute resolution. It has been observed that ADR is able to produce better outcomes than the traditional courts because firstly different kinds of disputes may require different kind of approaches which may perhaps be not available in the courts. Second factor for resorting ADR techniques to resolve the disputes is direct involvement and intensive participation by the parties in the negotiation to arrive at a settlement. Third advantage of accepting ADR is the intervention of a skilled neutral Adviser which is always very helpful in arriving at a settlement.

The increasing growth of global trade and the delay in disposal of cases in courts under the normal system in several countries made it imperative to have the perception of an Alternative Dispute Resolution System (ADRS), more particularly, in the matter of commercial disputes. When the entire world was moving in favour of a speedy resolution of commercial disputes, the United Nations Commission on International Trade Law way back in 1985 adopted the UNCITRAL Model Law of International Commercial Arbitration and since then a number of countries has given recognition to that model in their respective Legislative systems. An important feature of the said model is that it has harmonized the concept of arbitration and conciliation in order to designate it for universal application.

2.1. Treaties And Conventions:
- Geneva Protocol on Arbitration Clauses, 1923
- Geneva Convention on the Execution of Foreign Arbitral Awards, 1927
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 1958
- Recommendation regarding Interpretation of Article II (2) and Article VII (1) of the New York Convention, 2006
- Agreement relating on Application of the European Convention on International
Commercial Arbitration (Paris Agreement), 1962
• Convention on the Settlement of Investment Disputes Between States And Nationals of Other States (Washington or ICSID Convention), 1965
• Convention Providing a Uniform Law on Arbitration (Strasbourg Convention), 1966
• Convention on the Settlement by Arbitration of Civil Law Disputes resulting from Relations of Economic And Scientific Technical Cooperation (Moscow Convention), 1972
• Inter-American Convention on International Commercial Arbitration (Panama Convention), 1975
• UNCITRAL Arbitration Rules, 1976.

2.2. Techno Legal Online Dispute Resolution (ODR) Centre Of India
Therefore, the Indian Legal Framework has drawn various inspiration from the already existing global level conventions and therefore recently come up with techno legal Online Dispute Resolution (ODR) Centre Of India (TLCEODRI) to promote and use Online Dispute Resolution (ODR) in India for various dispute resolution purposes. TLCEODRI has also drafted an “ODR Clause” that they can use in their agreements, contracts, etc. We have also launched a dedicated blog for ODR training along with an ODR discussion forum where techno legal aspects would be discussed for the first time in ODR’s history. ODR experts and specialists wishing to enroll with TLCEODRI can also see the empanelment procedure in this regard. Above all, TLCEODRI has launched the first ever techno legal ODR portal of India that is covering vast dispute resolution fields. The portal is known as Online Disputes Resolution & Cyber Arbitration Portal of TLCEODRI where ODR is used to resolve dispute of national and international stakeholders.

3. THE ARBITRAL PROCEEDINGS IN ONLINE SYSTEM OF ARBITRATION
Online arbitration is a branch of dispute resolution, which uses technology to facilitate the resolution of disputes between the parties. Online arbitration is also termed as cyber-arbitration, cybitration, cyberspace arbitration, virtual arbitration, electronic arbitration or arbitration online techniques. The following are its components of importance:
(i) Arbitration Agreement
(ii) Arbitration Proceedings
(iii) Arbitration Award.

(ii) Arbitration Agreement:
The UNCITRAL Model Law (“MAL”), the New York Convention on Recognition and Enforcement of arbitral Award (“New York Convention”), the European Convention and the Turkish International Arbitration Law all require the agreement to be in writing, however, they do not have a restriction as to the form of arbitration agreement. A step further has been taken under Article 4 of the Turkish International Arbitration Law by validating the arbitration agreement executed by electronic means. 433


www.supremoamicus.org
222
In India, Arbitration and Conciliation Act, 1996 which is drafted on the lines of the “MAL”, does not exclude technological developments. It thus becomes important that an online arbitration clause must pass the test of Section 7 of the Act to be valid. Under Section 7, an agreement shall be in writing if it is contained in exchange of letters, telex, telegrams or “other means of telecommunication” which should signify an active assent by both parties. It can be argued convincingly that an exchange of e-mail can be equated to an exchange of telegram. Despite the existence of certain important technical distinctions between telegrams and e-mails, it is not impossible to replicate the critical features of an exchange of telegrams through an appropriate use of e-mail. It was held by the Hon’ble Supreme Court of India that electronic communication provides a required record of the agreement. This uncertainty can now be securely departed with, after the enactment of the Information Technology Act. Section 4 of the Information Technology Act, 2000 renders legal recognition of electronic transfer of communication which is admissible as evidence. Using electronic signatures in an arbitration agreement can further help protect the parties. The Information Technology Act, 2000, under Section 5, identifies electronic records and digital signatures. 434

To conclude, under the existing legal framework, an arbitration agreement accomplished by electronic communication is admissible and can be fully effective if it is meticulously drafted within the structure of the necessary legal guidelines.

(ii)Arbitral Proceeding:
Traditionally, arbitration relied on meetings of arbitrators and parties appearing in person or through duly authorized representatives. Now, that the Internet encourages remote dispute resolution, and physical meetings are more and more often eliminated, or more accurate, replaced by diverse electronic exchanges. The parties to an arbitral proceeding are empowered to determine the rules of procedure. They also have the right to decide on the seat of arbitration and the date of commencement of the proceedings. On the basis of that fundamental principle of arbitration law, it is possible to “adapt the procedure to the electronic arena”. Even so, such an online proceeding has to be according to the general principles of arbitral law i.e. the parties have to be treated equally and they should be given full opportunity to present their case. For example if one of the parties lacks the technical know-how of computers and the internet, it would be wrong to conduct an online arbitration.

(iii)Arbitral Award:

(a) rendered or made available in an electronic form; and
(b) accessible so as to be usable for a subsequent reference.
The issues with regard to awards if an award issued online after conducting an online arbitration can be enforced by national courts within the existing legislative framework was a discussion in the NYC, which implied that it merely requires a party seeking enforcement to furnish the duly authenticated original award or a duly certified copy thereof. The question is whether requirement for ‘an original’ can be satisfied by an electronic file as it would be difficult to define the original of such an electronic file and also considering the fact that it is easy to replicate it. The answer to this question can be found in Article 8 of the UNCITRAL Model Law on Electronic Commerce, which explicitly states that a requirement to present information in its original form can be met by an electronic data message.

The Arbitration and Conciliation Act, 1996 requires an award to be in writing and to be signed by the arbitral tribunal. A combined reading of section 3, 5 and 15 of the Information Technology Act, 2000 is sufficient to suggest that ‘digital signatures’ can provide for both authenticity and integrity, they can serve the purpose of a handwritten signature.

Section 89 of the Code of Civil Procedure (the Code), in its original form related to arbitration proceedings which was annulled with the enactment of the Arbitration Act, 1940. The new Section 89 and the related rules have now been introduced in the CPC (Amendment) Act, 1999. The said section illustrates that wherever, in the opinion of the court, there exists an element of settlement between the parties, the court shall refer the same for various forms of ADR. 435

A number of arbitration institutions have already opened the possibility to perform arbitral proceedings online. They have made an effort to either acclimatize their existing arbitration rules to the online environment, or to set up new sets of rules for online arbitration. The legal framework for online arbitration requires multiple layers of regulation at different level. The international commercial arbitration not only encompasses the institutional rules of arbitration and private contractual agreements but also international conventions, bilateral treaties, model laws (such as UNCITRAL model laws) and national arbitration laws. All these aspects need to be taken care of even in online arbitration.

4. CHALLENGES TO CYBER ARBITRATION

Every system has its own advantages and disadvantages. Though cyber arbitration has facilitated smooth and prompt resolution of disputes between parties across nations, it has its own cons. Both the parties sitting together with a neutral person acting as their arbitrator sometimes proves beneficial as the parties will be able to understand each other in a much clearer manner which may not be possible in cyberspace, even though both the parties are sitting opposite each other. Another disadvantage is accessibility of online arbitration when in many countries;

435 Grid Corpn. of Orissa Ltd. V. AES Corpn 2006 134 CompCas 305 Orissa
use of Internet is banned or is highly restricted.  
One more glaring disadvantage is that even though online arbitration can reduce the overall cost of the process, but the up-front and continuing fees or the initiation fees is very high. The cost to start an online proceeding can be high and sometimes when a lot of disturbance occurs in cyberspace, then highly intricate and complex machines have to be purchased which in no way can reduce the cost of the arbitration.  

5. JUDICIAL PRECEDENTS
In the leading case of State of Maharashtra v. Dr.Praful B. Desai438, Hon’ble Supreme Court held that video-conferencing could be resorted to for the purpose of taking evidence of a witness.
The arbitration agreement entered into between the parties by exchange of emails through no formal agreement in writing signed by the parties is valid and enforceable as the validity of such agreements is upheld by Hon’ble Supreme Court of India in the matter of “Shakti Bhog Foods Ltd. Vs. Kola Shipping Ltd.”439 and “Trimex International FZE Ltd. Vs. Vedanta Aluminum Ltd.”
In Grid Corporation of Orissa Ltd. vs. AES Corporation440, the Supreme Court held- “when an effective consultation can be achieved by resort to electronic media and remote conferencing, it is not necessary that the two persons required to act in consultation with each other must necessarily sit together at one place unless it is the requirement of law or of the ruling contract between the parties”.

6. CONCLUSION
The combined effect of IT Act 2000 and Arbitration and Conciliation Act, 1996 gives legal recognition to the Cyber/Online Arbitration in India. The emergence of cyber arbitration is no doubt more expeditious and useful that traditional arbitration practice. However, as pointed herein above, it too faces some techno-legal issues. In order to make cyber arbitration a primary mode of amicable settlement of disputes, these issues needs to be addressed by the state authorities, business entities and arbitral institutions.

7. SUGGESTIONS
➢ Promotion and development of institutional cyber arbitration.
➢ Developing the curriculum and training involving techno-legal aspects cyber arbitration.
➢ Cyber threats and cyber security awareness.
➢ Promoting faster, affordable and interruption free web services.
➢ Enacting a comprehensive national as well as international data protection statute.

440 AIR 2002 SC 3435
Chapter XVI, section 377 of Indian penal code 1860 is very much in news after a landmark judgment was passed by the supreme court of India overruling Suresh koushal (2014). The supreme court of India decriminalized homosexuality which was before a crime in India, with this judgment a ray of hope came to LGBT community which is primarily based for the homosexual people. Many NGO’s like NARS Voice against section 377 and many others came up supporting the decision of supreme court. This judgment gave a wider aspect over individual autonomy as well as decisional privacy to choose the life partner in a way they wanted to, nevertheless before this period the essence of homosexuality was seen. Many writes like Devdutt Pattnaik have mentioned and compared the modern times with mythology. In his book Shikhandi has illustrated how homosexuality prevailed in earlier times as well. The apex court mentioned that section 377 was used as a weapon to harass members of LGBT community.

The CJI said that “Courts must protect the dignity of an individual as the right to live with dignity is recognized as a fundamental right”. Respecting the rights and individuality of others in the supreme humanity, criminalizing gay sex is irrational and indefensible now in the eyes of law as well. The apex court has stated that “sexual orientation is a biological phenomenon and any discrimination with this regard is violative of fundamental rights, so far as the consensual unnatural sexual act in private is concerned it is neither harmful nor contagious to the society” this statement however made a huge difference in the lookout society had over homosexuality. Denial to self expression is akin to inviting death which was lived by the homosexual people of India. The state has no business to control the lives of the people of LGBT community members added Justice Chandrachud. The court here by said that unnatural sex with animals and children remain in force. Section 377 of IPC was formulated 157 years ago and criminalized certain sexual acts by dubbing them unreasonable offences’. These acts were punished by a term up to 10 years, the law punished “carnal intercourse against the order of nature with any man, woman or animal” and thus had bigger implications for same sex relationships. Gay sex is considered taboo by many in socially conservative India, as well as in neighbouring Bangladesh, Sri Lanka and Pakistan. In 2009, Delhi high court had declared Section 377 unconstitutional but that decision was overturned in a ruling by three SC justices in 2013 on the grounds that amending or repealing the law should be left to Parliament, but lawmakers failed to take action and in July the government told the apex court to give a ruling in this case. This upliftment of ban has made ways and has affirmed their rights to adopt, marry and have a family of their own. It may also prevent social ostracism with the court declaring affirmatively that it was not a mental disorder but something inate to a human being. No one can be discriminated against only on the grounds of their sexual orientation and called for constitutional
 protección to even sexual minorities. Several leading lights of the small but significant LGBT community had challenged the very existing of the law one the statute book .CJI Dipak mishra said “Section 377 is irrational, arbitrary and incomprehensible as it etters the right to equality for LGBT community, LGBT community possesses same equality as other citizens “. Society as a whole cannot decide the rights of a person based on the sexual orientation one has , this right is wholly a personal right . After the judgment was passes the judges of the apex court stated that society as a whole owes an apology to the members of the LGBT community for all the discrimination . The supreme of country ruled in August 2017 that every individual has a fundamental right to privacy, which is a part of right to life and sex is private . The supreme court mentioned that however less is the number of people of LGBT doesn’t mean there rights can be minimized . While the top court acknowledged that sex as per the order of nature was seen as intercourse between a man and a woman for the purpose of procreation, the fact that it had already recognized a third gender needs to be kept in mind . The court mentioned that moment a provision violates the fundamental right of a citizen, this court has power to strike it down irrespective of the majoritarian government ‘s power to repel, amend or enact law . Two years ago, a petition was filed by dancer N S Johar, journalist Sunil mehra, chef Ritu Dalmia, hotelier Aman Nath and business executive Ayesha Kapur who said that Section 377 violated their right to privacy and personal liberty. The issue of Section 377 was first raised by an NGO ,Naaz Foundation, which in 2001 approached the Delhi High court that then decriminalized sex between consenting adults of the same gender by holding the penal provision “illegal”. This judgment marked the end of an era as after sixty eight years after the founding fathers of Republic India encoded the right to freedom of life and liberty, the Supreme court upheld the right of every human being to be free, regardless of sexual orientation or identity. India now joins a proud league of nations that recognizes true freedom of gender identity and sexual expression. This ruling of the supreme court will not only impact India, but will also undoubtedly have an immense transnational value. The effect of this judgment is especially likely to be felt in other common law countries, and it will, hopefully, provide an impetus to those countries that still have equivalent provisions in their statute books, to critically consider the lawfulness and legality of provisions that similarly criminalise consensual sexual relations. The present decision, as much as it was expected, leads one to believe that the Indian judiciary is indeed the last bastion of fundamental rights of the country. The legislatures and the executive each had their chances to undo what our colonizers had left behind, but chose to do nothing. The judiciary, after swinging this way and that eventually found reason, and brought order to chaos. No kind of prejudice and discrimination can continue in perpetuity. Section 377 was introduced in Indian criminal law in furtherance of western notions of morality based on Abrahamic ideologies. At the time of its introduction, limited consideration was given to a contradictory morality that existed in sub continent, which recognized homosexuality
and did not criminalize it. Even as the UK and other jurisdictions abandoned it for a more reasoned position of homosexuality being nothing but a variation in human nature, Indian governments and other public institutions, over the decades, have tried to perpetuate antiquarian ideas. The first reaction is one of relief, and joy, this decision is only the beginning of the long walk to ultimate freedom for all. International law strictly prohibits any discrimination on the grounds of sexual orientation or gender identity. The office of the UN High Commissioner of the Human rights oblige states to protect individuals from homophobic violence, prevent such violence, decriminalize homosexuality, and respect fundamental freedoms of all persons. The removal of section 377, which decriminalizes homosexuality, is but one step towards meeting these obligations. Target populations have been psychologically scarred, subjected to violence and discrimination, not just at the hands of police and enforcement authorities, but by the society at large. Going forward, this cannot mean mere passive non-interference, but also active protection of vulnerable population. This may also mean that some form of affirmative action is required to make sure that frictionless assimilation actually takes place. Beyond decriminalizing homosexuality, we need to think about how homosexuals and persons who identify themselves as being outside the conventional binary, can be integrated into society without using their gender or sexuality as the foci of such integration. So, for example, we need to start thinking of how social institutions like marriage or parenting can be re-imagined; we need to redesign pedagogical tools to embrace these differences; we need to redevelop institutions like schools and workplaces to make them all inclusive. This is only the dawn of new era. True and complete freedom is yet to be achieved. We can say that we have won freedom, fully only when everyone, all over India, genuinely and whole-heartedly, believes that no person is “different”. The idea that everyone is equal is sacrosanct, and at its heart, is really uncomplex: that everyone can love equally, freely and fearlessly. The day we can assure ourselves of this is the day we can say that we have truly won our freedom.

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CRIMINOLOGY: THE PILLAR OF CRIMINAL LAW

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“The deviant and the conformist...are creatures of the same culture, inventions of the same imagination.” - Kai Erikson.441

The theories of crime are deeply rooted within the edifice of the assumption that the increase in the crime rate is directly proportional to the social and economic advancement of the world. Historical criminology brings methods and concepts from history to the study of crime and criminal justice. This paper covers the different aspects of schools and frameworks of criminology and their perspectives on the existence of the branch of criminal law, theory, and research.

For thousands of years, mankind has developed and applied vague or specific thoughts about what behavior should be labeled as criminal, who the criminals are, and what the causes of crime may be. This paper highlights the roles and views of philosophers of different centuries regarding the understanding of a criminal, crime, and those who criticized the cruel and unjust criminal justice system.

This paper also examines a comparative analysis of global crime rates and trying to search for consensus between the famous criminology viewpoints. The paper also focuses on sociologists, psychologists, and physicians that introduced societal and individual causes of crime in a comprehensive way. Finally, the paper puts forth new developments in the field of criminology, the disciplines which triggered new thoughts on the causes of crime, including the white-collar crimes, female criminality, and, the evolutionary concept of victimology.

Introduction

A society is governed by a set of rules modified or uncodified. Where there are guidelines of a given society, its infraction is inescapable and there lies the need for concocting some ways that intend to check such propensities in the society that prompt infringement of its standards. In each civilization certain demonstrations are illegal. State forces certain punishments upon the miscreant with the protest of saving peace in the society and advancing great conduct towards one another and towards the network on the loose.

As per Terence Morris "Crime is the thing that society says is a crime"442 by setting up that a demonstration is an infringement of the criminal law. The idea of crime has dependably been reliant on general sentiment. Without law, there can be no crime by any means. The law mirrors the general assessment of time. More than some other part of the law, criminal law is the reflection of popular supposition. With the end goal to know the nature and the substance of crime, we should above all else

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441 Janice Knight, Orthodoxies in Massachusetts: rereading American Puritanism (1997).

442 TERENCE MORRIS, CRIME AND CRIMINAL JUSTICE SINCE 1945 17 (1989).
realize ‘what is law?’ on the grounds that the two inquiries, crime, and law are so firmly related with one another that it is exceptionally hard to comprehend one without knowing the other. Law is the total of guidelines set by men as politically prevalent or sovereign, to men as politically subject that is it is routed to the individuals from the society as a rule.

According to Blackstone “crime is an act committed or omitted in violation of a public law either forbidding or commanding it”443. As per Kenny “Crimes are wrongs whose sanction is punitive and is in no way remissible by any private person but is remissible by crown alone, if remissible at all” 444. Austin mentions that “A wrong which is pursued at the discretion of the injured party and his representative is a civil injury; a wrong which is pursued by the sovereign or his subordinates is a crime.”445

Criminology is the logical investigation of the nature, degree, causes, and control of criminal conduct in both the individual and in society. It is an interdisciplinary field in the conduct sciences, drawing particularly upon the exploration of sociologists (especially in the humanism of abnormality), analysts and specialists, social anthropologists and in addition on compositions in law. Regions of research in criminology incorporate the frequency, structures, causes and outcomes of crime. While a moderately new scholarly discipline, the art of criminology is ancient.

Historical Evolution

As human culture has advanced more than a large number of years, so has our comprehension of the reasons for crime and social orders' reactions to it. As is regularly the situation, the historical backdrop of current criminology discovers its underlying foundations in antiquated occasions. From the beginning of time, individuals have perpetrated crimes against each other.

The Beginning of the Laws

Laws that clearly characterized crimes and related disciplines were built up to both suppress crime and to put a conclusion to the blood quarrels that brought about the unfortunate casualties' vengeance. The Code of Hammurabi446 is one of the earliest, and possibly the best-known endeavors to establish a set discipline scale for crimes. The standards set out in the code are best depicted as the "law of retaliation."

- Intermingling of Religion and Culture

In western culture, a significant number of early thoughts regarding crime and discipline were protected in the Old Testament of the Bible. The idea is most

443 BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND (1765).
444 KENNY, OUTLINES OF CRIMINAL LAW 15-16 (2010).
447 JOHN LATHROP, GEORGE THACHER & JAMES WHITE BURDITT, A DISCOURSE ON THE LAW OF RETALIATION: DELIVERED IN THE NEW BRICK CHURCH, FEBRUARY 6, 1814 (1814).
effectively perceived as the articulation "eye for an eye." In early social orders crime, alongside most everything else was seen with regards to religion. Criminal acts afforded the divine beings or God. It was in this setting demonstrations of retribution were defended, as a way to conciliate the divine beings for the insult carried out against them by the crime.

- The connection of crime with early philosophy

Quite a bit of our advanced comprehension of the connection among crime and discipline can be followed to the compositions of the Greek logicians Plato and Aristotle, however, it would take over a thousand years for a significant number of their ideas to flourish. Plato was among the first to guess that crime was regularly the aftereffect of a poor instruction and that disciplines for crimes ought to be evaluated dependent on their level of blame, taking into consideration the likelihood of moderating conditions. Aristotle built up the possibility that reactions to crime should endeavor to avoid future acts, both by the criminal and by others who might be slanted to perpetuate different crimes. Most remarkably, that discipline for crime should fill in as an obstruction to other people.

- Evolution of Crime and Punishment in the Middle Ages

The presentation and spread of Christianity all through the west realized an arrival to a religious association among crime and punishment. With the decay of the Roman Empire, an absence of solid focal expert prompts a stage in reverse in demeanors toward crime.

Criminal acts started to be thought of as works and impacts of the fallen angel or Satan. As opposed to old occasions, where disciplines were frequently completed to assuage the divine beings, disciplines were currently done with regards to doing God's work. Harsh punishments were intended to cleanse the criminal of transgression and free them of the impact of the fallen angel.

- Establishments for the Modern View of Crime

The Roman Catholic scholar Thomas Aquinas communicated some ideas in his


treatise "Summa Theologica." It was trusted that God had built up a ‘Characteristic Law,’ and crimes were comprehended to disregard the regular law, which implied that somebody who perpetrated a crime had likewise carried out a demonstration which isolated themselves from God. It started to be comprehended that crimes hurt the unfortunate casualty as well as the criminal. Criminals, while suffering the punishment, were likewise to be felt sorry for, as they had put themselves outside of God's grace.

- Present day Criminology and the Secular Society

The lords and rulers of that time guaranteed their extremist specialist on the desire of God, professing to have been set in power by God and along these lines acting inside His will. Crimes against people, property, and state were altogether seen as crimes against God and as sins. Rulers professed to be both of head of state and head of a chapel.

As the thought of detachment of chapel and state started to flourish, thoughts regarding crime and discipline took a more mainstream and humanistic shape. Present-day criminologists try to take in the main drivers of crime and to decide how best to deliver it and to anticipate it. Early criminologists upheld a sound way to deal with managing crime, pushing against the maltreatment by administrative experts.

**Notable Theories surrounding Criminology**

452 THOMAS & REGINALD, THE "SUMMA THEOLOGICA" OF ST. THOMAS AQUINAS (1920).

**Classical Criminology Theory**

1. Cesare Beccaria

   - He upheld for a fixed size of crime and comparing discipline dependent on the seriousness of the crime. He also held that the punishment ought to be proportionately more prominent than the potential joy gain by breaking it.

   - A great thinker and jurist who believed people were essentially determined and motivated by independent self-centered goals, however, they would be judicious in their activities.

   - Beccaria trusted that the job of judges ought to be restricted to deciding blame or guiltlessness and that they should issue penalize dependent on the rules set out by the governing bodies.

   - He also recommended that the role of government was to follow up for the benefit and in the best interest of all the citizens.

2. Jeremy Bentham

   - He brought the concept of ‘Utilitarianism’ to light whereby, law ought to guarantee the greatest good for a greater number of individuals.

   - He also put forth the proposition that law ought to be founded on a social contract among government and

453 CESARE BECCARIA, GRAEME NEWMAN & PIETRO MARONGIU, ON CRIMES AND PUNISHMENTS (2016).

nationals, with each side tolerating certain outcomes if the contract were broken.

**Positivist Theory**

Positivism puts the spotlight on biological and mental components (instead of a lawful framework) to clarify criminal conduct.

**Sociological Theory**

- **Anomie Theory**
  As society moved from a country to an urban setting, the conventional qualities and bonds that controlled a person's conduct inside the gathering were debilitated; no longer controlled by societal standards in the good old ways and given the secrecy a person may get in a major city, certain people swung to crime.

- **Ecological Theory**
  Communities that experienced high rates of destitution and social breaking down is more likely to be forgiving or support criminal action than a more affluent neighborhood.

- **Strain theory**
  It states that a social structure inside a society may make individuals carry out crimes. In particular, the degree and kind of abnormality individuals take part in relying upon whether a society gives the way to accomplish social objectives.

- **Social Conflict Theory**
  It basically implied that crime is unavoidable in a capitalist society.

- **Consensus Theory**
  It talked about how there is an all-inclusive meaning of good and bad, a universal concept and criminal law mirrors this consensus.

- **Labeling theory**
  It is the fundamental thought that abnormality and congruity result less from what individuals do as from how others react to these activities. This theory focuses on the relativity of abnormality, the possibility that individuals may characterize a similar conduct in any number of ways.

- **Rational Choice theory**
  It states that individuals carry out crimes when it is judicious for them to do as such as indicated by investigations of expenses and benefits, and that crime can be lessened by limiting advantages and augmenting expenses to the eventual criminal.

- **Psychopathic Theory**
  Natural criminals do not feel disgrace or blame from their activities. They do not fear discipline and have little sensitivity for the general population they harm. These people are said to have a mental issue as psychopathy or identity issue.

- **Social disorganization theory**
  It states that crime will probably happen in regions where social organizations cannot straightforwardly control gatherings of people.

- **Social learning theory**
  It states that individuals embrace new practices through observational learning in their environments.

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455 STEPHEN JONES, CRIMINOLOGY (2013).
Subcultural theory
It states that conduct is impacted by components, for example, class, ethnicity, and family status. This present theory's essential spotlight is on adolescent crime.

Sociological Perspective
Criminology is the investigation of crime and criminals; a part of human science. All the more precisely, it is the investigation of crime as a social pattern, and its general roots, its many manifestations and its effect on society all in all. That makes it an essential type of humanism and sociological instrument.

Understanding Foucault’s Power and Knowledge in Criminology
As we attempt to analyze the formation of the concept of crime in the old age we cannot overlook the role by alleged specialists, or "capable men", in the social development of the criminal as a "class separated". These specialists included welfare and police authorities, legal advisers, restorative experts, therapists, and humanitarians. The majority of their perspectives of criminals fit inside Foucault's power/knowledge paradigm. For Foucault, power, and knowledge are not seen as independent entities but are inextricably related—knowledge is always an exercise of power and power always a function of knowledge, which implied that the subject of their expert gaze, "the criminal," was deprived of individual personality and diminished to a social issue that society hated and these "skilled men" could evidently fathom. In other terms we can also say that Law is dictated by the political procedure thus law endorses certain measures of lead to be seen by the general population in society. These measures have the endorsement of the society all in all. Any deviation from the measures of conduct settled by the society is rebuffed. In this way, such direct as does not accord with the recommended standard is inexact known as crime.

Criminology as a Political Agenda
The notion behind criminality was also a need of a political agenda. If we look through the inceptions of criminology amid the French Revolution, the part played by individuals from the Victorian legal system in articulating the new idea of the "reasonable man" in homicide cases, the evident relationship of criminality with Jews, crime, and corruption in late-nineteenth-century urban Germany, and the criminologists' look greatly affected the general public.

This new talk on criminals totally stripped the individual criminal of any personal identity. Rather, "the criminal" is a "type" of human, one regularly without "typical" mental and scholarly resources. When these characters had been expelled, it turned out to be considerably simpler for criminologists and the state, especially after the Nazis rose to power in Germany, to manage criminals, who were frequently delineated as Jews, as they saw fit, without a lot of open resistance.

Reading Edward Said’s theory of ‘Self’ and ‘Other’ in Criminology

Literary Critic Edward Said has famously founded the postcolonial canon and his theory of 'Self' and 'Other' can be well applied to distinguish between a common man and a criminal. For instance the common man sees himself as 'self' and attributes all the superior traits to himself and relates the reasonable behavior with his personal take and whatever he understands as negative, as different, as something that ought not to be done, or that has to be prohibited he reckons that as the 'other'. In this relation, Nazi Germany specifically addresses the idea of the criminal as "other".

All the more decisively, non-churchgoers, nontraditional ladies (the individuals who declined to wed), rowdy specialists, and those on the left of the political range were marked as "hysteros," "mental cases," or biologically mediocre and along these lines deserving punishment. Eventually, these ways aided in the production and legitimization for Nazi race laws.

The Relationship between Demographics and Crime

Criminology grew further as sociologists attempted to take in the underlying drivers of crime. They contemplated both the society and the person. In 1827 France, with the first ever publication of national crime statistics, Belgian analyst Adolphe Quetelet took a gander at similitudes among socio-economics and crime rates. He looked at zones where a higher rate of crime happened, and the age and sex of the individuals who carried out these crimes. He found that the most noteworthy quantities of crime were carried out by under-taught, poor, younger individuals. He likewise found that more crimes were carried out in wealthier, more well-to-do geological zones. This exhibited crime happened to a great extent because of chance and demonstrated a solid relationship between financial status, age, training, and crime.

Global Crime Rate

According to the ‘International Statistics on Crime and Justice’ by European Institution for Crime Prevention and Justice in affiliation with the United Nations if we take into consideration for the purpose of our study the crime index of Intentional Homicide it can be suggested that, overall, figure 1 indicates low homicide levels in nations in Europe, Asia and North America, with reasonable ascension between criminal equity and general wellbeing information. Conversely, both criminal equity and general wellbeing information demonstrate fundamentally higher rates in South America, Central America, the Caribbean, and Southern Africa. Extensive information disparities stay for Middle, Western, and Eastern Africa. Substantive work on the

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460 REPORT SERIES - INTERNATIONAL STATISTICS ON CRIME AND JUSTICE, REPORT SERIES - INTERNATIONAL STATISTICS ON CRIME AND JUSTICE (S. HARRENDORF, M. HEISKANEN, & S. MALBY EDs.)
managerial information recording frameworks in both the criminal equity and general wellbeing fields is required in these sub-areas before significant examinations can be made with other sub-districts of the world. Figure 1 additionally uncovers the proceeded with the presence of significant information constraints. Specifically, not very many nations in Middle, West and Eastern Africa can give criminal equity information on the purposeful murder. Where information is accessible, huge contrasts exist as contrasted and general well-being figures.

Modern Criminology

In the late nineteenth century, Italian psychiatrist Cesare Lombroso 461 contemplated the reason for crime dependent on individual biological and mental attributes. Lombroso found certain physical qualities shared among criminals that persuade there was a natural and genetic component that added to a person's capability to perpetrate a crime. These two lines of reasoning, natural and ecological, have advanced to supplement one another, perceiving both inner and outside elements that add to the reasons for crime. The two schools of thought shaped what is today viewed as the control of modern criminology. Criminologists currently consider societal, mental and organic variables. They make arrangement suggestions to governments, courts and police associations to help with countering crimes. The criminal equity framework currently serves to rebuff criminals to deter future crimes rather than just respond to crimes officially carried out.

New Developments in the Field of Criminology

● White-Collar Crime

It was characterized by Edwin Sutherland462 as crime carried out by people of high social position over the span of their occupation. The salaried crime includes individuals making utilization of their word related position to advance themselves as well as other people wrongfully, which frequently causes open harm. In this type of crime, open mischief wreaked by false promoting, advertising of perilous items, misappropriation, and a gift of open authorities is broader than the vast majority think, a large portion of which go unnoticed and unpunished.


462 EDWIN HARDIN SUTHERLAND, WHITE-COLLAR CRIMINALITY (1940).
• Hate crime
It is a criminal demonstration against a man or a man's property by a wrongdoer spurred by racial, ethnic, religious or different predisposition. Abhor crimes may allude to race, family line, religion, sexual orientation, and physical handicaps. As per a Statistics Canada publication, "Jewish" people group has been the in all probability the casualty of detest crime in Canada amid 2001-2002. Generally speaking, around 57 percent of despising crimes are propelled by ethnicity and race, focusing on mostly Blacks and Asians, while 43 percent target religion, fundamentally Judaism and Islam.

• Female Criminality
Female crime, by definition, alludes to the crimes carried out by women. It relates to the male crime and is a crime order which is produced using a sex point of view. The primary reason for this order is to investigate the reasons for female crime and make a positive counteractive action. Lately, without a doubt, there has been a surge in the number and relative proportion of female crime yearly which cannot be overlooked. It has become imperative to contemplate female criminality as a different frame.

• Corporate crime
It alludes to the unlawful activities of a company or individuals following up for its benefit. Corporate crime ranges from intentionally pitching broken or unsafe items to deliberately dirtying nature. Most instances of corporate crime go unpunished, and many are never at any point known to the general population.


• Organized crime
It is a business that provisions unlawful merchandise or administrations, including sex, medications, and betting. This kind of crime extended among settlers, who found that society was not continually ready to impart its chances to them. A well-known case of composed crime is the Italian Mafia.

• Victimology
Victimology is the logical investigation of victimization, including the connections among unfortunate casualties and guilty parties, exploited people and the criminal equity framework, and victims and other social gatherings and foundations, for example, the media, organizations, and social developments. Victimology examines casualties of crimes and different types of human rights infringement that are not a real crime.

Conclusion
Crime is not permanent like a sin, that can be characterized and have a presence past the points of confinement of what men may state and do. It is basically a relative meaning of conduct that is always experiencing change. The rebellion of law might be named as a crime. Be that as it may, insubordination of all law is not described as a crime. To a typical man, crimes are those demonstrations which individuals in society consider deserving of genuine condemnation. Crime is said to be a demonstration which is both illegal by law and against the ethical notions of the society. For a demonstration to be a crime it must be one done infringing upon law and in the meantime, it ought to be against the ethics.
assessments of the society of the occasions. Moral qualities differ from nation to nation, every now and then and from place to put in the same nation. This is clear from the way that Homosexuality is India till very recent was a crime.\textsuperscript{464} *****
IPR V. HUMAN RIGHTS: PROTECTION OF PHARMACEUTICALS AND DRUGS BY MEANS OF PATENTS AT THE COST OF RIGHT TO HEALTH OF PEOPLE

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ABSTRACT
Initially, Intellectual Property Rights and Human Rights were two different fields of law. But recently, it has been very widely noticed that these two fields of study have been conflicting each other. This article attempts to explain this conflict in context of the collision between Intellectual Property Rights and Right to Health of the people and trace its detrimental impact on this basic human right of right to health. The article elaborates on how it is an irony that drugs which are being manufactured to improve the health conditions of people are not even accessible to them, due to its patent protection, let alone affording them. This article limits itself to the impact of patent protection on access to affordable medicines. It also tends to describe the impact of patent protection on biological resources which are used as a source of raw material for the development of new drugs. Further, this article discusses the patent protection of the pharmaceuticals and drugs under TRIPs agreement and its implementation in Indian pharmaceutical industry. It has also been the effort of the author to propose certain recommendations for the improvement of patent protection regime in furtherance of public interest. The article attempts to assert that sheer and compulsive attention is required to be paid to this conflict. There is a dire need to take into consideration the human physical well-being while allocating IP rights.

1. Introduction to Conflict Between Intellectual Property Rights and Human Rights

Just as in the industrial revolution, the key resources were raw materials and labour, similarly, when it is about an information or knowledge-based economy, intellectual property plays the role of a central asset. Intellectual property is the generic term used to designate the subjective rights that the various legal orders grant to the creators of immaterial assets of intellectual origin which acquire their value primarily from creative efforts. Those immaterial assets may be of two kinds, namely either literary and artistic creations or distinctive signs and inventions. Intellectual property therefore establishes the protection of ideas and designs in art and technology, in industry and in trade.

The domain of Intellectual Property Rights is universal in its nature. This is because of the assumption that such rights are not meant or need to be culture specific. The cultural and intellectual domination that is implied by intellectual property rights impinges and infringes a range of rights like

knowledge rights, livelihood rights, right to subsistence, health rights, right to life, etc.\(^{468}\)
All of these latter rights have become an important part of the human rights discourse. Even though these are referred to be a part of domain of human rights but they lack legal protection that "rights" stipulate. So, instead of being enforced as the legal rights, these rights are still seeking protection as they stand diminished by Intellectual Property Rights.\(^{469}\)

Human rights and intellectual property are two different bodies of law which are now increasingly coming together to become intimate bedfellows. Initially, the two subjects developed aloof from each other but lately tensions between intellectual property rights and human rights are budding continually leading to several discourses pertaining to the intersection of the fields.\(^{470}\)

A human-rights approach acknowledges to recognize the normative primacy of artistic and scientific works, first and foremost, as an expression of human dignity and creativity and not economic commodities whose value is determined by their utility and economic price tag.\(^{471}\) A human rights orientation is predicated on the supremacy of protecting and nurturing human dignity and the common good. It seeks to preserve a balance between the rights of inventors and creators and the interests of the wider society.\(^{472}\)

2. Detrimental Impact of IPRs on Realization of Right to Health

Article 25(1) of the Universal Declaration of Human Rights, 1948, states explicitly that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care [emphasis added] and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” This principle of the right to health is underpinned by Article 12 of the United Nations International Covenant on Economic, Social and Cultural Rights, 1966, which states that “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. On the other hand, Article 27(2) of the Universal Declaration of Human Rights, 1948, states that “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

United Nations Sub-Commission on the Promotion of Human Rights had affirmed, in Resolution 2000/7 that the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author


is, in accordance with Article 27(2) of the Universal Declaration of Human Rights, is subjected to limitations in the public interest. But even though human rights should enjoy primacy over patents, there is no evidence which suggests that the right to health is considered as a prioritised norm under international law.

It is pertinent to note that just as the other rights of an individual are protected and safeguarded by the State, similarly, an individual’s right to health must be guaranteed by the State. But it cannot be implemented in the same manner for right to health can be attained only after obtaining certain variables which actually lead to the improvement of one’s health. These variables include food, medical assistance, nutrition, hygiene, etc. Furthermore, these variables can be achieved through various combined actions such as access to drugs, therapeutic diagnosis’ techniques and apparatuses, affordable treatments, quality of health facilities, goods and services including prevention and cure of diseases. States are bound to promote the right to health through the ensuring of access to affordable treatments. The detrimental impacts of IPRs on the right to health can be encapsulated in the following points.

2.1 Skimpy Access to Affordable Medicines/ Drugs

The right to health includes access to appropriate health care. Lack of access to affordable medicines is a global issue now. In this regard IPRs has a major role to play. When a medicine is protected through patent it causes an increase in its price which in return has a negative impact on patients’ access to medicine. Mostly, patent protection leads to a monopoly situation as patent holders, which are almost always corporations, have the freedom to price their products arbitrarily, often high, and thus, again making patented drugs far more expensive than their generic counterparts. Furthermore, over the years total costs of discovering or manufacturing a new drug, through usage of biotechnology, has escalated and thus the cost of bringing a drug to market is approaching US$ 3 billion, which is a 145% over the estimate made in 2003. As a result, pharmaceutical

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corporations are always disinclined towards making these drugs available at reduced rates for low prices of drugs fetch them less profit. But since patents are the first and foremost reward that provides an incentive to these pharmaceutical corporations, it stimulates them to further research and innovate in the development and production of new medicines. This results in higher prices for medicines in rich and poor countries alike. The final conclusion, thus, remains the same that expensive drugs are a fundamental outcome of patent regime leading to unavailability of drugs to penurious people.

2.2 Health Crisis in Developing Countries
Another negative impact of patent regime of pharmaceuticals in on the developing countries where population not only have lower economic status, but also lower health status and higher needs to medicine. It has already been discussed that how pharmaceuticals corporations price their drugs very high. As a result, most of the essential drugs that are being manufactured by these corporations are beyond the means of poor persons lacking health insurance, which includes the majority of residents in less developed countries. It is ironic to note that mostly it is the developing countries which has the highest rates of medicines and other drugs. It was seen in Kenya that Nevirapine, which prevents mother-to-child transmission of H.I.V., costs $874 despite the desperate need of the drug but only $430 per 100 units in Norway, where there is hardly any market for it. Increasing access to essential medicines in poorer countries, including a loosening of patent protections on medicines has become a significant matter of discourse now. But it has always been opposed by pharmaceutical giants claiming that their profits will dry up if patent protection is removed from the drugs and medicines. Pharmaceutical corporations consider patents as the only reward to encourage research and innovation for the development and production of new medicines. As a result, it is followed by the production of only those drugs which have an alluring market and increasing sales because it procures them high profits apart from having patents as the only incentives. Thus, there is no significant

483 Cecilia Oh, IPRs and Biological Resources: Implications for Developing Countries, 8 J of Intellectual Property Rights 400, 404 (2003).
487 M. Koning, Biodiversity prospecting and the equitable remuneration of ethnobotanical
growth in research and development of drugs pertinent to diseases of developing countries, as it is non-profitable, leading to a substantial neglect of these diseases which are termed as neglected diseases.\textsuperscript{488} Furthermore, these corporations are supported by the governments of their own country. These governments impede the governments in poor countries to obtain drugs from other cheaper sources through parallel importing so that their people can have access to modern essential treatments.\textsuperscript{489} For example, in late 90s when there were millions of people suffering from HIV/AIDS who could not afford the original brand medicine, South African government imported generic anti-retroviral medicine for treating HIV/AIDS endemic situation. As a result, giant pharmaceutical companies such as GlaxoSmithKline filed a lawsuit against the government.\textsuperscript{490} Wherefore, the only option the governments of developing countries are left with, to guarantee the citizens their health, is to import the branded medicine despite them being unaffordable for a part of the population.\textsuperscript{491} 

\texttt{www.supremoamicus.org}
documented in Indian Scientific literature and ancient texts for the same anti-diabetic properties. British company Phytopharm acquired a patent over the active ingredient of Hoodia cactus, used as a slimming drug and an appetite suppressant, after the findings of its medicinal qualities was passed on to the company by San community of Southern Africa which was already traditionally using it. Later, to commercialise the drug, Phytopharm sold the exclusive global license of the drug to Pfizer for US$ 21 million. This patent is criticized as San community receives less than 0.003 per cent of net sales of the product and is not only exempt from sharing their benefits but also prevented from using their knowledge of Hoodia in any other commercial application. Therefore, the peroration invokes that biodiversity is the reserve and resource of mankind. It belongs to everyone yet no one. Therefore, everyone has a right to make its utilization but no one has a right to secure exclusive rights over its use.

Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement was introduced with an intent to produce certain universal standards for implementation of Intellectual Property Rights and frame the

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500 Id. at 209.
rules of the game of the developing countries on par with the developed countries. 503 This agreement forced the World Trade Organization (WTO) members to take action for protecting intellectual property rights. The WTO has extensive membership and all the members are required to fully implement TRIPS except for the least developed members. This has greatly influenced domestic developments in the field of patent protection for medicines.504 The agreement entails that any patented product should be produced, imported, sold or used under permission of the patent owner.505

Article 27 of TRIPS that patent protection is extended to all the fields of technology. This includes the necessity for protecting intellectual property rights of the owners and manufacturers of medicines as well. Article 28 and 33 of TRIPS makes it necessary for the members of WTO to grant exclusive rights for a minimum period of 20 years. These exclusive rights are to prevent any other party from making, using, offering for sale, selling or importing for these purposes the patent product without consent.506 Thus, with the implementation of TRIPS, a monopoly in the market was created every time a medicine was created. Furthermore, these medicines were sold at the highest possible price with the absence of any other low price generic drug of the same nature. As a result, these patented drugs costs patients an arm and a leg.507

It was the non-availability of drugs used in the treatment of HIV/AIDS in Latin American and African countries which started off the discourse of the conflict between the provisions of TRIPS and right to health. Consequently, European Union and WHO insisted that detrimental impact of TRIPS on the availability and affordability of drugs should be taken into consideration and calls for appropriate action.508 It was in 2001, at Inter-Ministerial Conference in Doha, that this problem was realized in its totality for the first time. As a result, Doha Declaration made it an obligation for the members of WTO to implement and interpret the provisions of TRIPS with a view to safeguard public health and promote public interests.509 It also recommended that patented medicines must be supplied, by issuing compulsory licenses under Article 31 of TRIPS, to those needy countries which cannot manufacture them by due to technical

incapability. Rwanda was the first country which managed to attain a compulsory license for an antiretroviral drug, TriAvir, from a Canadian generic company Apotex.\textsuperscript{510} Even though Doha Declaration stated that public interests are above private interests but still, very few compulsory licenses have been granted till today. The major reason behind this is that in order to get a compulsory license, certain conditions are imposed on the importing country which become really challenging to implement.\textsuperscript{511} For example, the exporting country should obtain a license to export the product, produce batches only for the required quantity which has to be specially labeled and colour coded for the purpose and stop production once that demand is met.\textsuperscript{512} Furthermore, granting of compulsory licenses also leads to the creation of “gray market.” It happens when patented drugs are sold in the local market a price less than the price it is listed at to sell in the targeted market.\textsuperscript{513} This might not be supply of illegal products such as black marketing but this causes a revenue loss to the governments and economically burden the country due to the shrinkage of Foreign Direct Investment in the country.\textsuperscript{514}

4. Pharmaceutical Industry in India - Implementation of TRIPS

In 1950s, Indian Pharmaceutical Industry was not technologically capable enough to manufacture drugs and medicines indigenously.\textsuperscript{515} But by the late 1980s, India emerged as one of the largest drug exporters in the world by attaining self-sufficiency in its pharmaceutical production. This progress was the result of implementation of Patent Act of 1970 and the Drug Policy of 1978.\textsuperscript{516} Under this patent regime, Indian drug manufacturers could copy pharmaceutical products that were otherwise patented in foreign nations, leading to a boom in the production of generic drugs.\textsuperscript{517} The Drug Policy of 1978 paved way for the enhancement of R&D and technology and production of bulk drugs and intermediates by promoting several measures to guide and control foreign companies with a 75 percent share of the domestic market. This turned out be a disincentiveto foreign companies and thus,

\begin{itemize}
  \item \textsuperscript{510} D. Yang, \textit{Compulsory Licensing: For better or For Worse, The Done Deal Lies in The Balance}, 17 Journal of Intellectual Property Rights 76, 78 (2012).
  \item \textsuperscript{512} S. Flynn, A. Hollis & M. Palmedo, \textit{An Economic Justification for Open Access to Essential Medicine Patents in Developing Countries}, 2 Journal of Law 184, 195 (2009).
\end{itemize}
developing the ability to produce generic drugs.\textsuperscript{518}

With the enforcement of TRIPS Agreement in 1995, like many other developing nations, India was also not in favour of the TRIPS Agreement. But being a member of WTO, India, necessarily, had to modify its domestic intellectual property laws in order to comply with the agreement.\textsuperscript{519} It was until 2005 that India fully implemented TRIPS. All this while Indian pharmaceutical industry had maintained a comparative advantage of cheap and skilled workers among developing economies.\textsuperscript{520} India amended its domestic intellectual property law, namely Patents Act, 1970, in three stages. Firstly, in 1999, India adopted the provision which enabled the entities to submit product patent applications for pharmaceuticals and agricultural chemicals to the patent office that would be held until examination in 2005.\textsuperscript{521} Second, in 2002, when India extended the patent terms to 20 years as mentioned in TRIPS. It is pertinent to note that initially the patent terms was of 7 years from the time of filing of the patent or 5 years from the date sealing of the patent, whichever was shorter. Third, in 2005, India brought into compliance Patents (Amendment) Act, 2005, which made patent protection available for all kinds of innovation. It also deals with the issuance of compulsory licenses of Pharmaceuticals for the export purposes.\textsuperscript{522} Thus, with the incorporation of the provisions of TRIPS Agreement two major changes were introduced in the Indian Patent Law, first, it introduced product patents for pharmaceuticals as well and second, patent holders were ensured patent protection for a period of 20 years.\textsuperscript{523}

Post TRIPS, Indian Pharmaceutical Industry emerged as a major global exporter of drugs and medicines. On the list of countries that exported the highest dollar value worth of drugs and medicines during 2017, India was at 11\textsuperscript{th} position with a total of $8.7 billion worth of drugs which is equal to 2.6% of total drugs/medicines exports.\textsuperscript{524} Another, feather in the cap of India is the establishment of several research facilities, in the country, of major leading global generic pharmaceutical corporations. This due to the necessary adjustments and amendments made by India in its laws. One of them being limiting the reach of product patent protection in the country through Section 3(d) of the Patents (Amendment) Act of 2005.\textsuperscript{525}

\textsuperscript{524} Daniel Workman, \textit{Drugs and Medicine Exports by Country}, World’s Top Exports, June 8, 2018, \url{http://www.worldstopexports.com/drugs-medicine-exports-country/}.
provides for a tougher standard for securing patents by postulating that in order to attain patent for a new version of any product it must be proved that new versions are therapeutically more beneficial than earlier versions on which patents had expired.526 This limiting of patent protection initiated in 1993 when Novartis filed patents around the world for its synthesis of the molecule imatinib but claimed that the molecule can only be administered to cancer patients as imatinib mesylate.527 Thus, the resulting drug came to be known as Glivec. When Glivec approached Madras Patent Office for patent protection, it was rejected on the grounds that it was “an unpatentable modification of an existing substance imatinib.” The Indian Supreme Court, following the same opinion, rejected the claim.528

India has managed to prevent common abusive patenting practice by limiting the patent protection with a view that unless enhanced or superior efficacy of a drug is not demonstrated in accordance with section 3(d) of the Patents (Amendment) Act of 2005, it cannot be granted a patent. But this was possible only because of the interpretation of Article 27 of TRIPS which allows member states a fair amount of flexibility when enacting patent laws that conform to and protect their national interests.529 Therefore, the resulting patent laws of the member states cannot be entirely arbitrary. It is suggestive of the fact that TRIPS in itself is not catastrophic to the public health and their interests. Right to health of a country’s citizens depends on the manner in which TRIPS’s provisions are incorporated in the intellectual property laws of the country. Thus, efforts are being made to reduce the impact of patents on prices and affordability of drugs, these efforts must be supported by governmental national programmes providing for insurance schemes for the betterment of healthcare of the people.

5. Recommendations for Better Patent Protection of Pharmaceuticals for Improvement of Public Healthcare

Evidently enough, the concern for securing access to affordable drugs is a real one, and there have been various arguments preaching that how increasing patent protection for the products of powerful MNCs works only to hurt the common man.530 But at the same time, one cannot ignore the reality that protection of intellectual property rights provides these corporations with the needed incentive to invent and manufacture the drugs on which patients around the world rely, whether

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528 Id. at 549.
branded or generic. Therefore, a balance needs to be struck.\textsuperscript{531}

5.1 Interventions by Governments

First and foremost, it is the responsibility of a government to prevent the rights of its citizens. Even though, governments cannot prevent the pricing of the medicines by the patent holders and restrict their trading activities. But there are several other ways through which governments in developing countries can actually prevent the violation of the human rights. The most appropriate method through which it can be achieved is the use of competition law.\textsuperscript{532} By the means of competition law competition in the market can be controlled. Generally, patent holding pharmaceutical companies tend to enjoy a monopoly in the market and in order to perpetuate it they even make agreements with generic drug manufacturers.\textsuperscript{533} Through these agreements, generic drug producers are paid by patent holding pharmaceutical companies for postponing the entrance of generic medicines in the market, which are cheaper than the patented drugs, and thus, these pharmaceutical companies enjoy monopoly in the market even after the expiration of their patents. Thus, appropriate implementation of the competition law will deter such pharmaceutical companies from illegally curtailing the competition in the market and thus, results in the decline in the price of the drugs making them accessible and affordable for the people.

Furthermore, governments can also guarantee affordable healthcare through its schemes. It can various steps such as funding the research centers and labs which contribute in achievement of affordable medicines. This way these labs will be more self-sufficient and procure better results. Governments can also itself purchase the patents of those life-saving drugs which are expensive and then provide licenses for them to local drug manufacturers at lower prices.

5.2 Voluntary Licensing of Patented Drugs

Governments in developing countries are doing firm efforts to improve the accessibility of affordable medicines for their citizens. This is being done by imposing price controls on all those medicines which are being sold by foreign pharmaceutical companies at a very high and unaffordable price. However, this effort is not very successful as these pharmaceutical companies explicitly refuse to provide their medicines to sell in the market of those developing countries which have very strict (consumer-friendly) price control regulations.\textsuperscript{534} Therefore, developing nations choose the option of compulsory licensing. Compulsory licensing is the grant of an authority by the government to produce and manufacture the patented medicines without the consent of patent-holders.


\textsuperscript{532} Dr. ShuchiMidha& Aditi Midha, Compulsory License: It’s Impact on Innovation in Pharmaceutical Sector, 2 International Journal of Application or Innovation in Engineering & Management 2319, 2327 (2013).


holder. But again, compulsory licensing also comes with its upshots. Most of the times compulsory licensing leads to threats of trade retaliation and investment red flags. In such a condition, voluntary licensing is the most feasible option for the governments. Voluntary Licensing is obtained for patented drugs by international organization like WHO by paying a negotiable price to the patent-holder and then these organisations give the right to produce these patented drugs to the developing nations. In return of this, developing nations pay these organisations and conduct massive production of the drugs which can later be imported to needful countries. The fundamental reason for preferring voluntary licensing to compulsory licensing is that there is no threat to the rights of those pharmaceutical companies who are the real patent holders of the medicines as the production of the medicines is limited to the local market and there is no involvement of parallel importation.

6. Conclusion
Health is a basic human right and access to medicine is a basic tool to ensure health. It cannot be denied that outright unavailability of patented drugs is causing an impediment to this right. Furthermore, patents are being acquired for the usefulness of biological resources as well. Traditionally biodiversity was considered a resource of mankind and that is why was known as heritage of the entire human race. It is clear that visible conflict between Intellectual Property Rights and Human Rights is embodied in TRIPs agreement as well. Patent protection is actually snatching away the right of everyone to enjoy the benefits of scientific progress and its applications. Thus, it is necessary that more human-rights advocates get involved with intellectual property issues then only it is likely that many of the problems will also be considered to be violations. Developed countries are required to come forward and help developing countries in the protection of right to health of people. More opportunities have to be allowed and welcomed for propounding the issues of intellectual property from a human rights’ perspective.
THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION – AN INDIAN CONTEXT

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KEY WORDS
Third party funding, International Arbitration, and India

ABSTRACT
This article discusses the concept of third party funding in the context of international arbitration. After a general description of what third party funding is and how it works, the article examines the possible implications that the various principles of third party funding such as the conflict of interest, confidentiality, control of arbitral proceedings may have on the impartiality and independence of the arbitral proceedings. Since the involvement of a third-party funder may create different situations of conflict of interest for the arbitrators, which in turn may affect the entire arbitral proceedings and the final award, the article suggests that the disclosure of the existence of a third-party funder in arbitration is an essential step to safeguard the fairness and transparency of the arbitral process. The article then discusses the various dispute funding models such as the insurance of disputes, corporate financing, and the sale of claims. Further, the article briefly discusses the various jurisdictions, which recognized the idea of third party funding. The article then evaluates as to whether third party funding should be given statutory recognition in India or not? Finally, the article concludes by suggesting that third party funding should be adopted in India.

INTRODUCTION
With the increase in the cross-country trade and business, the need for effective dispute resolution mechanism is also increasing. To this end, international arbitration is a popular choice, leading to an exponential growth in the use of this mechanism. Parallel to this growth, the costs associated with submitting a dispute to the international arbitration are also increasing. A considerable number of parties in international arbitration, whether engulfed in financial difficulties or otherwise are now exploring the possible alternative routes to pay these increased costs. Third party funding (TPF) is one such possibility.

TPF is a financing method or arrangement whereby an entity that is not a party to a dispute and the arbitral proceedings arising therefrom, finances all or part of the expenses incurred by one of the parties to the arbitral proceedings. If the funded party is the claimant, then the funder contracts to receive a percentage of the proceeds if the claimant wins the case. In contrast, if the funded party is the defendant, the funder can

539 Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration
https://www.arbitrationicca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf
540 Supra 1
541 Supra 1
contract to receive a predetermined payment from the defendant and also the agreement might include an extra payment to the funder if the defendant wins the case. Conventionally, TPF is offered on a non-recourse basis, that is, the funder has no recourse against the funded party if he loses the case. In other words, unlike a loan, the funder’s recourse for the repayment of the funded amount is limited only to the claims awarded by the arbitral tribunal if any. The third party funder could be a bank, hedge fund, insurance company, an individual or a corporation.  

In the recent years, the demand for TPF is sharply increasing. The main forces for such increase are, first, the increasing need for accessing justice. A simple example to demonstrate this could be that there is a mid-size company (the claimant) has been wronged by a much larger corporation and is faced with the decision as to whether to spend its capital on pursuing the arbitration or allocating the capital to its business operations. Further, if it decides to self-fund the arbitration, it is likely to be outmatched in resources as against its opponent. But if the claimant opts for TPF then it allows the claimant to grow its business while pursuing the action in a manner that poses no cash flow risk. Second, companies and individuals seeking a means to pursue meritorious claims along with maintaining sufficient cash flows to continue conducting their businesses. Lastly, the worldwide market turmoil and uncertainty has inspired investors to look into other investment options that are not directly linked to or affected by the financial markets. Each arbitration matter is a discrete investment and is independent of the market conditions. This independence dodges the third party funder’s investment and the potential profit that can be accrued from the general uncertainty that prevails in the financial markets.  

In the past few years’ international market has seen a tremendous increase in the TPF agreements owing to which the markets are becoming increasingly competitive. In order to sustain the increasing competition funders are seeking to differentiate themselves and offer alternative applications for their investment. For instance, in addition to financing the legal costs funders are also willing to provide working capital for the claimant’s companies/businesses during the lifetime of the arbitration proceedings. In other words, a claim holder along with raising funds for arbitral proceedings can also use the claim as an asset in order to raise capital for its business. TPF like any other mechanism has its own advantages and disadvantages and these have been discussed below.

It has several advantages, which will explain the current attention given to TPF in international arbitration.

- Access to justice by providing the parties the financial assistance, which is otherwise unavailable, to them. In the case of Arkin

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543 Third Party Litigation Funding by Nicholas Rowles Davies page number 63-64

v. Borchard Lines\textsuperscript{545} the court upheld the use of TPF and also reiterated that access to justice is a key benefit of TPF.

- TPF is a way to manage the financial risk that is usually associated with bringing or defending a claim of arbitration. This is so because the financial burden i.e. the liability of the costs or the consequences of failure to arbitration is shared with the funder.
- Funder’s due diligence and assessment of the case provides an objective appraisal of the claim along with dissuading frivolous and vexatious claims, if any.
- Subject to the terms of the funding agreement, the funder can bring in additional professional expertise to assist the party in deciding the arbitrators and the legal counsel that is going represent them.\textsuperscript{546}

Besides the advantages, several objections have been raised for the use of TPF in international arbitration and the same is being discussed below:

- The interest of the funder might not be same as that of the funded party and party might want to pursue a different strategy, which the funder might refuse to finance.
- The funder has an advantage through economic power and may take an advantage by including clauses, which might be a detriment to the party.
- Subject to the terms of the funding agreement, the funder with their professional expertise might insist on participating in day-to-day issues (includes the selection of the arbitrators as well) of the arbitral proceedings. The problem with such interference could be that as a funder his decisions could be influenced by financial considerations, rather than legal constructs.\textsuperscript{547}
- Subject to the terms of the funding agreement, the funder might insist upon the attorney of the funded party to act in the fiduciary capacity for not only the funded party but also for himself. This could result in a conflict of duties for the attorney if he is to work for both the parties.

As there are no regulations, governing TPF in international arbitration there is widespread skepticism with respect to certain aspects that are involved in the process of third party funding. These aspects are identified as control, confidentiality/privilege, disclosure, and conflict of interest.

**Control**

One of the major concerns expressed by the members of the international legal community about TPF is the funded party’s autonomy to make decisions. This is so because it often regarded that the funder will take control over the arbitral proceedings and the party’s decision-making process. For instance, when and at what level to settle a claim. This discussion is also important because the legality of the funding agreement is dependent on who has the control, mainly in the common law jurisdiction where the doctrines of champerty and maintenance still exist.

\textsuperscript{545}Arkin v. Borchard Lines (2005) EWCA Civ 655

\textsuperscript{546}Third Party Funding In International Arbitration – Issues and Challenges in Asian Jurisdiction by RamaniGarimella

\textsuperscript{547}Third Party Funding In International Arbitration – Issues and Challenges in Asian Jurisdiction by RamaniGarimella
Related to the issue of control the first question that needs to be answered is how actively does the funder seeks to interfere in the process and monitor his investment. The answer varies from funder to funder and is also largely dependent on the funding agreement but at a minimum, the funder will require a report on the progress of the case and updates on any significant developments of the case this also includes an offer to settle the matter. In some instances, the funder might take an active role this is to say that the funder might involve in planning the legal strategy and attending the client meetings etc.

However, it should be noted, that a TPF agreement is not an unconditional arrangement to provide funding until the conclusion of the case. There are provisions in the agreement with respect to funding being dependent upon the merits of the case and compliance with the terms of the funding agreement. Breach of the agreement or fundamental change in the likelihood of success may entitle the funder to terminate the agreement. And in cases of serious breach of the funding agreement, the funder might have other recourses for the amount invested. Though these kinds of terms in agreement might not amount to direct control but may act as an indirect control. Furthermore, if the funded party is completely dependent on the funder for financing the arbitration proceedings, the possibility of the withdrawal of funding may amount to powerful indirect control. But in reality, the vast majority of the funding agreements are structured carefully to ensure that the funder does not have the control over the case or the funded party.

Confidentiality / Privilege

In order for a party to obtain funding, it is necessary for him to share certain confidential and occasionally highly sensitive information with prospective funders. It is important for the party sharing such information to ensure that the information is secure and privileged. So it is important for parties to navigate the process of information sharing with utmost care by minimizing the risk of waiving privileged information. Usually, parties enter into non-disclosure agreements before sharing any information with the other parties. However, drafting standard regulations by international arbitration institutions with respect to sharing confidential information with funders is much needed.

Disclosure and Conflict of Interest

When a party enters into a TPF agreement as result of such agreement there might arise the issue of conflict of interest (whether actual, potential or perceived). The three possible conflict of interest situations that are identified are between the funder and the funded party. Second between the funder and the funded party’s attorney and third is between the funder and the arbitrator.

While the majority of funded cases proceed smoothly with an aligned interest between the funder and the funded party there can be a possibility for conflict of interest at some stage. For instance, the funded party wants to settle for an amount but the funder might perceive as insufficient in comparison with the investment made and the vice versa. Similarly, issues where their budget overrun or merits of the case are deteriorated as a
result of the discovery of new evidence by the opponent can create situations where the interest of the funded party might diverge from that of the funder.

In reality the relationship between the funder and the funded party’s attorney often go deeper, that is to say, that party might have entered into a funding arrangement as a result of the attorney introduction and also funder might be the client of such attorney. And if the attorney represents both funder and the funded party then the attorney might be in conflict of duty to both the parties. Typically, the funding arrangement is structured in a manner where there is a clear demarcation between the duties owed to the party and those owed to the funder (if the attorney represents). However, to mitigate such conflict attorneys recommend maintaining independent legal counsel for both the parties.

Third party funders can raise another potential conflict of interest that is distinct from those that were discussed above. This is the possible conflict of interest between the arbitrator and the funder, and if there actually the existence of conflict then such a conflict will result in a nullification of the award passed. This conflict is illustrated through an example there is a party (P1) funded by the funder (F) and X is the arbitrator in an arbitral dispute (A1), F along with funding P1 is also funding another party in another unrelated arbitral dispute (A2) where X’s son is the one who is being funded by F. The fact X’s son is being funded by F would raise concerns about the independence and impartiality of X towards the other party in A1. This whole set of events would render X to be ineligible to be an arbitrator in A1. The solution to the problem illustrated in the example can be avoided if F in A1 makes a disclosure with respect to the funding arrangement. The absence of an obligation to disclose the presence and identity of the funder’s participation in the arbitration seems to be problematic in international arbitration.

**Other Alternative Funding Models**

TPF has been emerged as a source of funding for international arbitration only in the recent years. Before the arrival of TPF there were other various alternative means through which international arbitration was funded. This section of the article briefly discusses some of the funding models that exist.

**A. Insurance**

Insurance has been one of the oldest ways of financing disputes. The insurance packages usually cover all costs that are involved as a part of the dispute, this includes the cost incurred to bring a claim or to defend the claim, the attorney’s fee, and to pay any award, or order which is passed against the insured. There are mainly two kinds of insurance models and they are referred to as “before the event” (BTE) and “after the event” (ATE) insurance.  

BTE insurance model is usually taken to cover the possible future legal dispute/s. Under this model, the insurer receives the premium in advance. And the insurance provides finance for bringing in claims or defending the claim and all the other associated costs involved. The insurer has

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548 James Clanchy “Navigating the Waters of Third Party Funding in International Arbitration” Page 82
no interest in the proceeds of the arbitration expect to minimize the expenditure incurred by the insured party and for this reason, the insurer controls the conduct of the arbitration as closely as possible

ATE insurance is also known as the litigation/arbitration insurance, is subscribed after the legal dispute has arisen. The insurance premium under this package is structured in a unique manner that is the contingency premium model. The insured under this model pays the insurance premium only if the claim is successful, in which case the premium is usually paid out of the settlement agreement or the compensation award obtained. It is similar to the TPF model but the return paid is much lower. The ATE insurance model is very similar to the TPF and the only distinction is that the former does not provide the day to day financing, but instead pay the insured on indemnity basis if the case is unsuccessful and also the insurance premium is typically much lower than the return sought by a funder under the TPF model.549

The second way is an equity based funding. This means that the funder might provide finance required for pursuing the claim by the company in return for an equity ownership in the company. Private placement of equity is the most effective and common way of raising funds in equity based funding.

C. Sale of Claims
Under this model, there is an outright sale of the claim by the claimholder to the funder. This is because the claimholder may view lengthy arbitration proceedings as an expensive and time-consuming affair and would transfer the rights to another party in exchange for some consideration payable immediately. Usually, the consideration is cents on dollars. Even the funders are happy with the sale of claims because they will have an unfettered power and control over the arbitration proceedings unlike funding some third party.

In common law jurisdictions and jurisdiction where champerty exits, the outright sale of claims is not permitted and there is a prohibition on funders from taking the control over the claims of another party. Thus, the definition of the TPF in these jurisdictions is restricted to as an arrangement for an investment in the claim holder’s arbitration in return for a financial interest, as opposed to the outright

B. Corporate Financing
Under this model there are mainly two ways through which the funding is obtained. One is through corporate finance and this can be best illustrated by the following example, a parent company can grant a loan to its subsidiary to enable the subsidiary to pursue the claim. The other instances could be that the shareholders, creditors or other stakeholders of the company itself might provide financial assistance needed for pursuing the claim in return for some benefit

(550) Crystallex International Corporation v Bolivarian Republic of Venezuela, Case No. ARB (AF)/11/12

549 Bristow’s, Guide to Litigation Costs Funding and Insurance, (last accessed on 30th May 2018)
However, in some civil law jurisdictions, the outright sales of claims are permitted and the funders are allowed to pursue the claims of the third parties.

D. Attorneys as Funders
Attorneys may also act as funders in certain cases. In this model the attorney bears some or all the cost of the arbitration and along with sharing the risk. The structure under this model is usually that the attorneys don’t charge any legal fees in exchange for a share in the award or the settlement obtained.

E. Portfolio Funding
Portfolio funding is yet another alternative approach of financing claims and many funders are actively promoting this approach because of its diversified risk. So how is a portfolio arrangement structured? A portfolio arrangement can be structured in many ways, but there are two popular models in which these arrangements are structured: 1) finance structured within a law firm, where claims holders are various clients of the firm; 2) finance structured around multiple legal disputes of a corporate claim holder over a relatively short period of time.

As it can be seen that in both the models’ finance is being structured over multiple claims, this structure provides the funder some form of cross-collateralization (meaning that the funder’s return is dependent upon the overall net performance of claims of the portfolio as opposed to an individual claim). These models of finance structure enable the law firm or corporate entities to secure TPF more quickly. In addition, there is also an economic benefit to this approach that is, the funder’s risk is spread across a number of claims, thus leading to a reduced risk percentage on each claim.

From a corporate claim holder perspective, portfolio financing provides another added advantage. This is the possible inclusion of some types of claims within the portfolio that would not otherwise be capable of being funded on an individual basis (for instance non-monetary claims). The inclusion is possible because of the cross-collateralization that portfolio financing provides.

Position of TPF in various Jurisdictions
Historically, common law jurisdictions have a bar on the TPF agreements on account of the common law principles of maintenance, champerty, and public policy. Maintenance has been defined as a process of funding of legal proceedings by an unconnected third party and champerty is described as an aggravated form of maintenance, wherein the third party funds the legal proceedings in exchange for a share in the proceeds arising out the legal proceedings. In the past few years, many jurisdictions around the world have relaxed the usage of the doctrines of champerty and maintenance and have promoted the idea of TPF. For instances, the England and Wales introduced a code of conduct for TPF including international arbitration in 2011. Then, the Paris Bar council in February 2017 adopted a resolution confirming that there is nothing precluding the parties from entering into TPF agreements. Yet again Singapore,

551 Persona Digital Telephony Limited and Others v The minister for Public Enterprise (2017) IESC 27
which is considered as the arbitration pro

country in the Asian continent, promulgated

the Civil Law Amendment Act in March

2017, to legalizing and regularizing TPF.

Even Hong Kong has made amendments to

abolish the torts of champerty and

maintenance and recognized TPF as not

being contrary to public policy. The sole

reason for such change in attitude in across

various countries is because of the TPF has

been proven to be an effective and efficient

way to combat the increasing legal cost in

international arbitration, and it is one best

way possible to meet these increasing cost

and provide access to justice by funding

people who cannot afford the costs. The two

Asian countries have also taken a step ahead

and made it mandatory on the parties

concerned to disclosure of the existence of

TPF.

Position of TPF Under the Indian Law

While jurisdictions around the world moved

away from these archaic doctrines, however,

India despite some early progressive

decisions on this subject continues to show

legislative inertia.  

In the case of Ram Coomar Condoo v Chandra Canto Mukerjee the Privy

Council held that the common law doctrines of champerty and maintenance are

applicable to England and not applicable to India except in those transactions, which are

“inequitable, extortionate and unconscionable and not made with the bona

fide objective”. The Constitutional bench of

the Supreme Court of India in the case of G.

Senior Advocate of the Supreme Court has

reiterated that the doctrines of champerty and

maintenance are not applicable to India and

that there is nothing morally wrong or

nothing against the public policy and public

morals that are being affected through

entering into the TPF agreements expect

when the lawyers are not involved in these

agreements or they are not having a

contingency fee structure. The position since

then remained the same and thus, an

agreement by a third party to finance the

cost of litigation is neither illegal nor void

on grounds of champerty and maintenance.

Along with the validity of TPF agreements,

there are also certain procedural challenges

faced by the parties and the funders while

routing funds into or out India.

Any transaction involving the foreign

exchange or non-residents parties then such

transactions are governed by the rules and

regulation of the Foreign Exchange and

Management Act, (FEMA) 1999. Section 5

and 6 of the FEMA classifies all the

transactions into two categories; current and

capital account transactions. Since FEMA

does explicitly classify TPF as either current

or capital account transactions, it is

uncertain as to how TPF would interact with

the regulations, especially since both these

transactions are treated differently under the

FEMA regulations.  

The reason for uncertainty in classification is because current account transactions include net

(...)


553 Ram Coomar Condoo v Chandra Canto Mukerjee (1876) SCC Online PC 19

554 G. Senior Advocate of the Supreme Court AIR (1954) SC 557

555 TPF In International Arbitration – India’s Readiness in a Global Context; By Anish Wadia and Shivani Rawat.

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profit from the investments and TPF is often regarded to be an investment. Thereby any profit accrued from such an investment would be under the current account transactions. On the other hand, capital account transactions include all the borrowing made either in foreign exchange or to/from a non-resident and hence, here TPF can assume the form of a loan.\textsuperscript{556}

A high level committee was constituted by the Government of India to review the institutionalization of arbitration in India. The committee along with other observations also indicated that it is time for India to consider formally permitting TPF in international arbitration, which is seated in India.\textsuperscript{557}

**Should India allow TPF?**

As mentioned above one of the strongest propositions for advocating TPF is to increase access to justice. The Supreme Court of India in the case *Anita Kushwala v Pushap Sudan*\textsuperscript{558} held that access to justice is recognized as a fundamental right under Article 14 and 21 of the Indian Constitution and is guaranteed to every citizen of the country. “Access to justice would remain a mere illusion if the adjudicatory mechanisms available were so expensive as to deter a disputant from having resort to the same”. Furthermore, the court stated that the driving principle behind the need for access to justice would remain same for all forms of dispute resolution.

It is a well-established fact as to how long a case can languish if taken before the court, but commercial arbitration has provided a relief to the litigants with its speedier disposal of disputes. Moreover, the judicial backlog and systemic administrative neglect,\textsuperscript{559} coupled with the heavy costs incurred while instituting a case in the court have led to render the court not be an effective way of resolving disputes. The judiciary’s pro arbitration approach in the recent times has led to advancement to the idea of access to justice that is to mean access to justice is not only limited to prosecute or defend a claim but having recourse to an affordable, quick and satisfactory settlement of disputes.\textsuperscript{560}

Therefore, it is important to note that TPF in India would enable not only access to justice but also effective access to justice.

Another impact of TPF is that as it provides parties access to speedier methods of dispute resolution it would in one manner help to reduce the backlog of cases in the Indian judicial system by diverting the litigants to a more attractive forum of dispute resolution. The extensive due diligence conducted by the funder prior to entering into a TPF agreement is a way to ensure that only meritorious claims are bought for adjudication.\textsuperscript{561}

\textsuperscript{556} TPF In International Arbitration – India’s Readiness in a Global Context; By Anish Wadia and Shivani Rawat.


\textsuperscript{558} Anita Kushwala v Pushap Sudan (2016) 8 SCC 509

\textsuperscript{559} Supreme Court of India, The Indian Judiciary Annual Report 2015-2016; Law Commission of India Report no 245 of 2014

\textsuperscript{560} TPF In International Arbitration – India’s Readiness in a Global Context; By Anish Wadia and Shivani Rawat.

\textsuperscript{561} TPF In International Arbitration – India’s Readiness in a Global Context; By Anish Wadia and Shivani Rawat.

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It is not often the case that both the parties to the arbitration have equal financial standing and this disparity has a huge impact on the prospects of settling a claim. For instance, a party might have a meritorious claim but is financially weak as against the opposing party who has sufficient clout to prolong the proceedings. As the arbitral proceedings require a continuous infusion of funds, the financially weaker party might be forced to settle for a less than the reasonable amount, regardless of the merit of the claim. In such kind of scenarios, a third party funding would protect the financially weaker party from entering into the unfair settlement. Thus, TPF can equalize the bargaining power between the parties and provide for a fair and equitable settlement if any. It is important that even parties who enter into international arbitration agreement take advantage of being sufficiently funded.562 Since the financial disparities between the parties can be erased by entering into a TPF agreement, with the advent of TPF in India, the commonly held perception that international arbitration is only for large business entities is weakened because now all the parties with a meritorious claim can have the sufficient financial strength by way of entering into a TPF agreement. Thus, TPF provides for a level playing field to the parties between large institutions and the average everyday litigants and can also act as a retributive tool in the hands of the weaker sections of the society.

Regulatory Framework for India

It is pertinent to note how India should be tackling with the idea of TPF. The law commission of India should be directed in facilitating a public consultation process on third party funding and to examine the idea from an Indian perspective and provide for the necessary elements for the development of TPF in India. The aspects that the law commission should focus are the examining the scope and growth of TPF in India; how to locally adapt the global best practices; the impact of TPF on the right to access to justice; regulatory approvals for cross border funding including the amendments to the FEMA Act; and the amendments that needs to be brought about in the Indian Arbitration and Conciliation Act 1996 and in the Indian Income Tax Act 1961. A public consultation on these issues would acquaint the general public on the concept of third party funding and also educates the disputants on its advantages.563

Another important issue that needs to be dealt with at the time of framing the regulations for TPF is whether hard or law soft approach should be followed. A hard law approach means that the regulation made is binding on the parties concerned. On the other hand, soft law approach means that the regulations made are non-binding on the parties concerned. Given the novelty and continual development nature of TPF, it is better India adopts a non-binding regime that is to provide regulations as guiding code of conduct to the parties. Thereafter, once TPF has been established as an industry

562 TPF In International Arbitration – India’s Readiness in a Global Context; By Anish Wadia and Shivani Rawat.

563 TPF In International Arbitration – India’s Readiness in a Global Context; By Anish Wadia and Shivani Rawat.
these regulations can be made into a binding code of conduct (if necessary).\textsuperscript{564}

**Conclusion**

Around the world, various jurisdictions have welcomed the idea of third-party funding and some common law jurisdictions have re-analyzed the applicability of the archaic doctrines of champerty and maintenance to give effect to the idea of TPF. Even though India is a common law country, through various judicial precedents it has been established that the doctrines of champerty and maintenance are not applicable to India hence, making a step closer for India to recognize the idea of TPF in international arbitration. It has also been established that adoption of the idea TPF would lead to an increase in the access to justice and also leads to a reduction in the number of cases the court has to deal with. TPF can also tackle the problem of rising costs for submitting the matter before an arbitral tribunal and is considered as the most favorable mechanism by the global legal community. Countries like the Hong Kong and Singapore have given statutory recognition of TPF in international arbitration so as to meet the needs of the international arbitration participants and to attract these participants to their countries for conducting the arbitration. With that in mind, it is important that India should take concrete steps towards developing a robust regulatory mechanism to ensure a smooth introduction of TPF in India.

The current lack of international regulations is largely owing to the fact that TPF is yet to expand its frontiers. This also places India in a unique position to navigate these waters with sufficient freedom in developing its own regulatory framework.

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LEGAL CONTROL OF PORNOGRAPHIC SITES AND ETHICAL AND MORAL ISSUES: A JURISPRUDENTIAL ANALYSIS

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ABSTRACT
Pornography can be considered as a broad and artistic culture. It can also be considered a concept, and it is left to individuals, who both approve and disapprove of pornography, to judge how it may affect their personal values, morality and ethics. In order for individuals to acknowledge these specific qualities, governments have developed censorship laws and feminists have argued for the rights of women, and against pornography. Yet, at the same time there is an opposition that advocates the right to use pornography. Pornography may also affect a person’s perception of sex, general intimacy between genders (both alike and unalike), and in some cases, self-perception.

Throughout this project, there will be an analysis of the concept of pornography from ethical, sociological and psychological aspects. Through philosophical viewpoints, we will incorporate the notions of ethics, morals and values. This project will focus on the impacts that pornography has on the individual and its culture, rather than the whole culture of pornography itself.

KEYWORDS
1. Pornography
2. Ethics

Chapter 1. INTRODUCTION & MATERIALS AND METHODS

1.1. INTRODUCTION

Pornography is the representation of sexual behaviour in books, pictures, statues, motion pictures, and other media that is intended to cause sexual excitement. The distinction between pornography and erotica is largely subjective and reflects changing community standards. The word pornography, derived from the Greek word porni (“prostitute”) and graphein (“to write”), was originally defined as any work of art or literature depicting the life of prostitutes.\(^{565}\)

Pornography has been defined in the Merriam-Webster\(^{566}\) as:
1: the depiction of erotic behaviour (as in pictures or writing) intended to cause sexual excitement,
2: material (such as books or a photograph) that depicts erotic behaviour and is intended to cause sexual excitement,
3: the depiction of acts in a sensational manner so as to arouse a quick intense emotional reaction

The Blacklaw’s Dictionary\(^{567}\) also defines pornography as:

\(^{565}\) Encylopedia Britannica.
“That, which is of, or pertaining to obscene literature; obscene; licentious.”

Thus, any material, video or audio or books, that causes sexual or erotic reactions in human being, is termed as ‘Pornography’. The beginning of pornography is not a recent advent. As early as 30,000 years saw the sexual awakening of man, with Paleolithic people were carving large-breasted, thick-thighed figurines of pregnant women out of stone and wood.

Observing through history, the ancient Greeks and Romans created public sculptures and frescos depicting homosexuality, threesomes, fellatio and cunnilingus. In India during the second century, the Kama Sutra was half sex manual, half relationship-handbook. The Moche people of ancient Peru painted sexual scenes on ceramic pottery, while the aristocracy in 16th century Japan was fond of erotic woodblock prints.

In the West, many early explicit materials were political, rather than exclusively pornographic, said Joseph Slade, a professor of media arts at Ohio University. French revolutionaries, in particular, satirized the aristocracy with sexually charged pamphlets. Even the Marquis de Sade's famously brutal and erotic works were part philosophical.

However, these artefacts were not purely meant for the sexual gratification of other men or women. They were viewed more as a form of art, to be looked at and appreciated for afar. The term ‘porn’, abbreviation of pornography, was started to be used in the 1800s, solely in the Western countries, when the pornographic industry was created, with technology given it the much needed boost. In 1839, Louis Daguerre invented the daguerreotype, a primitive form of photography. Almost immediately, pornographers commandeered the new technology. The earliest surviving dirty daguerreotype — described by Prof. Slade in a 2006 paper as "depicting a rather solemn man gingerly inserting his penis into the vagina of an equally solemn and middle-aged woman" — is dated at 1846. Video followed a similar path. By 1896, filmmakers in France were delving into the erotic with short, silent clips. Then, in the 1970s, changing social mores opened the door for public showing of explicit films. The Internet and the invention of the digital camera lowered the barriers to porn-making so low that entire websites are now devoted solely to non-professional videos.

However, with the increasing demand of more enticing content from the porn industry, the makers have to come up with facets that are socially out-casted. This leads to not only an unhealthy knowledge of sexually aggressive activities, but also no guidelines of utilising them in an young adult’s world. This project report aims to jurisprudentially analyse the legal issues that pertain to the functioning of pornographic

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569 Stephanie Pappas, The History of Pornography, LIVE SCIENCE (Oct. 11, 2010).
sites in India, and their morals as well as ethical aspects.

1.2. MATERIALS AND METHODS

- **Title** -

Title of the research paper is Legal Control of Pornographic Sites and their Ethical and Moral Values: A Jurisprudential Analysis

- **Problem** -

The main problem dealt in this project report is the high occurrence of the sexual content on the Internet, and how it is being legally maintained by the various countries, as well as its impact on the morals of the society.

- **Rationale of the study** -

The study of the legal aspect of regulating pornography is necessary to understand the psychological impact it has on today’s youth, and whether such activities should be allowed to be perceived by the society. It has become an immediate concern for the growing generation to understand the consequences of an activity that is now deemed as ‘casual’. Whether pornography fits the moral brackets of the society, and whether regulating it can help curb the menace of objectification of sex, is something the researcher wishes to demonstrate through this paper.

- **Objectives** -

The main objectives of the study are:

- To find out various laws regulating such sites all over the world.
- To examine its relation with morals and ethics with respect to jurisprudence.

- **Hypothesis** -

The idea about the topic is that pornography needs to be controlled by the cyber laws of a particular country as it is below the moral and ethical standards of society.

- **Nature of the study** -

This research project is Doctrinal in nature since it is largely based on secondary & electronic sources of data and also since there is no field work involved while producing this research and it largely involves study of various theories and comparison from different books, journal and other online sources thus not being empirical in nature.

- **Sources of Data** -

Data that were used for the completion of this research project are all secondary sources of data ranging from books, journal, articles and other online sources and as far as case laws are concerned these cannot be said to be primary sources since they are not first-hand information or judgment reports but a modified form found in books or journals.

- **Chapterisation** -

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This project report has been divided into following chapters:-

- **Chapter 1.-Introduction** deals about the general information and evolution of pornography and how it came to be.
- **Chapter 2.-Understanding the Legal Control of Pornographic Sites** is aimed at enabling the reader to understand how pornography is legally controlled in different parts of the world.
- **Chapter 3. – Legal Control under the Indian Law** is aimed at showing how Indian laws enable in controlling the viewership of pornography in the country.
- **Chapter 4.-Ethical and Moral Values of pornography** is aimed at showing how pornography fits into the ethical and moral brackets of society.
- **Chapter 5.- Jurisprudential Approach** is aimed at showing the approaches by jurists such as J.S. Mill as well as the Hart-Devlin debate on morality, to have a better understanding of law and morality.

### Chapter 2. DATA ANALYSIS

#### 2.1. UNDERSTANDING THE LEGAL CONTROL OF PORNOGRAPHIC SITES

Cyber pornography is in simple words defined as the act of using cyberspace to create, display, distribute, import, or publish pornography or obscene materials. With the advent of cyberspace, traditional pornographic content has now been largely replaced by online/digital pornographic content. Unlike the latter cyber crimes, which threaten the very creditability of the Internet, cyber pornography promotes the use of the Internet. Should cyber pornography be prohibited, or restricted? How much of cyber pornography should be legal? What are the powers of the state to prohibit or regulate cyber pornography? These are difficult issues to resolve. There are two reasons as to why cyber pornography has became difficult to regulate is: firstly, it is easily, freely, and conveniently available, secondly, its global accessibility. There are different legal statues for cyber pornography around the world.

In *People v. Freeman* 573 of 1988, the California Supreme Court stated that adult film production was to be protected as free speech under the First Amendment 574. They ruled that since such films did not include obscene images and indecency, and stayed within society's standards, the adult film industry should be granted the freedom of speech. 575 Escaping highly regulated government intervention, regulation in the adult film industry has been limited to preventing child pornography. In the United States Code of Regulations 576, under title ‘Title 18, Section 2257’, no performers under the age of 18 are allowed to be employed by adult industry production companies. The failure to abide by this regulation results in civil and criminal penalties.

572 Merriam-Webster.

575 Randazza, Marc J., *The Freedom to Film Pornography*, NEVADA LAW JOURNAL (Nov. 27, 2016).
prosecutions. To enforce the age entry restriction, all adult industry production companies are required to have a Custodian of Records that documents and holds records of the ages of all performers.

‘Extreme pornography’ is a term introduced by the UK Government in Part 5, Section 63 of the Criminal Justice and Immigration Act (2008), which made possession of such images a criminal offense from 26 January 2009. It refers to pornography (defined as an image which "of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal"), which is "grossly offensive, disgusting or otherwise of an obscene character", and portrays any of the following:

(a) an act which threatens a person’s life,
(b) an act which results, or is likely to result, in serious injury to a person’s anus, breasts or genitals,
(c) an act which involves or appears to involve sexual interference with a human corpse,
(d) a person performing or appearing to perform an act of intercourse or oral sex with an animal (whether dead or alive),

and a reasonable person looking at the image would think that any such person or animal was real.

The term covers staged acts, and applies whether or not the participants consent. Classified works are exempt, but an extract from a classified work, if the image was extracted for the purpose of sexual arousal, would not be exempt. Whether an image is "pornographic" or not is up to the magistrate or jury to determine simply by looking at the image; it is not a question of the intentions of those who produced the image.

2.1.1. LEGAL REGULATIONS

Some areas of legal concern regarding adult pornography are:

Prohibiting certain or all types of pornography that are illegal within a government’s jurisdiction, for countries that do not prohibit all pornography, this might include pornography featuring violence or bestiality, and the likes.

Preventing those under the legal age (for most this means a minor under 18) from accessing pornographic content.

Enforcing laws designed to ensure that performers in pornography are of legal age.

In jurisdictions that heavily restrict access or outright ban pornography, various attempts have been made to prevent access to pornographic content. The mandating of Internet filters to try preventing access to porn sites has been used in some nations such as China and Saudi Arabia. Banning porn sites within a nation's jurisdiction does not necessarily prevent access to that site, as it may simply relocate to a hosting server.

579 Associated Press, INDEPENDENT (Jul.23, 2010).
within another country that does not prohibit the content it offers.

Many nations that allow at least some types of pornography attempt to ensure that those under their legal age for accessing pornography (often 18 or 21) cannot easily access it. Various measures have been tried but with varying success. Within the United States, most websites have taken voluntary steps to ensure that visitors to their sites are not underage. Many Web sites provide a warning upon entry, warning minors and those not interested in viewing porn not to view the site, and requiring one to affirm that one is at least 18 and wishing to view pornographic content. Such warnings are at times used with other techniques, specifically on commercial and premium streaming sites.

The Adult Industry Medical Associates P.C. (formerly Adult Industry Medical Healthcare Foundation), also known simply as AIM or AIM Medical, was an organization that tested pornographic actors for HIV and other STDs on a scheduled basis.

Tests for the sex industry actors were done at the Foundation's offices in San Fernando Valley, Sherman Oaks, and Granada Hills. Each month, about 1,200 actors were tested for HIV, with results as early as 14 days after infection. This test is effective 10 days after potential infection, and anytime thereafter as compared to the alternative HIV test which requires a six-month waiting period to be effective. Other tests include such STDs as gonorrhea and syphilis.

AIM went out of business in 2011 after a lawsuit regarding violation of patient privacy. 581

Chapter 3. LEGAL CONTROL UNDER THE INDIAN LAW

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 either.

Under Section 67 of the Information Technology Act, 2000 makes the following acts punishable with imprisonment up to 3 years and fine up to 5 lakhs:

Publication- which would include uploading on a website, what's app group or any other digital portal where third parties can have access to such content.

Transmission- this includes sending obscene photos or images to any person via email, messaging, Whastapp or any other form of digital media.

Causing to be published or transmitted- this is a very wide terminology which would end up making the intermediary portal liable, using which the offender has published or transmitted such obscene content. The Intermediary Guidelines under the Information Technology Act put an onus on the Intermediary/Service Provider to


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exercise due diligence to ensure their portal is not being misused.

Section 67A of the Information Technology Act makes publication, transmission and causing to be transmitted and published in electronic form any material containing sexually explicit act or conduct, punishable with imprisonment upto 5 years and fine upto 10 lakhs.

- An understanding of these provisions makes the following conclusions about the law of cyber pornography in India extremely clear:
  - Viewing Cyber pornography is legal in India. Merely downloading and viewing such content does not amount to an offence.
  - Publication of pornographic content online is illegal.
  - Storing Cyber pornographic content is not an offence.
  - Transmitting cyber pornography via instant messaging, emails or any other mode of digital transmission is an offence.

This section also includes "causes to be published" and prohibits Internet Service Providers from transmitting adult content. But no ISP can block adult content on their own. They prefer to invoke Section 79 (3B), to block only on the direction of the government. ISPs insist on a list of websites common for all ISPs.

Govt provided such a list of 857 websites and ISPs blocked them for 5-days in 2015, from 1-August till 5-August. Due to huge loss of revenue to ISPs, govt softened its stance and instructed to block only child pornography.

In the infamous Baze.com case, the CEO Avnish Bajaj was arrested for an advertisement by a user to sell the DPS sex scandal video. The video was not uploaded on the portal, despite that Avnish was arrested under Section 67 of the Information Technology Act. It was subsequent to this case that the Intermediary guidelines were passed in 2011 whereby an Intermediary’s liability would be absolved if they exercised due diligence to ensure obscene content is not displayed on their portal. The act of collecting and storing cyber pornography is not an offence, but if the content involves minors, then it is punishable with imprisonment upto 5 years and fine upto 10 lakhs.

However, there is one case in which viewing cyber pornography is punishable with imprisonment upto 5 years and fine upto 10 lakhs, where the content contains children engaging with one another or with adults in sexually explicit acts.

Browsing or downloading Child pornography online is also a punishable offence under the Information Technology Act. The creation of child pornography is also punishable under the Act.

Recent Indian incidents revolving around cyber pornography include the Air Force Banned: Complete List of 857 Porn Websites blocked in india, Deccan Chronicle (Aug. 2014).

583 Shauvik Ghosh, Porn ban could cost ISPs, telecos 70% of Data Revenue, LIVEINT (Aug. 05, 2014).


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In the Supreme Court held

that the concept of obscenity would differ from country to country and from society to society on the standard of morals. Again it was recognised that the standards of contemporary society in India were also dynamic and if a reference to sex by itself were considered obscene, no books would be sold except those, which are religious. The court went on the say, what one has to see is whether a class, not an isolated case into whose hands the book, article or story falls, suffer in their moral outlook or become deprave by reading it or might have impure thoughts aroused in their minds. Again, in case of Samaresh Basu v. Amal Mitra\(^{594}\), the court said that the concept of obscenity is moulded to a great extent by the social outlook of the people who are generally expected to read the book. The court held that in order to constitute an offence u/s 292 of the IPC, the matter complained of as obscene must be so gross and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort.

### 3.1. INTERFACE BETWEEN INDIAN LAWS AND LAWS OF U.S. AND U.K.

The test of obscenity since Hicklin case has been variously stated with shifting emphasis, in the UK and the US. Broadly, it has been recognised that obscenity has to be judged in the context of contemporary standards and prevailing attitudes towards sex. However, Hicklin’s test was objected on certain

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\(^{590}\) The Indian Penal Code (45 of 1860).

\(^{591}\) (1868) 3 QB 360.

\(^{592}\) (1965) SC 881.

\(^{593}\) (1969) 2 SCC 687.

\(^{594}\) (1985) 4 SCC 289.

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grounds by Justice Brennan in the famous American case, Roth v. U.S.\(^{595}\). The three grounds identified by J.Brennan were:

- it permitted books to be judged obscene on the basis of isolated pages read out of context;
- it allowed the obscenity of a work to be determined by its likely effects on unusually susceptible persons;
- it posited fixed standards of propriety regardless of time, place and circumstances.

In this case it was held that a book could be judged obscene only if the dominant theme of the material taken as a whole considered and its likely effect on the average person is taken into account. This came to be popularly known as Roth's ‘three-pronged test’. The test was considered to be more effective than earlier Hicklin's test. Another important code that attempts to regulate obscenity is Indecent Representation of Women's (Prohibition) Act 1986.\(^{596}\) The title of the Act makes it amply clear that the legislature is to prohibit "indecent representation". Pornography, which amounts to indecent representation, is also an offence under this act. The issue to be determined is what may amount to indecent representation. To this section 2(c) of the Act defines indecent representation as –

*the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or 135 derogatory to, or denigrating, women, or is likely to deprave, corrupt, or injure the public morality or morals*.

The Supreme Court of India, in the case of Khoday Distilleries Ltd. and Ors. v. State of Karnataka and Ors.\(^{597}\), held that there is no fundamental right to carry on business of exhibiting and publishing pornographic or obscene films and literature.

In Kamlesh Vaswani vs. Union of India and Ors. a PIL petition was filed in the Supreme Court of India seeking a ban on pornography in India. The Court issued a notice to the central government of India and sought its response. The government informed the Court that the Cyber Regulation Advisory Committee constituted under Section 88 of the IT Act, 2000 was assigned with a brief with regard to availability of pornography on the Internet and it was looking into the matter.\(^{598}\)

On 26 January 2016, the Supreme Court in written order, instructed govt "to suggest the ways and means so that these activities are curbed. The innocent children cannot be made prey to these kind of painful situations, and a nation, by no means, can afford to carry any kind of experiment with its children in the name of liberty and freedom of expression. When we say nation, we mean each member of the collective."\(^{599}\)

Chapter 4. Ethical and Moral Values of Pornography

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\(^{595}\) (1957) 35 US 476.


\(^{597}\) (1995) 1 SCC 574.

\(^{598}\) Kamlesh Vaswani v. Union of India, (2014) 6 SCC 705.

\(^{599}\) Ibid.
Healthy sexuality combines emotional, social, intellectual, and physical elements, but pornography separates the mechanized components of intercourse from real sexuality itself. It leads to decreased sensitivity toward women and increased aggression. It also leads to a decreased ability to build healthy relationships or experience sexual satisfaction; users are increasingly unable to properly link emotional involvement with sex. Indeed, porn fosters incredibly unhealthy views about sexuality and human beings. Most porn portrays women as sex-obsessed, mindless objects, promiscuous and subordinate.\footnote{Rachel L. Wagley, \textit{Pornographic Ethics}, \textit{The Harvard Crimson} (Mar. 28, 2011).}

There is a moral obligation within systematic social order, and this is referred to as ‘ethics’. Along with moral obligation, there is the inclusion of moral concepts, and judgements that may define, or differentiate the values of morals and ethics, and will also have alternative meanings within an assortment of social orders. For instance, in terms of pornography, the standpoint of pro-pornographic theorists may defend the right and moral order to obtain, use and exercise pornography at their own free will.

On the other hand, the anti-pornographic stance may possibly exercise the right that pornography is considered harmful, and should be abolished from all modern day societies, since the outcome may or can lead to criminal offenses and unjust actions. Ethics, morals and values evolve with each passing decade, and therefore it must be analysed and discussed with a modern perspective, not to mention a realisation of how modern day society acts, thinks and performs. Pornography is a large field that has many elements, as well as retains ethical attitudes from both a positive outlook and a negative outlook. It can be considered important to uncover the differences between values, facts and ethics from both sides of the argument.

When discussing values, the aspect and realm of utilitarianism may create cause in order to decipher the differences and similarities in the arguments. According to Hare\footnote{R.M. Hare, White's Professor of Moral Philosophy at the University of Oxford from 1966 until 1983.}, utilitarianism is the concept of concern for a person’s well-being, rights, values and morals. The concept includes equality for all persons and establishes equal weight in both recurring arguments. However, there is a wide variety of variables in the consideration of utilitarianism, and in the concept of pornography, this is now perceived as equal and unequal rights. There is a fine line when developing arguments that are for or against the use and exercise of pornography. Individuals can be utilitarian, but still argue against pornography. For instance, a feminist, whom is anti-pornographic, can proclaim to be utilitarian, and can exercise the ‘equal rights’ aspect, and enable the ‘discrimination’ factor as the foundation of their argument. Or, the unequal rights aspect may be employed and the foundation could be ‘harm’ and ‘humiliation’ towards women, and in some cases, men. In regards to pornography, the foundation begins with a moral code, or conduct.
A person’s inner feeling and response to the idea and practice of pornography, and some arguments are based on the harmful outcomes that pornography, supposedly, produces. However, if free will and equal rights are in fact part of legislation, then both sides of the argument can be considered valid as both sides of a right to moral conduct and a code of values. In addition, it must be determined what can be considered fair, and what actions are considered right while governing a concrete world. When moral, values and attitudes are in constant change; it is proven difficult to maintain the just and unjust principles in government, society and social order.

Chapter 5. Jurisprudential Approach

5.1. John Stuart Mill’s Theory on Liberty

John Stuart Mill, was born in London lived from 1806 to 1873. He followed in his father’s footsteps as an intellectual utilitarian philosopher. After a mental crisis at the age of twenty, he proceeded to reinterpret his philosophy “truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right”. 602

Mill argues that though we act out of the best interest for everyone, no one can or should impose opinions on others or suppress others’ opinions or beliefs. The particular evil of such suppression is that one takes away an element of truth from the entire humanity for generations to come. If the opinion is right, the suppressors cheat themselves the opportunity to act according to the truth. Almost dire, if the suppressed opinion is actually wrong, one misses the opportunity to enhance the fundamental understanding and impression of such truth that comes from the conflict between opposing opinions. An individual can believe his or her opinions to be true but it is not until it has been exposed towards critique and discussion that the opinions can prove their infallibility and be called justified truths. This is because no one has the authority to settle the question of true or false on a universal level, as it is determined by the responding disagreement.

Mill asserts that by limiting freedom of discussion for the individual or a group, even though one is sure of one’s beliefs, the truth can fade away. Therefore one must not limit speech or thought but let it out to the debate where it might manifest itself or disappear as it proves itself valid or invalid. The truth is not a justified truth if it cannot stand in an argument against it. Mill argues that by limiting freedom of speech of other people, it does not entail the disappearance of the opposed beliefs. It can in fact further the opposing notions and cause even greater damage to the truth than if it had been openly discussed. Mill gives the example of the teachings of Socrates and Jesus where their ideas and values did not die with their executions. In the case of pornography the censorship of “Deep Throat”, an adult movie that came out in 1972, twenty-three American States only furthered the sale and distribution and eventually became a symbol of the sexual revolution that changed the

In relation to Mill’s arguments for the truth not prevailing by itself, the prosecution of Harry Reems shows how an opposition that is large and efficient enough ensures the survival of a suppressed truth. The trial against Harry Reems and the aftermath demonstrates how the interpretation of the law and thus the ‘truth’ is determined by moral codes and values, and the overturn of the verdict by the new precedential office in 1976 might not have happened had it been for the anti-censorship opposition. If the opposition had not taken action and the prosecution had not been coincidental, the ‘truth’ might not have prevailed.

Mill further states that neither society nor other people should have the right to restrict anyone from putting him - or herself in danger. This is a consequence of Mill’s central thought on individual liberty. According to Mill, this means that the success of a person’s existence is not defined by its goals, or whether its content is more or less reasonable. Instead, the ‘good life’ depends on the freedom to choose a way of life, no matter the outcome of such a decision. In other words, the good life comes from individual freedom to experiment with different ways of living. Each individual needs the freedom to choose and engage in different lifestyles of his or her own choosing in order to live a satisfactory life, because the individual knows what is best for him or her. Feminist Catherine MacKinnon believes pornography to be patriarchal and that it, no matter the content, is discriminating towards women. Here one has to consider if one is dealing with women in general or if one is ‘only’ looking at women who are participating in the pornography industry. A harmful outcome of its content as well as the context and that it is crucial to stop the subordination of women through the constant depiction of male superiority portrayed in pornography and the misogynistic violent behaviour that it can result in. These feminists base their arguments on narratives from women who argue that they have been subjected to misogynistic violent behaviour because of pornography. Furthermore, one can argue that a woman can have entered the industry voluntarily, but might be coerced to do other things on set than what she was initially told.

Thus, Mill’s theory teaches us to respect the opinion of others, and allow individual liberty to prevail, even if the act renders disturbance to the society. He asserts that what an individual does within closed walls is her matter of business, and one else’s.

5.2. LAW AND MORALITY- THE HART-DEVLIN DEBATE

Under the Criminal Law Amendment Act 1885, any homosexual activity between males was illegal. After the Second World War there had been an increase in arrests and prosecutions, and by the end of 1954, 605

604 Harry Reems was accused and convicted in accordance to the Law of Conspiracy in 1976, (Inside Deep Throat, documentary 2005.)

in England and Wales, there were 1,069 men in prison for homosexual acts, with a mean age of 37 years. Following several sensational trials, notably that of Alan Turing and Lord Montagu of Beaulieu, the Conservative government set up a departmental committee under Sir John Wolfenden to consider both homosexual offences and prostitution.

Wolfenden Committee\(^{606}\) had to prepare a report on the issue of legalising homosexuality and prostitution. The report came in favour of legalisation as it stated that the law need not concern itself with immorality. HLA Hart, Lord Patrick and Lord Devlin took part in the debate. The primary reason for the decriminalisation of homosexuality was on the basis of:

- Freedom of choice
- Privacy of morality

- Devlin’s Position
  - Law without morality destroys freedom of conscience and is the paved road to tyranny.
  - He talked about society’s ‘moral fabric’ which the society holds together and if the criminal law does not respect and reinforce society’s morality, it will destroy the ‘moral fabric’ leading to the disintegration of society.
  - Any category of behaviour that is capable of posing a threat to social cohesion can be governed by moral laws. They are justified as they protect society against the disintegrating effects of actions that undermine the morality of a society.

- Hart’s position
  - His position was based on Mill’s Harm principle, i.e., no act should be interfered with, unless it affects the rights of another person.
  - He warned against dangers of ‘populism’ and was against the view of imposing majoritarian perception of morality over the remaining members of the society.
  - He also stated that mere change in moral views does not lead to disintegration of society.
  - Hart’s approach is more individualistic to that of Devlin.

Thus, the Positive Morality and Critical Morality approaches of Devlin and Hart, respectively, compels one to think about which route to take, however, both theories are accurate in their own space. Pornography is definitely the subject of an individual’s choice, and that choice should not be interfered with unless the viewing of pornography by one person leads to violation of rights of another person.

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In cases where women are subjected to violent attacks by men who watch porn and wish to recreate the same situations in real life, law should interfere and try to protect not only the morality of society but also the freedom of another person.

CHAPTER 6. CONCLUSION & SUGGESTIONS

6.1. CONCLUSION

In conclusion, the result of ethical warrants is censorship. The evidence provided from the warrants is used differently in the pursuit of pornography, thus depending on the stance, might create the opposite effect of what was initially intended. If the individual is restricted from obtaining pornography, they may seek an alternative approach to obtain pornography because of their need for sexual autonomy. If people are denied the right to exercise their sexual autonomy they may rebel against the restriction in order to maintain their free will. Ethics are choices and with those choices come consequences, thus creating different degrees of consequences. People aim at choosing the option that has the most preferable consequence for them. Ultimately, we can conclude that there is no correct perception of pornography, as it is a subjective field, where the individual develops a personal opinion, which can be affected by the extreme convictions. We have come to the realisation, that no person is justified to determine what is right or wrong for other people, in terms of pornography, as you cannot control another person’s value-system.

6.2. SUGGESTIONS

Today it seems that the mentality or the way people think is changing, people are being more open about what ought to do and what not. The researcher thinks in a few years people will reach a point where they would think pornography should be legalized fully without any barriers. This in itself will give a huge relief to the sex industry in the country. If their profession becomes legal they would be able to enforce their rights fully and will also be able to fight any discrimination that comes their way. What is immoral for us might not be immoral for others therefore it can be said morals vary from person to person and since morals are not static only on the basis of morals if we regard prostitution illegal it should not be so.

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MARITAL RAPE: DARKER SIDE OF A MARRIAGE

By Riya Kumari & Chayan Roy
From ICFAI University, Dehradun

“They are all innocent until proven guilty. But not me. I am a liar until I am proven honest.”

Was my silence to this brutality a marriage vow? Is this suffrage a moral obligation? Will raising my voice against this cruelty makes me less of a good wife? I guess I should be quite.

Marriage is a bound between two souls where they vow each other to treat with love, affection and humanity. They share a consent to have a right on each other. But how far is this right misinterpreted? Marital rape is defined by any unwanted sexual acts by a spouse or ex-spouse, committed without consent or against a person's will, obtained by force, or threat of force, intimidation, or when a person is unable to consent. There are various types of rape, including battering rape, force-only rape and obsessive or sadistic rape.

Marital rape exists in the data, but not in law because our country has still not criminalized marital rape and so we don’t acquire such strong laws which could saves millions of wives from this cruelty. Rape is defined under section 375 of Indian Penal Code, 1860 but marital rape has no legal stand of its own.

There are different kind of marital rape. Starting with Forceful sex where the male forcefully enters into sexual intercourse with the women without her willingness. It includes battering rape, obsessive rape etc. Then comes sexual coercion in non-physical, where the male threaten or make false promises to end their marital status. It is majorly a verbal abuse non-physical manner to get into sexual contact without the consent of the female.

Laws favouring Marital Rape are Section 375 of Criminal Law (Amendment) Bill, 2013 is an anti-rape bill which defines sexual offences and acts which are strictly considered and followed.

There are various social activists and NGO’S which helps women who are suffering through marital rape and consults Domestic Violence Act, 2005 but are still unsuccessful to call marital rape as a serious crime.

Protection of Women from Domestic Violence Act, 2005 consist the reasonable civil remedies for the violence against women which includes marital rape too.

On a global level, Ghana, India, Indonesia, Jordan, Lesotho, Nigeria, Oman, Singapore, Sri Lanka, and Tanzania expressly allows spousal or Marital Rape. In four of these countries, it is permitted even when the victim is a child.

Ghanaian law, for example, states that “consent given by husband or wife at marriage, for the purposes of marriage, cannot be revoked,” unless the parties are divorced or legally separated. And spousal rape is only illegal if the perpetrator also uses abusive language, violence, or threats.
Supreme Court’s recent judgment states that sexual intercourse with wife below 18 years is rape so why not forceful sex with your wife be marital rape?

Keywords: Marital Rape, Sexual intercourse, Forceful sex, Rape, Domestic violence, Sexual offence.

MARITAL RAPE: DARKER SIDE OF A MARRIAGE

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Was my silence to this brutality a marriage vow? Is this suffrage a moral obligation? Will raising my voice against this cruelty makes me less of a good wife? I guess I should be quite.

Marriage is a bound between two souls where they vow each other to treat with love, affection and humanity. They share consent to have a right on each other. But how far is this right misinterpreted? Marital rape is defined by any unwanted sexual acts by a spouse or ex-spouse, committed without consent or against a person’s will, obtained by force, or threat of force, intimidation, or when a person is unable to consent. There are various types of rape, including battering rape, force-only rape and obsessive or sadistic rape.

Marital rape exists in the data, but not in law because our country has still not criminalized marital rape and so we don’t acquire such strong laws which could saves millions of wives from this cruelty. Rape is defined under section 375 of Indian Penal Code, 1860 but marital rape has no legal stand of its own as per now.

Rape is defined as:

“375. 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, and 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.

Secondly.—without her consent.

Thirdly.—with her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the
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. Explanation 1.—for the purposes of this section, "vagina" shall also include labia majora. 
Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity. 
Exception 1.—A medical procedure or intervention shall not constitute rape. 
Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.” 607

Kinds of marital rape
There are majorly three categorised kinds of marital rape broadly described as-

Force only rape
This kind of rape happens when the abuser desire to exert its power and control over the female. This form of rape is common where there is a larger contrast between the physical size and strength of abuser and victim, or in abusive relationships where physical violence is infrequent or non-existent.

Violent Rape
This kind of rape is defined as when the abuser uses extreme physical force to injure the victim; such physical abuse could result in injuries on the physical parts i.e. Genital areas and breast. Such assault includes physical violence by punching or beating or rape with physical assault. A wife due to such shameful act goes through immense humiliation and pain which becomes a part of their lives.

Obsessive and Sadistic Rape
This kind of rape takes the humiliation a female experience, to another level as the abuser rapes the victim by shameful means like, urinating on the female, acting out of fantasy and torcher or using objects during rape.

Status of Marital Rape in India
Every human being irrespective of his or her sex, has a certain right and authority over his or her own body. As stated in Indian Penal Code, Section 375- “Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.” This section naturally takes away this right and authority which is unfair, unjust and undue. There are some laws or rules or to be more specific “orthodox regulations” which needs to be changed and updated with time. The laws which make “Woman the Property of Man” and encourage such things needs to be changed. While most of the developed world has penalized marital rape, surprisingly, there is no law to protect married women against Marital Rape in India. Marital rape can't be made a Criminal Offence in India because of high illiteracy rate, poverty, extreme religious beliefs and the very ‘sanctity’ of marriage. Marriage in India is, among other things, a sexual contract because it gives the man implied consent to sex in perpetuity. It

607 The Indian Penal Code, 1860. Section 375.
reinforces the man’s “ownership” rights over the wife. This denies the woman any agency over her own body, its sexuality and its reproductive function. Refusing to criminalise marital rape is to accept that sexual coercion against a woman, so long as it is within a marriage, will be endorsed by both government and society. If women are to wrest control of their lives, they have to have the right to say no to their husbands without being socially penalised for it. The myth of the ‘wifely duty’ and the ‘conjugal right’ must end because marital sex, as all sex, must be with mutual consent and pleasure.

The best way that the law protects women subjected to marital rape is by charging the husband with a minor offence of cruelty, the punishment of which goes up to three years in jail or a fine. In worse cases, she can seek restraining order and protection under domestic violence legislation. It is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors, including level of education, illiteracy, poverty, myriad social customs and values, religious beliefs, the mind-set of the society to treat the marriage as a sacrament. The court in a case said “Defence counsel rightly argued that IPC does not recognize concept of marital rape. If complainant was a legally wedded wife of accused, the sexual intercourse with her by accused would not constitute offence of rape even if it was by force or against her wishes”  

The UN Committee on the Elimination of Discrimination against Women in February 2007. The CEDAW Committee has recommended that the country should “widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape from the definition of rape.”

When society makes theft or murder a punishable offence, it does so not because everyone is a potential thief or murderer but to protect everyone from the few thieves and murderers. Are these laws misused? Yes they are, all of them, and with a great frequency.

Despite the historical myth that rape by one’s partner is a relatively insignificant event causing little trauma, research indicates that marital rape often has severe and long-lasting consequences for women. The physical effects of marital rape may include injuries to private organs, lacerations, soreness, bruising, torn muscles, fatigue and vomiting. Women who have been battered and raped by their husbands may suffer other physical consequences including broken bones, black eyes, bloody noses, and knife wounds that occur during the sexual violence. Specific gynaecological consequences of marital rape include miscarriages, stillbirths, bladder infections, infertility and the potential contraction of sexually transmitted diseases including HIV.

**Laws relating to Marital Rape in India**


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608 The Life and Times of an Indian Homemaker
Sir Matthew Hale, Chief Justice in 17th Century England. Lord Hale wrote that: ‘the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual consent and contract, the wife hath given up herself this kind unto her husband which she cannot retract”

But this statement cannot be considered appropriate as it has no case laws or argument to basethe view. Indian laws are advanced but not yet so strong to stand on its own and be capable to criminalize marital rape in India.

So, present laws favouring Marital Rape are Section 375 of Criminal Law (Amendment) Bill, 2013 is an anti-rape bill which defines sexual offences and acts which are strictly considered and followed. There are various social activists and NGO’S which helps women who are suffering through marital rape and consults Domestic Violence Act, 2005 but are still unsuccessful to call marital rape as a serious crime.

In the 42nd Report by the Law Commission it was recommended that criminal liability should be attached to intercourse of man with his minor wife. However, the Committee refused the recommendation stating that husband cannot be guilty of raping his wife of whatever age since sex is a parcel of marriage. Further in 1983 with addition of Section 376A IPC, rape of judicially separated wife was criminalised.

Protection of Women from Domestic Violence Act, 2005 consist the reasonable civil remedies for the violence against women which includes marital rape too.

On 23rd August, 2005 Smt. Kanti Singh gave a speech on ‘the motion for consideration of the protection of women from Domestic Violence Bill, 2005’ in which she stated “All acts of gender-based physical and psychological abuse by a family member against women in the family, ranging from simple assault to aggravated physical battering, kidnapping, threats, intimidation, coercion, stalking, humiliating verbal use, forcible or unlawful entry, arson, destruction of property, sexual violence, marital rape, dowry or related violence, female genital mutilation, violence related to exploitation through prostitution, violence against household workers and attempt to commit such acts shall be termed ‘Domestic Violence’.” So, all these could be included in the ambit of the law. There is nothing wrong in that. There is a wide range of assault on women. When we consider the historical facts and also what is existing now, I think, this law will do some justice.

Case Laws relating to Marital rape in India

Independent Thoughts vs. Union of India

The exception to marital rape, as applicable to minor girls, was declared unconstitutional for violating two fundamental rights: Article 14 and Article 21 Constitution of India.

The Supreme Court has stated in its judgment that:-

“It must be remembered that those days are long gone when a married woman or a married girl child could be treated as subordinate to her husband or at his beck and call or as his property. Constitutionally a female has equal rights as a male and no statute should be interpreted or understood to derogate from this position. If there is some theory that propounds such an
unconstitutional myth, then that theory deserves to be completely demolished.”610
“The right of a girl child to maintain her bodily integrity is effectively destroyed by a traditional practice sanctified by the IPC. Her husband, for the purposes of Section 375 of the IPC, effectively has full control over her body and can subject her to sexual intercourse without her consent or without her willingness since such an activity would not be rape.”611

The prosecutor for the NGO, who argues to raise the age of consent, rightly points out the anomaly that women between 15 and 17 years of age who are not married and have consensual sex will be deemed raped as they are considered underage according to the POCSO Act. According to the terms of POCSO, any person below the age of 18 is a child. Therefore, the notion of "consent" does not have a legal standing in their cases. Thus the exemption stands in contradiction with the IPC provision.

205th report on the prohibition of child marriage

The Union of India should be directed to amend the laws relating to age of marriage and minimum age of giving sexual consent so that both are in conformity with each other. The petition prays for deletion of the explanation under section 375 IPC under which marital rape is not considered rape unless the wife is under 15 years of age. Provision relating to sexual intercourse with one’s own wife, the NCW suggested that “marital sexual intercourse by a man with his own wife without consent should also be considered as sexual assault.”612

Bhupender Singh V/s Union Territory of Chandigarh

In a decision relied on by the counsel, the Supreme Court stated that though there was ceremony of marriage between the complainant and the accused, the accused was already married refused to examine the allegations in the complaint as marital rape613

Post the case of Maneka Gandhi v. Union of India it has become the source of all forms of right aimed at protection of human life and liberty.614

Marital Rape: World status

Poland tops the list to recognize Marital Rape as a criminal offence in 1952. Australia, in seventies was another country to pass reforms in 1976 that made rape in marriage a criminal offence. Two decades before that, Scandinavian countries like Sweden, Norway, Denmark, and former soviet union and Czechoslovakia passed laws that criminalized spousal rape.

Since this implementation, several countries like South Africa, Ireland, Canada, The United States, New Zealand, Malaysia, and Israel have abolished Marital Rape in the 80’s. Between 1970s and 1993; all fifty states in USA made Marital Rape a Crime. European Parliament’s resolution on Violence against Women of 1986 called for criminalization of spousal rape which was done soon after by several nations including France, Germany, Netherlands, Belgium and Luxembourg. House of Lords in the UK struck down its common law principle that a marriage contract implied a woman’s consent to all sexual activity and made it a criminal offence.

610Independent Thought, p. 52, para 82.
611Independent Thought, p. 56, para 88.
612The Universal Declaration of Human Rights, 1948

613AIR2008(8) SCC 531
614AIR 1978 SC 597
In 2002, Nepal recognized Marital Rape as a criminal offence after its Supreme Court held that it went against the constitutional right of equal protection and the right to privacy. Ghana, India, Indonesia, Jordan, Lesotho, Nigeria, Oman, Singapore, Sri Lanka, and Tanzania expressly allows spousal or Marital Rape. In four of these countries, it is permitted even when the victim is a child.

Ghanaian law, for example, states that “consent given by husband or wife at marriage, for the purposes of marriage, cannot be revoked,” unless the parties are divorced or legally separated. And spousal rape is only illegal if the perpetrator also uses abusive language, violence, or threats.

Our view concerning marital rape
Rape is forcible seizure, or the ravishment of a woman without her consent, by force, fear or fraud. It involves coercive, nonconsensual sexual intercourse with a woman. Rape can be viewed as an act of violence on the private parts of a woman, and outrage by all means. It’s even more shocking how our society tries to normalize the sexual violence committed on wives. It is like an invisible sexual bondage, where one party decides the terms and conditions, and the other party agrees to perform. But if you decide to speak up against it, society will have issues with your culture. India’s most ancient cultural heritage of Veda must be thoroughly recollected in the context. The concept is marriage is ever sacred and it has been strictly advised to carry on the relation only for procreation not for exploitation of dignity of woman or unusual indulgence to satisfy the carnal appetite because of the self-made superiority of the male community destined to go to their doomsday of consciousness because of wrongful utilization of the highest evolved being of creation as man. Marital rape is violation of Fundamental Rights and of Human Rights. Most of the developed countries have amended and repeals the exemption of marital rape. This repealment should also be made effective in India and marital rape should be criminalized under Indian Penal Code, 1860 as recommended in 172nd Law Report

Secondly, the very definition of rape (section 375 of IPC) demands change. The narrow definition has been criticized by Indian and international women’s and children organizations, who insist that including oral sex, sodomy and penetration by foreign objects within the meaning of rape would not have been inconsistent with nay constitutional provisions, natural justice or equity. Even international law now says that rape may be accepted as the “sexual penetration, not just penal penetration, but also threatening, forceful, coercive use of force against the victim, or the penetration by any object, however slight.” Article 2 of the Declaration of the Elimination of Violence against Women includes marital rape explicitly in the definition of violence against women. Emphasis on these provisions is not meant to tantalize, but to give the victim and not the criminal, the benefit of doubt.

According to our society, it is not culturally possible for an Indian woman to get ‘raped’ by her husband, even if she dies screaming ‘no’. I personally fail to understand this argument. How can rape be a part of any culture? It’s a deviance of social culture and the state has a responsibility to address it.
Also, just because something is not a part of our culture, does that mean it’s not a reality? Theft, murder or burglaries, none of them are a part of our culture, but do we deny their occurrence, justifying that they are not parts of our culture? No, we don’t. Rather, we try to legally address these issues.

Why do we connect culture with crime? Clearly, to dilute the crime, as the state has no interest in making the husbands angry.

**Conclusion**

The judiciary in India, by passing the much needed legal reforms can lead the way towards equality by encouraging women to come up and report cases against the violence they face and help bring about a change in the way marital rape is viewed in society. Rape is rape and marriage cannot be an excuse for committing such a heinous offence. The judiciary in India, by passing the much needed legal reforms can lead the way towards equality by encouraging women to come up and report cases against the violence they face and help bring about a change in the way marital rape is viewed in society. If the reformers see rape as a crime against a woman and her person and bodily integrity and humanity, then marital rape and its punishment would be a legal possibility.

“I say nothing, not one word, from beginning to end, and neither does he. If it were lawful for a woman to hate her husband, I would hate him as a rapist.” – Philippa Gregory

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“Right to Education Act (RTE)” is an Act enacted by the Indian parliament during the tenure of Manmohan Singh as Prime Minister of India on 4th of August in the year 2009 i.e., nothing but to provide free and compulsory education to children from the age of 6 to 14 yrs in India under Article 21A of the Indian Constitution. The 86th amendment of the Indian constitution inserted Article 21A in 2002; which is free and compulsory education for all children from 6 to 14 years old. This article made education a fundamental right for every child in India. India became one of the 135 countries in the world to make education as a fundamental right of every child. Act came into force on 1 April in 2010. Enforcement of this policy is a joint responsibility of the state and the centre to provide free and compulsory education to children. Free and compulsory education means that,” All children from the age of 6 to 14 years shall have the right to free and compulsory elementary education at a neighborhood school. Direct or indirect cost to be borne by the child or the parents to obtain elementary education doesn’t exist in this policy even if child is studying under 25 percent quota in other school. The government will provide schooling at free of cost until child’s elementary education is completed. State governments were forced to implement the same in all the public aided and unaided schools without fail. Many people are still not fully aware of this Act and its provisions. Key features of this Act are that it makes education as a fundamental right of every child from the age of 6 to 14. Under this policy all private schools should reserve 25% of seats of total seats to children who belongs to disadvantaged groups and weaker section in the society and provide free and compulsory education till its completion. The Ministry of HRD set up a high level, 14-member National Advisory Council for implementation of this Act. The Right to Education for persons with disabilities until 18 years of age is applicable under a separate legislation i.e., the Persons with Disabilities Act. The passing of this RTE Act in 2009 marked as a historic moment for the children in India. This Act serves as a building block to ensure that every child has his or her right to get a quality elementary education, and that the State, with the help of families and communities, fulfils this obligation. Few countries in the world already have such national provision to ensure both free and child centred, child-friendly education.

The RTE ACT also forbids some of the issues like:

- Mental harassment over any student or physical assault by working or non-working staff.
- Illegal collection of fee which should not be collected.
- Prohibits the working of the school without recognition of Govt.

STATEMENT OF PROBLEM

Issues Relating to RTE Implementation and Challenges,
This study highlights the problems faced by people even after introduction of RTE policy and how RTE policy is misused by public. It tries to understand the benefits and challenges of the policy.

**RESEARCH OBJECTIVE**

1. To report the views of stakeholders/public on this RTE's reservation policy.
2. To understand key challenges, benefits and the feasibility of this 25% reservation in private schools.
3. To understand the various methods and approaches for the implementation of this provision.
4. To verify the awareness levels among teachers, parents and school management is enough/not.
5. To know how RTE policy is misused by people
6. To know loopholes of this policy

**AIM OF THE STUDY**

TO BECOME AWARE AND TO KNOW THE MERITS AND DEMERITS OF RTE POLICY.

**RESEARCH QUESTIONS**

1. BENEFITS OF RTE POLICY?
2. DRAWBACKS OF RTE POLICY?
3. HOW RTE POLICY IS MISUSED BY PUBLIC?
4. HAS THE ENROLMENT OF STUDENTS IN SCHOOLS INCREASED AFTER THE ACT?
5. WHILE ENROLMENT IS HIGH, THERE ARE STILL MANY WHO DROP-OUT. WHY HAS THE RTE FAILED TO BRING DOWN DROP – OUT RATE?

**INTRODUCTION**

The universalization of elementary education is an objective of the Indian government since independence i.e., from 1947 but not yet achieved so in order to achieve RTE policy was introduced and it became a fundamental right and an Act. RIGHT TO EDUCATION ACT,2009 is nothing but to provide free and compulsory education to children from the age of 6years to 14years by the state governments and central government in India. This act was enacted on 4th of August in 2009 i.e., during the tenure of Manmohan Singh who was then Prime Minister of India. Later right to education became a fundamental right. India became one of the 135 countries to make education as fundamental right. Act came into force on 1 April in 2010. This policy was introduced for the encouragement of people, who belonging to disadvantaged groups in society, poor etc., to send their children to study without paying even a rupee. Many people in India are still not aware of this policy so even after introducing this policy we are finding child labour. Under this policy all private schools should reserve 25percent of seats out of total number of seats for children who belong to disadvantaged groups and weaker section in the society and provide free and compulsory education till its completion. The Ministry of HRD set up a high level, 14-member National Advisory Council for implementation of this Act. The Right to

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615 Sections 33 and 34 of the Act

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Education for persons with disabilities until 18 years of age is applicable under a separate legislation i.e., the Persons with Disabilities Act. Under this policy parents doesn’t even incur indirect expenses like payment for uniform, books etc…This policy benefitted many, still many of them are benefitting and will benefit in future by this policy. Income line for which parents can enroll their children under the 25percent reservation is 3,60,000 rupees .There is a scope for doing malpractice and many of them done by producing false income statements for benefitting under this 25percent reservations in schools. People got low income certificates by paying a bribe and get free education for their children even though they can afford it and some try through intermediaries to get seat under 25% reservation in prestigious institutions. This way people who actually need the seat lose out on the opportunity, Under this policy fees of children who are studying in private schools will be, reimbursed by government so private schools may show the high expenditure statements per child. There are even many disadvantages because of this policy to children ,one of them is language barrier; which is faced by children joined in English medium schools from Govt schools .Under this policy teacher teaching in Government schools should be passed/qualified TET[Teacher Eligibility Test] conducted by respective states. The RTE ACT has provisions under this policy some of them are like prohibiting mental harassment over any student or physical assault by working or non-working staff, states shall ensure that the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Illegal collection of fee which should not be collected, Prohibits the working of the school without recognition of Govt, screening procedures for of children, capitation fee. There is also a provision for special training of school drop-outs to bring them up to par with students of same age. After one of the cases minority institutions are exempted from providing seats under 25% reservation to children from disadvantaged groups, weaker sections in the society. Under RTE Act schools should be managed by School Management Committees{SMCs} which should include local authority officials, parents, teachers and guardians. SMCs shall monitor utilization of government grants.RTE mandates 50% women ,parents from disadvantaged groups in SMCs. Some of the main features of RTE Act,2009 are child should be awarded with certificate after completion of elementary education,25% reservations for economically disadvantaged communities, financial burden will be shared between the state and the central government, Call need to be taken for a fixed student-teacher ratio. student teacher ratio for primary schools is 30:1 and for high schools it is 35:1 and other provision under this policy is there should be a primary school for every village within 1kilometre of the village for children of villagers. All the practitioners of education appreciate intent of the Act and believe that it leads towards the universalisation of elementary education though in our the country.

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616 Article 39 (e) and (f) of the Constitution of India.
REASON AND BACKGROUND FOR INTRODUCING RTE POLICY

Enforcement of compulsory education act took place in England in 1870. So in India demand was raised regarding provision of compulsory elementary education, demand for laws to be made to make primary education compulsory was made by Dadabhai Naoroji and Jyotiba Phule but for only four years from Bombay Presidency. The demand for Universalization of Elementary Education was first put forward by Indians like Dadabhai Naoroji before the Indian Education Commission (1882) to make the local bodies elected by the Indians responsible for elementary education. JyotiRao Phule also informed his views that primary education should be made compulsory at least till 12 years. In Calcutta Congress in 1905 declared that it is birth right of the people of India to get proper education. This resolution opened new chapter in the history of the primary education in India. First attempt to introduce compulsory education in British India was made by Ibrahim Rahimtoola and Chamanlal setalwad in Bombay. So Government of Bombay appointed committee in 1906 to examine the feasibility of introducing compulsory education in Bombay. Gopal Krishna Gokhale made efforts to make the Govt accept the principle of compulsory primary education in India. First vocal demand for introducing compulsory primary education was made by Gokhale. Since 1918 all the state legislatures started passing bills for introduction of compulsory primary education in India. After Government of India Act, 1919 control of elementary education transferred to Indian ministers and after 1937 Indian ministers got powers to act independently. Gandhi formulated scheme for providing basic education; which was discussed and endorsed at Wardha in 1937. This scheme later called as Wardha scheme; Under which 7 years of free and compulsory schooling is provided. National Policy on Education was framed in the year 1968 it is spoke about Indian government's commitment towards elementary education and National policy of education of 1986 and 1990 recommended to include Right to Education[RTE] as a fundamental right in the Indian constitution. In 1974 Government of India adopted National policy for children with an aim to provide free and compulsory education to children up to the age of 14. National policy on Education was formulated again in the year 1992 during the tenure of P.V.Narasimha Rao as Prime Minister and India signed the UN Convention on the Rights of the Child in 1992 and started the process of adopting legislation to make education a fundamental right of the child. Finally Right to education made as a fundamental right in Indian constitution under Article21A in 2002.

IMPLEMENTATION

The National Commission for Protection of Child Rights (NCPCR) and the state commissions monitor the implementation of the Act. 86th amendment made by the Parliament in 2002 i.e., to provides free and compulsory education to children from 6 years to 14 years in all schools and made “Right To Education” as a fundamental right under Article21A by replacing article 45. One of the provisions under this is 25% quota should be there for children belonging to disadvantaged groups, poorer section in society etc.. in all schools except in minority institutions and religious institutions. In 2003
free and compulsory education for children bill was prepared and posted in website and allowed public to comment and give suggestions.In 2004 taking suggestions into consideration first draft prepared in 2003 was revised.In 2005 Central Advisory Board of Education drafted the “Right to Education” Bill and submitted to the MHRD then it sent it to NAC [National Advisory Council] and then NAC sent it to PM for his observation. In 2006 finance committee and planning commission rejected it due to lack of funds. In 2009 Right to Free and Compulsory Education Bill, 2008 passed in both Rajya sabha and Loksabha. Later received president’s assent in August 2009. Financial burdens will be shared by the centre and the state governments in the ratio of 55:45 and the ratio for the northeastern states is 90:10\(^6\). Finally Article 21A and RTE Act came into effect on 1\(^{st}\) April in 2010 except in Jammu and Kashmir. Various initiatives were launched by the central government for the universalisation of primary education in India before launching RTE like Five year plans, Mid Day Meal Scheme, Rashtriya Madhmayak Siksha Abhyan (RMSA), Sarva Siksha Abhyan (SSA) etc.

**CURRENT STATUS OF THE RTE POLICY**

Since 2010 there is an improvement in the enrolment rate of students in schools and improvement in social infrastructure took place. People benefitting under 25 percent quota increased in private schools because parents’ preference for private schools with the expectation of better quality education in private schools are increasingly becoming an important stakeholder in Indian Elementary education landscape. However, although some states have been successful in implementing 25 percent criteria, there are some states that have failed. Pupil-Teacher ratio also improved since implementation. When the Right of Children to Free and Compulsory Education (RTE) Act, 2009 was passed by the Indian Parliament and came into force on 1\(^{st}\) April, 2010 people of India hoped to see rapid change that the accessibility and quality of education for children in India would be improved quickly. The Act had set a deadline for implementation of its various provisions. Eight years have been passed since the Act came into force, and we can only find failure on behalf of our governments to implement the Act within the deadline as evident from the fact the Union Cabinet chaired by the Prime Minister has now approved the amendment to RTE Act, 2009 i.e., to extend the deadline, for training of all teachers to acquire minimum qualifications prescribed by the academic authority till 31\(^{st}\) March, 2019. Earlier, the Proviso to Section 23(2) of the Act had specified that all teachers at elementary level, need to to meet eligibility criteria under RTE Act in order to continue in their jobs within a period of five years i.e., from 31\(^{st}\) March, 2015. Many of them state that commencement of the Act, did not possess the minimum qualifications as laid down surveys shown that attendance as well as learning levels had declined since the introduction of Act weren’t enough, the report of the Comptroller and Auditor General (CAG) on the implementation of the Act not only confirms this, but also revealed an open secret i.e., the irregularities and corruption that the Act gives rise to. The report also confirms the Annual Status of Education Report.

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\(^6\) Section 7 of RTE
findings and shows that the Act may not be getting all children into school, which is why it was legislated in the first place. The fact that the RTE Act has given rise to new sources of corruption that is in reimbrersments etc. Research conducted by NLSIU, Bangalore in 2018 showed that awareness of primary stake holders about the Act is at 62.18%. The study clearly stated that the implementation of the Act was not up to the mark. Many officials working in the education department are also not satisfied with the implementation of the RTE Act in the state. As per United Nations Development Programme [UNDP], India has made significant progress in universalizing primary education. India is on the track to achieve goal of universalizing primary education, which was aimed by many forefathers. Enrolment and completion rates of girls in primary school are improving day by day and catching up with those of boys. This includes elementary completion rates. At the national level, male and female youth literacy rate is likely to be at 94.8 percent and 92.5 percent.

**MERITS OF THE RTE POLICY**
- It prohibits school from receiving any capitation fee from any of their students.
- The schools are forced to provide the seats allocated in the RTE scheme only to the candidates who are incapable to pay their fees.
- It also makes sure that pupil teacher ratio is maintained by every school and it ensures that whether properly trained teachers are employed by the school for the proper education of the children.
- No discrimination and no harassment.
- It includes private schools.
- As 75 percent of SMC [school management committee] members are from parents of children studying, local authorities and 50 percent are women so they run school successfully.

**DEMERITS OF THE RTE POLICY**
- Children from Government schools may face language barrier in private English medium schools.
- As the fees is waived by the school under 25% quota for a specific section of people. In order maintain profits constant the school will tend to increase the fees of other students.
- Children who studied in private schools under 25 percent quota may feel difficult to adjust in Government schools after 14 years because their parents economical condition.
- The children from the poorer section may face the bullying/criticisms from the rich kids daily hurting their confidence.
- It doesn’t consider children above 14 years and below 6 years.
- Increase in corruption may take place by local authorities from unrecognized schools.

**CASE LAWS**
1. **Avinash Mehrotra v. Union of India & Others**

**Facts of the case:** This case took place in Madras. The school, a single thatched roof building with no windows and exit was a private school and with only one entrance. The fire started in a kitchen where cooks were preparing a midday meal, and killed 93 children and injured many of them. An instant writ petition was filed under Public Interest Litigation [PIL] in order to protect school children against similar future tragedies and to improve the conditions of the schools in the country. The Supreme Court issued notices to the Union of India, State Governments and the Union Territories.
Judgement : Supreme Court Of India in its verdict mentioned that Right to Education also includes right to the provision of a safe environment in schools and imposed an obligation on schools in all the states to comply with certain fire safety precautions.

2. Mohini Jain Vs State of Karnataka:
Facts of the case : Miss Mohini Jain, a resident in Uttar Pradesh, applied to enrol at Sri Siddhartha Medical College, a private medical college in Karnataka in MBBS course. The college requested to deposit amount of 60,000 as tuition fees for the first year and a bank guarantee to cover the fees for the remaining years. Mohini Jain and her family did not have the capability to pay the requested sum, and the private medical college denied her admission to her. She felt that discrimination took place and felt that the fee is high. Mohini Jain then filed a petition with the Supreme Court of India against the Karnataka government, challenging the notification permitting the private medical college to charge a higher tuition fee to students not admitted to government seats than those admitted to government seats. The Karnataka Medical Colleges Association, Sri Siddhartha Medical College were also added as respondents.

Judgement : “Turning to the issue of the fees, the Court struck down the payment of capitation fees and stated amount paid as capitation fee should not be as a condition for entry into any educational institution, whether it may be public institution or private institution. According to the decision, access to education must be realised for all people without discriminating based on economic status. If any State decides to discharge its obligations under the Constitution through private institutions, these institutions must abide by the same constitutional requirements as the State. In most of the institutions in India capitation fees make access to education based on income rather than merit, they were deemed to be contrary to the right to education, and arbitrary and in violation of the right to equal protection of the laws under Article 14 of the Indian Constitution.”

3. M C Mehta Vs State of Tamil Nadu and others :
Facts of the case : Petitioner found child labour in Kamaraj district in Tamil Nadu working in the Match factories of Sivakasi, which is famous for cracker industries in India and he concerned about them so he filed a writ petition under Article 32 of the Indian constitution. The Respondent Government did not deny the existence of child labour, but instead offered suggestions to ameliorate the problem. There were 2941 children working in factories. The Supreme Court issued an order in 1990 calling for a ban on child labour in the manufacturing process of matchsticks and fireworks. However, subsequent to this order, an accident occurred in the Sivakasi Match Factories in which 39 people died. After this was published the Court matter and make suggestions, such as payment of compensation.

Judgement : The Supreme Court has considered the constitutional perspectives for the abolition of the child labour in the Sivakasi Match industries. The Court has issued detailed directions to eradicate the child labour, who are below the age of 14 years in this hazardous industry. The Court has insisted that the employers must comply
with the provisions of the Child Labour (Prohibition and Regulation) Act. The Court has emphasized that abolition of child labour is definitely a matter of great public concern and significance.

4. T.M.A.Pai Foundation v. State of Karnataka 618:
This case is about establishment of minority institutions.
Judgement: The court in its verdict stated that the state cannot interfere if reasonable fee was being charged by institution and if the admission was on basis of merit. However, minority educational institutions which are receiving aid from the state have to admit a reasonable number of students belong to nonminority groups and stated that state can fix quota for admissions to these educational institutions but it cannot fix fee charged and also admission can be done on the basis of common admission test and on the basis of merit.

5. Society for Unaided Private Schools of Rajasthan v Union of India & Another:
Judgement: The Supreme Court of India in its verdict stated that constitutionality of section12 of the Right of Children to Free and Compulsory Education Act [RTE],2002 under which all the schools which are both state-funded and private, should accept 25% intake of children from disadvantaged groups except charitable and schools established not for profit as example,.and also Court in its verdict stated that the RTE Act could not require private, minority schools to satisfy a 25% quota, as this would constitute a violation of the right of minority groups under Indian constitution establish private schools under the Indian Constitution.


SUGGESTIONS
- To include children even after 14 years till 18 years under RTE policy.
- Free education should be provided even after 8th class i.e., to be extended till completion of UG course.
- Salaries for teachers should be increased based on students performances in schools.
- Events and programmes should be organised in rural and urban areas in order to bring awareness about RTE policy in people.
- Scholarships should be provided to meritious students till completion of 11th ,12th classes i.e., only for 5percent/10percent students and based on economic status.
- Government should set up Special schools for SC/STs,who are economically backward after enrolment of children if not Government may face losses if only few are attending.
- All the Government educational institutions should be brought together so that Government may not incur loss.
- Fifty percent of the expenses should be provided to the person who is interested in building up school and providing education to all the people in rural areas.
- There is a need to setup the mechanism to monitor the effective implementation of the RTE Act by the Local Authority as specified under section 32of the Act.

618 AIR 2003 SC 355
Compulsory rule should be made regarding elementary education should be received in only Government schools and fees should be paid by all except children from poorer section.

Infrastructure should be improved instead of spending funds on election campaigns or by decreasing percentage of allocation on other sectors.

Government should recruit people who are suffering from educated unemployment in schools so that Government can reduce its burden of giving high salaries and employment opportunity will be available for many.

Section 3 of the Act concentrates only on academic streams but not on education related to complete physical, mental and psychological well being so these should be included in schools.

**CONCLUSION**

Introduction of RTE Act in 2009 became remarkable in the education system of India and benefitted many and benefitting many because of introducing this policy. However, the Constitution of India and Supreme Court have declared that the education is now a fundamental right of the children of India but it is upto 14 years from 6 years of age, it does not speak about children who are from 3 to 5 years and the Centre's much touted 'Sarva Shiksha Abhyan' Programme has failed to meet its initial ideals because of many reasons, mainly "low teacher-to-pupil ratio in several States and "irregular monitoring of the facilities", according to former Vice-Chancellor of Bharatidasan University, Dr S Muthukumaran in this way many of them criticized SSA so RTE was introduced in order to achieve the goal of Indian Government but it is not up to the mark because amendments should be made to this Act. It is needed that the Constitution should again be amended and the children of age group of 3 to 5 years of age should be included; as by the time the child reaches the age of 6 years most of the children belonging to poorer sections will be working into the child labour due to the poverty. Indian Constitution only ensures that the state shall provide primary education to the children up to the age of 14 years but not the higher education to the people. Parents have a prior right to choose the kind of education that shall be given to their children. The right to education will be meaningful, only if education reaches to all the sections of the people in the society, if not it will fail to achieve the target that is to make Indian society an educated/literate society. There are many advantages and even disadvantages for this.RTE policy has been amended once that is to extend time period for teachers who are appointed till 2015 to meet eligibility criteria for teaching and second time it is amended to remove no-detention policy. After knowing about RTE i conducted survey to know awareness about RTE in people. After survey i came to know that nearly 70 percent of people are not aware about RTE and even few of them they don't know what is RTE. So, all the people of our nation should become aware of this scheme and should join their children in the Government schools if they could not meet expenses to send their children to private schools. If it is done then literacy rate in our nation increases and their children become skilled and earn well in future. For making

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619 Article 26 of Universal Declaration of Human Rights
RTE policy successful cooperation of people is needed. Poor People should be encouraged to send their children to Government schools by conducting awareness programs, campaigns about RTE. People should send their children to Government schools instead of sending their children to private schools by paying hefty sums of donations and capitation fees. If our present generation is educated then problems like unemployment and poverty will be eliminated in India.

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THE TEST OF ‘ESSENTIALITY’ OF RELIGIOUS PRACTICES—APPLICATION AND IMPLICATIONS

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ABSTRACT

From the excommunication case to Santhara to the Sabarimala judgement, whenever any matters of faith are brought before the court, this 64-year old controversial piece of jurisprudence is revisited and each time perceived in a different light. Though people from all sides of the political and religious spectrum have argued against Essential Religious Practices Test, a fair alternative is yet to be designed and accepted by the judiciary. The Supreme court as guardian of fundamental rights has employed this test as a means to draw the line between religious freedom and state intervention by satisfying that a practice seeking refuge under the right to freedom of religion is an essentially religious practice. However, this is usually seen as judicial intrusion in an arena that technically belongs to the Legislature. It is also argued that such a power by the state almost nullifies the right to religion; with the state dictating to its subjects what religion is and how it should be observed. What contributes to make the whole arrangement more dysfunctional is the inconsistency in its applicability over the years and redundancy in certain cases. In this context, the essay seeks to review the idea behind developing this substantive test and its theoretical and practical shortcomings.

State and Religion:

On the 2nd of December, 1948, Dr. Ambedkar delivered a speech in the Constituent Assembly where, among other things, he observed:

“The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters we will come to a standstill. I do not think it is possible to accept a position of that sort. There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious. It is not necessary that the sort of laws, for instance, laws relating to tenancy or laws relating to succession, should be governed by religion.”

From these words, the concern of the Father of the Constitution is quite apparent. As a country which differs in its very definition of ‘secular’ to mean not irreligious but multi-religious, religious and secular life are so intensely entangled that the state just cannot adopt a stance of indifference. History is testimony to the fact that more often than not, religious practices have suffered collision with constitutional provisions. In the Indian society, religion


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has a habit of percolating into every aspect of life; perhaps this is the reason why religion and religious practices find a mention in the very core of the constitution. Article 25 and 26 enshrine freedom to practice one’s religion as a fundamental right to everyone, without discrimination. This right, like any other fundamental right has also been granted air tight protection against arbitrary actions by the state under Article 13.

**Development of a Substantive Test**

Reading closely into and examining the intricacy and clever verbiage in these articles we realize that the freedom of inner faith, belief or conscience is alone guaranteed under Article 25(1). Customs, rituals and practices observed by various communities and denominations are conveniently placed under one head as “matters of religion” under Article 26(b) which have really nothing to do with choice, of religion as matters of freedom of conscience. Judicial recognition of such religious practices, sometimes even in the confliction of social order and welfare legislations endangers the very basis of Article 25(1). Many a times, the practices that supersede the welfare legislations bought for reform or oppose to public order, morality, health or violation of provisions of Part III need to be brought to test by the judiciary for legitimate asylum under Article 25. For this purpose the judiciary employs a certain ‘Essential Religious Practices Test’ also known as the ‘Essentiality test’ originated in 1954 judgment of Supreme Court in the Shirur Matt case. By adopting this test the judiciary took upon its self the arduous task of ascertaining if the practice in question is an essential part of the religion by referring the doctrines of that religion. A ballsy undertaking—but a wishful one.

It cannot be disagreed that there may be certain religious practices that give rise to casteism, communalism and gender based discrimination, breeding discord and dissent threatening national integrity and such practices better be done with. As the dispenser of justice and the guardian of fundamental rights, the judiciary also is rightly empowered to adjudge this matter. So the Essentiality test is not that a flopperoo after all. It sought to differentiate the essentially religious practices from the essentially secular ones so as to exclude that the latter from legislative protection, setting substantial limits on the independence of religion.

But what started off as a test to determine the nature of a religious practice, whether secular or essentially religious, over time became one to determine the importance of the religious practice. Hence, the original idea behind the arrangement though functional, was affected by its wavering interpretation and inconsistent applicability.

**Critical analysis of applicability of the test**

- In the recent Sabarimala judgment622, the court overturned the 1991 decision of the Kerala High Court that held the ban of women from entering the temple was constitutional and justified. In its decision it

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621 The Commissioner, Hindu … vs Sri Lakshmindra Thirtha Swamiar … 1954 AIR 282, 1954 SCR 1005

622 Indian Young Lawyers Association & ors vs State of Kerala and ors, WRIT PETITION (CIVIL) NO. 373 OF 2006
stated that such a ban was a breach of right of female worshippers. It also stated that the devotees of the temple could not be considered a religious denomination to be granted freedom to manage their own affairs under Article 26. So far, so good. However, it also absurdly went on to declare that the exclusion of women from the temple is not an ‘essential religious practice’. This was seen as belittling the sentiments of the devotees to whom this traditional practice is both significant and integral to their faith. The state should refrain from making such remarks. This was exposed sheer discretion employed by the judges on case to case basis. To make this point I rely on three (of many) such typical judgments. In the Gramsabha of Village Battis Shirala vs Union of India, the worship of live cobra by a certain sect was not recognized by the Supreme Court to be an essential practice. It based its judgment on the fact that the ‘Dharmasastra’ makes no mention of such a practice. So reference to religious texts was sought to test the practice. Next in the Ananda Margis case, the Tandava dance was denied the status of an ‘essential religious practice’. This was seen as belittling the sentiments of the communities that do, in fact consider the Hijab to be a very integral part of practicing their faith. Whether or not the practice is an essential one should be decided by clerics well versed in the rules of the religion.

The second argument is more of a practical shortcoming on the application of this test. In Saifuddin Saheb vs. State of Bombay, Justice K.C. Dasgupta said: "What constitutes an essential part of a religion or religious practice has to be decided by the Courts with reference to the doctrine of a particular religion."

Examining the outcomes of various cases where this doctrine has been cited will expose sheer discretion employed by the judges on case to case basis. To make this point I rely on three (of many) such typical judgments. In the Gramsabha of Village Battis Shirala vs Union of India, the worship of live cobra by a certain sect was not recognized by the Supreme Court to be an essential practice. It based its judgment on the fact that the ‘Dharmasastra’ makes no mention of such a practice. So reference to religious texts was sought to test the practice. Next in the Ananda Margis case, the Tandava dance was denied the status of an ‘essential religious practice’. This was seen as belittling the sentiments of the communities that do, in fact consider the Hijab to be a very integral part of practicing their faith. Whether or not the practice is an essential one should be decided by clerics well versed in the rules of the religion.

623 Utkarsh Anand, SC to PMT students: Faith won’t disappear if you don’t wear scarf (hijab) one day, THE INDIAN EXPRESS, July 25, 2015 2:09:27 pm
624 AIR 1962 SC 853
625 Gramsabha of village Battis Shirala vs Union of India & Ors. BOMBAY HC CIVIL APPELLATE JURISDICTION WRIT PETITION NO.8645 OF 2013
626 Acharya Jagdishwaranand vs Commissioner Of Police, Calcutta, 1984 AIR 512, 1984 SCR (1) 447

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an essential practice, the court’s argument being that the practice came to be adopted years after the sect was formed. Note that the practice in this case was tested on chronological grounds to be declared inessential to the religion. In Mohammed Fasi vs Superintendent of Police and ors627, the petitioner’s argument that sporting a beard is one of the essential religious practices of Islam was rejected on the grounds that such a practice is not in vogue, and that certain Muslim dignitaries do not wear beards. This time empirical evidence was relied on instead of referring to religious texts. It is noteworthy, that in all these cases no uniform constitutional tests have been employed and the judges have been granted the leverage to decide whimsically which part of a religion is essential and which isn’t. Adopting such a parameter is a recipe for disaster. Can we permit human sacrifice, trafficking of human beings and female infanticide if these practices are deemed to be essential practices?

Another impediment of this test is unreasonable applicability in certain cases. Sabarimala is not the first case where the essentiality test has been unnecessarily invoked. In the Babri Masjid628 case the SC, instead of deciding the matter on the test of eminent domain of the state, delved into the question of whether a mosque itself can be considered as an essential part of the religion of Islam and then conveniently went ahead to hold that it wasn’t. Similarly in the Haji Ali Dargah629 case, the court in its reasons for the judgment stated the inability of the Trust in proving that preventing the entry of women devotees in the sanctum sanctorum of the dargah ‘is an essential and integral part of the religion.' It should have rather confined itself to the constitutional reasoning that right to equality is subservient to the freedom of religion (and other fundamental rights).

The aforementioned cases all pose an underlying question. Did these cases even merit the court’s intervention? The judiciary can certainly intervene when a fundamental right is seen to be curtailed or a constitutional provision violated, but such interference is a threat to the freedom of religion so ideally manifested in the Constitution. It seems more like the judiciary overstepping its powers to an extent that would undermine the very principle of secularism that the Constitution embodies. Dissentions in religious practices have been present since their very origins of religion. What is religion to one is superstition to the other. Stirring the hornet’s nest will give rise to never-ending arguments. Hence, the state, in its own interest ought to steer clear of interfering in religious traditions and customs.

Judicial overstepping?

Speaking of overstepping, the Supreme Court appears to have virtually assumed the functions of the legislature by taking upon itself to outlaw practices after

627 (1985) ILLJ 463 Ker
628 Dr M. Ismail Fraqui And Ors. vs Union Of India And Ors. AIR 1995 SC 605, JT 1994 (6) SC 632, (1994) 6 SCC 360, 1994 Supp 5 SCR 1
629 Dr. Noorjehan Safia Niaz And 1 Anr vs State Of Maharashtra And Ors. ORIGINAL CIVIL JURISDICTION PUBLIC INTEREST LITIGATION NO. 106 OF 2014(Bombay HC)
its own appraisal. The Parliament, as the appropriate law-making body, is only authorized to outlaw anything.

It is pertinent to be noted that unlike other articles, Article 25 starts off with restrictions: “Subject to public order, morality and health, and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.” Its second sub clause, elucidates that the state can make laws “regulating or restricting any economic, financial political or other secular activity which may be associated with religious practice.” Similarly, Article 26 along with the rights given to religious denominations guarantees these denominations to administer property ‘in accordance with law.’ These are used as arguments to warrant judicial intervention in matters of religion. Indeed, all these irrefutably prove that reasonable restrictions on the freedom of religion maybe imposed by the state. Just that the power to impose such restrictions is within the realm of the Legislature. The role of the judiciary here would be only to ensure that such restrictions are reasonable.

Conclusion

The test of essentiality is an extreme case of what they fashionably call ‘judicial activism.’ This attempt by the judiciary to remodel religion in a more progressive light has been met with fierce criticism considering the conservative complexion of the Indian society. So what can be the resolution to this dilemma? Justice Chandrachud made a noteworthy suggestion during the hearing of the Sabarimala case.

“The test should be whether a practice subscribes to the Constitution irrespective of whether it is essential or not”.

To solve the conflicts arising out of religious practices, the Supreme Court instead of applying the test to conclusively interpret religious doctrines, should test it on constitutional morality irrespective of whether a practice is essential or not. It should stick to deciding if the practice is unconstitutional, not if it is inconsequential. This will bring back the judiciary to its traditional role as guardian of fundamental rights and interpreter of constitutional provisions.

It will also be in the interest of the secular character of the state, that religious freedom be personal freedom of practicing religion according to one’s own faith and conscience, not as interpreted by the state.

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THE CONSUMER PROTECTION BILL, 2018

By Sarthak Arora
From National Law University, Odisha

ABSTRACT

“Customers are the most important visitor on our premises, they are not dependent on us and we are dependent on them. They are not an interruption in our work. They are the purpose of it. They are not outsiders in our business. They are part of it; we are not doing them a favor by serving them. They are doing us a favor by giving us an opportunity to do so.”

This era is an era for consumers. The philosophy which is behind marketing of a product is based on the taste of a consumer. Consumer is one who controls the market and its function and is called as the heart of marketing. The present scenario of the market is no more product centric but buyer centric. There are some lofty traders which misguides the innocent consumers as a consumer we have to face problems related to goods which are defective, poor service, adulteration in food, duplicate goods, late deliveries, no after sales service, advertisements which are false and misleading and price discrimination. These problems are there because some manufactures wants to take an undue advantage of the consumers which are helpless. The Consumer Protection Act, 1986 was one of the examples which can be termed as a milestone for ensuring the rights of consumers are protected but now Government has introduced Consumer Protection Bill, 2018 which replaces the thirty year old act and is redefined and framed according to the present scenario of the industry. The sole motive of the Consumer Protection is ensure that the rights of the consumers are protected. This paper will focus on the difference between The Consumer Protection Act, 1986 and The Consumer Protection Bill, 2018 and will highlight the key features of Consumer Protection Bill, 2018 and will talk about the importance of Consumer Protection Act in today’s world.

INTRODUCTION

Indian market is mostly dominated by consumerism particularly from the reforms of economy. It is being transferred from sellers’ market to buyers’ market. Exploitation is increasing day by day inspite of having the rigid consumer laws and measures taken by the government in the interest for consumers. One of the reasons for this situation is lack of awareness there in consumers about the rights and protective measures. The Consumer Protection Act provides protection of rights to the consumers and gives them chance for redressal. Consumer Protection Act provides consumer redressal at three levels: district, state and national. This Act is applicable to all the goods and services, but does not include the goods which are for resale. The Consumer Protection Bill, 2018 will replace the Consumer Protection Act, 1986 and will set up a Central Consumer Protection Authority which will protect and promote the rights of the consumers. The Bill helps in safeguarding the rights for the consumers.

consumers on the account of changes that have taken place in the e-commerce industry. It serves notices for goods and services and can give a ruling against misleading advertisements. This bill will also help in establishing Consumer Protection Council at the three levels as an advisory body for consumer protection. The sole objective of this bill is “to provide for the protection of the interests of consumers and for the said purpose, to establish authorities for timely and effective administration and settlement of consumers’ disputes.”

This Bill will give powers to Central Consumer Protection Authority to fine a manufacturer for a false advertisement. It has been noted that by the Traders body that "It is imperative that liability should be cast upon brand ambassadors under the Consumer Protection Act." This Bill also envisages provisions for the liability of a product and action taken on the account of harm which has been caused to consumers due to a defective product. Further, provision of “Mediation” as an ADRmechanism has also been given in this bill.

OBJECTIVES OF THE CONSUMER PROTECTION BILL, 2018
The main objective of the Consumer Protection Bill, 2018 is “to provide for the protection of the interests of consumers and for the said purpose, to establish authorities for timely and effective administration and settlement of consumer disputes”.

The Consumer Protection Bill, 2018 will set up a Central Consumer Protection Authority which aims “to promote, protect and enforce the rights of the consumers. The Central Consumer Protection Authority can also act on the complaints of unfair trade practices, issue safety guidelines, order product recall or discontinuation of services and has punitive powers which can impose penalties.”

The Consumer Protection Bill, 2018 will set up “Consumer Disputes Redressal Commissions at District, State and National level to look into the consumer complaints. Consumer Protection Councils and Consumer Mediation cells will be set up at National, State and District levels as an advisory body”.

HIGHLIGHTS OF THE CONSUMER PROTECTION BILL, 2018
Consumers are not aware about their rights which are given under the Consumer Protection Act and there have been many hurdles in the implementation of the act. The rate at which consumer cases were getting disposed of was 90% which is good but the time taken for the disposal is long. It takes more than an year on an average to settle a consumer case. Law Commission of India had stated that there should be separate law

635 “Total Number of Consumer Complaints Filed/Disposed since inception Under Consumer Protection Law, National Consumer Dispute Redressal Commission, as on March 12, 2018”
in relation with unfair contract terms and should be presented as a draft bill in the Parliament. In 2015, a bill was introduced to replace the Consumer Protection Act 1986. The Bill stated various provisions regarding liability of the product, contracts which were unfair and setting up a regulatory body.

**KEY FEATURES:**

- There will be Consumer Dispute Redressal Commissions to hear the disputes on goods which are defective, trade practices which are unfair, excessive pricing, goods which do not comply with the norms of the safety and the liability of the product. These complaints can be filed online and from where the complainant resides.
- These Commissions will be at three different levels which are District, State and National. Jurisdiction of these commissions will be up to Rs one crore for District, Rs one crore to Rs ten crore for State and above Rs ten crore for National. These Commissions can declare the terms which are unfair as null and void.
- The Consumer Appeals from District Commission will go to State Commission and from State Commission it will go to National Commission. Appeals from National Commission will go to Supreme Court.
- The time period to dispose a complaint will be three months if there is no analysis or testing required and if analysis or testing of a commodity is required then it will be five months.
- The District Commission will consist of a President and at least two members and State and National Commission will consist of a President and at least four members.
- There will be Mediation cell also in each Commission. The Commission may refer the case for mediation if both the parties agree upon it.

**PRODUCT LIABILITY**

The bill allows the consumer to file a claim for the liability of the product against the seller for defects in the product. Consumer can also file for compensation for the harm which has been caused including damage to the property, personal injury or illness and mental agony.

**UNFAIR AND RESTRICTIVE TRADE PRACTICES**

An unfair trade practice means a statement which is false about the “quality or “standard of a good or a service”, selling of goods not up to the standard, no issue of a receipt, refusing to refund good within 30 days. Restrictive trade practice means unjustified costs on consumers which includes delay in supply which leads to increase in the price.

**PENALTIES FOR THE SELLERS**

- The seller may face “imprisonment of up to three years or a fine of Rs 25000 extendable to Rs one lakh”, or both if he does not comply with the orders of the Commissions.

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- The seller may face “imprisonment of up to six months or fine of up to Rs 20 lakhs”, or both if he does not comply with the order issued by the Central Consumer Protection Authority.

- The seller may face a “penalty of up to Rs 10 lakh and can extend to Rs 50 lakh” for a subsequent offence and “imprisonment of up to two years and can extend to five years” for a subsequent offence for a false and misleading advertisements.

- The Central Consumer Protection Authority may charge a fine for selling or importing adulterated products and if the re is injury caused to the buyer then the seller would have to pay a “fine of up to Rs three lakhs along with imprisonment of up to one year”, and if no injury is caused to the buyer then the seller would have to pay a “fine of up to Rs one lakh with the imprisonment of up to six months”. If the hurt is grievous then the penalty would be up to “Rs five lakhs along with imprisonment up to seven years “and if there is a death then the “penalty would be Rs ten lakh or more along with imprisonment of seven years which can extend to life imprisonment.”

- The Central Consumer Protection Authority can impose penalty for manufacturing duplicate goods. The penalties for this are that if there is an injury then it would be a “fine of up to Rs three lakhs along with imprisonment of up to one year” and if there is grievous hurt then then a “fine of up to Rs five lakhs with imprisonment of up to seven years” and in case of death then the penalty would be “Rs ten lakhs or more along with imprisonment of seven years” which can extend to life.

**CONSUMER PROTECTION ACT, 1986**

**V/SCONSUMER PROTECTION BILL, 2018.**

<table>
<thead>
<tr>
<th>PROVISIONS</th>
<th>CPA1986</th>
<th>CPA2018</th>
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<tbody>
<tr>
<td><strong>Ambit of law</strong></td>
<td>Goods and services were taken into consideration excluding services which were free and personal.</td>
<td>All goods and services including online and teleshopping are taken into consideration excepting services which were free and personal.</td>
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<tr>
<td><strong>Trade Practices which are unfair</strong></td>
<td>Six types of Unfair and Trade Practices including representations which are fake and misleading advertisements</td>
<td>Added three more types of practices namely failure to give a receipt, refusing to accept goods which are returned within the time period.</td>
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<tr>
<td><strong>Product Liability</strong></td>
<td>No provision was given.</td>
<td>Buyer can claim from the seller.</td>
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<tr>
<td><strong>Unfair Contracts</strong></td>
<td>No provision was given.</td>
<td>Listed six terms which can be called as unfair.</td>
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<tr>
<td><strong>Regulating Authority</strong></td>
<td>No provision was given.</td>
<td>Establishes CCPA which</td>
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<tr>
<th>Jurisdiction of the Commission</th>
<th>can issue safety notices and can impose fine on advertisements which are false.</th>
<th>recommend the members for the Commission.</th>
<th>ADR Mechanism</th>
<th>No provision was given</th>
<th>There will be mediation cell in each commission.</th>
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<tr>
<td>District – till Rs 20 lakhs</td>
<td>District – till Rs 1 crore</td>
<td></td>
<td>Penalties</td>
<td>If the seller does not comply with the order given by the Commission, “he may face imprisonment between one month and three years or a fine of Rs 2000 to Rs 10,000 or both”.</td>
<td>If the seller does not comply with the orders given by the Commission, “he may face imprisonment of up to three years or a fine of not less than Rs 25,000 which can extend up to Rs one lakh or both.”</td>
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<tr>
<td>State – Rs 20 lakhs to Rs 1 crore</td>
<td>State – Rs 1 crore to Rs 10 crores</td>
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<td>National – above Rs 1 crore</td>
<td>National – above Rs 10 crores</td>
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<tr>
<td>Compositio n of the Commission</td>
<td>District: Presided by a judge of a district court with atleast two members.</td>
<td></td>
<td>E-Commerce industry</td>
<td>No provision was given</td>
<td>Defines “direct selling and e-commerce and the central government may give rules for preventing unfair trade practices in E-commerce”.</td>
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<td>State: Presided by a judge of a high court with his two members.</td>
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<td>National: Presided by a judge of a supreme with his four members.</td>
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<td>Appointments</td>
<td>Judicial members and other members will</td>
<td>Central Government will recommend the members</td>
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IMPORTANCE OF CONSUMER PROTECTION IN TODAY’S WORLD.

Consumer Protection is important as it protects the customers and brings confidence in different institutions within the country. A country can have a growth when “consumers have trust in the producers, so the producers should provide an assurance to the consumers so as to win their trust. Consumer Protection laws are important so as to protect the consumers from misleading advertisements and poor services.”

- **To protect against Quality of the product:** Rarely, companies produce products which are shoddy in nature on purpose. However, producers may produce products which are of low quality so as to increase their profits. This can be prevented if consumer files a complaint and a successful complaint can stop the manufacturer to stop the production of those goods.

- **To stop practices which are Unethical:** The economy is very competitive nowadays and business owners will “cut corners to the health or safety of the consumers”. It can also produces bad service which a consumer has to deal with it. This can be prevented if countrywide attorneys prepare a case before the court and should also educate consumers about their rights and how can they redressed it.

- **Unorganized Consumers:** Consumers are generally dispersed and they are not united. On the other hand, sellers and manufacturers are organized and powerful. They should be united and should fight against the unfair trade practices.

- **Duplicate Goods:** There is a rise in the duplicate products and difficult for a buyer to distinguish between a duplicate and genuine product. It is necessary that the products should comply with the safety norms of quality.

- **Misleading Advertisements:** Sellers give misleading information about the products and generally consumers are misled by these false advertisements. There should be a mechanism which should prevent these advertisements.

- **Adulteration:** Consumers do not get pure or quality products even after paying a higher price. Organization usually provide these adulterated goods for profit maximization. Consumers should file a complaint against these companies.

- **Irregular Supply:** Organizations creates scarcity which is artificial of the goods by hoarding them which results in the rise in the prices. This is generally done due to shortage of storage area.

- **Some common problems:** Malpractices of Businessmen, Black marketing, Misleading and False advertisements and warranties.

**CONCLUSION**

Consumers are still exploited in India with the prevalence of poverty and illiteracy. The government has continuously tried to safeguard the interest of the consumers through new legislations. By introducing new issues like misleading advertisements, creating of a regulator which can keep a check and adding mediation cell and product liability for the first time, the Consumer Protection Bill, 2018 does fairly well. Consumer cases will be resolved faster now but there are certain issues which should be
revisited like jurisdiction which is overlapping between CCPA and Consumer Forums. Consumer Protection Bill, 2018 is definitely a right step and will strengthen the consumer rights and sentiments in the future. However consumer awareness is also required which can come through consumer education and the actions which are taken by the government, consumer activist, NGOs and other agencies as it required the most to make consumer protection movement a success in India which can benefit our society in general.

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ADMINISTRATIVE DISCRETION: BUREAUCRACY IN DEMOCRACY

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ABSTRACT
Discretion is contrary to the equality and Indian constitution is based on the basic principle of equality which brings the conflict within the Grundnorm of largest democracy of the world. Administrative discretion refers to the will of the administrative authorities in decision making and functioning for the public welfare and to maintain law and peace. India like most of the countries of the world is a welfare state where government works with a basic aim of social and economic welfare of the society. “Nothing is permanent except change”, and with the consistent change in the society it is not possible to change the law with that consistency and this is the point where administrative discretion comes with an upper hand. In the present scenario, there are different situations, circumstances and problems arising every now and then which cannot be solved by the general rules of society. Administrative authorities can exercise their discretion according to the situation and circumstance and this forms the base of “discretion”. The applicability of general rule in varied circumstance, it would lead to injustice within the society.

This paper would be concentrated on an essential part of administrative law i.e., administrative discretion. The aim of the paper is to have a basic and deep idea of what administrative discretion is according to dictionaries, scholars, philosopher and thinkers and how discretion prevails within a democracy promoting equality and other basic fundamental principles such as rule of law simultaneously. The paper would be conferred with landmark and essential judgments stating how judiciary is acting as watchdog to limit the abuse of the discretionary powers and what are the negative sides of the concept, the doctrines and test attached with administrative discretion.

Keywords: Discretion, rule of law, democracy, injustice, equality.

1. INTRODUCTION

Due to the decline of the individualism and doctrine of laissez-faire, the philosophy of the welfare state was adopted in various countries and it led to tremendous increase in the state activities and it has become necessary to confer discretionary powers on the administrative authorities so that they may be able to meet the emergent situation in the public interest, promptly and efficiently. The Judiciary, Legislation and Executive are the backbone of smooth functioning of the nation within the constitutional mandates. Indian constitution provides right to equality which brings every individual on the same podium irrespective of their inequalities and differences but the implied notion within this provision is the “equality amongst the equal”. It is true that for the best functioning of the government and administration there is a need of discretion for the officials. It is a recognized fact that today no administration

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639 Indian const. art. 14.
can function without discretion but it is equally true that absolute discretion is a ruthless master. Discretion is considered to be more destructive of freedom than any of man’s other invention. “Discretion” is the right to choose between different options available to an individual according to his will and without any expressed or implied boundaries. For example what I want to wear? What I want to eat? Where I want to go? Answer to every question is “discretion”. Discretion gives an individual the power to decide what he wants. A person is having all the rights to dispose his property in his will as per his discretion without any fear of law or any other factor and no matter how arbitrary it is. But when “administrative” word as a prefix is added to “discretion”, choice remains constant but ceiling is attached to it. Discretion is very essential part for the functioning of the state and it gives freedom to the officials to take decisions when and where required as per the situations but like a coin, it is also having two sides, the other side should not be ignored so whenever discretion is conferred, the abuse of such discretion took place and lead to irreparable losses. Being a part of world’s largest democracy, every citizen of the nation is filled with pre conceived notion that discretion to administrative authorities will be contradictory with every basic principle such as right to equality, rule of law and fundamental rights and every authority promoting these basic principles like judiciary.

To gain a proper understanding of a subject, the primary requirement is the understanding of the subject from various perspectives. In India, judicial decisions are not just judicial pronouncement of the matter but are the benchmark to define various subjects of the society. The thoughts of renowned and intelligent legal minds are very essential aspect to understand a subject with the circumstance from affirmative as well as negative side. Before moving further with administrative discretion, we will first look at the definitions by judiciary, philosophers and legal minds.

“Discretion” means the power, right or liberty to decide one way or the other; to act according to one’s own judgment; freedom of choice; to completely understand one’s power or control; the freedom to decide what should be done in a particular situation.

Discretion implies power to make choice between alternative course of action or inaction. A public officer has discretion whenever the effective limits of his power leave him free to make choice among possible course of action or inaction.

“Discretion”, proclaimed Coke is a science or understanding to discern between falsity and truth, between right and wrong, between shadow and substance, between equity and colorable glosses and pretences, and not to


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do according to their wills and private affection…. 644
In Secy. Of State for Education & Science v. Tameside Metropolitan Borough Council645,

Lord Diplock said:
“The very concept of administrative discretion involves a right to choose between more than one possible course of action on which there is a room for reasonable people to hold differing opinion as to which is to be preferred”
When someone is left to decide according to their discretion that what is right and wrong, it is presumed that the discretion should be sound discretion and according to prescribed law, if not done then judiciary is having power to redress the things done otherwise646.

2. ADMINISTRATIVE DISCRETION AND JUDICIAL REVIEW
“Judicial review provides for the sober second thought”
The constitution of India is supreme law of the land and the authority within which every law is governed and every individual is protected. Judiciary is the watchdog of the constitutional values given by the founders of constitution and judicial review is weapon to undo the arbitrary steps taken by legislation and executive. Judicial review provided to the Supreme Court is applicable within the territory of India and to the High Courts within state with no specific provisions but under article 32 and 136 for Supreme Court and article 226 and 227 for high courts respectively in constitution of India.

According to the dictionary, “judicial review” is “a procedure by which a court can pronounce on an administrative action by a public body” 647.

Judicial review is a great weapon in the hands of the judges. It comprises the power to control and to hold unconstitutional and unenforceable any law or order based upon such law or any other action by a public authority which is inconsistent or in conflict with the basic law of the land648.

As a matter of fact, unlimited power leads to arbitrariness and administrative discretion would have also, without judicial review. Looking at the objective of the judicial review, it is clear that the concept of judicial review is to ensure the proper functioning without the abusing the power provided to the authorities. The concept of judicial review was observed by the Supreme Court in Minerva Mills v. Union of India649, stating that the constitution of India has created independent judiciary and vested them with the power of judicial review to determine the authenticity and legality of the steps taken by the legislation and the validity of

the legislation. Another landmark judgment of Tata Cellular v. Union of India\textsuperscript{650} stated that any unfair action by any branch of the state must be set right by judicial review but the decision given in Barium Chemicals Ltd. v. Company Law Board\textsuperscript{651} showed definite orientation in the judicial behaviour for an effective control of administrative discretion. Under section 237 of companies act, 1956, the board is authorized to order an investigation in the affairs of the company. The Company law board ordered an investigation into Barium Chemicals Ltd. exercising its power on the basis that faulty planning laid to losses by the company and as the result, price of the shares of company had fallen and many eminent members from the board resigned. Court quashed the order of the board on the ground that the exercise of the discretion by board was extraneous as per mentioned in section 237.

3. FAILURE OF ADMINISTRATIVE DISCRETION

Every concept goes through two consequences, success and failure. When the concept is complied with all the positive results in the society and for the society they turn out to be successful but when some factor goes against the concept they lead to failure. Administration is conferred with discretion to exercise that power but if there is noncompliance, it may lead to consequences. Some failure to the administrative discretion is as follows:

1. Sub-delegation: Sub-delegation is the delegation of power conferred on specific authority to some other authority. The maxim delegatus non potest delegare (a delegated cannot further delegate) states that if power is conferred to an authority, it should be specifically exercise by the authority alone and not to be further passed on to other authority.

2. Acting under dictation: An administrative authority has failed to exercise its discretion if that discretion is under the influence dictation by the superior authority. In this case, the power is given to an authority but it is exercised by other authority where the concerned authority does not apply his mind and does not take action as per his will. In Rambharosa Singh v. State of Bihar\textsuperscript{652}, the relevant rules empowered the District Magistrate of the place to provide public ferries on lease subject to the direction of the commissioner but instead government of Bihar state gave directions on which District Magistrate acted taking into consideration the directions of the government. The high court in the decision set aside the orders passed by the DM.

Non-application of mind: This could be considered as a sub-part of the aforesaid condition but is a separate condition where non-application of the mind by the authority acting without due care and caution or without a sense of responsibility in the exercise of the discretion. In King Emperor v. Sibnath Banerji\textsuperscript{653}, an order of preventive detention was passed by the Home secretary on the recommendation made by the police authority but the order was quashed by the court on the basis of non-application of mind by the home secretary as authorized authority. The Supreme Court specifically stated in a recent judgment that the public authority

\textsuperscript{650}6 SCC 651(1994).
\textsuperscript{651}SCR 311(1966).
\textsuperscript{652}AIR 370 (PAT.: 1953).
\textsuperscript{653}72 IA 241(1944-45): AIR 156 (PC: 1945).
passing an order must disclose due and proper application of mind and such order should record a reason behind the order.  

4. Imposing fetters on discretion: Changing circumstances leads to changing laws and policies and if the authority in exercising the discretion does not take this into consideration, it does lead to failure of exercise of discretionary powers. The circumstance of every case is different and applying same facts and policies to each case will lead to non-application of mind. For example, alcohol is dangerous for a human body but this statement is not universally applicable as alcohol is used for medical purpose also, and a complete ban on alcohol by government is failure of discretion.

4. JUDICIAL BEHAVIOUR AND ADMINISTRATIVE DISCRETION

India as a nation has covered a long road of struggle and has developed with regards to judicial review and judicial behaviour on various other bodies of the state and courts have come up with very effective parameters against the arbitrary use of the discretionary power but still the conspectus of judicial review and behaviour remains halting and residual. There are two stages of judicial control mechanism of administrative discretion:

1. During the stage of delegation of discretion: Court exercise its control at the time of delegation of administrative discretion by the statutes to the administrative authority by checking the constitutionality of the law under which such delegation is made with reference to the fundamental rights under part III of the Indian constitution. So if any law delegates vague and discretionary powers to the administrative authorities, court would declare it as ultra virus.

2. During the stage of exercise of discretion: Unlike US, India is not having Administrative Procedure Act for the judicial review of the administrative discretion so the power of judicial review arises from the constitutional configuration of the court. The court in India has always held the view that judge-proof discretion is negation of rule of law. Therefore, they have developed various formulation which are generally classified into two categories:

(a.) That the authority is deemed not to have exercised its discretion at all, or there is failure on its part to exercise discretion. In *Purtabore co. Ltd. V. Cane Commr. Of Bihar* 655, the cane commissioner in the state of Bihar reserved 99 villages for the appellant company on the order of Chief minister on which court quashed the discretion by the cane commissioner taking the ground that he abdicated his discretion on the orders of some other authority; therefore it was deemed that the authority has not exercised his discretion at all.

But this does not take away the discretion of administrative authorities to frame policies for its exercise of its discretion where in case of *Shri Rama Sugar Industries Ltd. V. State of A.P.* 656, where section 21 of A.P. Sugarcane (Regulation of supply and purchase) ACT, 1961 gave permission to administrative authority to

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exempt tax on new factory which has substantially expanded but government framed the policy that only factories of cooperative sector would be exempted on which Apex court held that body empowered with statutory discretion may adopt rules and principles and such rules would not be arbitrary or against the objective of the act.

(b.) That the authority was not able to exercise its discretion in the prescribed manner, or abuse of discretion. The courts exercise their control when there is an improper use of administrative discretion or according to English courts it is “unreasonable” or according to American court includes in “arbitrary” exercise of discretion. In Indian Rly. Construction Co. Ltd. v. Ajay Kumar, the court held that in general, a discretion must be performed by the authority committed and the authority exercising the discretion should not exercise on the dictation of other authority and must not be what is forbidden or unauthorized to do.

5. ABUSE OF DISCRETION
When discretion is conferred to administrative authority, it must be exercised within the limitations of law. As Markose says, “When the mode of exercising according a valid power is improper or unreasonable, there is an abuse of power” 658. For example, a principle of a school dismisses a teacher who was having red hair. It is unreasonable as a teacher should be judged by her teaching skills. Therefore, principle used his discretion and exercised his power in an improper way leading to abuse of discretion.

**Wednesbury’s Principle**: Wednesbury’s principle is a principle laid down by the House of Lords in Associate Provisional Picture Houses v. Wednesbury Corpn. 659, states that when an administrative authority is given discretion, it should be exercised in the interest of public and the authorities should eliminate the irrelevant matter and must include the relevant matter while determination of the matter.

If an act by administrative authority is without jurisdiction or is in excess of power conferred by the statute or there is abuse or misuse of power, the court can interfere. In such an eventuality, mere facts that the authority denies the charge of mala fide or oblique motive or of its having taken into consideration improper or irrelevant matter does not preclude the court from enquiring into the truth of allegations leveled against the authority and granting appropriate relief to the aggrieved party. 660

Abuse of discretion may be inferred from the following circumstances:
1. Acting without jurisdiction;
2. Exceeding jurisdiction;
3. Arbitrary action;
4. Irrelevant consideration;
5. Leaving out relevant consideration;
6. Mixed consideration;
7. Mala fide;
8. Improper object;
9. Fraud on constitution;

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657 IAD 482 (Delhi: 2000), 83 DLT 242 (2000), 52 DRJ 598 (2000), ILLJ 1160 (Del.: 2000)
658 Judicial Control of Administrative Action in India 417 (1956).
659 1 ER 498 (ALL.: 1947).
10. Non-observance of natural justice;
11. Doctrine of proportionality;
12. Doctrine of legitimate expectation;
13. Unreasonableness.

6. ADMINISTRATIVE DISCRETION AND FUNDAMENTAL RIGHTS

Part III of the constitution of India conferring fundamental rights is the life line for the citizens residing within the territory of India which protects them from abusive power, discrimination, arbitrary action etc. and maintains equality amongst people (article 14), restricts discrimination (article 15), provides personal life and liberty (article 21), freedom of religion (article 25-28) speech and expression (article 19) and various other liberties demanded and required by a citizen and these fundamental rights provides an additional dimension to the judiciary to have a control on administrative action.

a. Article 22

Article 22 of the constitution provides for the safeguards to the person arrested or detained and gives wide range of powers to the administration authorities to exercise their discretion in these matters. The amount of administrative discretion in the matters of detention is huge with negligible specific legislative provisions or test for the purpose which might lead to arbitrary use of the discretion. The court cannot scrutinize grounds of the efficiency of executive action or whether the grounds are true or false.

The judiciary is having a limited control over the administrative discretion in these matters or rather just a superficial control and they can only interfere till questioning the efficiency and grounds for the detention but the major role is of the authorities with discretion.

b. Article 19

Article 19(1) (a) and article 19(2) is conferred with freedom of speech and expression to the citizens and the restrictions which are imposed in exercising this right respectively. Though article 19 is within the constitution of India as a fundamental right and infringement of the right is within the jurisdictional ambit of judiciary but when required necessarily government and administration is also conferred with discretion for maintaining law and order. In Virendra Singh v. State of Punjab, the Punjab Special Power (press) Act, 1956 was in question as the act provided discretionary powers to the government and executive on the matters related to printing and newspapers to take actions to preserve communal harmony within the state on which court held that there is nothing wrong in not imposing restrictions on the powers of the government as at the time of passing the act Punjab state was going through communal violence phase and it is the duty of the state government to maintain law and order which may compel them to take necessary steps to maintain peace.

But the blanket of necessity should not lead discretion to arbitrary action on which judiciary should have a close eye. In Himat Lal K. Shah v. Commr. of Police, Rule 7

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661 Indian Const. art. 12-35.
664 AIR 896 (1957), SCR 308 (1958).
under section 44 of the Bombay Police Act, 1951 provided powers beyond the boundaries of the constitution to the police commissioner of Bombay to grant or refuse permission for any public meeting on street which was by default a violation of article 19(1) (b) and article 19 (3) which provides for reasonable restriction within article 19 (1) (b) was stuck down by Supreme court on being unreasonable restriction on exercise of fundamental rights and section 15(2)(b) under criminal amendment act, 1908 as amended by Madras act, 1950 gave unrestricted power to state government to stuck down any association as unlawful was also struck down by apex court in State of Madras v. V.G. Row as being unconstitutional and allowing unauthorized use of discretion.

c. article 14
Administrative discretion is a combination of two words “Administrative” and “Discretion” where administrative authorities are having discretion to do something according to their will for the welfare of society beyond others personal discretion which is contradictory to basic fundamental right of right to equality within the constitution of India. Every individual is having discretion but to a personal level and administrative discretion is very different from personal discretion where earlier one is having no restriction or limitation and later is attached with reasonable restrictions. Professor A.V. Dicey says “Administrative Discretion is against the equality, and it becomes the cause of arbitrariness, discrimination and unjust”. As powers conferred with the administrative officers are wide, this may lead to abuse of article 14 (right to equality) so the Indian courts apply the “doctrine of proportionality” for examine the validity of the provisions with the help of article 14 of the Indian constitution and it acts as regulators to such grant of power.

Doctrine of proportionality: Doctrine of proportionality evolved from the courts of England when courts stated reviewing the administrative actions which expressly or impliedly affected the rights. As per Indian context, the concept of proportionality was in existence since beginning where courts had power to decide the reasonableness of restriction on fundamental rights, but in India v. G Ganayutham, apex court of India in the light of decision of House of Lords in Council of Civil services Unions v. Minister of Civil Services, expressly held that in proportionality of the restriction on the right is also a ground on which an administrative action could be impugned other then the basic grounds such as illegality, irrationality and procedural impropriety.

Article 14 and administrative discretion are functioning simultaneously where administrative discretion within its jurisdiction is able to balance the proper functioning of the authorities without hampering the fundamental rights of the

666 To assemble peaceably and without arms.
667 AIR 196 (1952).
668 Indian Const. art. 14.
669 S.P. SATHE, Administrative law 400 (7TH ed. 2004).
671 7 SSC 463 (1997).
673 S.P. SATHE, Administrative law 444 (7TH ed. 2004).
citizens mainly right to equality. Any rule or statute which confers discretionary powers to the authorities, which is violative of fundamental rights, is unconstitutional. Article 14 and article 19 acts as a regulator to check discretion exercised by the administrative authorities as to whether they should not be arbitrary or beyond the powers.

7. ADMINISTRATIVE DISCRETION AND RULE OF LAW

The concept of rule of law is understood as law being the sovereign authority and state is not governed by ruler but by the law. A.V.Dicey used the phrase “rule of law” for the first time in 1875. Rule of law is the basic principle for governing and functioning of various nations around the world. The concept of rule of law is not specifically mentioned within the constitution of India but it has existed and evolved through precedents. Rule of law mandates the state to function and perform their duties in just and fair manner and within the scope of law and the primary essential feature of rule of law is the absence of arbitrary power within the authorities and functionaries.

“No man… is so high that he is above the law. No officer of the law may set that law to defiance with impunity. All the officers of the government from highest to the lowest are the creatures of the law and are bound to obey it”. The aforesaid mentioned quotes signifies the reality of the developing society where law is the only supreme authority present and no human is above the law. Over the time, philosophers have come up and interpreted rule of law with administrative discretion and tried to correlate whether both the concept are parallel, contradictory or supportive in nature to each other. Dicey in his concept denies the rule of my ruler or king. Ivor Jenning was not in favour of contradicted dicey stating that government needs to be supported with discretionary powers for the welfare and cure of the societal problems. J.F. Garner took one step further and equated the concept of rule of law with the natural law, a normative ideal on which the legal system should look up to. Schwartz agreed with Garner that it is necessary to provide discretion to the administrative authorities and it would be supportive to the rule of law if the step by discretion is within the purview of law. Justice Doughlas did agree with Schwartz and stated “control of discretion is always crucial to effective judicial review. Since decision is at the heart of agency power, the administrative law is all about the control of discretion”. Prof. Wade was one amongst the philosophers who warns the courts and predicates that the


675 A.V.Dicey, Stubbs’ Constitutional History of Britain, Nation 20 154 (4th March, 1875), also see A.V.Dicey, The Rule of Law 67 (1980).


678 Quoted in P. C. Jain, Administrative Adjudication: A Comparative of France; UK; USA and India 158 (1981).


680 Wade, supra, 606.
court as, therefore, to draw the line between
the mistake made intra-virus and mistake
made ultra-virus\textsuperscript{681}.

It is not universal fact that discretion leads to
arbitrariness and in the landmark case of
Centre of Public Interest Litigation v. Union
of India \textsuperscript{682}; it is a presumption that
discretion would be exercised within the
ambit rule of law.

8. CONCLUSION

“Discretion is a better part of valor”
Administrative discretion is an essential and
necessary part of administrative authorities’
as well Indian democracy where the word
discretion is to be taken in a positive
connotation forming rules and regulations
and ultimately releasing the burden of
legislation if it fails to do so. “With great
power comes great responsibility” and
responsibility here is exercise of powers
within the ceiling to maintain a balance.
This paper concludes that the concept of
administrative discretion is like a double
edged sword. It is mandatory on one hand,
irrespective of the fact that if it is contrary to
right to equality or any other basic principle
of Indian Constitution and on the other hand,
it restricts the unlimited exercise of
discretion. The role of Judiciary is
exceptional as a guardian to prevent the
misuse of the powers given to the
administrative authorities. It is very essential
to strike a balance between judiciary and
administrative authorities. The face of
Indian legal system is painted with the ideals
of both of them but being separate organs of
government, there might be a collision of
thoughts on the same set of facts. Judicial

Review comes into picture when this
discretion leads to some gross violation
fundamental rights or if it destroys the basic
structure. A major challenge faced by the
judiciary here would be of interpreting
“what is extreme or gross violation of right”
and “what type of unreasonable discretion
could lead to such violation”.

In the exercise of this discretion the
judiciary has to maintain the dignity of the
power so provided to it as a separate organ
under the realm of the protection of
fundamental rights of all and preserving the
principles of natural justice at all costs.
As quoted by Justice Krishna Iyer, that
“Judicial Activism gets it’s most noteworthy
reward when its request a wipe of few tears
from few eyes.”

\textsuperscript{681} H. W. R. Wade, Administrative Law 70-71(1971).
\textsuperscript{682} 3 SCC 1 (2012).
COMPARISON BETWEEN THE CRIMINAL PROCEDURE OF ENGLAND AND INDIA WITH REGARD TO SIMILARITIES BETWEEN THEM

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From Alliance University

ABSTRACT

Since India and England both follow the adversarial system and most part of the criminal law followed in India is adopted from the United Kingdom, it can be presumed that there will be substantial similarity between their criminal procedures. This project aims to compare the criminal procedures followed in these two countries with regard to various stages of the criminal justice system i.e. pre-trial, trial as well as correctional and aftercare services. Also, the relationship of police and prosecution will be discussed in detail. Eventually, this project will trace the similarity between the criminal procedure of these two countries.

INTRODUCTION

In order to have a comprehensive analysis of the criminal procedure in India, it is better to know the judicial systems, the nature and extent of the investigation, the nature of the trial process and the correctional and aftercare services in England.

There are basically two prevailing criminal justice system in the world i.e. the adversary system and inquisitorial system. Both India and England follow the adversarial system. Under the adversarial system, the judge just hears the case of prosecution snd defense and gives his judgment. He is not involved in the investigation processs.

The criminal justice system is the process by which criminals are arrested, followed by investigation phases to determine evidence. Criminal offenses are usually investigated for facts and incidents, situations, scenarios, to prove the guilt of the individual. The charges framed against the individual are determined by the unruffled evidences, and a defense is made to oppose or object the prosecution of the criminal offense. To determine the guilt in the criminal process, the evidence is examined by the judge and judgment taken into consideration for the purpose of determining the result. After the conviction, various measures are adopted for institutional correction and aftercare of the offender.

All over the world there are many different types of criminal justice systems. There are two main justice systems: Adversary system & Inquisitorial system. In the Adversarial system, the judge just hears the case of the prosecution and the defense and gives judgment. It is basically a battle between the prosecution and the defense. However, in Inquisitorial system, the judge is a part of the investigation process and effort is made to know the truth. Both England and India follow the adversarial system.

This project will address the question of how the criminal procedure followed in England is different from that in India and what are the similarities they share?
HIERARCHY OF COURTS AND ORGANIZATION OF POLICE AND PROSECUTION

INDIA

Judicial System

In India, the Criminal Courts are present all the States and Union Territories with an object to deliver justice. The Hierarchy of the Criminal Courts in India is governed under the Code of Criminal Procedure. Some of the important provisions of the CRPC are s.6, s.16, s.20, s.28, s.227 etc., The following the hierarchy of the criminal courts in India:

<table>
<thead>
<tr>
<th>State</th>
<th>Zone</th>
<th>Range</th>
<th>District</th>
<th>Sub-division</th>
<th>Circle</th>
<th>Police Station</th>
</tr>
</thead>
</table>

Fig.1: Hierarchy of Criminal Courts in India.

Organization of Police

The functions of a police officer are based on various factors such as Social, Political and legal etc., Each state government is empowered under the Police Act, 1861, to establish its own police systems. Even other legislations like Indian Penal Code, Code of Criminal Procedure play a vital role in regulating this police system. There are several divisions under the structure of the police system of the state.

The divisions of the state police system in India are:

Fig.2: Hierarchy of the State Police System in India
Coming to the Hierarchy of the Police force in India, the Director General of Police (DGP) is the head and deals with administrating the entire police system within the State.

**Organization of Prosecution**

A Public Prosecutor plays a significant role in the Criminal Justice System. The Directorate of the Prosecution is formed for supervising and maintaining the discipline of prosecution agencies. In India, the hierarchy of the Prosecution is different in all the states. When it comes to Andhra Pradesh, the Additional and Deputy Director of Prosecution substitute the position of Deputy Director of Prosecution. The powers, functions and appointment of the prosecution are envisaged under the Code of Criminal Procedure, 1973. Based of the mechanism of the Prosecution in India, the following categories are made:

1. Director of Prosecution
2. Deputy Directors of Prosecution
3. Public Prosecutors and Additional Public Prosecutors
4. Assistant Public Prosecutor
5. Special Public Prosecutor

In India, the situation of the relationship between the Prosecution and the Police is deteriorating rapidly, which is leading to miscarriage of justice. No cooperation is present upon consultation, between the prosecution and the police while dealing with a case. Even the Apex court held that the police have stopped supervising over the prosecution after the amendment of the Code of Criminal Procedure in 1973. Compared to other countries like USA, France and Japan etc., the conviction rate in India is comparatively low even in serious offences.

**ENGLAND**

**Judicial System**

Coming to the Judiciary in England, there is a unified federal system, which consists of one system in England and Wales, The Second system in Scotland and the last system is in Northern Ireland.

The following is the hierarchy of the courts in England and Wales:

- Supreme Court of UK
- Court of Appeal
- Fig.4: Hierarchy of Prosecution in India
- Relation between Police and Prosecution in India
High Court of Justice (in few instances)  
↓  
Crown Court  
↓  
Court of Magistrate

Director of Public Prosecutor  
↓  
Chief Crown Prosecution  
↓  
Crown Prosecution Service (CPS)

Fig.5: Hierarchy of Criminal Courts in England.

**Organisation of Police**

In England, the police force and its hierarchy is regulated under the Metropolitan police Act, 1829. The entire police force is divided into two parts to cover different areas, they are:

- Greater London Metropolitan Police Service
- City of London Police

The police force mainly performs functions like supervising and operating activities in order to maintain law and order and also to secure the Britain royal family.

**Organisation of Prosecution**

The Prosecuting agencies in England were privately handled till 19th Century and later it was centralized. The Crown Prosecution Service is present in 14 states in England, mostly in Magistrate ad Crown Courts.

- Attorney General

Apart from the hierarchy of the Prosecution in England, there is private prosecution taken up mostly by the Royal Societies through different organizations.

**Relation between Police and Prosecution in England**

In England, the prosecution and the police relation is clearly explained through informal arguments or through a statutory reform. In case of inquisitorial system, the role of prosecution and investigation is empowered to the prosecutor alone. But in general, the police is never given the responsibility of prosecution and are only regarded with the role of investigation. Only in case of less serious crime, the prosecutor has the control over the entire investigation.

**PROCEDURE DURING PRE-TRIAL**

**PRE-TRIAL PROCEDURE IN INDIA**

**Stages of a Criminal Case before Trial**

On receiving information about a cognizable offence police register FIR and commence investigation. They collect evidence, arrest

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the accused and produce him before the Magistrate and secure orders for police custody or judicial remand. On completion of investigation, if the police feel that no prima facie case is made out final report will be filled before court. If the investigating agency feels that a prima facie case is made out, it will file a charge sheet before court.

**Investigation and the Public Prosecutor**

Police is the Chief Investigative agency of the State. Administratively police is independent from Directorate of prosecution and the judiciary. As a principle, it is said that the court does not possess any supervisory jurisdiction over police and their investigation. There is a clear cut and well demarcated sphere of activity for the police in crime detection which is the Executive power of the State. During investigative phase evidence is collected. Police examine witnesses and record their statements, collect material objects, conduct searches and seizures, arrest the accused, record their statements and confessions, arrange for test identification parades, obtain scientific reports and opinions from experts and prepare a case diary of all of it for each of the cases investigated.

**Arrest**

Gathering and collecting evidence may span a number of days or weeks, yet law requires the accused to be brought before a court within 24 hours of arrest. The power to arrest and the discretion whether to arrest or not is always vested with the police. When the police feel there are grounds for believing that the accusation is well founded they transmit the accused and case diary to the Magistrate for remand orders. It is the Magistrate who has ultimate control over police investigation. It is a matter of record that 60% of all arrests by police in the country are unnecessary and unjustifiable and 43% of the total jail expenditure in the country is wasted due to such arrests. Prof. Afzal Qadri reports in his survey that 85.7% of police officers agreed that arrests are made on extra legal consideration.

**Bail**

At the bail hearings before a court of law, if the case is not grave, there is no legal requirement for the court to hear the prosecutor and bail would be granted to accused invariably. In such cases, the Public Prosecutor does not get to know about the case until the police complete the investigation and file a final report or charge sheet before the court. If the offence is serious, the Public Prosecutor would be notified by the court about bail hearing.

**Witness Examination**

During the course of investigation police examine witnesses and record their statements. They make perverse enquiries, the investigation is either delayed or poor in quality, and they do biased investigation, behave rudely, discourteously with victims and witnesses and sometimes minimize the gravity of offence by manipulation. As the mandate of law is that police shall not take the signatures of witnesses recorded during investigation. There is no attempt at
PRE TRIAL PROCEDURE IN ENGLAND

The basic construction of the law governing pre-trial detention has been in place in England and Wales since the Bail Act (BA) 1976 came into force. Mainly, it provided for a guess in favour of bail for defendants in criminal proceedings, which can only be displaced - resulting in pre-trial detention (a remand in custody) - if certain, specified conditions are satisfied. Bail awaiting trial or sentence is thus the default position, and conditions can be attached to that bail only if they emerge necessary to the court in order to achieve defined objectives. Generally, before a decision is made, the accused must be given an occasion to make representations and (subject to certain exceptions) he or she has a right to be present, and to legal representation. The court making the decision must make a record of its decision, and if the decision is to deny bail or to impose conditions on bail, must give reasons for its decision. The reasons must be recorded, and the accused must be given a copy of the report. When bail is denied on the first occasion i.e. accused appears before a magistrates’ court, then generally he or she may make a further application to a magistrates’ court, and when bail is still denied, may make an appeal to the Crown Court.18

At the same time as the structure of the legislation has remained the same in the four decades since enactment of the Bail Act 1976, it has been amended on various occasions. In many cases the amendments have been firm by the need to expand the conditions in which bail can be denied, for example, where the accused was already on bail when the offence giving rise to the new proceedings was supposedly committed, or where the accused has purportedly committed further offences whilst on bail. On the other hand, amendments introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, were planned to restrict the use of remands in custody in cases involving an allegation of a summary-only offence.19 In addition, even as the Bail Act initially provided a complete code prevailing pre-trial detention, this was ended by the Criminal Justice and Public Order Act 1994, section 25, which restricts the use of bail for accused charged with certain grave offences, and by the Coroners and Justice Act 2009, section 115, which stops magistrates’ courts from yielding bail in murder cases. According to a leading criminal lawyer the result, is that a statute that was once of ‘great clarity… has become confused and difficult to apply without error’, and which is in pressing need of consolidation in order ‘to restore the order that is critical to achieving the right stability on a case by case basis’.20

SIMILARITY IN THE PRE TRIAL PROCEDURES IN INDIA AND ENGLAND

The role of police in process of investigation is very essential in both India and England. Police is in charge of the investigation process. Evidence is collected in the process
of investigation phase. Arrest or pretrial detention is very similar in India and England. Police has the authority to arrest the accused and to produce the accused before the concerned court.

In matter of bail also if the offence is not grave the police can grant bail. There is no need for the consent of the magistrate. So they are very similar in India and England.

The submission of no case by the accused or his counsel after the close of the evidence by the prosecution in U.K. resembles the hearing under Sec. 232 Cr.P.C. during the sessions trial in India. Such a procedure is not there after framing of charge in the cases triable by the magistrates. The public prosecutor also plays a very vital role in both India and England. The public prosecutor has the task to collect all the evidences and to convict the offender. Well there is a little difference in case of England is that a private prosecutor can be appointed.

The witness examination also takes place the same way in England and India. The witnessed is examined and then a report is prepared by the police accordingly. Witness Examinations helps the police get vital information related to the case.

PROCEDURE DURING TRIAL

TRIAL IN ENGLAND

U.K. does not have a single unified federal system. England and Wales have a system, Scotland has another system and Northern Ireland has a third system. In some cases, the Tribunal Court under the Immigration law has jurisdiction over the whole of the United Kingdom. Other courts constituted by other laws have jurisdiction over England, Wales and Scotland. The court of England and Wales is made up of higher courts and subordinate courts. The upper courts are the Court of Appeal, the High Court of Justice and the Court of the Crown. The court of appeal deals with the appeal of other courts. The High Court of Justice consists of 3 divisions, namely the Queen ’s Bench, the divisions of Chancery and Family. These divisions are not separate courts, but have independent procedures and practices adapted to their purposes. Any High Court judge can sit down to hear cases in the Crown Court. As for other matters, the Crown Court is a lower court. The subordinate courts consist of magistrate’s court, family proceeding court, juvenile court and the district court. The Magistrate’s courts are presided over by a bench of place magistrates or a legally trained District Judge. Lay magistrates are assisted in their work by legally qualified judicial secretary and they hear minor criminal cases. Juvenile courts deal with offenders to the age of 10 to 17. Some Magistrate’s courts also act as family proceeding courts dealing with family matters. The county courts have only civil jurisdiction.

Types of trial

Criminal trials in England and Wales are of two forms – they are either summary trials or trials on condemnation. The Summary trial takes place in magistrate’s courts. The judges are magistrates also known as ‘justice of the peace’. Three classes of offences are:

An offence triable only on indictment is one for which an adult must be tried on indictment.
(ii) An offence triable either way is one for which an adult may be tried either on indictment or summarily.

(iii) An offence triable only summarily is one for which both adults and juveniles must be tried summarily.

Summary trial

A summary trial also known as ‘trial on information’, commences with the charge or information being put to the accused by the clerk. Where it is alleged that two or more persons acted together to commit an offence they may be jointly charged in one information, and will normally be tried together. An information must claim only one crime, but two or more information can be tried together if the defendant consents or the magistrates think that the information is united in such a way that the interest of justice are best served by a single test.

If the accused pleads guilty to the information, the magistrates initiate the procedure that led to the sentence being pronounced. If the accused pleads not guilty, the accusation makes a brief opening speech; the prosecution witnesses are called, each of whom is first questioned ‘in chief’ by the prosecution’s legal representative and then cross-examined by the defence. The defence may, if they so wish, submit that there is no prima facie case against the accused, and if the magistrates agree they acquit forthwith; if no submission of no case is made or if one is made unsuccessfully, the defence may call witnesses who may include the accused; after the defence evidence if any their verdict.

When a person accused of committing a non-punishable crime is summarily brought before a court of magistrates, the court must conduct a preliminary investigation in order to determine whether, at the time of considering the evidence, there is sufficient evidence to submit it to trial by the jury for any indictable offence. The function of these procedures is to ensure that no one is prosecuted unless there is a prima facie case against them. Justices so acting is known as examining justices and their functions may be discharged by a single justice. They are not a court of trial. The trial on condemnation is nearly always preceded by intermedial proceedings which take place in a magistrates’ court. As soon as possible after examination of the witness, the court must have its statements read in the presence and hearing of the accused and must request that the witness sign the declarations. After the evidence for the prosecution, including any written statement, and after hearing any submissions, if any, has been submitted, the court must read the accusation and explain it in the common language.

Indictment

The Courts Act 1971, assize courts and courts of district sessions were abolished and replaced by the Crown Court, which is part of the Supreme Court of England and Wales. All proceedings on condemnation must be brought before the Crown Court. The course of the trial is controlled by a professional judge of the Crown Court. The most serious offences are triable only on indictment, e.g. murder, manslaughter, causing death by hasty driving, causing grievous physical harm with intention, using
a firearm to resist arrest, rape, buggery, incest, robbery, aggravated burglary, ordinary crime if it involved the threat of violence to a person in a lodging, blackmail, criminal damage with intention to imperil life and perjury in judicial proceedings. When a defendant appears on the dock, he is called by his name and then tried by the court clerk. A trial process begins with the court clerk who charges the accused to the accused. The hearing is to read every count of the indictment, ask the defendant if he is guilty or not guilty the defendant is entitled in all cases to declare guilty in addition to any complaint or special declaration; he can also plead not guilty of any other suspicion in the indictment, but guilty of another charge. If you plead guilty to all the charges, the court will embark on the procedures leading to the conviction.

**Summoning of Jurors**

If the accused pleads not guilty of all charges in the indictment, a jury will swear to prove the case. The Lord Chancellor is responsible for summoning jurors for service. A jury consists of twelve men and women, selected mostly by chance from a large (but not complete) cross section of the adult population under the age of 65. The prosecution lawyer opens the case to the jury will present a summary of the salient features of the case and the nature of the evidence to support it intends to gather. The public prosecutor must consider himself as justice ministers who frequent his administration rather than as advocates. After opening of the case, the prosecuting counsel calls his witness and tenders any written statements. When a witness is called, objection may be taken to his competency before he is sworn or affirmed. If there is no such objection, it is objected and rejected; each witness takes an oath or affirmation and is examined in the head. He can then be examined by the defendant or his lawyer and can be reviewed by the attorney for the prosecution.

When the lawyer for the prosecution has called all his witnesses and submitted written statements of witnesses who have not been called, you are entitled to close his case. After the case has been closed by the prosecution, the defendant or his lawyer can declare that it is not appropriate to go to the jury. The presentation can be confirmed if there is no evidence to show that the defendant has committed the tests. The same is the case in which there is some evidence and it is such that the jury correctly addressed could not condemn for this. In these circumstances, it is the judge's task, in a presentation that is made, to stop the

If there is no successful submission that there is no case of going to the jury, it is up to the accused, if he wishes, to present evidence. If he decides to give evidence, he must do so on oath and he is liable to be cross-examined. The general rule is that all matters of law must be decided by the judge, while all the facts must be decided by the jury. The judge is usually not obliged to determine matters of fact. However, there are times when a question of fact under discussion must be determined to decide whether to admit a piece of evidence. On these occasions, only the judge determines the questions of fact. The procedure is called “Trial within a trial” or “voir dire”. After completing the evidence of the accusation
and the defendant, the lawyer of both sides will address the court. At the end of the interventions of the counsel, the judge of the trial has summarized the case before the jury.

**Verdict: Summing up**

The conclusion of the summing up, the members of jury think about their verdict. The members of the jury may award, together then and there, but it is useful for all bailiff to be sworn and for the members of the jury to be conducted to their retiring room to consider their verdict. While there is nothing that prevents the trial judge to urge the jury to reach a verdict, it is a fundamental principle of criminal law that, since the verdict of a jury involves the freedom of the subject, the jury must decide completely and without inhibitions, uninfluenced by any extraneous consideration whatsoever. Judgment must be prominent orally in open court by the trial judge. The sentence in the Crown Court is pronounced by a Crown Court judge if the offender appears before the Crown Court as a result of being convicted, the Crown Court judge must meet two lay judges.31

**INDIAN TRIAL PROCEDURE**

The criminal law consist of three main acts: Indian Penal Code, 1860; Code of Criminal Procedure, 1973; Indian Evidence Act, 1872. The trial process in India is governed by the Code of Criminal Procedure, 1973. Prior to the promulgation of the 1973 Code, the jury trial system existed in India. It was complemented by the promulgation of the Code of 1973. The national court of jurisdiction in the criminal side is the first judicial magistrate class that there are fields of meetings, short auxiliary sessions, high courts and the Supreme Court. Except for matters for which the original jurisdiction has been granted to the court of sessions in very rare cases, all proceedings begin before the judges of the judiciary.

**Types of criminal trial**

- Warrant Trial (7 years or more)
- Summons Trial (Maximum 2 years)
- Summary Trial (Maximum 6 months)

**Stages of criminal trial in a Summons case**

In summons case32, whether it is on the basis of a police report or private complaint, when the accused appears before the Magistrate's court, the particulars of the offence shall be read more than to him and he shall be asked as to whether he pleads guilty or not. If he pleads guilty, the Magistrate, after satisfying that the plea was voluntary and that the accused is guilty of the offence and after deciding the question of probation, impose sentence on him. After the evidence has been closed, the defendant will be examined under Sec. 313 Cr.PC.33

- **Pre-trial:** In the pre-trial stage, the process such as filing of FIR and investigation is conducted.
- **Charges:** In summons trials, charges are not framed in writing. The accused appears before the court or is brought before the court then the Magistrate would orally state the facts of the offense he is answerable.
- **Plea of guilty:** The Magistrate after stating the facts of the offense will ask the accused
if he pleads guilty or has any defense to support his case. If the accused pleads guilty, the Magistrate records the statement in the words of the accused as far as possible and may convict him on his discretion.

- **Plea of guilty and absence of the accused:** In cases, where the accused wants to plead guilty without appearing in the court, the accused is supposed to send Rs.1000/- by post or through a messenger (lawyer) to the Magistrate. The absentee should also send a letter containing an acceptance of guilt and the amount of fine provided in the summons. The Magistrate can on his discretion convict the accused.

- **Prosecution and defense evidence:** In a summons case, the procedure followed is very simple and elaborate procedures are eliminated. If the accused does not plead guilty, then the process of trial starts. The prosecution and the defense are asked to present evidence in support of their cases. The Magistrate is also empowered to take the statement of the accused.

- **Judgement:** When the sentence is pronounced in a summons case, the parties need not argue on the amount of punishment given. The sentence is the sole discretion of the judge. If the accused is acquitted, the prosecution has the right to appeal. This right to appeal is also extended to the accused.

**Stages of criminal trial in a Warrant case**

Regarding a warrant case on police report, after appearance of the accused, the magistrate will listen to both parties and dismiss the defendant or file an accusation against him. In case of conviction, he will hear the defendant on the question of the sentence and, after having decided the question of probation, he can impose the sentence on the accused.

- On the filing of the complaint, the court will examine the complainant and its witnesses on the same day or any other day to decide whether any offense is made against the accused person or not.
- After examination of the complaint and the investigation report, the court may come to a conclusion whether the complaint is genuine or whether the prosecution has sufficient evidence against the accused or not. If the court does not find any sufficient material through which he can convict the accused, then the court will dismiss the complaint and record its reason for dismissal.
- After examination of the complaint and the inquiry report, if the court thinks that the prosecution has a genuine case and there are sufficient material and evidence with the prosecution to charge the accused then the Magistrate may issue a warrant or a summons depending on the facts and circumstances.

**Summary Trial**

Cases which generally take only one or two hearings to decide the matter comes under this category. The summary trials are reserved for small offenses to reduce the burden on courts and to save time and money. Those cases in which an offense is punishable with an imprisonment of not more than six months can be tried in a summary way. The point worth noting is that, if the case is being tried in a summary way. The point worth noting is that, if the case is being tried in a summary way.
way, a person cannot be awarded a punishment of imprisonment for more than three months.

4.3. Similarity in the Trial Procedures in India & England

Both the jury system and the bench system have their pros and cons. It is important to look at the advantages and shortcomings of each of these systems. Since trial by judges might be beneficial in one case while, trial by jury might be beneficial in another. Summary Trial is common in India and United Kingdom. Both the countries follow adversarial system, Public Prosecution opens the case and charges are framed by the court. In UK, examination i.e. chief & cross is a lengthy procedure often followed by the Crown’s Court. In UK, there courts are named as Crowns and Magistrate’s Court whereas in India, there are Session’s court & Magistrate’s court. Functions followed by magistrate’s court is same in both the countries i.e. trial of summons case and petty offences. Jury system is followed in Crown’s court (indictable offences) of United Kingdom & Judges in Sessions Court of India. Moreover, wigs are a essential part in the jury system of UK.

CORRECTIONAL AND AFTERCARE SERVICES

MEANING AND PURPOSE

The longer an offender stays in the prison the greater is likelihood that he might be harmed psychologically and will suffer. Several studies have revealed that many casual offenders turn out as hardened criminals after their term. Even though he comes out as a penitent and reformed person, his friends and relatives detest him and he acquires a stigma.

Time and again, when offenders are released from correctional institutions, they are confronted by social, economic and personal challenges which act as obstacle to a crime-free lifestyle they are required to live.

In such situations, aftercare and correctional services come to the rescue. It is often stated that aftercare is rather based on the understanding of the needs and outlook of the person who is going out of a correctional institution to face an unkind and inhospitable world outside.

IN INDIA

Once a person is convicted of any crime, he can be given the following kinds of punishment based on the offence he committed and as enumerated in the Indian Penal Code:

- Fine
- Forfeiture of property
- Imprisonment
- Solitary confinement
- Capital punishment

Prisons Act, 1894

It is the Prisons Act 1894, on the basis of what the present jail management and administration operates in India. In the
report of the Indian Jail Committee (IJC) 1919-20, for the first time in the history of prisons, 'reformation and rehabilitation' of offenders were identified as the main objective of the prison administrator.

The following provisions of the Prisons Act, 1894 discuss about the reformation of prisoners-

- Accommodation and sanitary conditions for prisoners, 37
- Provision for the shelter and safe custody of the excess number of prisoners who cannot be safely kept in any prison 38
- Provisions relating to the examination of prisoners by qualified Medical Officer 39
- Provisions relating to separation of prisoners, containing female and male prisoners, civil and criminal prisoners and convicted and undertrial prisoners, 40
- Provisions relating to treatment of undertrials, civil prisoners, parole and temporary release of prisoners 41

In 2016, the Parliament of India passed the Prisons (Amendment) Bill, 2016 to make amendments to the Prisons Act, 1894 with a view to provide protection and welfare of the prisoners.

Reformation

The institutional care of offenders involve reforming them while they are inside the Prison. The Prison authorities play a significant role in the process of reformation.

- Role of State Welfare Officers in Reformation of Prisoners

In various states of India, welfare officers are appointed to keep in touch with the prisoners and help them to adjust to their new situation and also help prisoners in maintaining their family ties. They have a vital role in the rehabilitation of offenders.

- Reformation of Under-trials

The under trial prisoners are not under an obligation to work under but remaining unemployed not only works against their self-interests but is also the waste of potential and labour. Therefore, it was advocated that a policy of persuasion rather than coercion to engage under trial prisoners in work should be adopted and if they chose to work they are paid wages.

- Reformation of Women Prisoners

The process of reformation of female prisoners involves generous treatment and the permission to meet their children frequently. It helps keeping them mentally fit and responds favourably to the treatment methods. Also, the idea of setting up separate jails for women provides the free environment to them.

- Reformation of Juveniles Offenders

For the reformation of juveniles, correctional institutions like Special homes 42, certified schools and borstals are constituted for providing the special treatment, medical care, education,
accommodation and vocational training to juveniles.

Non-custodial Methods in Reformation of Prisoners

The earlier penological considered custodial measure as the only way to curb crime. However, the modern penological approach believes in new forms of sentencing which aim to balance the needs of the community as well as the best interests of the accused.

Such punishments will involve the positive cooperation of the offender which is likely to be effective in his reformation.

- Probation

Probation is basically the release of an offender from detention, subject to a period of good behaviour under supervision. The Probation Officer guides the offender to rehabilitate himself.

Section 360 of the Criminal Procedure Code, 1973 talks about the order to release on probation of good conduct or after admonition. It states that if the convicted person is-

- Above 21 years and is punishable with fine only or with imprisonment for a term of seven years, or less;
- Any person under twenty-one years of age;
- Any woman convicted of an offence not punishable with death or imprisonment for life

Also, the offender must not have any previous conviction proved against him, the Court should consider his/her age, character or antecedents and the circumstances in which the offence was committed and instead of sentencing at once to any punishment, direct to release the offender on a bond, with or without sureties, to appear and receive sentence when called upon during such period (which should not exceed three years) as the Court may direct and in the meantime to keep the peace and be of good behavior.

Further, the Probation of Offenders Act, 1958 is the act governing probation in India. Under section 9 of the Act, if the offender fails to follow any conditions mentioned in the bond into by him, the Court can issue an arrest warrant or issue summons to him. The court can then either remand him to custody until the case is concluded or grant bail, with or without surety, to appear in the Court on the said date.

- Parole

Parole is the conditional release of an offender who has already served a portion of his sentence in a correctional institution. In India, the grant of Parole is governed by the Prison Act, 1894 and Prisoner Act, 1900. However, each State has its own parole rules, which have minor variations with each other.

Certain convicts are not eligible for parole like prisoners involved in offences against the State, or threats to national security, non-citizens of India, people convicted of murder and rape of children or multiple murders.

The paroled person is required to always carry the permit and should produce on being asked for it by any police officer/ magistrate/ any other competent authority. He should not associate with anti-social
elements and not indulge in coercing any of the witnesses or complainant to adduce evidence in his favor. He is required to report change in the address or his movement and leaving the locality or jurisdiction. He should also obey all laws and public ordinances and not indulge in alcoholism, intoxicating beverages and narcotics.

Aftercare services

The term ‘After-Care’ refers to the programme and services organized for the rehabilitation of inmates from correctional institutions. After-care plays an important part in any integrated programme of crime prevention. In the absence of proper after care and a strict follow-up the best of penological practices will be meaningless. The hardest part of punishment that ex-prisoners, particularly young ex-prisoners, will have to face is when they come out of the correctional institution.43

After-care has not been compulsory in India as there is no legal compulsion for an ex-inmate or a destitute to accept the services provided by an after-care institution.

In India, the after-care work was done for a very long time by philanthropic organizations which, in spite of some good work done by them, had all the limitations which such private organizations tend to have in this country. The Indian Jail Conference of 1877 for the first time discussed the question of helping ex-convicts but did not take any positive steps to implement it. Various Jail Committees in their reports emphasized the need for having effective aftercare programmes but hardly anything was achieved.

Section 44 of the Juvenile Justice Act, 2000 as well as the Model Prison manual, 2016 contain specific provisions with regard to after-care services.

IN ENGLAND

The Prison Act, 1952 governs the correctional services in England which lays down the procedure for prison setup and the correctional system followed therein.

In the prison, there are basically five formal commissioners. Below them, there are many subordinate officers like inspector, a governor, a medical officer and other officers.

In England and Wales there are five different types of penal institutions. There are fifty-six Local Prisons, five Convict Prisons, four Borstal Institutions, two Inebriate Reformatories and two Preventive Detention Prisons. There are also many institutions for the purpose of dealing with juvenile delinquents under the age of sixteen which are educational in character and are not included in the prison system.44

In men's prisons, the offender has to work for a month alone in solitary confinement. After that, he is set at labor in association with fellow prisoners. If he disobeys the rules, he can be sent back to solitary labor in his cell.

In the women's prisons, the prisoners work in association from the beginning. However, their work is optional, and they receive $1.20 a week.
In the prison used for both men and women, separate buildings or parts of a building are assigned for men and women to prevent them from seeing or communicating with each other. There is no provision of corporal punishment except in some exceptional cases.

**Probation**

The National Probation Service for England and Wales (built up in 2000) is a legislative Service, which falls under the expert of the Ministry of Justice (since May 2007). The National Probation Service is sorted out into Probation Trusts. Every Probation Trust has a Chief Officer and a Board. The Chief Officer is responsible for the expenditure within the area and for all operational performance issues. He also advises the Board on strategy and policy.

The Probation Service guarantees, during the trial, that litigants who have been remanded on conditional bail at an Approved Premise conform to the prerequisites. Preceding conviction, the Probation Service can give confirmed data to the Crown Prosecution Service and the Courts to aid decision making on bail.

The Probation Service oversees Community Orders which can contain up to twelve prerequisites including drug treatment, unpaid work, mental treatment, living arrangement limitations, electronic checking and so on. Few offenders are liable to Suspended Sentence Supervision Orders.

**Parole**

The Parole Board was set up in England in the year 1967 to advise the Home Secretary. At that time the Home Secretary was responsible for the release of prisoners on licence and their recall to prison. Now, Offender Management is the responsibility of the Ministry of Justice.

Since 1967 the Parole Board has been transformed from initially an advisory body, which usually made decisions on the papers about a prisoner and did not have the final say as to release, to finally a judicial body which determines the length of time a prisoner is supposed to spend in custody. It holds oral hearings where prisoners are present and legally represented. However, some decisions are still made ‘on the papers’ sometimes by a single member of the Board. The Board consists of members working as part-time. They include judges, psychiatrists, psychologists, probation officers and independent laypersons.

The Board has the status of an executive non-departmental public body (NDPB) which means although it receives the funding from central government (the Ministry of Justice), its day-to-day operations are totally independent from the Ministry. However, the Secretary of State for Justice appoints members of the Parole Board and is able to issue guidance to the Board about how it should make its decisions.

**Aftercare services**

In England, law provides for compulsory after-care for certain categories of offenders. The concept of after-care of prisoners in the United Kingdom can be traced as far back as 1776. Later, the Discharged prisoners’ Aid Society was
created.

In 1967, The Central After-care association was abolished and probation officers became directly responsible for all form of compulsory supervision for discharged offenders.

The Department of Health and Social Security has the general responsibility for meeting the financial needs of discharged prisoners. Where a person is released from an institution, he is placed under supervision for two years from date of his release. Probation officers are responsible for the supervision and after-care of the released inmates.

Comparison

The correctional and aftercare services that are provided by the criminal justice system in India and England are similar in many manners. The basic concepts of parole, probation and aftercare are the same.

The Prison Act, 1894 governs the institutional reformation and rehabilitation of the offender. This act is derived from the United Kingdom. This fact makes the process of reformation and institutional correction of offender very similar in India and England.

The idea behind correcting the convict with the help of reformation, rehabilitation, probation, parole etc. is the same in both India and England. However, there is minute difference with respect to the procedures followed thereunder.

In India, the application for parole should be made to the appropriate authority or the jail authority. In England, the Parole Board has the authority to determine the grant or rejection of parole and the Board consist of many members.

With regard to probation, in India, the Probation of Offenders Act, 1958 governs the process of probation and in England, there exist the National Probation Service which oversees the correctioning of offender through probation.

In England, there is mandatory aftercare services provided to the convict after his term gets over in the prison. However, in India, only recommendations and suggestions exist with respect to the aftercare services. The Juvenile Justice Act, 2000 and the Criminal Procedure Code, 1973 do mention about the significance of aftercare services and how they should be provided, but they are not compulsory and are only provided whenever it is very important to do so.

Thus, even if there are few procedural and administrative differences between India and England when it comes to correctional and aftercare services provided to offenders, the basic concept of reforming and rehabilitating the offender remains the same and the fact that the Indian prison system is adopted from the English counterpart, adds to that.

CONCLUSION

Both India and England follow the adversarial system. However, there exists difference between the procedures followed by these countries with respect to various stages of criminal procedure, be it the relationship between the police and the prosecution, the pre-trial procedure, the trial
procedure or the correctional and aftercare services provided thereafter to the offender.

But again, since both countries follow the adversarial system and the criminal law followed in India is influenced from that in the United Kingdom, the basic concept and idea behind the criminal procedure remains the same.

So we would like to conclude our project by stating that a parallel can be drawn between these two common law countries as there exist similarities in the criminal procedure as well.

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DOWRY DEMAND: A TERMITE FOR SOCIETY

By Simran Mehta & Nikhil Rana
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INTRODUCTION OF DOWRY:
Whenever a man demands dowry he not only abuses his education but also disrepute's his would be wife and motherland. And the one who consents to this demand are the supports of this evil practice.

In the ancient times the marriages were related to kanyadan. It was laid down in the Vedas and dharma that the matrimonial ceremonies are not complete until the bridegroom gets the dakshina, this is the reason that whenever the bridegroom is given a bride he also gets some valuable thing i.e. cash or something in kind which is known as dakshina. Thus marriage gets associated with dakshina in this way that something valuable is given to the bridegroom by the parents and relatives of the bride out of love and affection as dakshina. In the ancient time dakshina was a voluntary act but as the time passes the voluntary word has been disappeared from this practice and the practice which was earlier referred to as dakshina has now taken the shape of a force at the time of marriage as well as after the marriage and the term is now known as dowry. As the time changed this practice of dakshina which was in accordance with Vedas and dharma has taken the evil shape and in the 19th & 20th century various laws have been made to prohibit this evil practice of the society. Earlier the dakshina was given to the women with a view of her benefit but now the in-laws and the husband of the women make unnecessary demand of the valuable things in the name of custom and if the relatives, parents, guardians of the women fails to fulfill their demand the in-laws or husband may do cruelty or harassment with the women or may even abet her to commit suicide. During the last few decades this evil practice has made its root very deep in each part of the country and all sections of the society.

While noticing this increase in the evil practice of society the government of India made laws to protect the victim of this evil practice of dowry. The laws made were:
- Dowry Prohibition Act 1961
- Section 304-B of IPC

DOWRY PROHIBITION ACT 1961
This act defines dowry as well as many provisions are made under this act to punish the people who follow the practice of dowry. Earlier many bills were presented before the parliament and the state government but the government continued to ignore the bill thinking that there is no urgency of making separate legislation for prohibit dowry. Later on when the bill was given to the cabinet for consideration then the cabinet decided that the legislation must be made on the matter of dowry. With the passage of time the evil nature of dowry increased the pressure on the parliament as well as the state legislature on the social and political level and they felt need for making laws related to dowry. In the year 1959, dowry prohibition bill was introduced in Lok Sabha and then several discussions were made and 6th & 9th may 1961, a joint session of both Rajya Sabha and Lok Sabha was held and several
amendments were made by the houses and the bill received the assent of the president on 20th may 1961 and became Dowry Prohibition Act 1961.

**OBJECT OF THE ACT:**
The main objective of this act is to prevent all the evil practices being done in the society in the name of Dowry. It is to be ensured that any dowry given to the women is for her welfare. In-laws of the women should not force the parents, relatives or guardian of the women to pay more money or anything valuable against their will (i.e. the thing or cash amount which they do not want to give to their daughter or cannot afford it) to the in-laws of their daughters before and after the marriage and if any person whether in-laws or the husband does so will be punishable under this act. Thus the object of this act is to prevent the abuse of the custom which was practiced earlier and to protect the innocent women who became victim of the evil practice termed as Dowry.

**EXTENSION OF THE ACT:**
The Act shall extend to all the parts of India except the state of Jammu and Kashmir.

**MEANING OF DOWRY:**
Dowry means any valuable thing or property agreed to be given
1. By one person to the marriage to the other person to the marriage or to the relatives or parents or guardians before or after the marriage.
2. By parents of either parties to the marriage or by any other person, to either party to the marriage or to any other person at or before or after the marriage in connection with the marriage of the said parties. But the valuable thing received at the time of marriage as presents and gifts cannot be included in the dowry.

According to the dowry prohibition act 1961 the dowry giving taking and abetment to give or take the dowry or demanding dowry is punishable offence because many cases has been noticed where a women who enters her in-laws house with big dreams leaving behind her family expecting a good life in her matrimonial house but due to the evil practice of law she ends her life either by committing suicide or be burnt alive or cruelly done with that women in respect of the dowry.

In *Lichma Devi v/s Rajasthan Case* it was a case of bride burning on dowry demand and in this case the bride was burn by her mother in law and other relatives in the kitchen and when the investigating authority was called to investigate than they showed a different attitude towards husband of the bride and the Supreme Court discouraged this attitude of the investigating authority.

**IMMOVABLE PROPERTY ALSO INCLUDED IN THE PURVIEW OF DOWERY:**
It was not clear from the definition under section 2 of the dowry prohibition act that whether the dowry includes immovable property or not. But this confusion was solved in the case of *Vemori v. State of* 683

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683 Section 2 of dowry prohibition Act, 1961
684 1986 (1) WLN 106
Andhra Pradesh\textsuperscript{685}, where the court made it clear that immovable property including the land will come under the meaning of dowry.

Dowry Prohibition Act has mentioned several punishments to prohibit this evil practice of the society which is growing day by day and the punishments are:

- **Punishment for giving and taking dowry:**
  If any person is giving or taking the dowry or abets the giving or taking of dowry that person shall be punished with 5 years of imprisonment or the penalty of Rs. 15000 or to return the amount to be taken as dowry, whichever is more. Also it is given that anything taken as a present or gift at the time of marriage to the bridegroom without any demand is not included in the above case.\textsuperscript{686}

- **Punishment for demanding dowry:**
  If any person directly or indirectly demands dowry from the parents, guardian, or relatives of the bride that are punishable under this heading with an imprisonment of 6 months or in some cases it may extend to 2 years. Also the court has the discretion to reduce the imprisonment from 6 month depending upon the facts of each case.\textsuperscript{687}

In Indersen v. State of Bihar\textsuperscript{688}, the Patna High Court held that mere demand for dowry would not form any offence under the Section, unless it was shown that the other party consented to pay it.

- **Punishment for advertisement:**

  If any person publicizes any information regarding the cash or property or anything valuable through any medium of advertisement for the purpose of marriage of the male or female shall be punished with the imprisonment for 6 months which may extend to 5 years or with fine of Rs. 15000.\textsuperscript{689}

In Samundar Singh v/s State of Rajasthan\textsuperscript{690} the Supreme Court issued the directions which discouraged the grant of bail in the cases of dowry death.

- **Cancellation of marriage on non-fulfillment of dowry demand: punishable:**
  It happens many a time that whenever the demand of dowry is not fulfilled by one party to the marriage the other party cancels the marriage. This practice is also made punishable by the apex court in the case of S. Gopal Reddy v. State of A.P.\textsuperscript{691} Supreme court held that cancellation of proposed marriage for non-fulfillment of demand for dowry punishable under Section 4 of Dowry Prohibition Act 1961.

**Agreements for taking or giving dowry- void:**

According to section 5 of the Dowry Prohibition Act, “any agreement for taking or giving dowry shall be void.” This is the reason that a suit for the recovery of the amount agreed to be given as dowry is not maintainable. In the case Ramekbal Singh and others v. Harihar Singh\textsuperscript{692} Patna High Court was of the view that any amount or

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\textsuperscript{685} (1992) 1 crimes 287
\textsuperscript{686} Section 3 of dowry prohibition Act, 1961
\textsuperscript{687} Section 4 of dowry prohibition Act, 1961
\textsuperscript{688} 1981 Cr. LJ 1116
\textsuperscript{689} Section 4-A of dowry prohibition Act, 1961
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\textsuperscript{691} (1996) 4 SCC 596
\textsuperscript{692} AIR 1962 pat 343
any valuable paid under any such agreement which void cannot be recovered even after the fact that the marriage has not occurred.

PERSISTENT DEMAND OF VALUABLE PROPERTY AMOUNTS TO DOWRY DEMAND
Persistent demand of dowry is a situation when the party to a marriage constantly demands something valuable from the other party to the marriage. This situation often arises but the supreme could in the landmark judgment of Pawan Kumar v. State of Haryana \(^{693}\) held that persistent demand for any property such as T.V. scooter etc, after marriage would be said to be in connection with marriage and this would constitute a case falling within the definition of dowry.

PLACE OF COMPLAINTS AGAINST CASE OF DOWRY DEMAND:
In Smt. Sujata Mukherjee v. Prashant Kumar Mukherjee \(^{694}\) the Supreme Court held that a woman who is tortured by the husband and in-laws for dowry can file a criminal complaint at any place where such an offence under Sec. 498A IPC is alleged to have been committed against her.

DOWRY DEMAND - GROUND FOR DIVORCE:
If dowry is demanded by any person related to the bridegroom than that demand of dowry may become a ground for divorce. The bride can demand the relief of divorce on the demand of dowry.

The Supreme Court in the case of Sobha Rani v. Madhukar Reddi \(^{695}\) held that the demand for dowry, amount to cruelty and the same entitles the wife to get a decree for dissolution of marriage. In some cases the husband denies to fulfill his all the legal duties and obligations in relation to marriage because of non-fulfillment of the demand of dowry. Such people who withdraw from the marital obligations and duties are punished with the imprisonment of 1 year or with the fine of Rs.10000 or both.

Besides this Act the Government also felt a need for more protection to the women due to some of the loopholes in the Dowry Prohibition Act 1961. And a provision was made in Indian Penal Code to protect the women from Dowry. Due to legal problems the statistics of dowry death cases were increasing yearly. A separate provision related to dowry death was created by the government in Indian Penal Code.

SECTION 304-B OF IPC
The government in 1983 made amendments in IPC to protect the women from dowry related cruelty done by the husband and his relatives. According to the provision made for dowry death in IPC in Section 304-B the police investigation is must according to the circumstances if the death has taken place in the unnatural form i.e. within 7 years of the marriage and the cruelty or harassment is done with the women before her death by her husband or the relatives of the husband. Also their intension was to cause her death. Commission of dowry death involves cruelty. Cruelty done by husband and relatives are defined in Section 498-A of

\(^{693}\) 1998 Cr. LJ 1144
\(^{694}\) AIR 1997 SC 2465
\(^{695}\) 1988 SCR (1) 1010

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IPC and cruelty is a conduct which is likely to drive the women to commit suicide or cause injury or damage to life. Under Section 198A of Criminal Procedural Code it is provided that “No Court shall take cognizance of an Offence Punishable section 498A of the Indian Penal Code except upon a police report of facts which constitute such offence or Upon a complaint made by the person aggrieved by the offence or by her father, mother, brother, sister or by her father's or mother's brother or sister or, with the leave of the Court, by any other person related to her by blood, marriage or adoption.”

Also the Indian Evidence Act, Section 113B provides for the presumption of dowry death, if the woman is subjected to cruelty or harassment soon before her death in connection to the demand of dowry. The supreme court of India observed in the case of Alamgir Sani vs State Of Assam that “the death having taken place within seven, years of the marriage and there being sufficient evidence of demand of dowry, the presumption under Section 113-B of the Evidence Act gets invoked. There is no evidence in rebuttal.”

In the case of Durga Prasad v/s State of Madhya Pradesh (2010) the Supreme Court held that only proving the there was bride burnt in demand of dowry is not enough to hold the accused guilty it is also to be proved that the bride death was occurred within 7 years of her marriage in demand of dowry and the husband and the relatives soon before her death have done cruelty and harassment with her for dowry and they have deemed to cause her dead only then the dowry would be proved.

Punishment for Dowry Death
To punish those criminals who have spoiled the old custom and replaced it with the evil practice of Dowry, the government has made provision: The person who causes Dowry Death of women is punished with the imprisonment of 7 years and may extend to life imprisonment.697

Database of Dowry Cases Under the Dowry Prohibition Case:698
Besides laws made by the Indian legal system to eradicate this awful dowry practice much improvement was not witness. The total number of cases of dowry reported in India under Dowry Prohibition Act was 9894 during the year 2015. In terms of the dowry cases the top 10 states or UTs of India were:

1) Uttar Pradesh: Total number of cases reported under Dowry Prohibition Act was 2766 during the year 2015. It accounts to 27.96% of the number dowry cases in India under the Act in 2015.
2) Bihar: Total number of cases reported under Dowry Prohibition Act was 1867 during the year 2015. It accounts to 18.87% of the number dowry cases in India under the Act in 2015.
3) Jharkhand: Total number of cases reported under Dowry Prohibition Act was 1552 during the year 2015. It accounts to 15.69% of the number dowry cases in India under the Act in 2015.
4) Karnataka: Total number of cases reported under Dowry Prohibition Act was 1541 during the year 2015. It accounts to

697 Section 304B of Indian Penal Code
698 Community.data.gov.in
https://community.data.gov.in/

www.supremoamicus.org
15.58% of the number dowry cases in India under the Act in 2015.

5) Odisha: Total number of cases reported under Dowry Prohibition Act was 1201 during the year 2015. It accounts to 12.14% of the number dowry cases in India under the Act in 2015.

6) Tamil Nadu: Total number of cases reported under Dowry Prohibition Act was 333 during the year 2015. It accounts to 3.37% of the number dowry cases in India under the Act in 2015.

7) Andhra Pradesh: Total number of cases reported under Dowry Prohibition Act was 303 during the year 2015. It accounts to 3.06% of the number dowry cases in India under the Act in 2015.

8) Assam: Total number of cases reported under Dowry Prohibition Act was 95 during the year 2015. It accounts to 0.96% of the number dowry cases in India under the Act in 2015.

9) Madhya Pradesh: Total number of cases reported under Dowry Prohibition Act was 62 during the year 2015. It accounts to 0.63% of the number dowry cases in India under the Act in 2015.

10) Maharashtra: Total number of cases reported under Dowry Prohibition Act was 42 during the year 2015. It accounts to 0.42% of the number dowry cases in India under the Act in 2015.

The above mentioned first 5 states accounts to a total of 90.24% of reported dowry cases in India in the year 2015. All the 10 states together accounted for 98.68% of reported dowry cases under the Act in India as a whole for the year of 2015.

**LOOPHOLES OF DOWRY LAWS:**

The practice of dowry was deeply rooted in the Indian society that hardly any case comes up where the accused of this evil practice was actually punished. In spite of making the Dowry Prohibition Act and various provisions in IPC for the protection of the women there is no shortfall noticed in the cases related to dowry. Indian Legislation is putting so much of efforts to vanish the crimes in the society and judiciary is implementing the solutions to vanish them but still there are some drawbacks in the Indian laws that problems are being faced by the people in relation to the dowry and the laws are inefficient in stopping the dowry death. Some of these problems are:

**VAGUE LANGUAGE OF STATUTE:**

The language of the statue is vague and inefficient in preventing the dowries. The act covers the gifts given at the time of the marriage but it does not include the valuables demanded after the marriage in the name of the gifts. Also in Indian evidence Act, Section 113B, the word ‘soon before’ is not defined.

- **LAWS NOT FOLLOWED IN STRICT SENSE:**

  The other failure to prevent the dowry act is that the laws made are not being followed in the strict sense. The police officers have been given proper instructions of investigating in a dowry death case but police do not follow the process of investigation properly. And in some cases the police fail to investigate properly. And sometimes due to corruption the police take money from the husband and the relatives under the table to close the case. Less than 10% of the dowry death cases are investigated.
• **IGNORANT CULTURAL ATTITUDE:**
Girls in Indian society are considered as liability and boys are considered as assets because girls have to go to the next house i.e. the husband’s house and not so with the boys. A woman of Indian culture is taught from the very beginning that she has to marry a man and move with him in his family and there she has to get mixed up with the husband family and have to make place for herself in the family. She is also taught that she has to face each and every thing going in the family but she have to remain silent and she cannot speak a word against her in-laws. The women is made prepared for facing all the things whether right or wrong going in the family without complaining and returning back to the family because divorced women is a bad example for the society and for herself also and divorce will ruin the self respect of the family of the women and the women herself also. This is the reason that even if a women takes up a stand for her against any wrongful act of the in-laws say dowry act then she will not have the support of her parents or any other relative and when she is helpless she will commit suicide. Thus there is a need to change this kind of attitude in 20th century.

• **DOWRY AND STRIDHAN:**
Stridhan is the property which the women can claim as her own property. It includes something valuable such as jewelry, and other gifts. People today give the valuable property in the name of stridhan for the use of the bride but it is actually something which is similar to Dowry. For example people give luxurious cars for the use of their daughter but that car is not for only her use moreover it somewhere relates to dowry. No typical differentiation is given between the above terms dowry and stridhan in the Indian laws due to which the dowry is practiced in the name of stridhan. Thus both dowry and stridhan should be differentiated properly.

• **DISCRIMINATION:**
Though the world today is so advanced but still the women are considered weaker than man. If we study the treatment given by the Indian family to their daughters and to their sons, it is totally different. The people promote the education of the boys rather than that of the girls moreover girls are asked to involve in the household work rather than studying. On the other hand the boys are encouraged to study more. These type of discrimination unable the girls to enhance their knowledge in terms of the advancement of the society. The girls remain restricted to what happens with them and the way they were treat by their parents, they have no idea that the society is becoming so advanced regarding the crimes and they also their upcoming generations in the same way as their parents treated them and thus the evil practice of dowry continues from the generations because of the above discrimination.

• **DELAY IN DISPOSING CASE:**
The judiciary makes so much of delay in disposing of cases and the lengthy procedure in case of dowry death is also the reason that delay is faced in getting speedy justice. this loophole also creates the problem of “witness hostile” which means due to much delay in disposing the cases the witness that supports the case on the part of the plaintiff gets hostile i.e. he
may refuse to become the witness of the incident and lack of witness means lack of evidence and lack of evidence means that the case will not be proved and this will lead to the loss of the case and again the innocent will not get the justice and this act of dowry will continue to remain in the society

- **INEFFICIENT POLICE OFFICIAL:**
The police officers never reach on the time of committal of the offence and it is the drawback on the part of the police department. police always arrives late after the call is made due to their late arrival the crime takes place and the victim dies and the police is unable to save her life. Calling the police for help means that the crime will is to be committed may not take place due to timely arrival of the police but unluckily police never arrives on time. this problem is arrived because the all the calls made on the number 100 are directly connected to their central reporting department instead of the police station of the particular area and while transferring the information to that particular area the times get waste and the crime has taken place. The above problem may happen due to the lack of police officers available because the most of the crimes takes place at night and there is a lack of police officers on duty at night. And the officers are unable to reach the palace on time.

- **LESS AWARENESS AMONG WOMEN:**
Low level of education and awareness among the women in both rural and urban areas is one of the reasons that the women are less aware of the Laws in the society relating to the dowry. As because of less awareness the women are not able to file the complaints against those who practice the evil of dowry in society. Such women keep on tolerating the harassment for dowry.

- **REPORT OF FAKE DOWRY CASES:**
It has been noticed that many fake cases are filed by the bride or the married women to threaten the husband or in-laws. This increases the misuse of the dowry laws moreover increases the burden on the Indian Judiciary because of the fake cases.

Following are the Solution to the above loopholes:-

Women in the Indian Society need to get more educated and more independent because most of the cases noticed of bride burning are from the society where the women are not independent and educated. Various legal programs should be held to make the women who are still facing the evil effects of dowry aware about their rights and solutions to face it.

The women empowerment should be made stronger and the women should be treated equally to them and no discrimination should be made and more laws should be made to abolish the discrimination.

In dowry death cases the investigation of the police officers should be fast and there should be no corruption plus increase in the number of police officers on duty in morning as well as at night. In the case of Bhagwant Singh V/s Commission 699 of State the Supreme Court suggested that more number of lady police officer should be involved in the case of dowry death.

- The calls made on 100 number should be connected with the nearest police station

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699 1985 SCR (3) 942
of the area from where the call is made instead of connecting it with central reporting department. Because it causes delay in arrival of the police at the site of crime.

- Speedy disposal of cases should be made by making fast track courts for the dowry death cases.
- Some awaken movements are also needed to finish this evil practice which is deeply rooted in the society and no shortcuts can be adopted to finish this evil practice.
- The language used in the dowry prohibition act should widen the scope of the definition of Dowry and the word should also involve the dowry taken in the name of stridhan and gifts before, at the time and even after the marriage. There should be a provision made which gives proper definition of dowry and stridhan so that no valuables are exchanged between the parties to the marriage in the name of stridhan.
- The youth today should understand what they learn about the evilness of the dowry and should contribute to the society by not practice it.
- Awareness among the women regarding the dowry laws should be supported by the government by organizing “dowry laws awareness camps”.
- Strict laws should be made and implemented to avoid this misuse of the laws by the women against her husband or in-laws. For example: The police should arrest the husband or his relatives only after the proof of the crime and not on the mere assumption.

**CONCLUSION:**
Changes are needed in our society to protect those innocents who are the victim of the dowry system. Both Legal and Social changes are needed. The people of the society needs to broaden their thinking and should support their daughters and other women. Also Indian government need to look after the loopholes in the laws and the people need to change their mindset and start contributing in preventing the evil practices which harm the whole country. Our government needs to think about abolishing such practice which is ruining our society and various relationships and because of this evil practice many innocents just for some amount are losing their life. For securing the innocent victims government has launched a lot of laws but besides those laws such dowry practices are still continuing and existing in the society. Thus the government should either amend the laws and correct the loopholes in the laws due to which the dowry is still continuing in the society or the government should abolish this practice and custom of taking and giving dowry in the name of dakshina same as the custom of child marriage and practice of sati is abolished because they are just harming the society and no benefits are there in practicing such evil things.

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SUBMISSION OF RESOLUTION PLAN UNDER THE CURRENT INSOLVENCY REGIME OF INDIA: AN ANALYSIS OF SECTION 29 OF THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ACT, 2018

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ABSTRACT
For economic success of a country, its banking, commercial and investment market plays a very important role. In a genuine course of business, it may happen that the investment turns out to be bad. Under such circumstances Insolvency and Bankruptcy Code, 2016 plays an important role in preventing the plague of Non-Performing Assets in the market and providing an effective resolution process. Insolvency in general terms is default in repayment of the loans. Timely loan repayment is an important factor for banking and commercial efficiency. The Bankruptcy and Insolvency Code, 2016 provides a comprehensive resolution process within 180 days (270 if extended) and also provides for liquidation if resolution fails. The important aspect is that it focuses on resolution rather than liquidation. Even though the Code is comprehensive one, certain people still find out the loopholes and use it for their benefit during the corporate insolvency resolution process. The Amendment Act of 2018 tries to plug these loopholes and modify the code according to the requirements. This Paper critically analyses the Amendments made in the code with respect to the Resolution Applicant. The amendment Act has changed the definition of ‘Resolution Applicant’ and has made the process of selecting resolution applicant more in control of the Insolvency Resolution Professional. Amendment Act inserts 29A as a new section which bars range of people from taking part in resolution process. The main objective for the introduction of Section 29A was to discourage non serious applicants and pave way for an effective resolution process. The paper discusses the possible effects of these changes and how it might affect the insolvency laws of India which is still in its nascent stage.

PROBLEM OF NON-PERFORMING ASSETS IN INDIA
Insolvency, under common parlance refers to a situation wherein a firm defaults in repayment of its monetary obligations towards the creditors. In other words, it refers to a firm’s inability to pay back its outstanding debts. The phrase ‘inability to pay debts’ is sought to be determined by a simple question, whether the company is commercially insolvent and unable to meet its liabilities as and when they accrue, as opined by the High Court of Andhra Pradesh. When such a situation arises, a creditor can receive the payment by adoption of certain processes. He has two options to choose from, one being the

recovery of outstanding amount and the other being the resolution process. Resolution strives to keep the firm on track by the use of Insolvency and Bankruptcy Code, 2016. India faces a significant problem of stressed assets in the commercial sector. With 9.9 percent ratio, India is ranked 5th amongst all the countries with highest Non-Performing Assets (NPA). The asset quality recognition in 2015 conducted by the Reserve Bank of India created havoc on banks profit and loss accounts, many banks reported full financial year losses. The lenders suffered huge dip in the profit market and therefore had a larger impact on the national economy. The banking companies which were creditors in most of the cases are facing cash crunch to fund other projects and therefore charged high interest rates to maintain the profit margin. Both the banking and corporate companies has stressed balance sheets, hampering the investment led development process. Under such circumstances the Insolvency and Bankruptcy code, 2016 (hereinafter referred as IBC) is much needed law as previous reorganization and debt recovery laws are not adequate enough to solve the problem. The IBC is a landmark reform acknowledging the fact that business might fail and failure is not fraud.

**THE INSOLVENCY CODE OF 2016**

The IBC strives for the resolution rather than recovery by the way of liquidation making it better from other statutory resolution processes. The soul of IBC is that it provides forum to Creditors to resolve issues and to maximize the value of asset by the collective wisdom of the creditors in the form of Committee of Creditors (hereinafter referred as CoC). The CoC acts in unison which does not involve the debtor. Such principle based approach has yielded a positive outcome in the credit environment of the Country. Under the Code, the term ‘resolution applicant’ meant any person who submits a resolution plan to the resolution professional and ‘resolution plan’ means a plan proposed by any person for insolvency resolution of the Corporate Debtor (hereinafter as CD) as a going concern in accordance with Part II. Section 11 of the Code, barred certain persons from submitting applications for initiation of the resolution procedure. These included:

(a) a corporate debtor undergoing a corporate insolvency resolution process; or

(b) a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or

(c) a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or

(d) a corporate debtor in respect of whom a liquidation order has been made.

**ORDINANCE AND AMENDMENT OF IBC, 2016 AND BARS ON SUBMISSION OF RESOLUTION PLAN**

However, almost a year later, in 2017, The Insolvency and Bankruptcy Code (Amendment) Ordinance was promulgated

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703 Ibid., § 5(26).

704 Ibid., § 11.
on November 23 with intent to bar a few specific categories of persons from submitting plan for resolution. It was done keeping in mind that if they were allowed to submit the plans and take control of the company, it would prove to be dangerous. The ineligibility under the Amendment Act is four-fold. The first line is the individual ineligibility which bars a person from submitting a resolution plan. Second, it bars ‘connected persons’ associated with the individual applicant from initiating the resolution process. Third level of prohibition falls on ‘related parties’ and fourth it disallows ‘persons acting jointly or in concert’. Pursuant to this, The Insolvency and Bankruptcy Code (Amendment) Bill, 2017 was initiated in the Parliament to consolidate and enact the changes as provided under the ordinance and also to incorporate certain other changes to the Ordinance. It was passed by the Lok Sabha, the Rajya Sabha, received the mandatory assent of the President and was finally enacted as The Insolvency and Bankruptcy Code (Amendment) Act, 2018 in January, 2018 but deemed to have come into force on November 23, 2017705. The bar against the group of persons prohibited to submit plans, as mentioned under the Ordinance was slightly diminished. Also, the Amendment brought relief to Scheduled Banks, Alternative Investment Funds and Asset Reconstruction Companies by excluding them from under the head of “connected persons.”706

WHO CAN BE A RESOLUTION APPLICANT UNDER THE CURRENT INSOLVENCY REGIME OF INDIA?

The Act amended the definition of ‘resolution applicant’ under Section 5(25) of the Code which now reads, "resolution applicant" means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25. The reason why this becomes significant is because in the prior Code, Section 5(25), when interpreted simply, implied that any person was at liberty to submit the resolution plan to the resolution professional. The loophole in this Section was that upon a plain reading this section, it reflected that the resolution professional was under the obligation to invite lenders, future investors and other persons to put forth their resolution plans. This dichotomous interpretation of Section 5(25) was debatable. On one hand, it implied that only those persons could submit resolution plans who were specifically invited by the professional under section 25(2)(h) and on the other hand, since, section 5(25) lacked any reference to be read along with Section 25(2) (h) of the code, any person could freely submit the plan. The Amendment has shut all lines of speculation in this context. Now, only those persons, who receive an application by the professional can submit resolution plan. The Section also allows both, individual and joint resolution plans to be submitted. After Amendment the definition of ‘resolution plan’ has incorporated the words ‘resolution applicant’ in place of ‘any person’, which provides more clarity as

705 The Insolvency and Bankruptcy Code (Amendment) Act, 8 The Gazette of India § 1(2) (2018).
706 Ibid, § 29A (j).
regards the interpretation of the provision. As far as the eligibility of a future resolution applicant is concerned, the same is laid down by the Insolvency Resolution Professional. Further, it becomes applicable once the Committee of Creditors decides in approval of the same.\(^{707}\) For formulation of a proper resolution plan, first, the resolution professional prepares something known as an “information memorandum.”\(^{708}\) An information memorandum can be construed to be a repository of all the important information, available in both a physical as well as an electronic form, which is prepared by the resolution professional under the guidelines, as provided by the Insolvency and Bankruptcy Board of India (hereinafter IIBBI). When an applicant, by virtue of an undertaking, agrees to comply with the existing statutes and other regulations with respect to confidentiality maintenance and insider trading, it is then that this information memorandum is shared by the professional based upon which the applicant is supposed to come up with a Resolution Plan. The laws which are supposed to be complied with, include,

1. Section 195 of the Companies Act, 2013 which prohibits insider trading with respect to securities and bars communication or publication, in any manner whatsoever, of *non-public, price sensitive information to any person*. According to the Explanation under Section 195, ‘price sensitive information’ is information, the publication of which will affect the price of securities of the concerned Company.

2. Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015. Therefore, a resolution applicant must fulfill all criteria set out by the Insolvency Resolution Professional (hereinafter IRP) and must not be disqualified under Section 29A of the Insolvency and Bankruptcy Code (Amendment) Act, 2018. He has the burden to strive for the protection of Intellectual Property Rights under the proprietorship of the CD, to which he has gained access.\(^{709}\) He must also refrain from disclosure of any ‘relevant information’, inclusive of financial structures and situations, disputes etc. which is necessary for formulation of the resolution plan, belonging to the corporate debtor to a third party. A resolution applicant then comes up with a plan which he is then liable to submit to the resolution professional. Once this plan stands strong on the grounds laid under Section 29(2) of the Code such as providing for an efficient resolution process as specified by the IIBBI, prime focus on repayment of all the outstanding debts of the CD, containing cogent solutions for the management of affairs of the CD, strictly complying with all the laws in force, adhering to the IIBBI guidelines etc., the IRP submits the same to the COC for its approval. An applicant can be present for the meeting in which the plan submitted by him/her is under consideration. However, a right to vote in that meeting arises only if the applicant belongs to the category of financial creditors for the CD. The approval of the plan by the COC is done based on its feasibility, existing liabilities of the debtor, applicability to the situation in hand and the

\(^{707}\) The Insolvency and Bankruptcy Code (Amendment) Act, 8 The Gazette of India §25(2)(h) (2018).

\(^{708}\) The Insolvency and Bankruptcy Code, 31 The Gazette of India § 5(10) (2016).

\(^{709}\) Ibid, § 29(2)(b).
solutions for an effective resolution provided therein. Based on the provision, it can be said, that the rules are strict enough to distinguish honest applicants from mere hoaxes. Even though no other criterion has been set out under the Code, yet depending upon each case, the applicants are required to fulfill certain requirements in order to be eligible to submit a resolution plan. In the recent case of invitation of applicants for submission of plans for the CIRP of Jaypee Infratech\textsuperscript{710} the IRP invited Expressions of Interest (EOI) by Body Corporates and Investment Companies having minimum net worth and minimum assets under management of Rs. 1000 crores respectively. It was said that the prospective applicant must competency required for the execution of real estate projects, have a sound financial system, have an investing capacity of over Rs. 2000 crores and be able to complete the already over-delayed flat construction. The Code has provisions for rejection of the plan by the Adjudicating Authority once the same is approved by the COC. However, there is nothing to show the course to be adopted if the COC rejects the plan. The matter came up before NCLT Ahmedabad recently. The Authority was of the view that once a plan is rejected by the COC, the NCLT cannot interfere with the finding. This was ruled in the matter concerning CIRP of Steel Konnect\textsuperscript{711}. First its Director submitted the plan, which was rejected by the COC citing reasons of ineligibility under Section 29A of the Amendment Act. Later, the plan of an Asset Reconstruction Company (ARC) was also rejected based on the ground that it was non it conformation with the information memorandum. It is well observed that the criteria have been set forth with a view to eliminate applicants who lack seriousness and without financial and legal soundness.

**SECTION 29A - THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) ACT, 2018**

Section 29A of the Amendment Act bars ten categories of people from participating in the resolution and liquidation process. A critical aspect of this section is the extent of such disbarment. Such extensive Coverage are sourced from several laws including Banking Regulation Act, 1949, SEBI Act, 1992, Indian Penal code etc. The extensive coverage might go against the principles of IBC by reducing the chances of resolution of companies. The provision quotes that any person or person acting in Concert (PAC) will not be allowed to submit resolution plan if such person does not meet the condition under Section 29A. The meaning of PAC\textsuperscript{712} according to Substantial acquisition of shares &Takeover regulations, 2011 is “a person who have common objective of controlling the company by acquisition of shares or voting rights. Common purpose

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\textsuperscript{711} M Allirajan, Can’t Adjudicate on Rejection of Resolution Plan, The Times of India (September 21, 2018, 3:30PM), https://timesofindia.indiatimes.com/business/india-

\textsuperscript{712} SEBI (Substantial Acquisition of shares and Takeovers) Regulations, F. No.LAD-NRO/GN/2011-12/24/30181 Securities and Exchange Board of India, § 2(q) (2011).
maybe pursuant to some agreement or understanding which maybe formal, informal, direct or indirect”. This inclusion of PAC has widened the scope of non-eligible people and will have negative consequence on private equity investors, strategic investors and entities that might be associated with them. It is recommended that the definition of PAC should be specifically provided in IBC having narrow scope for the purpose of resolution. The following section analyses the various categories of persons barred from submitting a resolution plan under for initiation of the Corporate Insolvency Resolution Process (hereinafter CIRP). It also takes into account the Ordinance promulgated on June 6th, 2018 and the changes made therein.

1. 29A(a): Undischarged Insolvent
   This sub-section simply excludes an entity or person who is bankrupt and is itself going through insolvency process. By the virtue of 29A (j), connected person to such entity and aforementioned PAC also not participate in the process leaving only third parties who are not connected to the entity anyway.

2. 29A (b): Wilful defaulters.
   They barred by RBI from accessing bank credits and wide range of activities in the capital market by the SEBI. It is very apparent here that the legislators want to streamline the resolution process by removing such bidders. The message is very clear that those who are insolvent or who have defrauded the government/institutions and have caused losses to the banks cannot become in any way beneficiary of some other asset. The legislators want healthy competition between the parties and such step will not only streamline the process but also will bring credibility and transparency in it. It also has a political aspect and message to those who have duped financial institutions.
   The problem comes when this sub-section is read with 29 A (j) i.e. connected person, which might restrict some genuine bidders and therefore the resolution process will face some practical challenges.

29A (c) Any person with a loan that has been NPA for more than one year.

The intention of the government here is to stop bidding by the companies whose accounts are themselves Non-performing. It also encompasses and makes non-eligible promoters and management of the companies whose accounts are classified NPA for more than one year. Initially the government allowed any person to submit resolution plan but with the implementation of insolvency code government faced moral hazards of promoters buying back their firms with steep haircuts which was contrary to the moral interests of market, business ethics and creditors interests. The Act of buying back firm with steep haircuts is known as “phoenixing”. A famous case is of Synergy Dooray, where promoters with the help of synergy casting, a related company bought back the company with 94% haircut which was later challenged by Edelweiss on the

\[71^3\]The Insolvency and Bankruptcy Code, 31 The Gazette of India §§ 6-32(2016).

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ground of constitution of committee of creditors.\textsuperscript{714}

In practical sense this sub-section poses a big challenge as NPA in business may arise due to genuine reasons. The stringent conditions may shut the doors for genuine bidders. Again when read along with section 29A (j) i.e. connected person, any person connected to such tainted company or promoter will also become ineligible. This sub-section also creates uncertainty for the stressed asset market investors who have invested in defaulting firms or NPA.

Credit Suisse report of 2017\textsuperscript{715} states that more than fifty percent of stressed assets are with firms whose ICR is less than 1 i.e. they do not have means to pay the interests on the loans and NPA will remain for more than one year. It is to be understood that business arrangements are very complicated.

While the intention of the government is good, it has overlooked the practical challenges and restricted large numbers of genuine bidders by blanket cover of ineligibility, which may eventually harm the creditors by lower competition and lower resources. An important relatable case is of Essar steel where bidder like Numetal\textsuperscript{716} was disqualified as one of the shareholders of Numetal was Rewant Ruia, the son of Essar steel’s co-founder Ravi Ruia. A second bidder ArcelorMittal’s bid was rejected because it held stakes in defaulting companies like Uttam Galva steels. Both of the bidders approached NCLT for relief.

An exception to this rule of NPA is if the person pays all the dues with interest within 30 days. For the cases in which the resolution has already begun, the legislation language provides conflict and ambiguities. How 30 days can be given paying dues during 180 (270 if extended) days of corporate insolvency process. This may involve unnecessary delay and litigation. The timeline of process will be at risk. Second issue here is if promoter or company is paying by the deal of cash on table to lenders, why they should be disqualified, when it is serving both the purpose of creditors and price discovery.

Certain relief has been provided by the June 6\textsuperscript{th} 2018 ordinance which was promulgated by the President. According to the ordinance, a proviso has been inserted under 29A (c) which exempts purely financial entities not related to the corporate debtor, from disbarment under this sub-section. A relief is also provided to the stressed assets investors. The Explanation to this sub-section provides where a resolution applicant is holding NPA by the virtue of acquiring it prior to the resolution plan, will be provided with grace time of three years from the date of approval of the resolution plan. This will act as a cooling period for such resolution applicants to de-stress such assets.


4. **29A (d)**: Person convicted with an offence punishable with imprisonment of two Years. It is not necessary for the person to be actually imprisoned. The fact that imprisonment is of two years for the offence of which he or she is convicted is enough. Offence can be both civil and criminal. The negative aspect is that creditors may avoid bids from bidders who are under investigation and may be convicted anytime thereby overreaching the ambit of disbarment. A recent case is where Renaissance steels has claimed in NCLT against Vedanta Steels from taking over Electro steels as the executives have been alleged for criminal offence punishable for imprisonment of two years. This litigation has delayed the 270 days’ timeline for resolution of electro steels. However, more clarity was provided through an ordinance promulgated on 6th June, 2018. According to the ordinance the disbarment will only apply to the list of offences provided under the ‘white’ schedule and also the will not apply two years after from the date of release of imprisonment. An exception is that the resolution applicant will be disbarred if he is punishable for seven years or more under any law for the time being in force.

5. **Section 29A (e)** - Disqualified to act as a director under the Companies Act, 2013.

This clause is hit by Section 164(1) of the Companies Act, 2013 which enshrines the grounds for disqualification of a Director.

Following are the grounds which are mentioned under the Act:

a. If a competent Court has declared the Director to be of unsound mind.

b. If he/she is an undischarged insolvent, meaning thereby that the person is unable to clear off his outstanding debts.

c. He/she has applied for declaration of being an insolvent and the application is pending before the appropriate authority.

d. Conviction for a period which is not less than six months with respect to any offence involving moral turpitude and from the date on which such sentence ceased to have effect, a period of five years has not passed. It is also pertinent to note that the *proviso* to this sub-clause states that in a situation where the punishment for the offence involves a sentence of 7 years or more, the person shall lose the right to be a Director of any company whatsoever.

e. An order from any Court (including a Tribunal) disqualifying his candidature from appointment as a Director.

f. When payments in respect of call for shares held has not been paid by the Director and a period of 6 months has already passed from the last day on which such payment became due. This is applicable in those cases, wherein the holder has not already paid the full value of the shares at the time of issue.

g. Conviction under Section 188 of the Act for ‘related party’ transactions. A related party includes a director and his relatives. A key managerial personnel and his relatives, a firm in which the director, manager or his relative is a partner, a private company having the director on its board of issue.

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718The Companies Act, 18The Gazette of India § 2 (76) (2013).
board of directors, a person whose advice is acted upon by the director etc.

h. If the person has not been issued a Director Identification Number (DIN) by the Central Government.

Along with this, a person who is or has been a director in a company which has failed to furnish the annual financial statements for three consecutive years, not repaid back the deposits or interests arising on it etc. for a period of one year more, is not eligible for re-election for five years from the date of first default. Application of this Section under the IBC regime seeks to bar non-performing directors away from submitting a resolution plan. The loophole under Section 164 is that the Director is not given an opportunity to be heard and the appeal mechanism is not clear. Third parties, consequently get affected even though there is no default on their part.

6. Section 29A (f) –Prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets.

Cheating naïve investors is the most common crime the corporate sector witnesses. A lot of applications proposing to deal in securities are received under fake names merely to gain subscriptions. A perusal of this provision finds reference under two Statutes:


Under this Act, by virtue of Section 11, the Securities and Exchange Board of

India has been given various powers including suspend the trading of any security in a recognized stock exchange and restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities.720 These orders are recorded in writing with the prime objective of protecting the rights of the investors.


Chapter III of this regulation states that if the Board and the Chairman think there is a reasonable cause to believe that the transactions in securities are going on in a manner which is unfavorable for the investors or is not in consonance with the provisions of this enactment, it may give orders for investigation. In the case of BPL Ltd. v. Securities & Exchange Board of India721 the stock prices of B.P.L witnessed a conspicuous shift. The appellant was barred from accessing the capital markets for a period of four years and also prosecuted under Section 24 of the SEBI, Act which deals with offences.

All such persons are prohibited from taking part under the CIRP for the plain reason that they have violated the regulations at some point of time and are best kept away from unfairly participating in the resolution process.

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7. Section 29A (g) – Has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place and in respect of which an order has been made by the Adjudicating Authority under this Code.

By virtue of this provision, the scope of ineligibility has been widened. It restricts a promoter or any other key person of the corporate debtor from submitting a resolution plan if certain specified transactions have taken place in the debtor company and an order with respect to the same has been passed by the NCLT. A ‘transaction’ is nothing but an agreement with the object of transfer of assets, funds, goods or services either to or from the debtor company.

a. Preferential Transactions
They are covered under Section 43 of the Code. They refer to those types of transactions which get a preferential treatment over others. A duty is cast over the IRP to file an application with the NCLT for avoidance of the same. Clause 2 of Section 43 talks about the transactions which would fall under this category. An example of the same can be transfer of a property merely on account of an existing debt owed by the debtor to a creditor or a surety. The time limit for computing the same has also been provided for. It is two years before the date of commencement of the resolution process, if made to a related party. Otherwise, for all other transactions, it is one year. However, those transactions which are carried out in the usual course of business have been excluded under this head.

b. Undervalued Transactions
Section 45(2) of the Code deals with undervalued transactions. As the name suggests, these are carried out by the debtor in exchange of a negligible or a non-significant consideration. It may also be in the form of a gift. Upon the application of the IRP, the NCLT may pass an order to transfer back the property constituting subject matter of the transaction to the corporate debtor etc. The same time limit is applicable as that in case of preferential transactions.

c. Extortionate Credit Transactions
These transactions have the sole purpose to benefit the creditors and are covered under Section 50 of the Code. In these cases, the debtor pays an excessively high amount to avail the credit facility. The NCLT, upon receipt of the application may make appropriate orders to set aside such exorbitant debts and restore original position.

d. Fraudulent Transactions
The term being self-explanatory, involves those transactions which are carried out with a fraudulent intention to dupe the creditors. They intend to keep the assets, which would otherwise be claimed, away from the creditors. The Adjudicating Authority in this case, protects the interests of those creditors.

The aforementioned transactions are termed as ‘avoidance transactions’. The

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722 The Insolvency and Bankruptcy Code, 31 The Gazette of India § 3(33)(2016).
on is on the IRP under Section 25(2)(j) to apply for their avoidance. They are avoided so that the existing assets of the debtor company can be fully utilized to clear its debts. The promoters or other key people associated with the company against whom the NCLT has ordered with respect to such transactions are barred to be a resolution applicant.

For example, ‘XYZ’ is a firm undergoing a resolution process. The NCLT receives an application with respect to a fraudulent transaction which took place in ‘XYZ’ and passes an order against it. ‘P’, a promoter of ‘XYZ’ is not eligible to be a resolution applicant for another debtor company in this situation. The loophole in this provision can be posed in the form of a question: What if the NCLT passed the order before ‘P’ became a promoter? This loophole has been cleared vide Amendment Ordinance of June, 2018 which states that the clause shall not be applicable if the aforementioned Avoidance Transactions took place before the applicant’s acquisition of the debtor company and after approval of the resolution plan. Further, it shall also not be applicable if the resolution scheme has been given a nod by any regulator of the financial sector or a competent court. Moreover, the ordinance adds another requisite which states that the applicant must not have been involved in any of the four categories of transactions.

8. Section 29A (h) – Has executed an enforceable guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code.

The interpretation of the clause can be understood by an example. On the basis of the essential conditions required for a Contract of Guarantee, let ‘A’ company be a corporate debtor (a principal debtor), ‘B’ be a surety/guarantor and ‘C’ be the creditor. ‘A’ acquired financial loan from ‘C’ and has the obligation to pay it back. With respect to this transaction, ‘B’ is the guarantor for ‘A’. ‘C’, moves an application for resolution of ‘A’. So, as per the provision, ‘B’ cannot submit a resolution plan for any other debtor. The law has not laid down any provision for a situation in which the guarantor has already honoured the guarantee. Such a situation came up for consideration in the case of RBL Bank Ltd. v. MBL Infrastructures Ltd.723 in 2017. The NCLT in its order, was of the view that clause (h) was inserted to prohibit those guarantors who had not honoured their guarantee and had defaulted. When in the first place, the liability on the guarantor does not accrue, it cannot be held that he/she has defaulted. It was held that the Applicant in this case was not ineligible under Section 29A (h). The Ordinance of June ’18 however, has inserted clarifying words and now reads that the guarantee in question must have been invoked by the creditor and the same must remain unpaid, either in part or in full.

9. 29A (i) – Ineligibility in foreign jurisdiction

This clause extends the ineligibility criteria to the foreign companies or Indian

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companies who falls under 29A(a) to (j) in foreign jurisdictions. This sub-section widens the disqualification ambit to perhaps unjustified extent. Suppose for instance company A of UK has given guarantee for company B which goes insolvent, so now A cannot bid in India. In similar manner if A is connected person to any Indian company disqualified under 29 A(a) to 29 (i), it will be disqualified from bidding. The network of ineligibility is needlessly extended which will be ultimately bad for efficiency of Insolvency Law.

10. Section 29A (j) –connected person not eligible under clauses (a) to (i).

It has defined the term ‘connected person’ to include both present and future promoter, person(s) involved in management and control of the resolution applicant. It also extends to a holding company, an associate company or any other related party of the ‘connected person’. And all find meaning under the Companies Act, 2013. In a relief, the provision excludes a scheduled Bank, an Alternate Investment Fund and an Asset Reconstruction Company. The Ordinance of June 2018 makes clearer the exclusions under the category of ‘related party’. It excludes any financial entity which is regulated by a financial sector regulator and is related to the debtor company merely on account of ‘conversion of debts or instruments’ into equity shares.\(^{724}\) Along with the Scheduled Bank, AIF and ARC, a foreign based entity controlled by a central bank in a foreign jurisdiction and any investment vehicle registered with a non-Indian investor has also been excluded. The exclusion also extends to such persons which shall be notified by the Government.

CONCLUSION

In a nutshell any person satisfying the above criteria or if connected to any entity satisfying the criteria will be disqualified from bidding and also cannot take part in liquidation. The intention of the legislators behind 29A is good but its consequences can be negative in nature. It is right to argue that certain promoters may deliberately rundown the company so that the assets can be purchased at lower price and therefore the exclusion seem to be right.\(^{725}\) However, exclusion under such wide ambit and blanket ban on honest applicants may result in lower competition among the applicants who are seeking to resolve the company, ultimately it means lower recoveries for the creditors. In terms of small and medium scale companies, exclusion of promoter who may be the only one to revive the company as bidder will lead to forceful liquidation. Apart from this, procedural impact will be unnecessary disputes and litigation, complication of role of Insolvency Resolution Professional. Presently the Insolvency Law is in its nascent and volatile stage. The government must scrutinize its legislations, remove ambiguities, study the impact on the market and only then

\(^{724}\) The Insolvency and Bankruptcy Code (Amendment) Ordinance, 6 The Gazette of India § 22(vii)(2018).

implement its legislations with commercial rationale rather than any other.

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CAPITAL PUNISHMENT: MISERY OF DEATH ROW CONVICT

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ABSTRACT
Even in 2018, India is one of the few countries in the world which still considers punishing the convicts with capital punishment even for peacetime crimes. 140 countries have totally given up the use of capital punishment and even the Law Commission in its report in 2015 suggested the Indian courts to do away this form of punishment for peacetime crimes and use it only for the ones convicted under section 121 of the Indian Penal Code for waging war against the country. The common answer given the judiciary and the legislature who still want to retain the use of this aggravated form of punishment is the notion that this form of punishment is a huge deterrent for the individuals in the society to commit grave offenses like murder, rape etc. But many jurists have opined against it and reports suggest the opposite of it. Also the common trend seen with the Judiciary while they award capital punishment is the arbitrariness of the term ‘rarest of rare’ which they employ while giving such decisions. Also only 0.0037% of the people who are condemned to death sentence are actually executed as the rest of them are reprieved either by the higher courts or are pardoned by the President as was seen recently in the case of Channu Lal Verma vs. The State of Chhattisgarh where the Apex Court commuted the death sentence given to the convict to life imprisonment citing various reasons. The agony faced by the rest 99.9963% death row convicts who and their families live under a constant fear of looming threat of execution, till they are reprieved, is immeasurable. The methods used to execute the Death row convicts are also very barbarous and inhumane in India. The trend of giving death penalty thus has no significance in the present era, and this article tries to provide a brief overview of the above stated points and also tries to present an alternative to this type of punishment.

KEY WORDS: DEATH PENALTY, DETERRENCE, MENTAL AGONY, RAREST OF THE RARE

INTRODUCTION
There are three pillars of our Indian constitution namely Article 14, Article 19 and Article 21 which guarantee us the Right to Equality, Right to Freedom of Speech and Right to Life respectively. This all being our fundamental rights cannot be taken away by anyone except for the due process established by law. In Bachan Singh vs State of Punjab,\textsuperscript{726} Supreme Court held the validity of capital punishment and found it not to be violative of Article 21 as the state can take away this right of the citizen by procedure established by law. This was again justified by the apex court in the case of Channu Lal

\textsuperscript{726}1980 (2) SCC 684
Verma vs. The State of Chhattisgarh\(^{727}\), where the 3 judge bench held the constitutional validity of the capital punishment. Thus, capital punishment being an institution established by the law has the liberty to take away the life. But the concept of ‘Right to Live with Dignity’ which also comes under the ambit of Right to life\(^{728}\), is taken away by the functionaries of the government when the Death Row convicts and their families await the dooms day for years only to find their sentences being commuted to lesser sentences in majority of the cases. The Supreme Court has tried to remove this anomaly, but only to find each of the steps taken by them becoming ineffective and being rendered useless. For example, the Supreme Court in Vatheeswaran vs. State of Tamil Nadu\(^{729}\) held that if the appeal for a case has a time lapse of more than two years in it then the term of death sentence can be commuted to that of life imprisonment. This means the highest appellate court, i.e. the Supreme Court has only two years to uphold the decision of the lower court or to overturn it. But if it takes more than two years than the death sentence automatically gets commuted to life imprisonment.

This decision, however, was modified later, in the case of Smt. Triveniben vs. State of Gujarat\(^{730}\). It was held that the time period of two years must be taken from the time when the Supreme Court has finally declared its verdict. This was held because the convict sentenced to death can delay his time period in the process of making appeals to the higher courts. If we consider the first rule, it is more accurate than the second rule because the death row convicts and their families live a life of hopelessness, glum and despair and start waiting for that eventual day when they will finally be executed. Thus in this mental state, each day they live waiting takes a heavy toll on them and their families and the Indian Judiciary has seen cases in which the convicts are kept waiting for even more than ten to twelve years.

One more thing that makes this punishment of death penalty more unacceptable is its such (as was shown by a report given by Amnesty International in the year 2008) is that the Indian Courts on an average give death penalty to 60 persons in a year but only 4 people have actually been hanged since 2000\(^{731}\). If we calculate it mathematically, 0.0037 out of every 100 people have actually been executed. Out of the four which have actually been executed since 2000, only Dhananjoy Chatterjee was prosecuted for normal peacetime crime. Even then today, many are being prosecuted for normal peacetime crimes, only to be appealed and be commuted by the higher courts or to be pardoned by the President.

Italian philosopher, Cesar Beccaria in his article wrote-

“To serve a penalty such as capital punishment may urge the people to commit

\(^{727}\)2018(15)SCALE306

\(^{728}\)Maneka Gandhi vs. The Union of India, 1978 AIR 597

\(^{729}\)(1983), 2 SCC 68

\(^{730}\)(1989), 1 SCC 678

\(^{731}\) According to Government of India reports –

(1) Dhananjoy Chatterjee in 2004 for rape and murder
(2) Ajmal Kasab in 2012 for terrorism and waging war against the country
(3) Afzal Guru in 2013 for terrorism and waging war against the country
(4) Yakub Menon in 2015 for terrorism and waging war against the country
or engage in lesser forms of crime simply to avoid capital punishment."\(^{32}\)

Thus, according to Beccaria, instead of deterring people, it urges them to commit lesser proportionate crime. He did believe that the death penalty was useful in some situations, such as when there was a need to protect the security of a nation or a government but not in other cases. Thus according to him, giving capital punishment also does not deter the other members of the society too. Thomas Jefferson too, in his Bill for Proportioning Crimes and Punishment 1779, agreed to ideas of Cesare Beccaria.\(^{33}\) Following are the parameters on which when death penalty is measured, it is found to be untenable.

1. THE ARBITRARINESS OF THE DEATH PENALTY

In *Bachan Singh vs The State of Punjab*,\(^{34}\) the doctrine of ‘rarest of the rare’ was evolved which said that the court has power to give death sentence only in cases where the court believes that the case belongs to the rarest of the rare category. This doctrine of rarest of the rare however has always been left open ended. Very little is different between the cases of *Mukesh & Ors. Vs. State for NCT of Delhi and Ors.*\(^{35}\) (Nirbhaya case) or *Govindaswamy vs. State of Kerala*\(^{36}\) (Soumya’s Murder Case). In both the cases, the victim was brutally raped and was later thrown out of a moving vehicle, and both of them died. But death penalty was awarded only in the former case and not in the latter one. Only one difference which we can find in both these cases was that of media coverage. Nirbhaya Case was more politically publicised than the Soumya’s case, and therefore we can somewhat say that the public outcry in the first case forced the Delhi High court and later the Supreme Court to give death penalty, however as Soumya’s case did not receive that much publicity, the offender was only awarded life imprisonment. This is the first type of arbitrariness shown by the courts, i.e. where the publicity received by the case determines the type of punishment.

Another type of arbitrariness can be seen in these two examples. In 1984 after Indira Gandhi’s death, Anti-Sikh riots broke out and it is estimated that around 3000 people were killed in Delhi alone. But no one was punished for the mass murders until recently because many political leaders were involved in these crimes or to say these acts were done by their consent.\(^{37}\) Or even in the case Gujarat riots in 2002, same happened there too. But now let us take the case of 2008 Mumbai terror attacks. The only assailant or the terrorist who survived was Ajmal Kasab. He was convicted and hanged in just four years from the date when the crime was committed. To put into perspective only 166 were killed in Mumbai in this case the victim was raped by an handicapped man in the compartment reserved for women in a moving train and was thrown out of the moving train. She also died owing to her injuries.

\(^{32}\) Cesare Beccaria, Crime and Punishment, 1764

\(^{33}\) Vinay Naidoo, Can Society Escape the Noose…, Pg. No. 43 (HRLN Publication, 2005)

\(^{34}\) Supra 1

\(^{35}\) Criminal Appeal NO. 607-608 of 2017 Supreme Court

In this case, the victim was gang raped by 6 men and thrown out of the moving bus in the state of Delhi. She died because of the injuries suffered to her later.

\(^{36}\) AIR 2016 SC 4299

\(^{37}\) Pav Singh, 1984 India’s Guilty Secret, 2017

In his book Pav Singh expresses these ideas with proofs of the people who have actually seen it.
attacks, which is way lesser than the figure of Anti-Sikh riots of 1984 in Delhi alone. So, do these examples lead us to a conclusion that only poor and under privileged (as Ajmal was poor and illiterate) are generally prosecuted. This is also a common trend seen in the number of convicts given capital punishment in the post-Independence era.  

This also shows the arbitrariness of the courts while deciding a case for a poor or a rich man.

(2) THE AGONY OF THE CONVICTS

One shocking trend which has been seen is that the death row convicts are kept waiting for their D-day in India for a very long time and rules like the Vatheeswaran rule,\(^ {739}\) the Triveniben rule,\(^ {740}\) have been openly violated. Many have criticised the Vatheeswaran rule saying that it always takes more than 2 years for the appellate courts to give their decisions. Even if we accept this point, then also we see that in some cases the appellate courts have taken even as much as ten to twelve years to decide which is waymore than the three-year rule.

One case which describes the above said inference is *Purushottam Borate and ors. vs State of Maharashtra*,\(^ {741}\) in this case the convict was given death penalty in the year 2008 by the trial court and this was reconfirmed by the Supreme court in the year 2015. So, this shows that there is a gap of 7 years in. Also in the case of *Md. Jamaluddin Nasir vs State of West Bengal*, the Supreme Court agreed with the decision of trial court to give death penalty after 9yrs of the said judgment. However in both the above said cases, the convicts were never hanged and in the fear of which they had to spend a decade of extreme pain and agony.

But, in the cases such as that of *Amar Ku. Singh vs State of Uttar Pradesh*\(^ {742}\) and *Santosh Kumar Singh vs. State of Madhya Pradesh*\(^ {743}\) even though the Appellate Courts commuted the decision of death penalty to that of life imprisonment, it took them took 4 to 5 years in each of the cases which is a very long time considering the agony faced by them.

Also in the only case where the convict was actually hanged i.e. in the case of *Dhananjoy Chatterjee vs. State of West Bengal*,\(^ {745}\) the convict was hanged 10 years after Supreme Court agreed to the decision of the lower courts in 1994 and it is a well-documented fact that his family had to suffer a lot because of this. Now consider that the Law Commission in its report in 2015\(^ {746}\) gave instructions to the courts that they should only give death penalties in the cases where the said individual is booked under Section 121 of the Indian Penal Code that is for waging war against the country or spreading terrorism. But in all the above stated cases, none of them were for terrorism or waging war against the country. Each of these cases were crimes committed during the peacetime of the country. Another interesting fact shown by the Amnesty

\(^ {738}\) Vinay Naidoo, *Can Society Escape the Noose…*, Pg. No. 73(HRLN, 2015)

\(^ {739}\) Supra 3

\(^ {740}\) Supra 4

\(^ {741}\) AIR 2015 SC 2170

\(^ {742}\) Criminal Appeal no. 1240-1241 of 2014, Supreme Court

\(^ {743}\) AIR 2012 SC 1995

\(^ {744}\) AIR 2014 SC 2754

\(^ {745}\) (1994) 2 SCC 22

\(^ {746}\) 35th Law Commission Report of 2015
international in its report in 2017 said that there was an increased in the number of cases where the court condemned the accused to death penalty by 81% in 2016 from 2015. This is after the law commission gave its suggestion to the courts to stop using death penalty in normal crimes.

Now suppose that a person is given death penalty, his term is reduced to life imprisonment either by the appellate courts or he also has the right to ask mercy from the President, and in majority of the cases he gets respite from the either. The result of this is that only 5 have been actually hanged in India since 1995 and only 4 after 2000. Out these 4 after 2000, only Dhananjay Chatterjee remains the one who has been hanged for a peacetime crime. So, if we do not actually want to execute the ones condemned to death, then why are we actually giving them this cruel punishment. Only to cause mental agony to them and their family members. The question remains unanswered.

(3) THE BARBARITY OF CAPITAL PUNISHMENT IN INDIA

In India we still find that methods of execution are that of pre-medieval era (execution is carried by hanging the convicts by rope) unlike the others countries like U.S. and U.K. where newer methods like electrocution or lethal injections are used which are considered to be less barbaric and inhuman than the methods used in India. Also there are many instances where the convict faces experiences like rope with which he is hanged breaks, without him actually dying which cause extreme pain. Also the tortures that he has to go through like weighing of him and others are beyond imagination\textsuperscript{747}.

\textsuperscript{747} Justice Bhagwati in ‘Bachan Singh vs State of Punjab’ (1980 (2) SCC 684) -

“29. The physical pain and suffering which the execution of the sentence of death involves is also no less cruel and inhuman. In India, the method of execution followed is hanging by the rope.Electrocution or application of lethal gas has not yet taken its place as in some of the western countries. It is therefore with reference to execution by hanging that I must consider whether the sentence of death is barbaric and inhuman as entailing physical pain and agony. It is no doubt true that the Royal Commission on Capital Punishment 1949-53 found that hanging is the most humane method of execution and so do in Ichikawa v. Japan, Vide : David Pannick on “Judicial Review of Death Penalty, page 73 the Japanese Supreme Court held that execution by hanging does not correspond to ‘cruel punishment’ inhibited by Article 36 of the Japanese Constitution. But whether amongst all the methods of execution, hanging is the most humane or in the view of the Japanese Supreme Court, hanging is not cruel punishment within the meaning of Article 36, one thing is clear that hanging is undoubtedly accompanied by intense physical torture and pain. Warden Duffy of San Quentin, a high security prison in the United States of America, describes the hanging process with brutal frankness in lurid details: The day before an execution the prisoner goes through a harrowing experience of being weighed, measured for length of drop to assure breaking of the neck, the size of the neck, body measurement et cetera. When the trap springs he dangles at the end of the rope. There are times when the neck has not been broken and the prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck may be broken, and the rope many times takes large portions of skin and flesh from the side of the face and that the noose is on. He urinates, he defecates, and droppings fall to the floor while witnesses look on, and at almost all executions one or more faint or have to be helped out of the witness room. The prisoner remains dangling from the end of the rope for from 8 to 14 minutes before the doctor, who has climbed up a small ladder and listens to his heart beat with a stethoscope, pronounces him dead. A prison guard stands at the

www.supremoamicus.org
(4) IS CAPITAL PUNISHMENT REALLY DETERRENT

As Thomas Jefferson in his statement once said:

Feet of the hanged person and holds the body steady, because during the first few minutes there is usually considerables struggling in an effort to breathe.

If the drop is too short, there will be a slow and agonising death by strangulation on the other hand, if the drop is too long, the head will be torn off. In England centuries of practice have produced a detailed chart relating a man's weight and physical condition to the proper length of drop, but even these mistakes have been made. In 1927, a surgeon who witnessed a double execution wrote:

The bodies were cut down after fifteen minutes and placed in an antechamber, when I was horrified to hear one of the supposed corpses give a gasp and find him making respiratory efforts, evidently a prelude to revival. The two bodies were quickly suspended again for a quarter of an hour longer...Dislocation of the neck is the ideal aimed at, but, out of all my post-mortem findings, that has proved rather an exception, which in the majority of instances the cause of death was strangulation and asphyxia.

These passages clearly establish beyond doubt that the execution of sentence of death by hanging does involve intense physical pain and suffering, though it may be regarded by some as more humane than electrocution or application of lethal gas.

30. If this be the true mental and physical effect of death sentence on the condemned prisoner and if it causes such mental anguish, psychological strain and physical agony and suffering, it is difficult to see how it can be regarded as anything but cruel and inhuman. The only answer which can be given for justifying this infliction of mental and physical pain and suffering is that the condemned prisoner having killed a human, being does not merit any sympathy and must suffer this punishment because he 'deserves' it. No mercy can be shown to one who did not show any mercy to others. But, as I shall presently point out, this justificatory reason cannot commend itself to any civilised society because it is based on the theory of retribution or retaliation and at the bottom of it lies the desire of the society to avenge itself against the wrong doer. That is not a permissible eonological goal."

“Capital Punishments, become inconsistent with the safety of their fellow citizens...[capital punishment] also weakens the state by cutting off so many who, if reformed might be which exterminate instead of reforming...should be the last melancholy resource against those who existence is restored sound members of the society, who even under a course of correction, might be rendered useful in various labors for public and would be living and long continued spectacles to deter others from committing offences”748

Even as Beccaria said that it may force the individual to commit crimes of lesser punishment or find ways to escape the punishment rather than not committing the crime.749 The statistics show that even after the Nirbhaya’s convicts were condemned the number of rape cases recorded in the country have shot up significantly. It has also been scientifically proven the deterrent types of punishment such as the death penalty don’t have a long-term effect but only have a short-term effect750 and over 88% of the criminologists in USA believe that the capital punishment is not deterrent in nature751 as there are clear-cut statistics to prove the point mentioned above. One more fact that goes against the deterrent form of punishment is that resources are wasted for maintaining this institution and many researchers believe that this force could be used in a better way to prevent the crimes rather using it to deter the people.

748 Supra 7
749 Supra 6
751 A study conducted by the University of Colorado in 2012
CONCLUSION

John Rawls (1971) once said, “Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.” The above stated facts in this article clearly mention the injustice which is being caused to the death row convicts by the judicial and the executive machineries which force us to look for alternatives.

One alternative which can be implemented is by giving ‘Life Sentence without Parole’. The above-mentioned is one of the most talked about alternative when it comes to alternatives to capital punishment. Although a lot of Death penalty proponents fear the picture when these convicted criminals will be back on the streets and posing a threat of committing the crimes for which he was convicted again. Also he / she coming out may also pose a risk towards the ones who had testified against him. But if we look at the reality, most people who are sentenced to life without parole are not released at all, and even if someone is released, it is at least after 25-30 years, by then they are old men and women anyway. What we as a society need to realize here is that life without parole costs a lot less and also allows for mistakes to be corrected.

Another alternative which can be considered is the theory of reformation, where the individual is given a second chance to reform himself and be useful to the society. This is done through a method of Individualisation and it is conceived that even though the person has committed a crime, it is possible that the circumstance under which he committed the crime may not arise again in his future and thus he could be reproductive for the society.752

Thus, the theory of Capital Punishment has been spoken against from the times of justice Bhagwati in the case of Bachan vs The State of Punjab753 to the present day where 140 countries have totally stopped using it and the Law commission report of 2015 also suggests the same. But we see an increase in the number of death sentences in the last few years where as only a meagre percentage of them are actually being hanged. This article doesn’t try to challenge the constitutionality of Capital punishment, but tries to bring out the flaws, which requires to be rectified.

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752 Tanu Priya, Reformative Theory of Punishment,2014
753 Supra 1
ABORTION LIMIT OF 20 WEEKS UNDER THE MEDICAL TERMINATION OF PREGNANCY ACT: A FALLACY OF RULE OF LAW?

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INTRODUCTION
The rights of a pregnant woman to abort and that of the foetus to life is a debate that has shook the existing global legal framework on post and neo natal care. The act of terminating a pregnancy revolves around genetics, medicine, sexuality, jurisprudence, reproductive rights, as well as the foetus’s right to life which would mean that coming to one logical conclusion must be in consonance with all these aspects. The battle is between pro-life supporters who condemn abortions considering the death of an unborn child a social death and pro-choice supporters, who believe that women should be in total control of her reproductive life and nobody, not even the state, has the right to tell her what to do. The pro-choice versus pro-life debate found light in India only in the recent times owing to the state involvement in curbing the burgeoning population rates. This paper will be focussing on the pro-choice aspect of this debate.

The present limitation of 20 weeks prescribed for abortion under Medical Termination of Pregnancy Act in essence means returning to the 'dark ages' of state control over women, with women’s rights and liberties finding no sanctuary within the framework of the state. By enacting MTP Act, India has chosen a middle path instead of choosing outright a pro-life or pro-choice approach and this is perhaps rightly so, given the sensitivity of the issue. Thus India played it safe by adopting a balanced approach between the respective interests of the woman, the unborn and the state.

CURRENT LEGAL POSITION
S.3 of the Medical Termination of Pregnancy Act 1971 prohibits abortion of the foetus beyond 20 weeks of gestation. The Act does authorise abortion beyond 20 weeks where two registered medical practitioners are of opinion, formed in good faith, that, - (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health; or (ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. Hence, a substantial risk to the life of the pregnant woman or baby is a must to get a legal abortion beyond 20 weeks of gestation. The major reason for choosing such a particular time limit for abortion is grounded on the fact that the baby becomes viable only at around the 20th week of gestation which would mean the baby is no

longer indispensably dependant on its mother’s body and stands a chance of survival upon delivery, albeit with suitable aids at this pre-mature stage. Thus, in addition to state interest, the interests of the fully formed unborn child at this stage become noteworthy.755
The Indian Penal Code 1860, keeping in view the religious, moral, social and ethical background of the Indian community provides that causing a miscarriage with or without consent for a purpose other than saving the life of the woman is punishable.756 The MTP has an overriding application over IPC, yet outside the ring of the former’s protection the latter still operates. According to the IPC the offence falls under ‘Offences Affecting the Human Body’, and provides that causing a miscarriage with or without consent for a purpose other than saving the life of the woman is punishable. The MTP Act makes for a quantum difference in approach, as if by a legislative sleight through a non-obstante clause, by decriminalising abortion without bringing an amendment to the IPC or abrogating the penal provisions. The MTP Act sets some limitations regarding the circumstances when abortion is permissible, the persons who are competent to perform the procedure, and the place where it could be performed. Outside the ring of protection that the Act draws, the IPC still operates. The Government of India ratified the International Covenant on Economic Social and Cultural Rights (ICESCR), which guarantees the right to the highest attainable standard of health (Article 12) and the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) guaranteeing women the highest standard of reproductive health. Additionally, CEDAW explicitly affords women the right to freely decide the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.757 Thus in being forced to carry an unwanted foetus especially in cases where the foetus suffers from a substantial anomaly and no probability of independent survival, several pregnant all over the world and India are being denied the right to decide freely on the number and spacing of her children guaranteed under CEDAW. General Recommendation 24758 states that, “State parties that have laws that criminalize medical procedures only needed by women punish women who undergo those procedures.” Abortion is a medical procedure only needed by women and it is women whose lives and health are disproportionately put at risk by the MTP Act’s restrictions. The right to non-discrimination under CEDAW requires that abortion be lawful when necessary to protect woman’s health as a measure to eliminate discrimination against women in the field of health care. Unlike the position in India, countries like Albania, Australia, Belgium, Canada, China, Croatia, Denmark, Iceland, Israel, Luxembourg, Nepal, Netherlands, Slovakia, South Africa, United Kingdom, and United States do not include absolute

755See Articles 12 and 16 of CEDAW and General Recommendation 24.
time limits in their abortion laws conforming to women’s rights to life, equality and health. Instead, these countries consider the woman’s physical and mental health and doctors’ expert opinions in determining whether a medical termination of pregnancy can be performed post 20 weeks.

A.21 AND RIGHT TO ABORTION
A foetus is not a legal person, which means that it cannot be owed a duty of care. 759 Right to Abortion has been recognized under Right to Privacy which is a part of Right to Personal Liberty and which emanates from right to life. Thus, provisions of MTP Act and IPC violate the pregnant woman’s fundamental right to life by criminalising abortions beyond 20 weeks. Reproductive autonomy is part of a woman’s personal liberty guaranteed under A.21. The Supreme Court has clearly laid down in the landmark judgement of Rajagopal v. State of Tamil Nadu that right to privacy protects matters involving “procreation, motherhood and child-bearing.” The rights of an unborn child are tangential to that of the woman carrying the unborn child in her body. The Supreme Court in Nar Singh Pal v. Union of India 761, asserted that “Fundamental Rights under the Constitution cannot be bartered away. They cannot be compromised nor there does any estoppel exist against the exercise of Fundamental right available under the Constitution.”

The validity of the MTP Act was first challenged in Nand Kishore Sharma v. Union of India 762, it was argued that the Act, particularly Section 3(2)(a) and (b) and Explanations I and II to Section 3 of the Act were unethical and violative of Article 21 of the Constitution of India. The court here was equivocal on issues pertaining to status of a foetus and whether it is entitled to legal protection and hence avoided a closure on the matter. It went on to declare the MTP Act to be valid as it was in consonance with the aims and objectives of Article 21 of the Constitution.

The judiciary’s decisions in the recent times have been welcomed as progressive and supportive of reproductive rights. Nevertheless, for every liberal judgment, there are several ones which still succumb to the archaic limitations prescribed by the 1971 law. In one such case 763, the Bombay High Court, on its own motion, decided to take up the case of a pregnant prisoner seeking permission to terminate her pregnancy. In her requisition, the prisoner had written that she already had a five-month-old baby who was suffering from convulsions/epilepsy, diarrhoea and fever, and she herself was missing a clean bill of health. It was stated by her that it was already difficult taking care of herself and her first child and therefore it was much better for the child to be aborted now than have it be born into the world and have a bad life. The court finally held that a woman

762 Nand Kishore Sharma v. Union of India, AIR 2006 Raj 166.
763 High Court on its own Motion v. The State of Maharashtra, Suo Motu Public Interest Litigation No. 1 of 2016 (India).
had the absolute right of choice over abortion regardless of her position or job in society. This is applicable to all women irrespective of their marital status or whether she was a working woman, a homemaker or a prisoner. Besides other concerns mentioned herein, the age of the child who becomes pregnant resulting from rape need to be considered. A minor child’s body will be in no position to withstand a normal vaginal delivery let alone a C-section in case of complexities arising in the pregnancy. In itself the abortion would pose lesser risk to the girl than a delivery by surgical intervention in terms of anaesthesia, major abdominal surgery, complications, blood loss and wound healing. According to the Indian Academy of Paediatrics, at the age of 10, an average Indian female child will weigh 30 kg and be 140 cms tall at the 50th percentile. Given that maternal height of less than 145 cm is a predictor for obstructed labour and increases the risk of a bladder wall fistula during vaginal delivery it is not likely that this child can have a vaginal delivery without causing serious trauma to the perineum and pelvic floor muscles. Of course the foetus may also be growth retarded and of a low birth weight but it seems that the delivery will have to be surgical via a caesarean section. FOGSI advised that “in case of foetal abnormality which has been detected late and which leads to an extremely serious handicap at birth, such foetus should be allowed to be terminated, even after 20 weeks.” In the case of Suchita Srivastava and Anr. v. Chandigarh Administration, the Supreme Court expressed the view that the right of a woman to have reproductive choice is an inseparable part of her personal liberty, as envisaged under Article 21 of the Constitution. She has a sacrosanct right to have her bodily integrity. The Court further noted that it is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman’s right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices.

MENTAL HEALTH OF THE PREGNANT WOMAN
In case of pregnancies caused by raped, or a failure of birth control (for married women), the risk to the pregnant woman’s mental health is an acceptable admissible ground for abortion. Contrary to what legislator’s believe, the 20 weeks limitation only aggravates the mental trauma faced by pregnant woman resulting in the rise of illegal abortions which is a graver risk to the pregnant woman’s health. In several pronouncements by the Supreme Court in the recent times he term ‘mental injury’ has been given wider interpretation by the


766 Suchita Srivastava and Anr. v. Chandigarh Administration, AIR2010SC 235.
The Supreme Court in 2017 rape victim to abort a 24-week old foetus with severe abnormalities, as the medical board thought that the pregnancy could put her life in danger. According to the court, “The foetus is not compatible to life outside uterus. In other words foetus would not be able to survive. Equally, rather more important, continuance of the pregnancy would endanger the physical and mental health of the petitioner.” Thus decisions made by courts in this regard have not always been on an even footing, thereby necessitating changes to the existing law.

In Sarmishtha Chakrabortty and Ors Vs. Union of India (UOI) Secretary and Ors. too the Medical Board was of the opinion that the mother would have suffered a lot mental injury if the pregnancy is continued. This was taken as a ground by the Supreme Court to allow the abortion after 26 weeks. Furthermore, Ashaben v. State of Gujarat is one of several cases where the rape victim was denied termination as she was over 20 weeks pregnant. Here the girl was held captive before she could seek termination, the provisions of the Act did not grant her any relief and the judge expressed his inability to grant her remedy even when the circumstances were too dire. Hence it is quite apparent that there is an immediate requirement for change in the limitation provided for in the MTP Act as echoes by the views of eminent judges who have dealt with such cases as also the medical professionals who are experts in this area.

ABORTION BEYOND 20 WEEKS IN CASE OF FOETAL ABNORMALITY

The 20 weeks limitation brought about by the legislation keeping in mind the health of the pregnant woman. But this basis has become outdated, as unlike the circumstances existing in 1971 when the statute was brought about, technology has developed to the extent of making abortions safe even beyond the prescribed time limit. Furthermore, certain rare congenital diseases can be detected only after 20 weeks bearing in mind the stage of development of the foetus at this point. Of the 26 million births that occur in India every year, approximately 2-3 per cent of the foetuses have severe congenital or chromosomal abnormality. In certain cases these abnormalities can be detected before 20 weeks, but there does exist situations where malformations can be detected only after that period. Dr.Rishma Dhillon-Pai, consultant gynaecologist at Jaslok Hospital, says that the period between 20 weeks and 22 weeks offers good opportunities to check for anomalies in foetuses through a sonography. The doctors generally advise the patient to undergo these tests around the 18th week to find abnormalities and most of these reports take three weeks by which time the pregnant woman loses out on the prescribed cut off time under MTP.

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767 Sarmishtha Chakrabortty and Ors Vs. Union of India (UOI) Secretary and Ors; 2017(3)RC R(C civil)757
769 Ibid.
770 Supra 14.
772 24 weeks in this case.
773 S.Andhale, NCW wants abortions to be allowed till 24th week, DNA, (02.02.2013), Available at:http://www.dnaindia.com/mumbai/report-ncw-

www.supremoamicus.org
doctor while dealing with such a case would resort to three tests in order to determine the existence of abnormalities in the foetus. According to Dr. Nehha V Motghare there are precisely three tests conducted during the preliminary check-up: the Double Marker Test\textsuperscript{774}, the Triple Marker Test\textsuperscript{775} and the Anomaly Scan\textsuperscript{776}. It is pertinent that the aforementioned tests are carried out either during or beyond the stipulated time limit and after the diagnosis a window of opportunity is available to be utilised for curing the abnormality.\textsuperscript{777} But not in all cases is the result positive which prompts pregnant woman to resort to abortions before they can make an informed decision regarding whether or not to go ahead with the abortion.\textit{Dr. Nikhil Dattar \& Ors. v. \textit{Union of India}}\textsuperscript{778}, dealt with the issue as to whether the statutory time limit for abortion must be increased from the currently permitted twenty weeks of gestation to twenty four weeks or above. Here the petitioners reasoned that the congenital heart blockage in the heart of the foetus was detected at a late stage which was why the request to terminate the pregnancy was made in the 25\textsuperscript{th} weeks of gestation, they further expressed their inability to bear the emotional stress and monetary burden of giving birth to a child that may suffer from such severe health problems in the context of socio-economic conditions existing in India. The Mumbai High Court held that no categorical opinion of experts had emerged to state that the child would be born with serious handicaps and it thus denied recourse to medical termination of the pregnancy. It might be interesting to note here that an opinion emerged that terminating the life of a viable unborn on grounds of possible handicap is akin to mercy killing.\textsuperscript{779} In \textit{Sarmishtha Chakraborty and Ors. Vs. \textit{Union of India (UOI) Secretary and Ors}}\textsuperscript{780}, the Supreme Court granted permission for the abortion of a 26 week old foetus who was diagnosed with a cardiac malformation. According to a court appointed medical panel’s conclusions, the baby, after birth would have required intensive cardiac monitoring and staged management through the surgical procedures which has associated with it high risks of morbidity and mortality.

The author is not trying to stray away from the modern inclusive approach adopted by majority of the governing institutions in the present day; yet allowing a foetus with severe abnormalities to be born will only induce further hardships to the child as well as the biological mother taking her mental health and the foetus’ physical health into consideration. Such cases can be brought under the purview of s.3, Medical Termination of Pregnancy Act 1971. The basis for the contention in favour of abortion in cases of foetal disability/abnormality reframes the nature of the parenting relationship, making parenting conditional upon the child meeting certain criteria. This framework is essentially a shift from the

\textsuperscript{774}\textsuperscript{10-13 weeks.}
\textsuperscript{775}\textsuperscript{18-20 weeks.}
\textsuperscript{776}20 weeks.
\textsuperscript{778}Dr. Nikhil Dattar\&Ors. v. \textit{Union of India},(2008) 110 BOM. L. R. 3293

\textsuperscript{779}Supra 1.
\textsuperscript{780}Supra 14.

\url{www.supremoamicus.org}
progressive outlook of advancement of the physically or mentally challenged to avoiding the disability altogether. This ideas although in consonance with individual liberty and freedom is highly antagonistic to the modern day inclusive approach. Within this understanding of disability, genetic technology then becomes a tool not for promoting community health but a mechanism of social control for avoiding the appearance of difference. Pro-choice supporters argue that late-term abortion is justified as a form of self-defence to get rid of involuntary servitude and a form of slavery caused by pregnancy. The Supreme Court in *Suchita Srivastava vs Chandigarh Administration* while addressing the issue of eugenics, declined to accede to the state’s request for abortion for a 20-year-old inmate of a state-run protection home who was a rape victim and was mentally retarded, having a mental maturity of a nine-year-old. The court reminded: “Empirical studies have conclusively disproved the eugenics theory that mental defects are likely to be passed on to the next generation.” Though the foetus should have a right to life, it must be life with dignity, and a meaningful, wholesome life which would not be possible if the mother herself has not been able to form any emotional bonding with the foetus /would be child.

THE DEGREE OF ARBITRARINESS

The 2007 WHO report indicates that 98% of the unsafe abortions took place in developing countries with restrictive abortion laws, resulting in an estimated 66,500 deaths. Today, in a growing number of settings where abortion is legally restricted, women are using the drug misoprostol (Cytotec) to cause a miscarriage, whether under a doctor’s care or self-administered. This includes most of Latin America and the Caribbean, parts of Asia, several countries in Africa and a few European countries. Dr Anuradha Kapoor, senior gynaecological consultant at Max Healthcare, states that “the Level-II ultrasound, which is also known as the anomaly test, can be conducted only after the pregnancy is in the advanced stages - between 22 and 24 weeks”. It is this scan that detects abnormalities in vital organs, such as heart or kidneys but doctors continue to face "legal issues whenever it comes to getting rid of such foetuses and couples have to bear babies even if there isn’t much chance of their survival later". Common health problems faced by the foetus inside the mother’s womb are Hydrocephalus, where the foetus’ brain is not fully developed, and Congenital Anomalies such as Down syndrome, Cardiac trouble etc. In both these situations, the probability of the child succumbing to its impairment immediately after birth is high.

782 Supra 13.
785 Supra 24.
If the same occurs while the child is inside the womb it may have adverse and even a fatal effect on the mother which is one more danger she will have to foresee. In any case that the child survives it is usual for the child born to remain alive for some months or year albeit with severe health problem. Much of the Indian law was copied from the UK Abortion Act 1967, which included a similar time limit of 20 weeks at the time of enactment, but, with the changing scenario, the act was amended in 1990 and the time limit was increased to 24 weeks. Now, with advanced technology, there is no harm in women going for abortion at any stage.

Dr Rishma Dhillon-Pai, consultant gynaecologist at Jaslok Hospital, says the period between 20 and 22 weeks is the ideal time to check for anomalies in foetuses through sonography. "We generally ask a patient to undergo tests around the 18th week to find abnormalities. Some reports take three weeks and we lose on the MTP cut-off time. A little extension will come as a boon to a lot of women," said Dr Pai. The American Journal of Obstetrics & Gynaecology published a study reporting that diagnosis for cerebral anomalies often cannot be made until at least the 22nd week of pregnancy. In 2008, The Australian Medical Journal issued Pregnant Women with Foetal Abnormalities: The Forgotten People in the Abortion Debate, reporting that the accuracy of prenatal testing is compromised in jurisdictions where access to abortion is limited to 20 weeks or prior. The report also finds that in cases of foetal abnormalities, denying abortion may only delay the inevitable death of the child and extend the suffering of the family.

FETUS’S RIGHT TO LIFE

The pro-life arguments are centred on religion including the traditional Christian doctrines such as that all humans are made in the image of God or that all humans have an immortal soul. The foremost object behind the twenty weeks cut-off is the fact that the baby becomes viable at this stage. In other words, the baby is no longer indispensably dependant on its mother's body and stands a chance of survival upon delivery, albeit with suitable aids at this pre-mature stage. As it grows, it becomes more and more capable of independent survival. Thus, in addition to state interest, the interests of the fully formed unborn child at this stage become noteworthy.

The Convention on the Rights of the Child recognized the need for special protection of children before and after birth on account of their physical and mental immaturity. Further The Convention on Elimination of Discrimination against Women (CEDAW) views maternity as a social function which would mean that corresponding to several rights enjoyed by the pregnant woman including the right to privacy, there exists duties that must be performed to sustain and protect the child.


788 Supra 1.

A foetus cannot feel pain until late in pregnancy, because its brain is not sufficiently developed before then. The scientists have agreed that foetal brain will be sufficiently developed to feel pain from approximately the twenty sixth weeks. Thus, whether abortion is against the interest of a foetus must depend on whether the foetus itself has interests, not on whether interests will develop if no abortion takes place. Something that is not alive does not have interests. Also, just because something can develop into a person does not mean it has interests either. Once a foetus can live on its own it may have interests. This is only after the third trimester.

Perinatal hospice is put forward as an alternative for parents faced with the decision to terminate their pregnancy where the infants are brought to term by treating them as beings conceived with a tangible future. This alternative is preferred because of post-termination psychological distress and because biblical teachings emphasise the dignity and worth of each foetus. According to Ronald Dworkin, a foetus has no interest before the third trimester. Further a foetus cannot feel pain until late in pregnancy, because its brain is not sufficiently developed before.

THE MTP (AMENDMENT) BILL, 2014
The Medical Termination of Pregnancy (Amendment) Bill of 2014 proposes to expand the definition of registered medical practitioner with registered healthcare provider to include practitioners from other streams of medicine, such as Ayurveda and homeopathy. Under the Bill, nurses and auxiliary nurse midwives can also perform abortions. The Bill also proposes to extend the length of the period during which abortion may be conducted from 20 weeks to 24 weeks. The bill further involves extending the permissible period for abortion from 20 weeks to 24 weeks if the healthcare provider believes the pregnancy involves a substantial risk to the mother or the child. If substantial foetal abnormalities are detected, the amendment also allows an exception on the time limit for pregnancies to be terminated. Though the Bill echoes the High Court judgment in parts, a specific provision on women’s autonomy and their right to self-determination in the matter of abortion would reduce women’s vulnerability in clinical settings.

COMPARATIVE ANALYSIS WITH U.S.A
In Roe v. Wade, the U.S. Supreme Court decided by a 7-2 majority that an implied constitutional right to privacy, whether based on the Fourteenth Amendment’s

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793 Supra, at 28.


795 Supra 15.

796 Supra 11.

797 Roe v. Wade, 410 US 113 (1973)
The concept of personal liberty or in the Ninth Amendment’s reservation of rights to the people, was sufficiently broad to encompass a woman’s right to terminate her pregnancy, but it again set limitation for States to declare the outer limit to carry out the procedure.\(^{798}\) Later, in the case of \textit{Planned Parenthood v. Casey},\(^{799}\) the Court rejected Roe’s trimester framework while affirming its central holding that a woman has a right to abortion until foetal viability. The Roe decision defined “viable” as “potentially able to live outside the mother’s womb, albeit with artificial aid”. Justice Casey acknowledged that viability may occur at 23 or 24 weeks, or sometimes even earlier, in light of medical advances.

In U.S.A., following propositions may be deduced so far from the judicial decisions as regards to the status of the foetus:

a. The word ‘person’ in the 14th Amendment means a human being after birth and not foetus. It follows that the right to life does not begin from the conception.

b. It cannot be denied, however that there is a potentiality of life in the embryo from the moment of conception, so that the state may take this into consideration in regulating the mother’s right to abortion.\(^{800}\)

So, woman has right to abort until foetal viability and if there is any danger of life of mother or child or both.

\(\text{DRAWBACS OF PROVIDING COMPLETE AUTONOMY IN SECOND TRIMESTER}\)

One of the grim realities that must be faced is that the MTP Act is being rampantly misused to carry out sex-selective abortions as is evident from the highly skewed sex ratios in the country. India as a country has been persistently biased towards the girl child. Whether it would be justified under such circumstances to give further time to parents to consider gender-based termination of pregnancy and provide an enlarged legal umbrella towards acts that are detrimental to the society is a question definitely to be deliberated upon.\(^{801}\)

Second trimester abortions carry relatively more risk and account for a greater proportion of complications than first trimester abortions, even when the procedure used is safe, the provider skilled and the quality of care high. This is because abortion procedures and pregnancy itself are riskier as pregnancy progresses.\(^{802}\) The main reason behind the recent low figures of second trimester abortion deaths is the availability of trained professionals and more and more women seeking out their help. This development cannot really be attributed to the Indian diaspora as Indian women continue to resort to services from untrained professional help. Furthermore, the MTP Act mandates for a second doctor’s approval in case of abortions beyond 20 weeks which is

\(^{798}\) Supra 1.
\(^{801}\) Supra 1.
impractical from the service delivery point of view especially in rural areas. Getting a second doctor’s approval, especially in a rural setting, would be punitive and restrictive in effect, if indeed it is adhered to.

POSSIBLE MIDDLE GROUNDS
- The right of a woman to choose what to do with the foetus has to be balanced with the right of the foetus to survive.
- There could be no two opinions that a victim of rape shall be allowed the choice to abort, but this choice shouldn’t be made at a time when the foetus is viable and the termination of pregnancy could imperil the safety of the mother and the life of the foetus.
- A pregnancy which may result in the child being born with a disability should be terminated only after devising an inclusive approach of dignity to the unborn child.
- In Germany, the law permits abortion after mandatory counselling and a three-day waiting period. Rather than criminalising abortion, German law focusses on counselling, employment security, social welfare, and financial support to persuade pregnant women to give birth to their children. In this way, German law successfully achieves some degree of protection for the unborn by obtaining voluntary recognition of personal responsibility and respect for the personhood of the unborn. India can adopt features from countries having such progressive legislations.
- An urgent need to define what a foetus and when it becomes a “person” entitled to protection under the law.
- In case of foetal abnormalities: It might be suggested here that the adverse ramifications of giving birth to handicapped children may be minimized by creating effective state mechanisms for adequate support to such children and families, both financial and otherwise. Instead of giving a blanket cover to all cases, expert committees may be constituted to evaluate cases beyond twenty weeks on merit so that selective sanction for abortion at this stage is given.
- For a liberalized law like the MTP Act to deliver on its promise of safe and humane abortions, it needs to be accompanied by other social inputs like superior empowerment of women - especially in the matter of the degree of control exercised over their bodies and sexuality.
- No other barriers or hurdles should be imposed on women seeking second trimester abortion. In-depth, country-based research is needed, to bring out the facts on second trimester abortion, as evidence of why it should be treated as a legitimate form of women’s health care and supported in public health policy.  

CONCLUSION
Every person has the freedom to make choices. But this freedom ends when there are no longer choices but a single passage of life that is established through arbitrary and unreasonable laws. The right to abortion is as important as every other right and therefore no law can exist that takes away a woman’s right to choose over whether to go ahead with the abortion or not. Therefore when s.3 of the MTP Act decides for everyone that an unborn foetus has been in

803 Ibid.
the womb for 20 weeks or more could not be aborted.
The state has their own reasons for such framing of laws but at the end of the day it is not the state has to live life protecting a child who could have mental or physical impairments that could lead to financial and mental trouble to the mother. It is not in the states power to be aware of each and every such child born in this country and it shall continue to stay the same through the existence of s.3. Therefore if the state is in fact unable to ensure the betterment through the enforcement of such a provision then naturally the right to decide must be given to the child’s biological mother and no one else. The right to decide on an abortion must be a right that stays protected for years to come and it is up to the government to start now.

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HOW THE UCC WAS NOT LIABLE FOR THE BHOPAL GAS TRAGEDY:
AN ANALYSIS OF ONE OF THE BIGGEST INDUSTRIAL DISASTER

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ABSTRACT
The Bhopal Gas Tragedy was truly one of the most devastating industrial accidents in the world. Thousands of people died immediately whereas lakhs suffered permanent injuries. The exact number has never been verifiable with different reports claiming different numbers but one can be sure these were one of the darkest moments in our country’s history. On the 2nd and 3rd December a major MIC gas leak incurred from Union India Carbide Limited Plant a subsidiary of Union Carbide which manufactured pesticides. MIC or Methyl isocyanate is an intermediate chemical which is used in the production of carbamate pesticides spread through the city of Bhopal. Those who were exposed to the gas had immediate effects such as coughing, vomiting, feeling of suffocation, eye irritation etc. This paper analyses why despite all arguments UCC is not liable for the Bhopal Gas Tragedy and the Government and UCIL instead are liable for the accident. This paper will analyse the Arthur D Little and Ashok S. Kalekar report entitled “INVESTIGATION OF LARGE-MAGNITUDE INCIDENTS: BHOPAL AS A CASE STUDY”, judgments of courts in India as well as in USA and also analyse why the UCC was not responsible for the design, operations and activities of the plant. This paper will also analyse what actions UCC had taken to provide continuing aid after the disaster and will analyse whether the UCC has to rehabilitate the area near the plant.

I. INVESTIGATION OF LARGE-MAGNITUDE INCIDENTS: BHOPAL AS A CASE STUDY

1. HINDERANCES IN THE INVESTIGATION CAUSED BY THE CBI
According to the report 2 separate major technical investigations had taken place of the tragedy. One investigation was sponsored by the Government of India which was conducted by a staff of scientists and engineers from the Council of Scientific and Industrial Research (CISR). Whereas the other one was sponsored by the Union Carbide Corporation, Union Carbide India Limited (UCIL), outside experts and attorneys. Both these investigations were independent investigations. The Central Bureau of Investigation was also conducting its own investigations. Within days of the accident the Union Carbide investigators were at the site of the plant to provide any sort of assistance and to conduct their investigation. But to their shock they found that the plant had already been sealed by the CBI and the CBI had full and exclusive control of the plant. Along with this the
records of the MIC unit were also under the control of the CBI. Although the investigation team was permitted to see the copies of the records but it was only allowed to do so after specifically requesting a copy of a particular document.\textsuperscript{804} The CBI also prohibited interviews with the plant employees. A list of 193 plant employees were sent to the CBI for interview by the UCC team but the permission was refused. Only discussions with the Plant Manager and the MIC Production Superintendent were authorized by the CBI. Neither of them were on duty on the night of the incident. The CBI on the other hand was conducting a criminal investigation into the incident, and it was contended by the CBI that attempts by Union Carbide’s investigating team to interview the workers formally would tamper the evidence in the criminal investigation.\textsuperscript{805}

The CBI also conducted its criminal investigation using aggressive tactics. These tactics played a big role in the development of a “cover-up” by plant employees. In the interim the Indian Government filed a civil suit against Union Carbide Corporation in the United States, asserting that the government was the sole representative of the victims of the tragedy. But in an institutional role it continued to control and restrict the access of the sources of proof. This restricted the Union Carbide to find out the truth. The access to the sources of proof was denied for over a year due to which a lot of evidences got destroyed. Many employees had shifted to other places to seek employment and they had left Bhopal without leaving any forwarding addresses. It took weeks to ascertain their whereabouts by questioning former landlords and neighbours. Several had even relocated to Nepal and other remote areas of India.\textsuperscript{806}

2. TENDENCY OF PLANT WORKERS TO OMIT AND DISTORT FACTS

The plant workers to on the other hand had a tendency to distort and omit facts which was clearly evident. This made collection of evidence a time consuming process. The story which was told by the workers initially was a preferable one from their perspective, because it absolved everyone, except their supervisor. According to them the reaction happened instantaneously because of which there was no time to take preventive and remedial measures, and there was no known cause. Despite the fact that critical facts were being omitted and distorted the investigation continued and each new evidence was reviewed and reanalysed. Ultimately several firm pieces of evidence came to light which did not fit the story which was told initially by the workers. This led to the conclusion that a direct water connection was found by the workers and the workers had covered it up.\textsuperscript{807}

\textsuperscript{804}Pg. 3, Investigation of Large-Magnitude Incidents: Bhopal as a Case Study, Bhopal as a Case Study-Union Carbide Corp, May 1998, Ashok S. Kalelkar and Arthur D. Little.

\textsuperscript{805}Pg. 4, Investigation of Large-Magnitude Incidents: Bhopal as a Case Study, Bhopal as a Case Study-Union Carbide Corp, May 1998, Ashok S. Kalelkar and Arthur D. Little.

\textsuperscript{806}Pg. 4, Investigation of Large-Magnitude Incidents: Bhopal as a Case Study, Bhopal as a Case Study-Union Carbide Corp, May 1998, Ashok S. Kalelkar and Arthur D. Little.

\textsuperscript{807}Pg. 10, Investigation of Large-Magnitude Incidents: Bhopal as a Case Study, Bhopal as a Case Study- Union Carbide Corp, May 1998, Ashok S. Kalelkar and Arthur D. Little.
One of the more reliable accounts came from a witness who had absolutely no motive or reason to distort or omit facts. He was the “tea boy” who served tea in the MIC control room. Just before the incident the tea boy reported that when he entered the unit at around 12:15 a.m. everyone was quite. The atmosphere was tense. The operators refused to have tea. After questioning the operators, it was apparent that those operators who were directly involved were unable to give consistent details of events that never occurred. 808

3. SYSTEMATIC EFFORTS TO ALTER OR DESTROY LOGS
A sketch was found when reviewing the daily notes of the MIC unit for the period of the incident. The sketch showed a hose connection to an instrument on a tank, and it appears to explain how the water entered the tank. After further searching the records, several attempts to cover the story came to light. The time of occurrence of the incident had been altered log after log to reflect that the incident had occurred at a different time than which was initially recorded. Further in some logs, pages relevant to the period in question had been completely or partially ripped out. 809

4. WATER WASH THEORY ARGUMENT FAILURE AND DIRECT WATER CONNECTION

808 Pg. 13, Investigation of Large-Magnitude Incidents: Bhopal as a Case Study, Bhopal as a Case Study- Union Carbide Corp, May 1998, Ashok S. Kalelkar and Arthur D. Little.

809 Pg. 13, Investigation of Large-Magnitude Incidents: Bhopal as a Case Study, Bhopal as a Case Study- Union Carbide Corp, May 1998, Ashok S. Kalelkar and Arthur D. Little.

The water wash theory is false on many grounds. The UCC team after it gained access to the plant, talked to many witnesses and considered all evidences. It was concluded by the team that the theory could not withstand minimal scientific scrutiny. The Indian Government despite having all records and test results that discredit this theory, continues to embrace it. 810

The UCC team had considered all possible routes of water entry. It became convinced that the water had entered through a direct water connection. A disgruntled worker must have hooked up one of the readily available rubber hoses to Tank 610. He must have entered that storage area on the night of the incident. It was well known among the plant’s employers that water and MIC should not be mixed. He must have unscrewed the local pressure indicator, which can be done using hands and connected the hose to the tank with the intention of contaminating the tank contents. Minor incidents of sabotage by employees had occurred previously in the plant. These incidents occur in all industries around the world. It can’t be ignored as well that it was the time when the Prime Minister of India Mrs. Indira Gandhi was assassinated and there was wide spread of riots and attacks. This only increases the probability of sabotage.

The local pressure indicator was present two days prior to the incident. The instrument supervisor had told the UCC team that he

810 Pg. 8, Investigation of Large-Magnitude Incidents: Bhopal as a Case Study, Bhopal as a Case Study- Union Carbide Corp, May 1998, Ashok S. Kalelkar and Arthur D. Little.

found a hose lying beside the tank in the morning after the incident, and the water was running out of it. The local pressure indicator was also missing on Tank 610 after the incident. After his statements became public the CBI attempted to change his testimony through interrogation for 6 days.812

II. GOVERNMENT’S ROLE IN THE INCIDENT
The Union Carbide India Limited was a vast chemical complex which contained miles of complicated piping and hundreds of specialized reactors, pressure vessels and other equipment’s. More than 1,000 workers were employed. The Madhya Pradesh Government selected the location and the plant started operations in the late 1960’s. At that time the area near the site was very lightly populated. However in the coming years, thousands of people were encouraged to settle near the plant by the authorities and the authorities distributed “pattas” to them. The UCIL management made many complaints but the Government of Madhya Pradesh disregarded the complaints. Therefore the Government of Madhya Pradesh and the Union of India should be held liable for their negligence.813

The Government also in those days made policies which made it difficult for the UCIL plant to function. The Government at that time curtailed foreign investments in India and insisted on “technology transfer” without considering the fact whether the local talents will be able to handle such advance technologies.814

Where technology is available in India, it must preferred to foreign technology (regardless the quality of the technology). Once technology is imported in India, it becomes Indian technology. For not more than a period of 5 years it should not be paid.—Industrial Policy 1948

In 1956, following the Companies Act enacted that year, Union Carbide Corporation was forced to sell of 40% of its holdings in its Indian subsidiary, of which most was bought by the Indian government through public sector banks and companies. The plant eventually became Union Carbide India Limited. Robert Bidinotto in 1985 through his article in New York Times brought to light the government’s role in the tragedy.815

Under (India’s) industrial policy, business and government are seen as "partners" in joint ventures to promote "national goals."

What does business bring to such a partnership”? Basically, every creative element: vision, ideas, effort, know-how, capital. What does government bring to such a partnership? Basically, every coercive element: favours, dispensations, subsidies and other "carrots" for politically approved businesses, on the one hand—and on the other, prohibitions, regulations, punitive taxes and other "sticks" against politically unpopular businesses.816

Under the pretext of creating jobs a lot of automation had taken place, which left room

812Ibid.
813 Bhopal Plant History and Ownership, Union Carbide Corporation.
814Ravi Kiran and Sharmanth, 7 ways the government played a role in the Bhopal disaster, Money Life, December 3rd, 2014.
815Ibid.
816Ibid.
for human error. The UCIL was also asked by the government to end all foreign collaborations with UCC as soon as possible. The interim extension for UCC-UCIL collaboration was to end in January 1985. The accident occurred in 1984. Under this act new rules were made to decrease the share in equity of foreign holders. UCC had to eventually decrease its holding from 60% to 50.9%. Most foreign companies closed their Indian subsidiaries. Between 1973 and 1980, 40% of the companies shut down their Indian operations. Companies like Coca-Cola and IBM were also included in the list. They were forced to reveal their trade secrets.817

III. UCC NOT LIABLE FOR THE ACTS OF ITS SUBSIDIARY
In the case of Gunther vs. Capital Oneit was held that “liability for shareholders for the acts of a corporation is not there unless there is a reason to lift the corporate veil this is the basic rule of corporate form.818 In the case, of Esmark, Inc. vs. N.L.R.B., 887 F.2d 739, 759 (7th Cir. 1989) it was held that (“direct participation” theory of liability “limited to situations in which the parent corporation’s control over particular transactions is exercised in disregard of the separate corporate identity of the subsidiary”).819 The 2nd Circuit Court held in the case of Janki Bai Sahu vs. UCC and Warren Anderson that Sahu and many others near the plant have suffered terrible injuries which are long lasting. It is obvious that someone is responsible for this but after 9 years of contentious litigation and discovery the evidence of this case shows that UCC is clearly not that entity.

IV. SETTLEMENT GIVEN BY THE UCC WAS ADEQUATE
The Supreme Court had fully considered and rejected the challenges of inadequate settlement in the case of Union Carbide Cooperation and Others vs. Union of India and Others.820 The same decision was taken in the case of Bhopal Gas Peedith Mahila Udyog Sanghathan and Another vs. Union of India and Others.821 In the case of Union Carbide Corporation vs. Union of India and others it was held that a settlement of 470 million US Dollars has to be paid by the UCC to the Union of India It was held that the settlement was full settlement of all claims, liabilities and rights related to and arising out of the disaster. It was also further held in the case that all civil proceedings arising out of and related to the disaster be quashed wherever these may be pending. On February 15, 1989 the settlement was signed by the Attorney General for the Union of India and the Counsel for the UCC. 822 It was also decided that the settlement shall dispose all past, present and future claims, causes of actions and criminal and civil proceedings of any nature pending by all Indian citizens and all public and private entities with respect to all past, present and

817Ibid.
819Pg. 14, Janki Bai Sahu vs. UCC and Warren Anderson.
820Pg. 698, Union Carbide Cooperation and Others vs. Union of India and Others (1991 4 SCC 584), Supreme Court Cases.
822Pg. 3, Union Carbide Corporation vs. Union of India and others (1989 ACJ 427).
future deaths, health effects, losses, civil and criminal complaints of any nature, personal injuries, compensation against UCC, Union Carbide India Limited and Union Carbide Eastern, and all their affiliates and subsidiaries as well as each of their present and former directors, officers, agents, representatives, attorneys, employees, advocates and solicitors.\(^{823}\)

The compensation paid by the UCC was a lump sum payment. The court had considered all factors before deciding the amount. All U.S and Indian court filings, relevant laws, applicable law and the needs of the victims were accessed. It had called the settlement as just, equitable and reasonable. The court had also held that in an unlikely event the sum comes out to be less adequate the Union of India has to do well out of the shortfall. This was upheld in *Union Carbide Cooperation and Others vs. Union of India and Others*.\(^{824}\)

A rough and ready estimate was taken into consideration by the High Court and it was estimated that the number of fatal cases was 3000 where compensation would range from Rs 1 lakh and Rs 3 lakhs. This would amount to Rs 70 crores which is 3 times higher than what is awarded in motor vehicles accident claims. 5 years is enough to calculate the settlement amount.\(^{825}\) In the case of *Union Carbide Corp vs. Union of India* it was observed that the amount of disbursement available with the RBI was Rs. 1503.01 crores. The Reserve Bank of India by November, 1990 reported that the settlement fund, with interest, was approximately twice what was estimated to be needed to compensate the victims.\(^{826}\)

The Supreme Court of India after 15 years had ordered to release all remaining settlement funds to the victims. The number of deaths according to the Indian Council of Medical Research (ICMR) was 2,000 to 2,500. It was also reported that the number of overall deaths in gas affected areas declined rapidly after the disaster. Some politicians and writers have been motivated inflate the fatality number.\(^{827}\) It was also held in the case of *Bhopal Gas Peedit Mahila Udyog Sanghathan and Another vs. Union of India and Others* that there is already a system in place and any claims are to be determined by that system. The first determination is made by the Additional Welfare Commissioner and thereby a revision to the Welfare Commissioner. If even still the grievance exists then the proper remedy is to approach the High Court who would deal with the case more expeditiously and give relief to the claimant without any undue expense rather than approaching the Supreme Court under Article 32 or Article 136 of the Constitution.\(^{828}\)

According to the Browning report a very shaky estimates had been made by the Indian claimants for damages a number that has been as high as 5,00,000. The documents considered by the Supreme Court showed that 75% of the claims were from the areas the government did not recognise as gas affected. Approximately 2,50,000

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\(^{823}\) Pg. 4, Union Carbide Corporation vs. Union of India and others (1989 ACJ 427).

\(^{824}\) Pg. 689, Union Carbide Cooperation and Others vs. Union of India and Others(1991 4 SCC 584)

\(^{825}\) Pg. 3, Bhopal Gas Peedith Mahila Udyog Sanghathan and Another vs. Union of India and Others(2007 9 SCC 707), Justice Information Centre.

\(^{826}\) Pg. 322, Union Carbide Corporation Ltd vs. Union of India (2006 13 SCC 321).

\(^{827}\) Ibid.

\(^{828}\) Pg. 6, Bhopal Gas Peedith Mahila Udyog Sanghathan and Another vs. Union of India and Others(2007 9 SCC 707), Justice Information Centre.
claimants elected did not respond to requests made to them to appear for physical examinations. 829 A large number of claimants were asked to come for medical evaluations and categorisations of health status of the affected persons but only 3, 61, 166 appeared. Even if the relief was reached it was not given to those who were genuinely affected by the disaster and there is a huge probability that those not affected also got compensated.

V. IMMEDIATE AND CONTINUING AID GIVEN BY THE UCC
UCC immediately after the disaster provided approximately $2 million to the Prime Minister’s Relief Fund. UCC also immediately and continuously provided medical equipment and supplies. A vocational technical centre was constructed and opened in Bhopal and UCC had provided $2.2 million for it. But the centre was closed down by the government. An international team of medical experts was also sent by the UCC. UCC also funded the attendance by Indian medical experts at special meetings on research and treatment for victims. An additional $5 million to the Indian Red Cross was given by the UCC along with an initial $10 million to build a hospital in Bhopal but the offer was declined. UCC also shared all its information on methylisocyanate (MIC) with the Government of India which included all published and unpublished toxicity studies available at that time. UCC also provided $90 million to the charitable trust for a hospital. Furthermore in accordance to the order given by the Supreme Court in the 1991 judgment UCC also on humanitarian grounds bore the financial burden for the establishment and equipment of a hospital, and its operational expenses for a period of 8 years. 830

VI. UCIL WAS NEVER UNDER THE CONTROL OF THE UCC
In 1987 the U.S Court of Appeals for the 2nd Circuit held that UCIL is a separate entity, owned, managed and operated exclusively by Indian citizens in India. It upheld the lower court’s decision that UCC’s participation was limited and its involvement in plant operations was limited and its involvement in plant operation was terminated long before the accident. UCC did provide a summary ‘process design package’ for construction of the plant and services of its technicians to monitor the progress of UCIL in detailing the design and erecting the plant under the 1973 agreements. However the terms of the agreements were controlled by the Union of India. UCC was precluded from exercising any authority to “design, erect, detail and commission of the plant,” which was independently done from 1972 to 1980 by UCIL process design engineers who supervised around 55-60 Indian engineers employed by Humphreys and Glasgow a Bombay engineering firm. 831. The plant could not have been constructed using the preliminary process design information furnished by UCC. Detailed process design and engineering data prepared by hundreds of Indian engineers, process designers and subcontractors was

829 Pg. 13, Union Carbide: Disaster at Bhopal, Jackson Browning Report- Union Carbide Corp. Jackson B. Browning.
830 Union Carbide’s Response Efforts to the Tragedy and the Settlement, Union Carbide Corporation.
831 Pg. 6, Union of India vs. Union Carbide Corporation, West Law.
required for construction. The monitoring instrumentation, vent gas scrubber and the storage tank were manufactured by Indians in India.\textsuperscript{832}

In conclusion the plant has been constructed and managed by Indians in India. At the time of the incident no Americans were employed. More than 1,000 Indians were employed at the plant between 1980-1984. During that period only American was employed and he left in 1982. During the 5 year period before the incident the communications between the United States and the plant were almost non-existent. UCIL was responsible for “modifying the equipment, the engineering standards and process, as necessary to adapt the process design to the equipment and materials available in India.” UCC’s participation was limited to “major changes” in design aspects such as plant capacity, raw material specifications, and materials of construction.\textsuperscript{833}

In the case of Janki Bai Sahu vs. UCC and Warren Anderson the US Court of Appeals for the 2\textsuperscript{nd} circuit held that UCC did provide limited guidance to UCIL, but it does not follow that UCC designed the Bhopal Plant’s waste disposal facilities. Several UCIL employees on June 15, 1973, were sent a memorandum commenting UCIL’s waste disposal plan by Mr. G. R Hattiangadi of UCC. In that memorandum, UCC noted that UCIL “recommended neutralization of waste hydrochloric acid using limestone,” a procedure UCC found to be “perfectly acceptable”, and offered observations on UCIL’s evaporation pond concept, which was “somewhat different” from UCC’s concept. However, UCC had previously confirmed that” after he transmits the comments he has prepared proposals that have been made in India, Mr Hattiangadi has no further obligation to provide general information on the disposal of the plant wastes- other than any reviews or consultations that may be specifically requested by personnel in India.\textsuperscript{834}

It was further held that for the waste liquid incinerator to be used at Bhopal, UCC did provide a “criteria report”- a report laying out UCC’s performance and design requirements”. In simple words UCC specifically and clearly mentioned UCIL that it will play a limited role in respect to the design of the waste disposal system. It was told that all work in construction and engineering will be done in India and UCIL had assumed an overall responsibility for the implementation of the project.”There is no evidence in the records which show that UCIL manufactured the pesticides on UCC’s behalf. Holding UCC liable by agency also fails. There is absolutely no evidence to show that UCC’s approval power went beyond the strategic plans. It never extended to other areas of UCIL’s operations.\textsuperscript{835}

\section*{VII. UCC IS NOT LIABLE ON THE GROUNDS OF TECHNOLOGY TRANSFER}

Severe operating problems were encountered by UCIL with its naphthol operations. Although UCIL requested “UCC’s assistance to sort out the naphthol

\textsuperscript{832}Ibid.
\textsuperscript{833}Ibid.
\textsuperscript{834}Pg. 19, Janki Bai Sahu vs. UCC and Warren Anderson
\textsuperscript{835}Pg. 41, Janki Bai Sahu vs. UCC and Warren Anderson.

\url{www.supremoamicus.org}

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process problems there is no evidence to suggest that UCC in fact provided any naphthol technology to UCIL, and UCIL ultimately shut down the naphthol plant in 1982. Technical assistance that UCC provided to UCIL was performed in accordance with a 1973 Technical Services Agreement. UCC pursuant to this agreement to offer training and instructions for technical personnel, for a fee and only “upon the request of UCIL.”836 In the case of Janki Bai Sahu vs. UCC and Warren Anderson it was held that UCIL developed any unproved technology used in the plant. Extensive liability is not recognized by potential waste disposal issues. 837

VIII. UCC NOT LIABLE JUST BECAUSE IT WAS MAJORITY SHAREHOLDER
In the case of Fletcher v. Atex, the court dismissed claims against Kodak, the parent company on its allegation of participating in Atex’s manufacture of keyboards users to develop carpal tunnel syndrome. It held that since there was a lack of “special relationship” between Kodak and Atex. Kodak cannot be held liable just because it was generally aware that use of keyboards could contribute to repetitive stress injuries, that it acted tortuously by failing to warn the plaintiffs about the danger or by failing to prevent Atex from manufacturing the keyboards.838

In the case of Quinn v. Thomas H. Lee Co the court dismissed negligence claim against the parent company. It held that the only connection between plaintiff and the defendants is that Thomas H. Lee Company was the majority shareholder in American Health Companies.839

IX. UCC IS NOT LIABLE FOR ENVIRONMENTAL REHABILITATION
UCC should not be held liable for environmental rehabilitation as well. Around the Union Carbide premises samples from the tube wells and other drinking water sources were collected and analysed. The analysis found no traces of chemicals used in the Union Carbide factory or the wastes there. No residue of chemicals was also found from the water sources which may be linked to chemicals of the factory or the wastes there.840 Improper drainage of water and other causes of environmental pollution is the reason for the contamination of water sources. Many samples from these water sources have been collected and analysed by the National Environment Engineering Research Institute (NEERI), Naqpur. No traces of chemicals were found that may be related to the chemicals used in Union Carbide factory was found in these analyses.841 For the treatment of contaminated water of the factory three solar evaporation ponds were constructed. Under the supervision of experts the silt of pond number 1 and 2 had been safely disposed of in pond number 3. This was done through the secure landfill technique suggested by the NEERI. After possession of the land by the State

836 Pg. 28, Janki Bai Sahu vs. UCC and Warren Anderson.
837 Pg. 29, Janki Bai Sahu vs. UCC and Warren Anderson.
838 Fletcher vs. Alex (68 F.3d 1451), Case briefs.
840 Pg. 1, No Contamination of Groundwater or soil from wastes, Madhya Pradesh Government press release.
841 Ibid.
Government, the State Government had ensured safe disposal of the residual Sevin tar and Nepthol tar from the factory and had told that this would be in consultation with the NEERI Nagpur and I.I.C.T, Hyderabad.842

CONCLUSION
Thus after examining all reports, court decisions etc. it can be concluded that the UCC is not liable for the Bhopal Gas Tragedy. What happened that night is truly devastating. Someone needs to be held responsible for this disaster but after years of analysing and examining all the facts of this incident one thing should be made clear that UCC is not responsible for this incident. All theories made by the Government and the press are not scientifically possible. After years the real culprit is still free. The accident truly changed the course of our country. It made a difference worldwide. Worker’s safety precautions were mandated, legislation for environmental management was strengthened and chemical and waste management was reinforced.

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842Ibid.
COPYRIGHT & DIGITAL RIGHTS MANAGEMENT

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INTRODUCTION
The digital platform offers ample opportunity for the infringement of copyrights. It is quite natural for copyright holders to react panicky and uproar for proper regulation of the copyright market. The virtual world is more like a ball game where standard rules fail to achieve the intended objective. Digital Rights Management (hereinafter referred to as DRM) thus became a mechanism which was developed to counter the unauthorized use and give control to the copyright holders over the accessible categories and the type of modification and usage allowed. Digital rights management is a term which refers to various technologies that are used by software and hardware manufacturers, copyright holders and individuals to control the use of digital content.

The proposal came through the WIPO Performers and Phonograms Treaty (WPPT) and the WIPO Internet treaties of WIPO Cooperation Treaty (WCT) to provide a flexible enforceable mechanism for governing digital copyrights. Fair use means using the copyrighted work for the purposes of a search engines, commentary, parody, criticism news reporting, research, library archiving etc.

COPY PROTECTION
DRM also operates through copy protection. It prevents the user from making copy of the original work. Encryption is yet another commonly encountered forms of copy protection. Digital content is written in a code which can only be read by software or devices with proper key to unlock the code. Scrambling is a form of encryption that DRM uses, in which the key to decrypting the content is hardwired into the computer that read the content.

PROVISIONS OF DRM IN THE INDIAN COPYRIGHT ACT

India had consistently resisted becoming a contracting party to the TRIPS treaties, but the incorporation of digital regulatory provisions indicates an alteration to this position. Clause 2(a) of section 65A clearly specifies that nothing in the provision shall prevent the doing of anything referred to therein for the purpose that is not expressly prohibited by the Copyright Act, 2012. The provision also exempts circumvention of technological measures for the purpose of certain activities like encryption, research, security testing of a computer system or a computer network with the authorization of the owner.

protection of privacy and measures necessary in the interest of national security. The Indian copyright law permits circumvention with the help of third parties provided certain procedural conditions are satisfied. Section 65A of the Indian Copyright Act provides for a criminal penalty of imprisonment for 2 years and a fine, for violation of this provision.

COPYRIGHT AMENDMENT 2012

By the Amendment Act of 2012, the Copyright Law of India incorporates the provision of Digital Rights Management in the legal regime of copyright protection. India is not a signatory to WIPO Copyright Treaty or World Intellectual Property Organization Performances and Phonograms Treaty, but it still incorporates the provisions of these international documents to be in line with the International standards of copyright law, these provisions of Digital Rights Management in Indian Copyright regimes are in consonance with the European Union and Digital Millennium Copyright Law of the United States.

Indian provisions of Digital Rights Management are not as harsh as the other adaptations of International Standard, but still in spite of not having any obligation there arises a question that what actually compelled the Indian legal regime to incorporate these provisions in the Indian legal system. The recognition of these third generation rights in Indian legal system has both Positive and Negative effects.

LEGAL PROVISIONS

Article 11 of WIPO Copyright Treaty and Article 18 of WIPO Performers and Phonograms Treaty obliges parties to have ‘adequate and effective’ legal remedies to prevent the circumvention against applied effectively technological protection measures.

847. Article 11: Obligations concerning Technological Measures “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”

848. Article 18: Obligations concerning Technological Measures “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.”

849. According to the Information Society Directive, a technological protection is deemed to be ‘effective’, where the use of a protected work or other subject matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective, Article 6(3) of the Information Society Directive.
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The advantage of digital copies as compared to analog copies of the copyrighted work is more identical and easy to copy. Faster copying is the major factor which boosted the infringement of copyrights over the virtual world. With the emergence of such problems, WIPO came up with the regulation related to digital copying in 1996 with two Internet treaties.

Similarly Article 12 of WIPO Copyright Treaty and Article 19 of WIPO Performers and Phonograms Treaty provides for contracting parties to have adequate and effective legal remedies against the unauthorised tampering of rights management information.

**Doctrine of First Sale**

Doctrine of First Sale, which is in other words the Doctrine of exhaustion of rights on the first sale. It implies that all the rights of the owner are exhausted as the first sale is made by him, which means that the owner of copyright have no control over the subsequent sales made of what is to be done after the first sale is done, but due to this many protection measures owners tends to have a grip over the rights and products even after the first sale is done, and the buyer have mere licensee rights rather than having full ownership rights. So DRM basically provides for an additional protection to a work, which is anyway protected by the Copyright law.

**E-Books and Online Journals**

DRM appears in many e-books and online subscription journals. With e-books., it often takes the form of specialized software and hardware. In order to read a book in Amazon’s AZW or KF8 formats, it requires a Kindle standalone e-reader, Amazon’s web browser plugin or Amazon’s Kindle program for computers. Apple’s iBooks are protected by Apple’s FairPlay technology; iBooks can only be read on Apple devices.


851. According to the Information Society Directive, a technological protection is deemed to be ‘effective’, where the use of a protected work or other subject matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject matter or a copy control mechanism, which achieves the protection objective, Article 6(3) of the Information Society Directive.

852. Article 12: Obligations concerning Rights Management Information “(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.”

853. Dingley, supra note 1.
An Israeli hacker claims to have broken the copyright protection on Amazon's Kindle software for PCs, reports say. The hack will allow the ebooks to be transferred as pdf files to other devices. Labba, the hacker, responded to a challenge posted on Israeli hacking forum, hacking.org.

"DRM is not an effective way of preventing copying nor is it a good way of making sales. There isn't a customer out there saying 'what I need is an electronic book that does less," novelist and co-editor of the Boing blog Cory Doctorow told the BBC at the time when the Kindle was launched. Hackers begin to try and break as soon as a new DRM system is active. Most famously, Jon Lech Johansen, known as DVD Jon, cracked the copy protection on DVDs in 1999. He went on to break the copyright protection on iTunes, leading Apple to offer DRM-free music.

DRM AND LOW NET NEUTRALITY: THE UNHOLY ALLIANCE

DRM generally makes legal things illegal, as a consequence of which the innocent downloaders who are free-loaders at best, are prosecuted under the prevailing laws whereas the real threat continue to operate. Though India has not adopted overly draconian enforcement mechanisms, it is stated that the inclusion of DRM provisions in the Indian Copyright Act has not been founded on any rational basis.

DRM is largely used by many major content producers, software and hardware vendors. Some of the examples include:

- **Apple** – Until recently, iTunes’s FairPlay DRM software prevented iTunes customers from using music purchased directly from iTunes on any portable music player beside iPod, the iPhone, and a few authorized cell phone models.
- **Sony** – MiniDisc player usage is restricted by the company’s proprietary MagicGate DRM software.
- **Microsoft** – Microsoft’s 3-play technology, which is integrated into its Zune portable music players, restricts music files received from other Zunes to a maximum of three plays. Also the received music files cannot be re-send to other users.

There’s a very controversial example of such digital rights management (DRM) protection. The security researchers in 2005 discovered that Sony had installed rootkits on CDs that made it impossible to copy music. But made it possible to report back to Sony about listener habits. After public lawsuits and outcry, Sony recalled some of the CDs and stopped installing rootkits for future releases.

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854. BBC News, Amazon’s Kindle has copyright protection hacked, Available at: http://news.bbc.co.uk/2/hi/technology/8428126.stm. (Last updated at 8:40 GMT, Tuesday, 29 December, 2009).


COMPARATIVE STUDY OF DRM

Under the United States law, the Digital Millennium Copyright Act (DMCA) of 1995 banned the development and distribution of technology designed to sidestep DRM, as well as dodging DRM to access works that are under copyright. Since computer software can be copyrighted, the concept of DRM expanded to products that contain software. For instance, in 2015 the tractor company John Deere claimed that circumventing a tractor’s diagnostic software would be illegal under the DMCA. The claim conflicted with some of the farmers, who felt that they should be able to repair their own tractors. This conflict reflected the larger controversy over DRM, with the pro-DRM side claiming that such measures protect intellectual property and the anti-DRM side which claimed that such measures clearly negate the rights consumers have over their own property.857

PERMISSION MANAGEMENT

User Authentication - It is a technology which ensures that the person reading, viewing, or using the product is really the person who is supposed to have access to it, either through purchase or belonging to an identified class of users. Some traditional ways are there to authenticate a user. The first way is described as "something you know," it is usually a password or question based on your unique personal history for instance what street you grew up on or it may be the name of your first pet. For library users, it is often their library card number and related PIN which provide access to the subscription database. Second is "something you have," like a cell phone to which the software maker will text an access code. The final method is "something you are," which might be a fingerprint or retinal scan.858

HOW DOES DRM AFFECT DVDs?

DRM affects consumers most often through their inability to transfer content from one medium (a DVD, for example) to another (a computer hard drive). In a recent survey commissioned by NCL, 4% of consumers have reported that they had tried to save the content on a DVD to their hard drives, but failed because of DRM restrictions. DVD discs are controlled by DRM software called Advanced Access Content System (AACS) which the software maker will text an access code. The final method is "something you are," which might be a fingerprint or retinal scan.858

In order to copy a DVD to their hard drives legally, consumers must purchase an “expanded pack” edition of a DVD at an additional fee. These “expanded packs” usually contain a separate “DRM-free” disc that allows the copying of the disc’s contents.859

ANOTHER TYPE OF PERMISSION MANAGEMENT


858. What is Digital Rights Management?, Available at: https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1121&context=libpubs, (Last accessed: 27 November 2018)

859. NCL, supra note 14.
It is known as Regional Restriction (also known as geoblocking). Many entertainment companies have the contractual right to sell a movie or TV show only in certain parts of the world. The purpose of adding regional restrictions to digital content is to ensure that only those users can access and view the content who are living within the identified region. When you log in to Netflix, they will check the IP address that your computer is using. If the address is not from the U.S., Netflix will not allow to access their streaming videos. The DVD Consortium, a group of ten companies (JVC, Hitachi, Matsushita, Mitsubishi, Pioneer, Philips, Sony, Thomson, Time Warner, and Toshiba) that created the DVD standard, divided the world into seven regions. The United States comes in Region 1, Japan in Region 2, etc. Most DVDs and DVD players are encoded with the region they are connected to, hence a DVD player sold in Region 2 cannot play a DVD sold in Region 1.

Modern copying has made technology comparatively easier. A person living in the nineteenth century who wanted to make a copy of Moby Dick needed access to a printing press. Likewise, manufacturing and reproducing music required phonograph cylinders. The duplication of a song, such as "Oh! Susanna," it required musicians to perform the song multiple times to make multiple copies. With the help of evolving technology, mimeographs and photocopiers allowed for easier duplication of written works. VHS and audiocassette tapes also allowed for easy at-home copying of movies and TV shows. But as a consequence, the quality degraded as copies were made from earlier copies. Fast-forwarding to today.

You can get a free digital copy of a work with a few clicks of a mouse. Within eight hours of airing, 1.5 million pirated copies of the Game of Thrones fifth season finale were downloaded.\footnote{Dingledy, supra note 1.}

**CONCLUSION**

Technological advances have made it easier for the artists to reach audiences they could have only reached in previous eras after facing great difficulties. That same technology also makes it easier to make unauthorized copies of artists' works, whether pure copies or modified versions. DRM is one of the tools that content owners, artists, and content distributors use to reduce unauthorized access, copying, and distribution. At the same time, it is a tool that comes with substantial costs to the end users of that content. This debate over DRM is an important one.